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THE SEDONA CONFERENCE COMMENTARY ON RULE 34 AND RULE 45 "POSSESSION, CUSTODY, OR CONTROL"

A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1)

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2024 COVER MEMORANDUM

In 2016, consistent with its mission to move the law forward in a reasoned and just way and to provide thought leadership on this issue, The Sedona Conference published its *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467 (2016). The *Commentary* analyzed the different tests federal circuits have applied to determine whether a litigant or subpoenaed non-party has "possession, custody, or control" of documents or data under Rules 34 and 45, and identified a split of authority between circuits that apply a "practical ability" standard, circuits that apply a "legal right" standard, those that have applied a "legal right plus notification" standard, and even some circuits where district courts have applied both the "practical ability" and "legal right" tests. The Sedona Conference's 2016 recommendations on this issue are summarized in the Abstract to the *Commentary*.

In January 2023, the Steering Committee of Working Group 1 appointed a Brainstorming Group to consider and make recommendations to the WG1 Steering Committee whether an update of the 2016 *Commentary* would be beneficial.

The Brainstorming Group held extensive meetings from January 2023 until April 2023, during which it conducted detailed legal research on federal and state cases that have addressed the issues of Rule 34 and Rule 45 "possession, custody or control" since the original *Commentary* was published, and dialogued about whether updates in technology like cloud computing and ephemeral messaging or developments in other areas of the law such as privacy and international laws or regulations warranted updating the 2016 *Commentary*.

The Brainstorming Group led a session at the 2023 WG1 Midyear Meeting in Portland, Ore., on April 27, 2023, entitled, *What's the Verdict: Updating The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* where it

presented an outline of the issues under consideration by the Brainstorming Group and dialogued with WG1 members in attendance on those issues.

After the meeting, the Brainstorming Group reconvened to consider the dialogue from the Midyear Meeting.

Conclusion

The Brainstorming Group reached consensus that Sedona need not update the original 2016 *Commentary* because the guidance is still valid, and there is still consensus in WG1 regarding the recommendations in the original *Commentary*.

The WG1 Steering Committee, by consensus, adopted that recommendation.

The Sedona Conference, therefore, is updating the cover of the *Commentary* to reaffirm its recommendations, consistent with Sedona's mission of moving the law forward in a reasoned and just way. The contents of the *Commentary* otherwise remain unchanged.

The Sedona Conference acknowledges the efforts of brainstorming group leaders Ashley Picker Dubin and Paul Weiner in bringing this project to completion. We also thank brainstorming group members Elliot Bienenfeld, Jack Bisceglia, Vince Carnevale, Jessica Tseng Hasen, Leeanne Mancari, Jason Moore, David Nolte, Kristen Orr, Jon Polenberg, Kyle Pozan, and Caleb Sweeney and steering committee liaisons Tessa Jacob, Kaleigh Boyd, and Sandra Metallo-Barragan for their dedication and contributions to this project.

January 2024

PREFACE

Welcome to the final, July 2016, version of The Sedona Conference *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). The Sedona Conference is a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others, at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks called Working Groups to engage in true dialogue, not debate, in an effort to move the law forward in a reasoned and just way.

The public comment version of The Sedona Conference *Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control"* was published in April 2015 after two years of dialogue, review, and revision, including discussion at two of our WG1 midyear meetings. The public comment period closed June 15, 2015, and was cited six months later by the United States District Court in *Matthew Enterprise, Inc. v. Chrysler Group LLC*, No. 12-cv-04236, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015). The editors reviewed the public comments received and, where appropriate, incorporated those into this final version. I thank once again all of the drafting team members for their dedication and contribution to this project. Team members that participated and deserve recognition for their work are: Victor L. Cardenas Jr., Alitia Faccone, Susan Barrett Harty, Mark Kindy, Edwin Lee, Lauren E. Schwartzreich, Ronni D. Solomon, Martin T. Tully, Cheryl Vollweiler, Kelly M. Warner, W. Lawrence Wescott II, and James S. Zucker. The Sedona Conference also thanks The Honorable Kristen L. Mix for her participation as a Judicial Observer. Finally, The Sedona Conference thanks Paul D. Weiner for serving as both the Editor-in-Chief and Steering Committee Liaison.

We hope our efforts will be of immediate and practical assistance to judges, parties in litigation and their lawyers, and database management professionals. We continue to welcome comments for consideration in future updates. If you wish to submit feedback, please email us at comments@sedonaconference.org. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Craig Weinlein
Executive Director
The Sedona Conference
July 2016

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I. ABSTRACT

Rule 26(a) of the Federal Rules of Civil Procedure allows for the discovery of "documents, electronically stored information, and tangible things" in the responding party's "possession, custody, or control." Similarly, Rule 34(a) and Rule 45(a) obligate a party responding to a document request or subpoena to produce "documents, electronically stored information, and tangible things" in that party's "possession, custody, or control." Yet, the Rules are silent on what the phrase "possession, custody, or control" means. Therefore, parties must look to case law for a definition. Unfortunately, the case law across circuits (and often within circuits themselves) is unclear and, at times, inconsistent as to what is meant by "possession, custody, or control," resulting in a lack of reliable legal—and practical—guidance. The inconsistent interpretation and application of Rules 34 and 45 in this context are especially problematic because parties remain absolutely responsible for preserving and producing information within their "possession, custody, or control" and face material consequences, including sanctions, for their failure to do so.

Furthermore, in today's digital world, the determination of whether and when information should be considered to be in a responding party's "possession, custody, or control" has become more complex. New technologies and organizational initiatives have further blurred the legal and operational lines of who actually "controls" data for purposes of preservation and production, and have multiplied the practical problems associated with preserving and producing data that a party does not directly control. The proliferation, use, and transfer of vast quantities of digital information, deciding how and where to store that information, and increasingly complex business relationships aimed at addressing the creation and storage of information, have all spawned multiple issues that have profoundly

affected the issue of "possession, custody, or control" under the discovery rules.

This Commentary is intended to provide practical, uniform, and defensible guidelines regarding when a responding party should be deemed to have "possession, custody, or control" of documents and all forms of electronically stored information (hereafter, collectively referred to as "Documents and ESI") subject to Rule 34 and Rule 45 requests for production. A secondary, corollary purpose of this Commentary is to advocate abolishing use of the common-law "Practical Ability Test" for purposes of determining Rule 34 and Rule 45 "control" of Documents and ESI. Simply stated, this common-law test has led to inequitable situations in which courts have held that a party has Rule 34 "control" of Documents and ESI even though the party did not have the *actual ability* to obtain the Documents and ESI. Therefore, this Commentary recommends that courts should interpret and enforce Rule 34 "possession, custody, or control" obligations in ways that do not lead to sanctions for unintended and uncontrollable circumstances. To support that recommendation, this Commentary also looks to several well-established legal doctrines upon which to model the contemporary scope of a party's duty to identify, preserve, and collect Documents and ESI, such as reliance upon a modified version of the business judgment rule. Helping resolve the disparity among circuits to bring a uniform, national standard to this important area of the law is consistent with Sedona's mission of moving the law forward in a just and reasoned way.

II. THE SEDONA CONFERENCE PRINCIPLES ON POSSESSION, CUSTODY, OR CONTROL

Principle 1: A responding party will be deemed to be in Rule 34 or Rule 45 "possession, custody, or control" of Documents and ESI when that party has actual possession or the legal right to obtain and produce the Documents and ESI on demand.

Principle 2: The party opposing the preservation or production of specifically requested Documents and ESI claimed to be outside its control, generally bears the burden of proving that it does not have actual possession or the legal right to obtain the requested Documents and ESI.

Principle 3(a): When a challenge is raised about whether a responding party has Rule 34 or Rule 45 "possession, custody, or control" over Documents and ESI, the Court should apply modified "business judgment rule" factors that, if met, would allow certain, rebuttable presumptions in favor of the responding party.

Principle 3(b): In order to overcome the presumptions of the modified business judgment rule, the requesting party bears the burden to show that the responding party's decisions concerning the location, format, media, hosting, and access to Documents and ESI lacked a good faith basis and were not reasonably related to the responding party's legitimate business interests.

Principle 4: Rule 34 and Rule 45 notions of "possession, custody, or control" should never be construed to override conflicting state or federal privacy or other statutory obligations, including foreign data protection laws.

Principle 5: If a party responding to a specifically tailored request for Documents or ESI (either prior to or during litigation) does not have actual possession or the legal right to obtain the Documents or ESI that are specifically requested by their adversary because they are in the "possession, custody, or control" of a third party, it should, in a reasonably timely manner, so notify the requesting party to enable the requesting party to obtain the Documents or ESI from the third party. If the responding party so notifies the requesting party, absent extraordinary circumstances, the responding party should not be sanctioned or otherwise held liable for the third party's failure to preserve the Documents or ESI.

III. BACKGROUND

A. Rules 34 and 45 Impose Important Obligations on Parties Deemed to Control Documents and ESI and the Law Prescribes Consequences for not Meeting Those Obligations

If a responding party has possession, custody, or control of relevant[1] Documents and ESI, it has a duty to preserve[2] and produce[3] them in discovery. If a party fails to do so, it may be sanctioned.[4] This outcome makes sense if a party has physical possession or actual custody of its own Documents and ESI; for example, Documents and ESI stored on its servers on the company's premises or a computer that an individual owns. The preservation and production requirement also makes sense if a party enters into a direct contractual relationship with another to handle its Documents and ESI, such as when a party outsources all of its payroll functions to a third party and retains the legal right to obtain Documents and ESI on demand and/or can set the terms and conditions on which it may retrieve those Documents and ESI, or when an individual signs up with an ISP (internet service provider) for his/her personal email account. In those circumstances, the Rule 34 and Rule 45 terms "possession" and "custody" are fairly straightforward and do not present a problem. Indeed, when Rules 34 and 45 were amended in 2006 to specifically include "electronically stored information," it was far easier to enforce these Rules along bright lines without

1. *See* FED. R. CIV. P. 26(b) (setting forth the scope and limits of discovery, including that: discovery must be proportional to the needs of the case; discovery of ESI must be limited from sources that are not reasonably accessible due to undue burden or cost; and privileged matters are not subject to discovery).

2. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003).

3. *See* FED. R. CIV. P. 34(a).

4. Metropolitan Opera Ass'n v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003).

the further need to specifically define possession, custody, or control.[5]

However, in today's dynamic and ever-expanding digital information landscape, potential unfairness develops when an overly expansive definition of "control" is applied. Simply put, in today's digital world, the relationship between *a party in litigation* and the individual or entity that *actually possesses* potentially relevant Documents and ESI has become far more complex and multi-faceted.[6] In many instances, Documents and ESI are

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5. While the Federal Rules of Civil Procedure were amended in December 2015, those amendments did not specifically address the issues of Rule 34 and 45 "possession, custody, or control." The December 2015 amendments did, however, recognize that the data explosion that created the need for rule amendments in 2006 to specifically address "electronically stored information" has continued unabated, thus supporting the need for additional rule amendments in 2015:

> [T]he explosion of ESI in recent years has presented new and unprecedented challenges in civil litigation. . . . [T]he remarkable growth of ESI will continue and even accelerate. One industry expert reported to the Committee that there will be some 26 billion devices on the Internet in six years – more than three for every person on earth.

See Memorandum from Chair of the Advisory Committee on Federal Rules of Civil Procedure Judge David G. Campbell to Chair of the Standing Committee on Rules of Practice and Procedure Judge Jeffrey Sutton, p. B-15 (Sept. 2014), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjV9c7KrfrMAhWq5IMKHVVHDQEQFggcMAA&url=http%3A%2F%2Fwww.uscourts.gov%2Ffile%2F18218%2Fdownload&usg=AFQjCNEiQyk8P6qPY5YW1PgfM-spZBn4Vg&bvm=bv.122676328,d.amc [hereinafter Advisory Committee Report].

6. The drafters of the 2015 federal rule amendments specifically took note of how new technologies were impacting litigation:

> Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even

in the possession or custody of non-parties to a lawsuit, creating scenarios more difficult for courts and parties to navigate. Some everyday examples of these challenges include the following:

- If a service provider has no legal right to obtain information from one of its customers, should it be required to preserve, search, and produce the customer's information that it does not have in litigation on the threat of sanctions for failure to do so?
- If a subsidiary corporation that is a separate legal entity from its parent corporation has no legal right to obtain Documents and ESI from its parent, should the subsidiary be required to preserve, search, and produce Documents and ESI from its parent in litigation on the threat of sanctions for failure to do so?
- Should the same obligations exist if that same parent corporation is also located in a foreign jurisdiction where it is subject to data privacy or blocking statutes that do not contain exceptions for American litigation?
- If an employer has neither the actual ability nor legal right to obtain Documents and ESI from its employee's personal devices—because doing so may violate important public policy interests and statutes (including social media password protection laws that have been enacted in many states) or for other reasons—should the

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presently foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the "cloud," complicating the preservation task.

See Advisory Committee Report, *supra* note 5.

> employer be required to preserve, search, and produce that information in litigation on the threat of sanctions for failure to do so?

The crux of the matter is that Rules 34 and 45 require the responding party to produce Documents and ESI within a party's possession, custody, or control, yet, nowhere in the Federal Rules are the terms possession, custody, or control defined.[7] As a result, different circuits across the country have created an inconsistent body of case law and standards about what constitutes "control" over data.[8]

B. Interpretation of Rule 34 and Rule 45 Possession, Custody, or Control is Inconsistent across Federal Circuits, Leading to Irreconcilable Standards

1. The Three Standards for Rule 34 and Rule 45 Possession, Custody, or Control

The federal circuits have taken differing approaches to what constitutes possession, custody, or control under Rules 34 or 45. This has led to a lack of clarity for lawyers and litigants that must manage discovery or advise clients regarding the production of Documents and ESI in multiple jurisdictions.[9] This is especially problematic given that in today's digital world, borders

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7. FED. R. CIV. P. 34(a), 45(a).

8. *See, e.g.*, Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 514 (D. Md. 2009) ("What is meant by [Rule 34] 'control' . . . has yet to be fully defined.").

9. As discussed below, one of the primary drivers of the 2015 amendments to Rule 37(e) was to "provide a uniform standard in federal courts." *See* FED. R. CIV. P. 37(e)(2), Committee Note (Dec. 15, 2015). *See also* Advisory Committee Report, *supra* note 5, at B-14, B-17 ("Resolving the circuit split with a more uniform approach . . . has been recognized by the Committee as a worthwhile goal. . . . [The] primary purpose of [amended Rule 37(e)] is to eliminate the circuit split on [a key aspect of the rules].").

have broken down and many businesses and individuals live their lives and conduct business nationwide.

As a general matter, the case law in this area has coalesced into three broad interpretations of when the producing party will be deemed to have Rule 34 "control" over Documents and ESI in the hands of a third party. The result is to impose an obligation on the litigant to preserve, collect, search, and produce the Documents and ESI in the hands of the third party, even though the producing party does not actually possess or have actual custody of the Documents and ESI at issue. These three interpretations are:

- **Legal Right Standard:** When a party has the legal right to obtain the Documents and ESI (the "Legal Right Standard");
- **Legal Right Plus Notification:** When a party has the legal right to obtain the Documents and ESI. Plus, if the party does not have the legal right to obtain the Documents and ESI that have been specifically requested by its adversary but is aware that such evidence is in the hands of a third party, it must so notify its adversary (the "Legal Right Plus Notification Standard"); and
- **Practical Ability Standard:** When a party does not have the legal right to obtain the Documents and ESI but has the "practical ability" to do so (the "Practical Ability Standard" or "Practical Ability Test").

The Legal Right Standard requires a party to preserve, collect, search, and produce Documents and ESI which the party has a legal right to obtain. The Legal Right Standard has been

followed by some federal courts in the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[10] [11]

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10. *See, e.g.*, **3rd Circuit:** Brewer v. Quaker State Oil Ref. Co., 72 F.3d 326, 334 (3d Cir. 1995); **5th Circuit:** Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 821 (5th Cir. 2004) (finding plaintiff's subpoena requesting all documents to which the defendant had "access" overly broad, and limiting the scope of documents requested pursuant to Fed. R. Civ. P. 34(a) to those over which the defendant had "control"); **6th Circuit:** *In re* Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) (explaining that a party has possession, custody, or control only when the party has the legal right to obtain the documents upon demand); *accord* Flagg v. City of Detroit, 252 F.R.D. 346, 353 (E.D. Mich. 2008) ("documents are deemed to be within the 'control' of a party if it 'has the legal right to obtain the documents on demand'"); Pasley v. Caruso, No. 10-cv-11805, 2013 WL 2149136, at *5 (E.D. Mich. May 16, 2013) (concluding that the Sixth Circuit had not adopted the "expansive notion of control" constituting the Practical Ability Test); **7th Circuit:** Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (affirming party's failure to produce documents not in its possession and to which it had no legal right); United States v. Approximately $7,400 in U.S. Currency, 274 F.R.D. 646, 647 (E.D. Wis. 2011) (holding that a party is obligated to produce records when it has a legal right to obtain those records even if it does not have actual possession); DeGeer v. Gillis, 755 F. Supp. 2d 909, 924 (N.D. Ill. 2010) (same, in Rule 45 context); **8th Circuit:** Beyer v. Medico Ins. Grp., No. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("The rule that has developed is that if a party 'has the legal right to obtain the document,' then the document is within that party's 'control' and, thus, subject to production under Rule 34."); United States v. Three Bank Accounts Described as: Bank Account # 9142908 at First Bank & Trust, Brookings, S. Dakota, No. CIV. 05-4145-KES, 2008 WL 915199, at *7 (D.S.D. Apr. 2, 2008) ("To the extent the government's subpoena asks for documents from Mr. Dockstader which he does not have in his possession or custody, and as to which he has no legal right to obtain the document, Mr. Dockstader's objection is sustained."); New All. & Grain Co. v. Anderson Commodities, Inc., No. 8:12CV197, 2013 WL 1869832, at *8 (D. Neb. May 2, 2013) (concluding that defendants had gone "above and beyond their obligation under the Federal Rules of Civil Procedure" by requesting and obtaining documents that they did not have the "right or authority" to demand); **9th Circuit:** 7-UP Bottling Co. v. Archer Daniels Midland Co. *(In re* Citric Acid Litig.), 191 F.3d 1090 (9th Cir. 1999), *cert. denied sub nom.* Gangi Bros. Packing Co. v. Cargill, Inc., 529 U.S. 1037 (2000); **10th Circuit:** Am.

The Legal Right Plus Notification Standard similarly requires that a party preserve, collect, search, and produce Documents and ESI which it has a legal right to obtain, but also requires that the party must notify its adversary about potentially relevant Documents and ESI held by third parties.[12] The obligation to notify the adversary about evidence in the hands of third parties can be traced to products liability litigation, in which the

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Maplan Corp. v. Heilmayr, 203 F.R.D. 499, 502 (D. Kan. 2001) (rejecting the Practical Ability Test and explaining that "[a]s it is undisputed that defendant does not have actual possession of the VET documents, he can be required to produce only those documents that he has 'legal right' to obtain on demand"); *accord* Noaimi v. Zaid, 283 F.R.D. 639, 641 (D. Kan. 2012) (same); Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Nemaha Brown Watershed Joint District No. 7, 294 F.R.D. 610 (D. Kan. 2013) (holding that plaintiff had not met its burden of proving defendant had necessary control because it "ha[d] not shown that the District has the legal right to obtain the documents requested on demand from former District Board members, staff, or employees"); **11th Circuit:** Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984) ("Under Fed. R. Civ. P. 34, control is the test with regard to the production of documents. Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.").

11. Note that some courts in the 11th Circuit have also applied the Practical Ability Standard. *See, e.g.*, Anz Advanced Techs. v. Bush Hog, LLC, No. CIV.A. 09-00228-KD-N, 2011 WL 814663, at *9 (S.D. Ala. Jan. 26, 2011), report and recommendation adopted *sub nom*. Anz Advanced Techs., LLC v. Bush Hog, LLC, No. CIV.A. 09-00228-KD-N, 2011 WL 814612 (S.D. Ala. Mar. 3, 2011) ("'[C]ontrol' has been 'construed broadly by the courts' to include not just a legal right, but also a 'practical ability to obtain the materials' on demand."). In one public comment, it was noted that the decision in the 11th Circuit Case of *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984), that followed the Legal Right Standard, "has been ignored by some district courts in the Circuit."

12. *See, e.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001) ("If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.").

defendant manufacturer would be unable to inspect the product, or otherwise assert defenses based on plaintiffs' "misuse, alteration or poor maintenance" of the product.[13] The Legal

13. Anderson v. Schwartz, 179 Misc. 2d 1001, 1003, 687 N.Y.S.2d 232, 237 (Sup. Ct. 1999).

Right Plus Notification Standard has been followed by some federal courts in the First, Fourth, Sixth,[14] and Tenth Circuits.[15]

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14. Note that some courts in the 6th Circuit have applied both the Legal Right and Legal Right Plus Notification Standard, thus:

- [Legal Right]: *In re* Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) (holding that a party has possession, custody, or control only when the party has the legal right to obtain the documents upon demand); Pasley v. Caruso, No. 10-cv-11805, 2013 WL 2149136, at *5 (E.D. Mich. May 16, 2013) (holding that the Sixth Circuit had not adopted the "expansive notion of control" constituting the Practical Ability Test).
- [Legal Right Plus Notification]: Lexington Ins. Co. v. Tubbs, No. 06–2847–STA, 2009 WL 1586862, at *3 (W.D. Tenn. June 3, 2009) (holding "federal law of spoliation governs cases filed in federal court" and "[e]ven where a party does not own or control the evidence, the party still has a duty 'to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence'" (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 1991) and sanctioning plaintiff for failure to preserve evidence)). *Cf.* Adkins v. Wolever, 692 F.3d 499, 505 (6th Cir. 2012) (reasoning that the "cases from around the country" plaintiff cites, including *Silvestri,* for the proposition that a spoliation sanction is proper "even though [defendant] was not personally responsible for the destruction of evidence . . . are not binding precedent requiring the district court to impose a spoliation sanction in this instance. [Courts] owe substantial deference to the professional judgment of prison administrators." (citing Beard v. Banks, 548 U.S. 521, 522 (2006) and holding "[t]he ultimate determination of culpability is within the district court's discretion so long as it is not a clearly erroneous interpretation of the facts")).

15. *See, e.g.*, **1st Circuit:** Perez v. Hyundai Motor Co., 440 F. Supp. 2d 57, 61 (D.P.R. 2009) (citing *Silvestri*, 271 F.3d at 591, as the spoliation of evidence standard):

> The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation . . . . If a party cannot fulfill

The Practical Ability Standard requires a party to preserve, collect, search, and produce Documents and ESI *irrespective of that party's legal entitlement or actual physical possession of the documents* if a party has the "practical ability" (what that means is discussed in greater detail below) to obtain the Documents or ESI.[16] The Practical Ability Standard is followed by some federal

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this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.

4th Circuit: Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 1991); **6th Circuit:** Lexington Ins. Co. v. Tubbs, No. 06–2847–STA, 2009 WL 1586862, at *3 (W.D. Tenn. June 3, 2009); *compare* Adkins v. Wolever, 692 F.3d 499, 505 (6th Cir. 2012); **10th Circuit:** Chavez v. Hatterman, No. CIV.06–cv–02525–WYD–MEH, 2009 WL 807440, at *2 (D. Colo. Jan. 20, 2009) (noting the *Silvestri* standard, but finding that plaintiff was not aware of relevancy of data at the time it should have been preserved).

16. *In re* NTL, Inc. Securities Litigation, 244 F.R.D. 179, 195 (S.D.N.Y. 2007), *aff'd sub nom*. Gordon Partners v. Blumenthal, No. 02 CIV 7377LAK, 2007 WL 1518632 (S.D.N.Y. May 17, 2007).

courts in the Second, Fourth,[17] Eighth,[18] Tenth,[19] Eleventh,[20] and District of Columbia Circuits.[21]

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17. Note that courts in the 4th Circuit have applied both the Practical Ability Standard and Legal Right Plus Notification Standard:

- [Practical Ability]: Digital Vending Services International, Inc. v. The University of Phoenix, No. 2:09cv555, 2013 WL 311820, at *6 (E.D. Va. Oct. 3, 2013) (ability to control is defined as "when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action") (internal citation omitted); Grayson v. Cathcart, No. 2:07-00593-DCN, 2013 WL 1401617, at *3 (D.S.C. Apr. 8, 2013) ("Control does not require legal ownership or actual physical possession of documents at issue; rather 'documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.'"); Ayers v. Sheetz, Inc., No.: 3:11-cv-00434, 2012 WL 5331555, at *1 (S.D.W. Va. Oct. 26, 2012) ("Control may be inferred, even when a party does not have possession or ownership of the evidence, 'when that party has the right, authority, or practical ability to obtain [the evidence] from a non-party to the action.'").
- [Legal Right Plus Notification]: King v. American Power Conversion Corp., 181 F. App'x 373, 377–87 (4th Cir. May 17, 2006) ("Accordingly, the Kings failed to discharge their duty to afford American Power sufficient notice. 'If a party cannot fulfill this duty to preserve [evidence] . . . , he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.'") (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001)); Ayers v. Sheetz, Inc., No. 3:11-CV-00434, 2012 WL 5183561, at *2 (S.D.W. Va. Oct. 18, 2012), *aff'd*, No. 3:11-CV-00434, 2012 WL 5331555 (S.D.W. Va. Oct. 26, 2012) ("This duty [to preserve] requires the party to 'identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation' and to 'notify the opposing party of evidence in the hands of third parties.'") (internal citation omitted).

18. Note that courts in the 8th Circuit have applied both the Practical Ability Standard and the Legal Right Standard:

- [Practical Ability]: Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000) ("Therefore, under Rule 34, control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action.") (citation and quotations omitted); Handi-Craft v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *6 (E.D. Mo. Nov. 25, 2003) ("Thus, the appropriate test is not of legal entitlement, but of control or practical ability to obtain the documents.").
- [Legal Right]: Beyer v. Medico Ins. Group, No. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("The rule that has developed is that if a party 'has the legal right to obtain the document' then the document is within that party's 'control' and, thus, subject to production under Rule 34.") (internal citation omitted); United States v. Three Bank Accounts Described as: Bank Account # 9142908 at First Bank & Trust, Brookings, S. Dakota, No. CIV. 05-4145-KES, 2008 WL 915199, at *7 (D.S.D. Apr. 2, 2008) ("To the extent the government's subpoena asks for documents from Mr. Dockstader which he does not have in his possession or custody, and as to which he has no legal right to obtain the document, Mr. Dockstader's objection is sustained."); New All. & Grain Co. v. Anderson Commodities, Inc., No. 8:12CV197, 2013 WL 1869832, at *5 (D. Neb. May 2, 2013) (concluding that defendants had gone "above and beyond their obligation under the Federal Rules of Civil Procedure" by requesting and obtaining documents that they did not have the "right or authority" to demand).

19. Note that courts in the 10th Circuit have applied both the Practical Ability Standard, Legal Right Standard, and Legal Right Plus Notification Standard, thus:

- [Practical Ability]: Tomlinson v. El Paso Corp., 245 F.R.D. 474, 476 (D. Colo. 2007) ("Control 'comprehends not only possession, but also the right, authority, or ability to obtain the documents.'"); Ice Corp. v. Hamilton Sundstrand Corp., 245 F.R.D. 513, 517 (D. Kan. 2007) ("Production of documents not in a party's possession is required if a party has the *practical ability* to obtain the documents

from another, irrespective of legal entitlements to the documents.") (internal quotation omitted).

- [Legal Right]: Am. Maplan Corp. v. Heilmayr, 203 F.R.D. 499, 501–02 (D. Kan. 2001) (rejecting the Practical Ability Test and explaining that, "[a]s it is undisputed that defendant does not have actual possession of the VET documents, he can be required to produce only those documents that he has 'legal right' to obtain on demand"); *accord* Noaimi v. Zaid, 283 F.R.D. 639, 641 (D. Kan. 2012) (criticizing Ice Corporation v. Hamilton Sundstrand Corp., 245 F.R.D. 513 (D. Kan. 2007) and reaching the same conclusion); Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Nemaha Brown Watershed Joint Dist. No. 7, 294 F.R.D. 610, 614 (D. Kan. 2013) (holding that plaintiff had not met its burden of proving defendant had necessary control because it "ha[d] not shown that the District has the legal right to obtain the documents requested on demand from former District Board members, staff, or employees").
- [Legal Right Plus Notification]: Chavez v. Hatterman, No. 06–cv–02525–WYD–MEH, 2009 WL 807440, at *2 (Jan. 20, 2009) (noting the *Silvestri* standard, but finding that plaintiff was not aware of relevancy of data at the time it should have been preserved).

20. Anz Advanced Techs. v. Bush Hog, LLC, No. CIV.A. 09-00228-KD-N, 2011 WL 814663, at *9 (S.D. Ala. Jan. 26, 2011) ("'[C]ontrol' has been 'construed broadly by the courts' to include not just a legal right, but also a 'practical ability to obtain the materials' on demand.").

21. *See, e.g.*, **2nd Circuit:** Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 138 (2d Cir. 2007) ("If a party has access and the practical ability to possess documents not available to the party seeking them, production may be required."); GenOn Mid-Atl v. Stone & Webster, 282 F.R.D. 346, 354 (S.D.N.Y. 2012), *aff'd sub nom*. GenOn Mid-Atl., LLC v. Stone & Webster, Inc., No. 11 CV 1299 HB, 2012 WL 1849101 (S.D.N.Y. May 21, 2012); **4th Circuit:** Digital Vending Services International, Inc. v. The University of Phoenix, No. 2:09cv555, 2013 WL 311820 at *6 (E.D. Va. Oct. 3, 2013); Grayson v. Cathcart, No. 2:07-00593-DCN, 2013 WL 1401617 at *3 (D.S.C. Apr. 8, 2013); Ayers v. Sheetz, Inc., No. 3:11-CV-00434, 2012 WL 5183561, at *2 (S.D.W. Va. Oct. 18, 2012); **8th Circuit:** Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000):

2. Variances in Application of the Three Standards

The different rules and corresponding circuit splits are set forth in the charts below, which also reflect that federal courts in some circuits have applied more than one standard.

> Therefore, under Rule 34, control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action.

(citation and quotations omitted); Handi-Craft v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *6 (E.D. Mo. Nov. 25, 2003) ("Thus, the appropriate test is not of legal entitlement, but of control or practical ability to obtain the documents."); **10th Circuit:** Tomlinson v. El Paso Corp., 245 F.R.D. 474, 475 (D. Colo. 2007) ("Therefore, Rule 34(a) enables a party seeking discovery to require production of documents beyond the actual possession of the opposing party if such party has retained any right or ability to influence the person in whose possession the documents lie."); **11th Circuit:** Anz Advanced Techs. v. Bush Hog, LLC, No. CIV.A. 09-00228-KD-N, 2011 WL 814663, at *9 (S.D. Ala. Jan. 26, 2011); *cf. also* Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984) (despite espousing the Legal Right Standard, stating "[w]e do not, however, completely rest our holding on this factor of 'control.' We find instead that the primary dispositive issue is whether [the defendant] made a good faith effort to obtain the documents over which he may have indicated he had 'control' in whatever sense, and whether after making such a good faith effort he was unable to obtain and thus produce them."); **District of Columbia Circuit:** Bush v. Ruth's Chris Steak House, Inc., 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'").

CATEGORY	CIRCUIT											
	1	2	3	4	5	6	7	8	9	10	11	D.C.
Legal Right			X		X	X	X	X	X	X	X	
Legal Right Plus Notification	X			X		X				X		
Practical Ability		X		X				X		X	X	X

To further complicate matters, even within these general categories there are differences in the ways in which federal courts within the circuits define and apply the standards:[22]

LEGAL RIGHT STANDARD	
CIRCUIT	**STANDARD**
3rd Circuit	"within the party's control"[23]

22. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 540 (D. Md. 2010).

23. Gerling Int'l Ins. Co. v. C.I.R., 839 F.2d 131, 140 (3d Cir. 1988) (The Third Circuit defines "control" as the "legal right to obtain documents on demand.") (internal quotation omitted); Sanofi-Aventis v. Sandoz, Inc., 272 F.R.D. 391, 395 (D.N.J. 2011) ("The control test articulated by the Third Circuit in *Gerling International* 'focuses on the relationship between the two parties.'"); Power Integrations, Inc. v. Fairchild Semiconductor Int'l Inc., 233 F.R.D. 143, 146 (D. Del. 2005) ("Control is defined as the legal right to obtain the documents required on demand."). *But see* Barton v. RCI, LLC, No. CIV.A. 10-3657 PGS, 2013 WL 1338235, at *6 (D.N.J. Apr. 1, 2013) (noting "[i]f the producing party has the legal right or practical ability to obtain the documents, then it is deemed to have 'control' . . . even if the documents are actually in the possession of a non-party") (internal citation omitted).

LEGAL RIGHT STANDARD	
CIRCUIT	**STANDARD**
5th Circuit	"the legal right to obtain the documents upon demand"[24]
6th Circuit	"the legal right to obtain the documents upon demand"[25]
7th Circuit	"control or custody of a document or thing"[26]

24. Enron Corp. Savings Plan v. Hewitt Associates, LLC, 258 F.R.D. 149, 164 (S.D. Tex. 2009) ("Under Rule 34 documents are deemed within the possession, custody, or control of a party and subject to a request for production if the party has actual possession, custody, or control or has the legal right to obtain the documents on demand."). *But see* Piazza's Seafood World, L.L.C. v. Odom, No. CIV.A. 07-413-BAJ-CN, 2011 WL 3664437, at *3 n.6 (M.D. La. Aug. 19, 2011), *adhered to on reconsideration*, No. CIV.A. 07-413-BAJ-CN, 2011 WL 4565436 (M.D. La. Sept. 29, 2011) ("Federal courts have consistently held that documents are deemed to be within the 'possession, custody, or control' of a party for purposes of Rule 34 if the party has 'actual possession, custody, or control, or has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a non-party to the action.'"). *See also* Wood Group Pressure Control, L.P. v. B&B Oilfield Services, Inc., Civ. No. 06-3002 SECTION: "N" (4), 2007 U.S. Dist. LEXIS 83708 at *43–44 n.15 (E.D. La. 2007) ("Courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to or indirect control over such evidence.").

25. *In re* Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) (holding that a party has possession, custody, or control only when the party has the legal right to obtain the documents upon demand); Pasley v. Caruso, No. 10-cv-11805, 2013 WL 2149136, at *5 (E.D. Mich. May 26, 2013) (holding that the Sixth Circuit had not adopted the "expansive notion of control" constituting the Practical Ability Test).

26. Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (affirming party's failure to produce documents not in its possession and to which it had no legal right); United States v. Approximately $7,400 in U.S. Currency, 274 F.R.D. 646, 647 (E.D. Wis. 2011) (holding that a party is obligated to produce records when it has a legal right to obtain those records

LEGAL RIGHT STANDARD	
CIRCUIT	**STANDARD**
8th Circuit	"if a party 'has the legal right to obtain the document,' then the document is within that party's 'control' and, thus, subject to production under Rule 34"[27]
9th Circuit	"the legal right to obtain the documents upon demand"[28]
10th Circuit	"legal right to obtain the documents on demand"[29]
11th Circuit	"Under Fed. R. Civ. P. 34 . . . Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand."[30]

even if it does not have actual possession); DeGeer v. Gillis, 755 F. Supp. 2d 909, 924 (N.D. Ill. 2010) (same, in Rule 45 context); McBryar v. Int'l Union of United Auto. Aerospace & Agr. Implement Workers of Am., 160 F.R.D. 691, 694 (S.D. Ind. 1993).

27. *See* Beyer v. Medico Ins. Group, No. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009).

28. Dugan v. Lloyds TSB Bank, PLC, No. 12CV02549WHANJV, 2013 WL 4758055, at *2 (N.D. Cal. Sept. 4, 2013) ("In the Ninth Circuit, 'control' is defined as 'the legal right to obtain documents upon demand.'"); Ubiquiti Networks, Inc. v. Kozumi USA Corp., No.12-cv-2582 CW JSC, 2013 WL 1767960, at *1 (N.D. Cal. Apr. 15, 2013) (same).

29. Noaimi v. Zaid, 283 F.R.D. 639, 641 (D. Kan. 2012).

30. Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984).

LEGAL RIGHT PLUS NOTIFICATION STANDARD	
CIRCUIT	**STANDARD**
1st Circuit	"owns and controls" and duty to notify opposing party of evidence in the hands of third parties[31]

31. *In re* New Eng. Compounding Pharm., Inc., No. 13-cv-2419, 2013 U.S. Dist. LEXIS 161652 (D. Mass. Nov. 13, 2013) (Respondent recipients of Rule 45 subpoenas were required to produce responsive documents in their "possession custody or control," and "[t]o the extent that a respondent does not have responsive documents within its possession, custody, or control, it may simply state so."); Correia v. Town of Framingham, No. CIV. 12-10828-NMG, 2013 WL 952332, at *3 (D. Mass. Mar. 8, 2013) (defendant police officer was found to have "control" under Rule 34 over his employment personnel file in the possession of the state, because pursuant to state law he could obtain his personnel file upon demand, whereas information maintained in "other sorts of employee files . . . that are maintained separately from a 'personnel file'" were not under the officer's control); Bringuier v. AVCO Corp., No. CIV. 09-2140 ADC, 2011 WL 6372456, at *1 (D.P.R. Dec. 20, 2011) (defendant investment corporation did not have "right, authority, or ability to obtain [plane wreckage] upon demand" where it denied having possession, custody, or control over the wreckage and disclosed in correspondence with plaintiffs' counsel that the wreckage was in the possession, custody, and control of a claims supervisor under an insurance policy held by the owner of the aircraft—defendant was also insured by the same insurance carrier but under a different policy—and plaintiffs failed to rebut the assertion that defendant had no control); Rosie D. v. Romney, 256 F. Supp. 2d 115, 119 (D. Mass. 2003) (explaining that "control" under Rule 34 exists where a party has a "legal right to obtain documents," and "control" may be established by the existence of a principal–agent relationship or a legal right pursuant to a contractual provision and finding that defendant had the right to control and obtain the documents that were in the possession of various third party subcontractors because undisputed language in contracts with similar subcontractors allowed the defendant to examine and copy the same kind of documents at issue; and rejecting defendants' argument that plaintiffs should subpoena the third parties for the documents they seek).

LEGAL RIGHT PLUS NOTIFICATION STANDARD	
CIRCUIT	**STANDARD**
4th Circuit	"'owns and controls' and duty to notify opposing party of evidence in the hands of third parties"[32]
6th Circuit	"Even where a party does not own or control the evidence, the party still has a duty 'to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.'"[33]
10th Circuit	possession, but if relinquished ownership or custody, must contact new custodian to preserve[34]

PRACTICAL ABILITY STANDARD	
CIRCUIT	**STANDARD**
2nd Circuit	"right, authority or practical ability to obtain the documents at issue"[35]
4th Circuit	"right, authority or practical ability to obtain documents from non-party to the action"[36]

32. Ayers v. Sheetz, Inc., No. 3:11-CV-00434, 2012 WL 5183561, at *2 (S.D.W. Va. Oct. 18, 2012).

33. Lexington Ins. Co. v. Tubbs, No. 06–2847–STA, 2009 WL 1586862, at *3 (W.D. Tenn. June 3, 2009).

34. Chavez v. Hatterman, No. CIV.A06-cv-02525-WYD-MEH, 2009 WL 807440, at *2 (D. Colo. Jan. 20, 2009).

35. Alexander Interactive, Inc. v. Adorama, Inc., No. 12 CIV. 6608 PKC JCF, 2014 WL 61472, at *1 (S.D.N.Y. Jan. 6, 2014).

36. Digital Vending Services International, Inc. v. The University of Phoenix, No. 2:09cv555, 2013 WL 311820, at *6 (E.D. Va. Oct. 3, 2013).

PRACTICAL ABILITY STANDARD	
CIRCUIT	**STANDARD**
8th Circuit	"right, authority or practical ability to obtain documents from non-party to the action"[37]
10th Circuit	"any right or ability to influence the person in whose possession the documents lie"[38]
11th Circuit	"practical ability to obtain the materials on demand"[39]
D.C. Circuit	"the right, authority or practical ability to obtain the documents from a non-party to the action"[40]

37. New All. & Grain Co. v. Anderson Commodities, Inc., No. 8:12CV197, 2013 WL 1869832, at *3 (D. Neb. May 2, 2013) ("A party does not need to have legal ownership or actual possession of documents, 'rather documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.'"); E*Trade Securities LLC v. Deutsche Bank AG, Civil No. 02-3711 RHK/AJB, 2005 U.S. Dist. LEXIS 3038, at *8 n.2 (D. Minn. Jan. 31, 2005) ("[C]ourts have sometimes interpreted Rule 34 to require production if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents."); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000) (quoting Bank of New York v. Meridien BIAO Bank Tanzania, Ltd., 171 F.R.D. 135, 146 (S.D.N.Y. 1997)).

38. Tomlinson v. El Paso Corp., 245 F.R.D. 474, 477 (D. Colo. 2007); Ice Corp. v. Hamilton Sundstrand Corp., 245 F.R.D. 513, 521 (D. Kan. 2007).

39. ANZ Advanced Techs. v. Bush Hog, LLC, No. CIV.A. 09-00228-KD-N, 2011 WL 814663, at *9 (S.D. Ala. Jan. 26, 2011) ("'[C]ontrol' has been 'construed broadly by the courts' to include not just a legal right, but also a 'practical ability to obtain the materials' on demand.").

40. Bush v. Ruth's Chris Steak House, Inc., 286 F.R.D. 1, 5 (D.D.C. 2012) ("Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather 'the right, authority or practical ability to obtain the documents from a non-party to the action.'").

The varying standards and the often inconsistent definition and application of these standards have left parties and courts with conflicting guidance to consider when making defensible discovery decisions.

C. A Deeper Look at the Practical Ability Standard Demonstrates that it Produces Potentially Unfair Results

Most courts applying the Practical Ability Standard rely on the following assumption: Rule 34 "control" does not require a party to have *legal ownership* or *actual physical possession* of any Documents and ESI at issue.[41] Instead, "documents are considered to be under a party's control when that party has the right, authority, or *practical ability* to obtain the documents from a non-party to the action."[42] Some courts have expanded the meaning of "practical ability" to mean the possibility that a party could potentially obtain the documents on demand.[43] In contrast, under the Legal Right Standard, the *possibility* of obtaining the Documents and ESI without the concomitant *legal right* to do so would be insufficient to establish Rule 34 "control."[44]

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41. *See, e.g.*, Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D.N.Y. 1992) (The courts have "interpreted Rule 34 to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents.").

42. Goodman v. Praxair Servs., 632 F. Supp. 2d 494, 515 (D. Md. 2009) (quoting *In re* NTL, Inc. Secs. Litig., 244 F.R.D. 179, 195 (S.D.N.Y. 2007)).

43. *See* Steele Software Sys. Corp. v. DataQuick Info. Sys. Inc., 237 F.R.D. 561 (D. Md. 2006) ("control has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought on demand") (internal quotation omitted); S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469, 471 (S.D.N.Y. 2000) ("control" construed to include the "practical ability to obtain the materials sought upon demand").

44. *See* Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (noting that even though a third party in possession of the documents likely would have provided the documents to plaintiffs upon plaintiffs' request, as this third party did at a later date, and that plaintiffs could have

Highlighted below are select areas where application of the Practical Ability Standard has led to unfair results.[45] We also note that the lack of a precise, commonly-accepted definition of "practical ability" results in an unfair lack of predictability with respect to how the Practical Ability Standard will be applied in a given case.

1. The Practical Ability Standard may Compromise the Ability of Parties with Cross-Border Operations to Comply with Their Legal Obligations, and Gives Short Shrift to Corporate Formalities of Legally Distinct Entities

Courts have applied the Practical Ability Standard to require parties with cross-border obligations to produce Documents and ESI from related entities with foreign operations, even when such production causes the entity to violate foreign data privacy laws. For example, one court ordered a domestic parent corporation to produce those documents it could obtain from its foreign subsidiary by 'picking up the telephone' or, in the alternative, to file an affidavit attesting to why it could not access those documents.[46] In this regard, the inequity of the Practical

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purchased the documents, such factors did not establish control; and explaining that "the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite").

45. Our research has revealed 206 cases that have either applied or referenced the Rule 34 "practical ability" test. To download an easy-to-use, sortable spreadsheet of these cases, *see* The Sedona Conference, *"Compendium of Practical Ability Cases: A Resource for Understanding the Sedona Conference Commentary on Rule 34 and 45 Possession, Custody, or Control,"* THE SEDONA CONFERENCE (July 2016), https://s3.amazonaws.com/IGG/publications/Sedona+Practical+Ability+Cases+080516.xlsx.

46. S2 Automation LLC v. Micron Tech., Inc., No. CIV 11-0884 JB/WDS, 2012 WL 3656454, at *12 (D.N.M. Aug. 9, 2012) ("It may be that S2

Ability Standard is perhaps felt most acutely by organizations that are subject to international privacy laws that operate to legally preclude discovery and/or movement of private data across the border and into the United States.[47] The consequences

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Automation does not have the legal or practical right to obtain documents from S2 Israel. If that is the case, it must file an affidavit from a corporate official to that effect."). *See also In re* Ski Train Fire of Nov. 11, 2000 Kaprun Austria, No. MDL 1428(SAS)THK, 2006 WL 1328259, at *78 (S.D.N.Y. May 16, 2006) (applying Practical Ability Standard to hold parent company based in Germany must produce documents from wholly owned, non-party subsidiary company based in Austria: "Although the evidence demonstrates that Siemens [Germany] cannot legally compel Siemens Austria to produce its documents, there is evidence which strongly suggests that, as a practical matter, Siemens [Germany] can secure documents from Siemens Austria. . . . [Thus] the Court concludes that the only reasonable conclusion to draw is that if Siemens [Germany] needed the assistance or cooperation of Siemens Austria in a matter of concern to the company, it would receive such assistance, be it in the form of providing documents in Siemen's Austria's custody, or otherwise."); Orthoarm, Inc. v. Forestadent USA, Inc., No. 4:06-CV-730, 2007 WL 1796214, at *2 (E.D. Mo., June 19, 2007) (applying Practical Ability Standard, U.S. subsidiary ordered to produce documents from German parent because both companies had "interlocking management structures," and subsidiary had produced other parent documents without claiming no control, "thereby demonstrating the ability to obtain documents from the parent company upon request"). *But see,* Pitney Bowes, Inc. v. Kern Int'l., Inc., 239 F.R.D. 62 (D. Conn. 2006) (applying Practical Ability Standard but finding no control where plaintiff failed to offer evidence that the documents in the possession of defendant's foreign parent were necessary for the defendant's business or were routinely provided to it in the course of business and denying motion to compel).

47. *See, e.g.*, *In re* Flag Telecom Holdings, Ltd. Sec. Litig., 236 F.R.D. 177, 181 (S.D.N.Y. 2006) (applying Practical Ability Standard to hold individual defendant was obligated to obtain documents from his former employer because he "is a senior executive of [his former employer], a former party [that is 'one of India's largest private sector enterprises' that had been dismissed with prejudice] to the litigation, and certainly has the practical ability to obtain the documents sought by plaintiffs' Request," and rejecting defendants' argument that plaintiffs themselves should seek production from the non-

party former employer located in India via the procedures set forth in the Hague Convention: "Mccormack is a party who has control over the corporation's documents irrespective of their location . . . therefore . . . plaintiffs are not required to proceed under the Hague Convention"); Ssangyong Corp. v. Vida Shoes Int'l, Inc., No. 03 CIV.5014 KMW DFE, 2004 WL 1125659, at *12–13 (S.D.N.Y. May 20, 2004) (applying Practical Ability Standard and ordering production of documents where New York branch of Hong Kong bank resisted subpoena of documents located in Hong Kong headquarters, court finds control and, as part of a comity analysis, observes that Hong Kong's interest in bank secrecy was not strong (the court characterized arguments that the bank faced the possibility of a Hong Kong injunction, a Hong Kong judgment for civil liability to accountholders, and potential criminal sanctions if it violated the injunction, as "quite remote on the facts of this case"), that "a strict confidentiality" order would reduce any hardship on the bank and its accountholders, that the documents sought via the subpoena were "very important" to the litigation, and that plaintiff who served subpoena had made a strong *prima facie* showing of bad faith by the accountholders (who may have participated in the fraud at issue in the underlying case)). *But see* Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 151 (S.D.N.Y. 2011), *aff'd sub nom*. Tiffany (NJ) LLC v. Andrew, No. 10 CIV. 9471 WHP, 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011) (finding control where subpoenas were issued to New York branches of Chinese banks, despite the fact that branches were on separate computer systems from the Chinese offices that held the documents, but refusing to compel production pending exhaustion of Hague Convention based upon a comity analysis due to "true conflict" between United States and Chinese law (which prohibited production)); Tiffany (NJ) LLC v. Andrew, No. 10 CIV. 9471 RA HBP, 2012 WL 5451259, at *2 (S.D.N.Y. Nov. 7, 2012) (Following production of certain information from Chinese banks under the Hague Convention, the court subsequently declined to enforce the subpoena asking for production of additional information, noting "the centerpiece of plaintiffs' futility argument last year was . . . the People's Republic of China would either not respond at all to a request pursuant to the Hague Convention or would take an inordinate amount of time to do so. Experience has now proven both arguments to be unfounded."). *Accord In re* Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., 15 F. Supp. 3d. 466, 472 (S.D.N.Y. 2014) (denying motion to quash search warrant directed to Microsoft to produce the contents of one of its customer's emails where that information is stored on a server located in Dublin, Ireland, reasoning that the Stored Communications Act, passed as

for violating international laws can be severe.[48] Even so, the relatively broad discovery permitted by U.S. federal courts is in tension with international restrictions on data movement.[49]

Similarly, courts applying the Practical Ability Standard have given short shrift to corporate structures that apply to legally distinct entities.[50]

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part of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2701–2712, does not implicate principles of extraterritoriality, and "it has long been the law that a subpoena requires the recipient to produce information in its possession, custody, or control regardless of the location of that information," (citing Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143, 147–48 (S.D.N.Y. 2011) ("If the party subpoenaed has the practical ability to obtain the documents, the actual physical location of the documents—even if overseas—is immaterial"))), *rev'd*, __ F.3d.___, No. 14-2985 (2nd Cir. July 14, 2016) (holding the Stored Communications Act "neither explicitly nor implicitly [] envisions the application of its Warrant provisions overseas," without reaching the issues of Rule 34 control, and rejecting the government's arguments to treat the SCA Warrant as equivalent to a subpoena and that "'similar to a subpoena, [an SCA warrant] require[es] the recipient to deliver records, physical objects, and other materials to the government' no matter where those documents are located, so long as they are subject to the recipient's custody or control," that relied upon "a collection of court rulings construing properly served subpoenas as imposing that broad obligation to produce without regard to a document's location").

48. See The Sedona Conference, Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery, THE SEDONA CONFERENCE, at 20–22 (Aug. 2008), https://thesedonaconference.org/publications (describing criminal conviction for violation of French statute prohibiting disclosure of information required in foreign judicial proceedings).

49. *Id.* at 23–26 (noting U.S. courts have held that they were not bound to use Hague Convention procedures over the Federal Rules of Civil Procedure).

50. *See, e.g.*, *In re* Ski Train Fire of Nov. 11, 2000 Kaprun Austria, No. MDL 1428(SAS)THK, 2006 WL 1328259, at *1, 6 (S.D.N.Y. May 16, 2006) (After court dismissed Siemens Austria as a party to the case "because it has insufficient jurisdictional contacts with this District," court applied the Practical

However, courts in Legal Right Standard jurisdictions have given greater deference to international considerations, as well as corporate formalities that apply to legally distinct entities, especially when considering affiliate/"control" issues.[51] Toward

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Ability Standard and held Siemens Germany—the parent company of Siemens Austria—must produce documents in the possession of Siemens Austria—even though the court did not have jurisdiction over Siemens Austria—because "the test for determining whether a corporate entity is the alter ego or a 'mere department' of another, are distinct from the issue of whether a parent has legal or practical access to its subsidiary's documents," and rejected defendant's argument that Siemens Germany and Siemens Austria are "distinct entities and that Siemens [Germany] does not have legal control over Siemens Austria," despite the court's prior findings when dismissing Siemens Austria "that the two companies do not operate as a single entity and that they observe all of the legal formalities of a distinct company."); Dietrich v. Bauer, No. 95 CIV. 7051 (RWS), 2000 WL 1171132, at *3 (S.D.N.Y. Aug. 16, 2000), *on reconsideration in part*, 198 F.R.D. 397 (S.D.N.Y. 2001) (Court finds Hague Convention procedures not required and New York branch of U.S. division was required to produce documents pursuant to Rule 45 subpoena in the possession of a branch of U.K. division, because parent company incorporated in Ireland exercised sufficient control over its wholly owned subsidiary, reasoning: "[c]ontrol has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand. This Principle applies where discovery is sought from one corporation regarding materials which are in the physical possession of another, affiliated corporation." (internal quotation omitted); The court also rejected the argument that the "[c]ourt does not have personal jurisdiction over the corporate entity which has actual possession of the documents sought, namely, AIB Group (UK) . . . [because] personal jurisdiction and 'control' of documents are distinct issues in that court can compel discovery of documents in 'control' of a party although in 'possession' of person over whom there is no personal jurisdiction.").

51. For example, in United States v. Deloitte & Touche USA LLP, 623 F. Supp. 2d 39, 41 (D.D.C. 2009), aff'd in part and vacated in part on other grounds, remanded sub nom. United States v. Deloitte LLP, 610 F.3d 129 (D.C. Cir. 2010), a civil tax refund case, the government moved to compel production of documents in response to a subpoena aimed at the opposing party's (Chemtech) auditing firm (Deloitte), even though the documents

this end, courts in Legal Right Standard jurisdictions have rejected the Practical Ability Standard, denying a motion to compel a U.S. corporation to produce documents in the possession of its German parent, explaining that ordering discovery from an entity beyond its jurisdiction would be "a futile gesture."[52] In rejecting the plaintiff's request to apply the Practical Ability Standard, that court also reasoned: "[c]ontrol must be firmly placed in reality, not in an esoteric concept such as 'inherent relationship.'"[53]

Likewise, one court in a Legal Right Standard jurisdiction specifically rejected a requesting party's suggestion to "go beyond 'corporate formalities'" via the application of the Practical Ability Standard to order a U.S. subsidiary to produce

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were in the possession of the firm's so-called affiliate in Switzerland. The court rejected the government's argument that the auditing firm had sufficient control over its Swiss affiliate and denied the government's motion to compel. Though both Deloitte USA and Deloitte Switzerland were members of a Swiss verein, the government failed to establish that Deloitte U.S.A. had "the legal right, authority or ability to obtain the documents on demand" from Deloitte Switzerland/the affiliate. The court also rejected the government's argument to use the Practical Ability Standard and order production based upon the "close working relationship" in connection with Deloitte Switzerland's audit work for Chemtech, reasoning:

> [c]lose cooperation on a specific project does not, per se, establish an ability, let alone a legal right or authority, on Deloitte USA's part to acquire documents maintained solely by a legally distinct entity. In fact, upon Deloitte USA's request for the documents, Deloitte Switzerland refused to produce them absent an order from a Swiss court.

Id. (citations omitted).

52. Ehrlich v. BMW of N. Am., LLC, No. CV 10-1151-ABC PJWX, 2011 WL 3489105, at *1 (C.D. Cal. May 2, 2011).

53. *Id.* (citing U.S. v. Int'l Union of Petroleum and Indus. Workers, FFL-CIO, 870 F.2d 1450, 1453–54 (9th Cir. 1989)).

documents in the possession of its parent company, a Korean corporation with a principal place of business in Seoul, reasoning:

> the separate and distinct corporate identities of a parent and its subsidiary are not readily disregarded, except in rare circumstances justifying the application of the alter ego doctrine to pierce the corporate veil of the subsidiary.[54]

2. The Practical Ability Standard may Compel an Entity to Produce Documents and ESI in Violation of an Existing Contract

Courts in Practical Ability jurisdictions have ordered parties to produce documents even though that production would require the party to breach an existing contract with a non-party to the case that expressly prohibits the use of the non-party's documents for unauthorized purposes or disclosure. In this instance, the court reasoned that a discovery order requiring a party to violate the terms of its contractual agreement trumped "most other commitments."[55]

3. The Practical Ability Standard Often Fails to Recognize Distinctions between Separate Sister Corporations

Courts have applied the Practical Ability Standard to obligate sister corporations to obtain documents from each other when each has ties to a common parent corporation,

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54. Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 233 F.R.D. 143 (D. Del. 2005) (rejecting Practical Ability Standard and quashing subpoena to subsidiary seeking documents in possession of Korea-based parent corporation and noting that party seeking production could pursue a subpoena through Hague Convention procedures).

55. S.E.C. v. Strauss, No. 09 CIV. 4150 RMB/HBP, 2009 WL 3459204, at *1 (S.D.N.Y. Oct. 28, 2009).

notwithstanding the fact that the entities may lack a sufficient relationship to warrant the imposition. Courts applying the Practical Ability Standard frequently bypass a thorough corporate veil analysis and order production of documents in the possession and custody of non-party sister entities. For example, one court relied on the Practical Ability Standard to order production of documents in the possession and custody of a non-party sister entity.[56] In that instance, the court did not consider or apply an "alter-ego" or veil-piercing analysis and, without discussion or analysis, simply concluded "as between the parties, Defendant has a 'practical ability' to obtain the information Plaintiffs seek on demand."[57] In contrast, courts that apply the Legal Right Standard analysis provide for a narrower scope of discovery among sister entities.[58]

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56. Wells v. FedEx Ground Package Sys., Inc., No. 4:10-CV-02080-JAR, 2012 WL 4513860, at *1 (E.D. Mo. Oct. 1, 2012).

57. *Id.* at *4–5. *See also In re* Ski Train Fire of Nov. 11, 2000 Kaprun Austria, No. MDL 1428(SAS)THK, 2006 WL 1328259 (S.D.N.Y. May 16, 2006); Dietrich v. Bauer, No. 95 CIV. 7051 (RWS), 2000 WL 1171132, at *3 (S.D.N.Y. Aug. 16, 2000).

58. For example, in *In re Citric Acid*, the court applied a Legal Right analysis and denied discovery of information in the possession and custody of a foreign co-member of an international accounting organization. *In re* Citric Acid Litig., 191 F.3d 1090 (9th Cir. 1999). Similarly, in a civil tax refund case, the court denied the government's motion to compel the production of documents in the possession and custody of the party's Swiss affiliate because it was not clear that the party had the legal right, authority, or ability to demand and obtain the documents. United States v. Deloitte & Touche USA LLP, 623 F. Supp. 2d 39 (D.D.C. 2009). *Cf. also*, Ehrlich v. BMW of N. Am., LLC, No. CV 10-1151-ABC PJWX, 2011 WL 3489105, at *1 (C.D. Cal. May 2, 2011); Gerling Int'l Ins. Co. v. C.I.R., 839 F.2d 131, 140 (3d Cir. 1988) (The two corporate entities at issue had a common president who also was the chairman of the board of directors of one of the corporations (Universale) and a minority stockholder in the other (GIIS). The court declined to find that GIIS had sufficient control over Universale to require production of its books and records: "Where the litigating corporation is the subsidiary and the parent

Other courts have combined the Practical Ability Standard and the Legal Right Standard with elements of a veil-piercing analysis to reach a more equitable determination of whether Rule 34 "control" existed concerning discovery sought from related sister entities.[59]

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possesses the records, control has been found to exist where the "alter ego" doctrine warranted piercing the corporate veil. . . . The few cases involving sister corporations under common control follow the same pattern as the cases involving a litigating subsidiary. The requisite control has been found only where the sister corporation was found to be the alter ego of the litigating entity. In this case, the Tax Court seems to have regarded GIIC and Universale as sister corporations under common control. It did so, however, only on the basis of an improper presumption that Gerling controlled Universale and a tacit assumption that Gerling controlled GIIC despite his minority stockholder status. Moreover, even if these corporations had been properly presumed or assumed to be under common control, there was no finding, and no record to support a finding, that their corporate entities had been disregarded by themselves or Gerling in the course of their businesses or that GIIC had acted for the benefit of Universale either in the transactions giving rise to the alleged tax liability or in conducting this litigation. In such circumstances, we conclude that there was no foundation for the Tax Court's conclusion that GIIC had sufficient control over Universale to require production of its books and records in the United States." *Id*. at 141–42.)

59. *See, e.g.*, Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543 (E.D. Mo. Nov. 25, 2003) (ordered discovery after considering commonality of ownership, intermingling of directors, officers, employees, documents exchanged in the normal course of business and the involvement of non-party entity in the litigation). *See also* Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302, 305–07 (M.D.N.C. 1998) (ordering party to produce documents in custody of non-party sister corporation after applying "control" factors and noting that to determine Rule 34 control, courts consider (i) "legal right" to obtain documents; (ii) "actual ability" to obtain documents; (iii) existence of "alter ego" relationship; (iv) amount of parent's ownership in subsidiary and control factors, including (a) commonality of ownership, (b) exchange or intermingling of directors, officers, or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party

Additionally, in certain cases construing the relationship among a corporate family for purposes of adjudicating Rule 34 "control," the court's decision has turned on whether a party had access for business purposes to documents in the possession and custody of a corporate sister. For example, one court denied discovery sought from a non-party sister entity because the party upon whom discovery was propounded did not have access to the information in the normal course of business.[60]

4. The Practical Ability Standard may Compel Individuals to Produce Documents and ESI in the Possession of Companies they Own but that are not Parties to a Case

Ownership in a company, regardless of the percentage of ownership or involvement in that company's day-to-day business, has been found to be sufficient to establish a "practical ability" to obtain Documents and ESI from the company, even where the company is not a party to the case. For example, courts have applied the Practical Ability Standard to order individuals to obtain and produce information in the possession and custody of non-party companies where the individuals are partial owners. In one case, the court compelled production from a joint-venture ("JV") entity of which the individual owned 49% on the basis of contract, and based upon testimony that the JV

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corporation in the litigation. The court stated that Rule 34 control for discovery among members of corporate families is broader than "control" for the purpose of determining liability); E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 286 F.R.D. 288 (E.D. Va. 2012) (construing Rule 34 control based in part on assessment of corporate veil factors); *cf.* Doe Run Peru S.R.L. v. Trafigura AG, No. 3:11mc77, 2011 U.S. Dist. LEXIS 154559 (D. Conn. Aug. 23, 2011) (denying discovery because affiliate relationship and arms-length transactions failed to establish practical ability to obtain documents).

60. *See, e.g.*, S.E.C. v. Credit Bancorp, Ltd., 194 F.R.D. 469 (S.D.N.Y. 2000) (denying discovery request because party did not have regular business access to information in possession and custody of non-party sister entity).

entity had provided documents upon request 90% of the time.[61] Likewise, another court cited the Second Circuit's broad standard of "control" and ordered an individual to obtain and produce documents in the possession and custody of a subsidiary in which the individual was a 50% owner.[62] Courts applying the Legal Right Standard to similar factual scenarios reached the opposite conclusion.[63]

5. The Practical Ability Standard may Compel Corporate Parties to Produce Documents and ESI in the Possession of Former or Current Employees or Employers even if the Employers have no Legal Right to Demand or Obtain such Documents and ESI

Courts have applied the Practical Ability Standard to find that employers have Rule 34 "control" over documents in the possession of former employees. For example, a court ordered defendants, including former corporate officers and directors, to produce documents in the possession of the former corporate secretary, even though the former secretary had not worked for

61. Kamatani v. Benq Corp., No. CIV.A. 2:03-CV-437, 2005 WL 2455825, at *1 (E.D. Tex. Oct. 4, 2005).

62. Am. Rock Salt Co. v. Norfolk S. Corp., 228 F.R.D. 426 (W.D.N.Y. 2005), *objection denied by, stay denied by*, 371 F. Supp. 2d 358 (W.D.N.Y. 2005).

63. Noaimi v. Zaid, 283 F.R.D. 639 (D. Kan. 2012) (denying a discovery request seeking corporate documents in the possession and custody of a corporation because the individual's 20% ownership interest failed to establish 'control' under the Legal Right Standard applied in Kansas); Am. Maplan Corp. v. Heilmayr, 203 F.R.D. 499 (D. Kan. 2001) (reversing magistrate judge's grant of motion to compel defendant to produce corporate documents in the possession of a third-party corporation for which defendant was president and a minority shareholder, finding that although defendant might have the practical ability to obtain the documents he did not have legal authority and the third party retained the right to confidentiality of the documents sought).

the defendants in five years, and to submit an affidavit detailing their efforts.[64] However, applying a Legal Right Standard, at least one court reached the opposite conclusion and denied a motion to compel production of documents in the possession and custody of non-party former directors.[65] Likewise, a court applying a Legal Right Standard denied plaintiffs' Motion to Compel text messages sent or received by a corporate-defendant's employees' personal cell phones because the corporate defendant did not issue the cell phones to the employees, the employees did not use the cell phones for any work-related purpose, and the corporate-defendant otherwise did not have any legal right to obtain employee text messages on demand.[66] Moreover, while no court has squarely held that the Practical Ability Standard can compel corporate parties to produce documents and ESI in the possession of current employees, the Practical Ability Standard could arguably put employers in the awkward position of asking for the personal documents and ESI

64. Scovin v. Great W. Life & Annuity Ins. Co., No. 3:02CV1161, 2006 U.S. Dist. LEXIS 71386 (D. Conn. Sept. 29, 2006). *See also In re* Folding Carton Antitrust Litig., 76 F.R.D. 420, 423 (N.D. Ill. 1977) (suggesting that an employer may have control over documents in the possession of a former employee if that individual is still receiving economic benefits from the employer).

65. Miniace v. Pac. Maritime Ass'n, No. C 04-03506 SI. 2006 WL 335389 (N.D. Cal. Feb. 13, 2006) (applying Legal Right Standard and, on that basis, denying production of documents in custody of former directors). *Accord In re* Lululemon Athletica Inc., 220 Litig., No. CV-9039-VCP, 2015 WL 1957196, at *4–7 (Del. Ch. Apr. 30, 2015) (finding it unwarranted to search the personal email accounts of a company's non-employee directors for documents responsive to discovery requests).

66. Cotton v. Costco Wholesale Corp., No. 12-2731-JW, 2013 WL 3819974, at *1 (D. Kan. July 24, 2013); *see also* Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 12-cv-04236, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015) (applying the Legal Right Standard, denying motion filed against corporate party to compel production from employees' personal email accounts).

of their employees (and former employee) which may be deemed improper or "coercive."[67]

In some instances, former employees have been found to have the practical ability to obtain documents in the possession of their former employer, or an entity over which they used to exercise some degree of control, even though the former employer/entity was not a party to the case. For example, a defendant/former senior executive was ordered to produce documents in the possession of his former employer, even though the employee handbook stated that such documents were the employer's property and employees could not take documents home unless necessary for work.[68] The court found that employees were permitted to utilize documents, thus, the defendant, as a senior officer, had the practical ability to obtain them. Yet, even where courts have applied the Practical Ability Standard in this context, they have reached inconsistent results.[69] In contrast, some courts applying the Legal Right Standard have found that

67. *See, e.g.*, Debbie Kaminer, *Can Employers Ask Applicants for Social Media Login Information,* N.Y.L.J. (July 27, 2012), http://www.newyorklawjournal.com/id=1202564023558/Can-Employers-Ask-Workers-Applicants-for-Social-Media-Login-Information?slreturn=20160428100635.

68. *In re* Flag Telecom Holding, Ltd. Sec. Litig., 236 F.R.D. 177 (S.D.N.Y. 2006).

69. *Cf.* Diaz v. Washington State Migrant Council, 165 Wash. App. 59, 265 P.3d 956 (2011) (reversing contempt finding and applying federal Practical Ability Test, court finds that corporate director had no duty to make personal records regarding immigration status available to the corporation he or she serves, and there had been no showing that defendant non-profit had practical ability to secure personal records belonging to its directors); Piazza's Seafood World, L.L.C. v. Odom, No. CIV.A. 07-413-BAJ-CN, 2011 WL 3664437 (M.D. La. Aug. 19, 2011) (noting Practical Ability Standard, court found that as an ex-commissioner of a state agency, the defendant no longer had custody or control of the documents in the possession of the agency).

former employees did not have Rule 34 "control" over documents in the possession of their former employer.[70]

Under the Practical Ability Standard, current employees sometimes have been found to have the practical ability to obtain documents in the possession of their employer, even where the employer is not a party to the case. For example, a defendant was ordered to produce his personnel file, which was in the possession of his current employer, and placed the burden on him to demonstrate that he had no control over the documents.[71] The court reasoned that as a high-ranking officer and director, defendant failed to present evidence that he lacked the practical ability to produce documents in his own personnel file. Likewise, a defendant corrections officer was ordered to produce prior and subsequent excessive force complaints by prison inmates against the corrections officer contained in his employer's (the N.Y. Department of Correctional and Community Services, "DCCS") files, despite the fact that the defendant's lawyer "engaged, unsuccessfully, in extensive communications with DCCS concerning Plaintiff's requests to obtain the requested documents, and DCCS is unable to accommodate Plaintiff's requests."[72] In reaching that result, the court canvassed other cases that had applied the Practical Ability Standard and noted those courts had looked at factors like:

- "a degree of close coordination";

70. Lopez v. Chertoff, No. CV 07–1566–LEW, 2009 WL 1575214 (E.D. Cal. June 2, 2009) (under Legal Right analysis, former employee of public defender's office did not have Rule 34 control over documents in possession of her former employer); Lowe v. D.C., 250 F.R.D. 36, 38 (D.D.C. 2008) (court did not invoke either Practical Ability or Legal Right Standards but stated "[f]ormer employees of government agencies do not have 'possession, custody, or control' of documents held by their former employers").

71. *In re* Teligent, Inc., 358 B.R. 45 (Bankr. S.D.N.Y. 2006).

72. Gross v. Lunduski, 304 F.R.D. 136 (W.D.N.Y. 2014).

- "similar interests, missions or goals";
- "interests are sufficiently aligned and closely interrelated"; and
- a "sufficient nexus."[73]

6. The Practical Ability Standard may Compel Service Providers to Produce Information Owned by Clients and Customers even if the Service Provider has no Legal Right to Demand or Obtain such Documents and ESI

Courts have applied the Practical Ability Standard to trump the absence of a party's legal right to control documents by imposing on parties who provide services a duty to preserve and produce documents stored on their client's servers. For example, in an employment matter, plaintiffs sued their employer, Accenture, for age discrimination.[74] While employed by Accenture, plaintiffs performed Information Technology (IT) work for Accenture's client, Best Buy, and were provided bestbuy.com email accounts during the service period. Plaintiffs moved to compel discovery of emails sent by Accenture employees through Best Buy's email server with bestbuy.com email addresses. Accenture objected on the ground that the emails were stored on Best Buy's servers and were contractually owned by Best Buy—which was not a party in the case. The court found these facts irrelevant for purposes of applying the Practical Ability Test, reasoning: "[i]f an Accenture employee with a bestbuy.com email address can access information sent from or received by his or her bestbuy.com email address within his or her

73. *Id.*

74. Hageman v. Accenture, LLP, No. CIV. 10-1759 RHK/TNL, 2011 WL 8993423 (D. Minn. Oct. 19, 2011).

normal day-to-day work, then that information is within Accenture's control."[75]

Several other courts applying the Practical Ability Standard have found that similar obligations exist between service providers and their customers.[76] Courts have also used a "relationship" standard to determine Rule 34 "control" as between entities that conduct business with one another but otherwise have

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75. The *Hageman* court did issue one caveat, denying plaintiffs' motion with respect to information stored on Best Buy's server to the extent it was "inaccessible to Accenture employees within their normal day-to-day activity[]," explaining that:

> [t]he fact that Accenture employees used bestbuy.com email addresses does not make information that is no longer accessible [to] [*sic*] those Accenture employees within Accenture's possession, custody, and control merely because the information may be stored or archived on the bestbuy.com server. The contract between Accenture and Best Buy does not state that Accenture can freely access the bestbuy.com server or has a contractual right to obtain information on the bestbuy.com server upon request. Rule 45 is the proper vehicle for Plaintiff to obtain information from the bestbuy.com server that cannot be accessed by an Accenture employee within his or her normal day-to-day activity.

Id. at *4.

76. *See* Chevron Corp. v. Salazar, 275 F.R.D. 437, 451 (S.D.N.Y. 2011) (lead counsel had "practical ability" to obtain and produce email from other professionally affiliated law firms and individuals in response to subpoena); Ice Corp. v. Hamilton Sundstrand Corp., 245 F.R.D. 513 (D. Kan. 2007), *objection overruled by, motion to strike denied by,* No. 05-4135-JAR, 2007 WL 3026641 (D. Kan. Oct. 12, 2007) (granting plaintiff's motion to compel where court found that based on the master service agreement between defendants and contractors, defendants had sufficient control and practical ability to obtain the documents); Chicago Ins. Co. v. Wiggins, No. 02-73801, 2005 U.S. Dist. LEXIS 27159 (E.D. Mich. Aug. 12, 2005) (plaintiff had practical ability to demand materials that third parties used to train plaintiff's employees).

no corporate or legal relationship.[77] Yet, some courts applying the Practical Ability Standard have taken a more nuanced approach—again reinforcing the inconsistent application of this standard—moving away from outright sanctioning the producing parties even where the court found the party had "control." In these cases, the courts have instead compelled the producing party to make efforts to obtain the requested documents from non-parties and to document their efforts to obtain the information with the court, or face the possibility of sanctions.[78] One court found the contractual relationship between the defendant and its subcontractor satisfied "control" under Rule 34, but ruled that the defendant could either produce any responsive documents in the subcontractor's possession or provide the requesting party with an affidavit detailing its efforts to obtain the documents.[79]

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77. *See* R.F.M.A.S., Inc., v. So, 271 F.R.D. 13, 24 (S.D.N.Y. 2010) (relationship between jewelry designer and her manufacturer sufficient to establish Rule 34 control, stating "[e]vidence in a party's 'control' has been interpreted to mean evidence that the party has the legal right, authority or practical ability to obtain by virtue of its relationship with the party in possession of the evidence").

78. Sekisui Am. Corp. v. Hart, No. 12 CIV. 3479 SAS FM, 2013 WL 2951924 (S.D.N.Y. June 10, 2013) (despite notifying Defendants of its intent to seek damages in October 2010, Plaintiff's failure to implement litigation hold until January 2012 and failure to notify the outside vendor managing its computer operations that it needed to preserve relevant electronically stored information until nearly three months after the suit was filed was held to constitute negligent spoliation).

79. Sedona Corp. v. Open Sols., Inc., 249 F.R.D. 19 (D. Conn. 2008). *See also* Cummings v. Moran Shipping Agencies, Inc., No. 3:09CV1393 RNC, 2012 WL 996883 (D. Conn. Mar. 23, 2012) (ordering plaintiff to make efforts to obtain the requested documents not in his possession and if unable to do so, to file an affidavit detailing his efforts); *In re* Vitamin C Antitrust Litig., No. 06-MD-1738, 05-CV-0453, 2012 U.S. Dist. LEXIS 166720 (E.D.N.Y. Nov. 19, 2012) (plaintiff failed to meet burden to demonstrate practical ability to obtain documents where defendant denied possession, custody, or control and

Service provider cases in Legal Right Standard jurisdictions result in more consistent and arguably more equitable outcomes. In one case the court denied defendant's motion to compel production of documents used by and in the possession of its independent claims adjustor.[80] The court reasoned that the appropriate vehicle to obtain these documents was via a Rule 45 subpoena.[81]

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plaintiffs failed to show that, for example, defendant's independent auditing firm would turn over the documents to defendant upon defendant's request; but court directed defendant to make such a request and reminded plaintiffs that they should have sought the documents directly from the audit firm "years ago when discovery was ongoing"); Fisher v. Fisher, No. CIV. WDQ-11-1038, 2012 WL 2050785 (D. Md. June 5, 2012) (as bank account holder, defendant found to have practical ability to obtain bank records, but applying the Rule 26(b)(2)(C) proportionality test, court directed plaintiff to subpoena the financial institutions, except to the extent it would be less expensive for defendant to obtain and produce these documents).

80. Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726 (E.D.N.C. 2000).

81. *See also*, Haskins v. First Am. Title Ins. Co., No. CIV. 10-5044 RMB/JS, 2012 WL 5183908 (D.N.J. Oct. 18, 2012) (in class action in Legal Right jurisdiction, defendant Title Insurance Company ordered to serve litigation hold notice on its third-party agents to preserve the third-party agents' closing files, where contracts between the Title Insurance Company and each of the third-party agents expressly required agent to maintain and preserve documents and make them available to defendant for inspection and copying on demand at any time; order carved out any agreements that did not contain similar language); Inline Connection Corp. v. AOL Time Warner, Inc., No. C A 02-272-MPT, 2006 WL 2864586 (D. Del. Oct. 5, 2006) (finding no legal right of defendants to obtain documents in the possession of third-party telephone companies).

7. Effect of "Control" Issues on Third-Party Discovery

The application of the Practical Ability Standard may also unduly increase the burden of parties by requiring them to obtain documents from non-parties.[82]

However, in *Lynn v. Monarch Recovery Management, Inc.*, the court recognized that even under a practical ability analysis, Rule (26)(b)(2)(C) considerations of proportionality, including burden, expense, and convenience made a Rule 45 subpoena the appropriate vehicle through which a party should seek documents from a non-party when the producing party did not have possession or custody of billing information of its telephone provider.[83]

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82. Chevron Corp. v. Salazar, 275 F.R.D. 437 (S.D.N.Y. 2011) (lead counsel waived privilege in related matter and was compelled to produce documents from co-counsel because it had the practical ability to obtain the documents); S.E.C. v. Strauss, No. 09 CIV. 4150 RMB/HBP, 2009 WL 3459204 (S.D.N.Y. Oct. 28, 2009) (discovery obligations trump "most other commitments"; practical ability means access); Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726 (E.D.N.C. 2000) (court rejected application of Practical Ability Test to compel party to produce documents in possession and custody of third party and explained that "ability to obtain" test would usurp principles of Federal Rules of Civil Procedure by permitting parties to obtain documents from non-parties who were not subject to the control of any party to the litigation).

83. Lynn v. Monarch Recovery Management, Inc., 285 F.R.D. 350, 361 (D. Md. 2012):

> Rule 34 requires a party to produce only those documents that are within the party's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). "Rule 34 'control' does not require a party to have legal ownership or actual physical possession of any [of the] documents at issue." *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515 (D. Md. 2009) (citation omitted). Instead, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party." *Id.* (citation and internal quotation marks omitted); *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561, 563–65 (D. Md. 2006).

Another recent case[84] also suggests that even though a party may have the "practical ability" to obtain documents from a non-party, a Rule 45 subpoena was the appropriate discovery device for collecting the documents since they were not under the producing party's physical control.

In those cases, the court determined that proportionality of the costs and burdens associated with discovery were so great that a Rule 45 subpoena was the correct method of extracting such discovery. *Lynn* and *Fisher* thus indicate that physical control over documents should be the dispositive factor in determining the appropriate procedural discovery device.

> Because Defendant has an account with the telephone carrier, Defendant likely has "the right, authority, or practical ability" to obtain an itemized telephone bill from the carrier, and may be compelled to do so. *See Goodman*, 632 F.Supp.2d at 515. However, Fed. R. Civ. P. 26(b)(2)(C) instructs the Court to "limit the frequency or extent of discovery otherwise allowed" if, *inter alia*, "the discovery sought . . . can be obtained from some other source that is more convenient, less burdensome, or less expensive." In light of the foregoing, the parties are DIRECTED as follows: If there are any additional documents not previously produced "identifying any calls to Plaintiff or 301-620-2250" in Defendant's actual possession or custody, Defendant must produce them, subject to the parties' stipulated confidentiality order, if Defendant contends that they contain confidential information. *See* Fed. R. Civ. P. 34(a)(1). If documents responsive to this request are not in Defendant's possession or custody, but are in the physical custody of a non-party telephone carrier, Defendant will not be compelled to produce them. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). Rather, Plaintiff may obtain the documents by issuing a Fed. R. Civ. P. 45 subpoena to the telephone carrier.

84. Fisher v. Fisher, No. CIV. WDQ–11–1038, 2012 WL 2050785 (D. Md. June 5, 2012).

D. How new Technologies may Influence the Rule 34 Possession, Custody, or Control Analysis

New technologies and organizational initiatives can further blur the lines of who actually "controls" Documents and ESI for purposes of preservation and production. They also complicate the practical problems associated with preserving and producing Documents and ESI that a party does not directly control.[85]

1. Cloud Computing

For purposes of this Commentary, we will refer to "cloud computing" simply as the use of a remote device or network to store, manage, preserve, or backup any of a party's rightfully owned data or software.[86] In this context, there are two major

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85. The drafters of the 2015 federal rule amendments specifically took note of how new technologies were impacting litigation:

> Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their phones, tablets, cars, social media pages, and tools not even presently foreseen. Most of this information will be stored somewhere on remote servers, often referred to as the "cloud," complicating the preservation task.

See Advisory Committee Report, *supra* note 5.

86. A more technical and thorough definition of Cloud Computing has been published by the National Institute of Standards and Technology:

> Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of five essential characteristics, three service models, and four deployment models.

issues with cloud computing: (1) the location of the data, and (2) who is managing the data (be it one's own company or a third party). The increasingly widespread use of cloud computing services to store information raises questions with respect to the ownership of the information, the right and ability to control the information, and the disposition of the information at the expiration of the cloud computing service contract. Frequently, businesses make decisions to use cloud computing resources on the basis of business judgments, in order to fulfill business needs, improve efficiencies, and reduce costs. However, when a contract is made with cloud providers, there is often little or no ability to effectively negotiate terms with the cloud provider because the provider only accepts standardized agreements.

Multi-tenancy issues: Cloud computing environments may use operating system tools to host the business applications and data of more than one client in the same physical or logical computing environment, which is referred to as "Multi-tenancy" or "Split-tenancy." Further, multi-tenant computing environments may also store together ("commingle") the data of multiple clients in the same logical area of computer memory or on the same physical storage device.

Since this data is commingled, it is more difficult to show which data is owned by whom. Unlike a simple index used to track boxes stored in a warehouse, multi-tenancy computing environments may require an understanding of how a computing environment uses metadata to track, manage, and maintain logical distinctions among commingled data to comply with legal obligations to access, preserve, collect, and understand commingled data.

Peter Mell and Tim Grance, *The NIST Definition of Cloud Computing (Draft*) (Jan. 2011), http://docs.ismgcorp.com/files/external/Draft-SP-800-145_cloud-definition.pdf.

Location/Jurisdiction issues: Data stored "in the cloud" may also reside in more than one physical location which raises issues about the body of law applicable to such data, thereby posing additional preservation and collection challenges, especially since data sets may either be split into multiple locations or redundant storage locations.

Importantly, the third-party vendor's data retention policies and data preservation protocols may differ from or conflict with those of the data owner. Third-party vendors may also be subject to different statutory obligations on the basis of the jurisdiction in which they operate. To the extent such inconsistencies arise, data owners may face additional compliance issues and litigation risk and expense when extracting data. They also may find that they have conflict of law issues when attempting to recover their own data.

Privacy and security issues: Data stored in the cloud may be accessible by a greater number of people, including the cloud vendor's employees. Moreover, when data is held by a cloud provider, there is a risk that it can be sought directly from the cloud provider—in some instances without notice to the customer.[87]

The issues of who has possession, custody, or control in this age of electronic information is complicated by cost, burden, access, privacy, and contractual issues that simply did not exist in

87. *See* Catherine Dunn, *Microsoft Reveals Law Enforcement Requests for Customer Data,* LAW TECHNOLOGY NEWS (March 26, 2013), http://www.corpcounsel.com/id=1202593423164/Microsoft-Reveals-LawEnforcement-Requests-for-Customer-Data ("In general, we believe that law enforcement requests for information from an enterprise customer are best directed to that customer rather than a tech company that happens to host that customer's data," [Microsoft General Counsel Brad] Smith said. "That way, the customer's legal department can engage directly with law enforcement personnel to address the issue.").

a world populated only by hardcopy documents. In short, unique issues of location, access, and multi-tenancy make cloud computing quite different than boxes of paper files stored in a depository.

2. Social Media

Social Media sites have complex possession, custody, and control issues because there is often a commingling of interests and sources as it pertains to speech and data communicated and collected on these sites. This information is generally in the custody of the third-party company which hosts the social media platform. But courts commonly require production of social media data and information from both individual[88] and corporate sources. There is no question that individuals and corporations have control over the data which is created on these social media sites; however, they do not host this data and do not have physical possession of this data.

88. *See, e.g.*, Quagliarello v. Dewees, No. CIV.A. 09-4870, 2011 WL 3438090 (E.D. Pa. Aug. 4, 2011) (plaintiff's social media relevant to rebut emotional distress claims); E.E.O.C. v. Simply Storage Mgmt, LLC, 270 F.R.D. 430, 436 (S.D. Ind. 2010) (rejecting EEOC's claim that producing social networking content would infringe on claimants' privacy because merely locking a profile from public access does not prevent discovery and ordering EEOC to produce "any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity stream, blog entries)," third-party communications, photographs, and videos for the claimants that "reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state"; and instructing that in accordance with the liberal discovery standard of Rule 26, in carrying out the court's order "the EEOC should err in favor of production"); Ledbetter v. Wal-Mart Stores, Inc., No. 06-CV-01958-WYDMJW, 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (court ordered plaintiffs to produce email and other communications from Facebook, MySpace, and Meetup.com).

When information regarding a social media account is requested by a party in litigation or an investigation, it is the duty of the custodian to produce a valid copy of the data available. There are tools that can assist in the download of this data, but in many cases a complete set of data can only be recovered with the consent or cooperation of the "owner" of the data.

Corporations do not own or control their employees' personal social media accounts. There have been instances where employees' personal accounts contained information or speech relevant or desired as evidence by a corporation. While some have attempted to argue that under the Practical Ability Standard, corporations may have the "practical ability" to obtain data from social media sites they do not own or control merely by asking their employees to preserve/produce it, no court has specifically held this to be true. To the contrary, as noted above, an employer's demand for this information from an employee may be viewed as improper or "coercive."[89] Likewise, many states have enacted legislation that specifically prohibit an employer from seeking such information from an employee, and an employer's attempt to solicit an employee's usernames and passwords to facilitate a social media capture may violate those states' privacy statutes.[90]

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89. *See, e.g.*, Debbie Kaminer, *Can Employers Ask Applicants for Social Media Login Information,* N.Y.L.J. (July 27, 2012), http://www.newyorklawjournal.com/id=1202564023558/Can-Employers-Ask-Workers-Applicants-for-Social-Media-Login-Information?slreturn=20160428100635.

90. See, e.g.:

- Philip L. Gordon & Joon Hwang, *Making Sense of the Complex Patchwork Created by Nearly One Dozen New Social Media Password Protection Laws*, LITTLER (July 2, 2013), http://www.littler.com/making-sense-complex-patchwork-created-nearly-one-dozen-new-social-media-password-protection-laws ("In a single season, spring 2013, seven states enacted social media password protection legislation, bringing the total number of states to 11 since Maryland enacted

Employers also need to be aware of restrictions on policies they issue concerning employees' use of social media, as they may conflict with federal or state regulations.[91]

3. The "Bring your Own Device to Work" Movement[92]

"BYOD," or Bring Your Own Device is an increasingly popular corporate practice where employees purchase and own the physical hardware device (i.e., a smartphone or tablet) that then

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the first such law in May 2012. Bills are pending in more than 20 other states. The current roster of states, dominated by the Rocky Mountain Region and the Far West, is as follows: Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah and Washington. New Jersey appears poised to join this group as the state's legislature amends a bill conditionally vetoed by Governor Christie in May."); *and*

- Philip Gordon & Joon Hwang, *New Jersey Becomes the Twelfth State to Enact Social Media Password Protection Legislation*, LITTLER (Sept. 1, 2012), http://www.littler.com/new-jersey-becomes-twelfth-state-enact-social-media-password-protection-legislation-recent-amendment ("On August 29, 2013, New Jersey became the twelfth state to enact social media password protection legislation, continuing the nationwide trend towards imposing some form of restriction on employer access to the restricted, personal social media content of applicants and employees. The new law becomes effective on December 1, 2013.").

91. *See, e.g.*, *NLRB's Acting General Counsel Issues Third Guidance Document on Social Media and Approves One Policy*, LITTLER (June 5, 2012), http://www.littler.com/publication-press/publication/nlrbs-acting-general-counsel-issues-third-guidance-document-social-0 (noting that policy provisions that, among other things, required employees to protect confidentiality, prohibited inappropriate postings, encouraged employees to be respectful, fair, and courteous, and addressed the friending of co-workers, could potentially violate the National Labor Relations Act).

92. The Sedona Conference is preparing a more detailed commentary on BYOD issues that will be available on its website once it is released for public comment.

is connected to a corporate network system or otherwise used to conduct the company's business. There are a myriad of issues that are created via BYOD initiatives.[93] As a general matter, an employer does not have "control" over or the right to access personal information and data stored on home or personal computers, personal email accounts, personal PDAs, etc., of its employees. Thus, if an adversary demands such information in discovery, an employer can legitimately object. Yet, if an employer has a BYOD program, and has the ability to access employees' personal devices for work data, the lines concerning personal data and responsibility become blurred.

Likewise, the reality is that an employee may constructively and realistically have both custody and control over a BYOD device. Although the device may hold enterprise "owned" information, the employee both owns and accesses the data. Without the employee's consent,[94] an employer is not likely to have the legal right to both secure control and custody of the device, much less preserve information on the same device.[95]

93. For a thorough discussion of BYOD issues, *see The "Bring Your Own Device" to Work Movement: Engineering Practical Employment and Labor Law Compliance Solutions*, THE LITTLER REPORT (May 2012), http://www.littler.com/files/press/pdf/TheLittlerReport-TheBringYourOwnDeviceToWorkMovement.pdf.

94. At least one court has held that an employer's ability to secure consent from its employees can only go so far. *See* Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 325, 990 A.2d 650, 665 (2010) (rejecting employer's claim to access employee's attorney-client communications "[b]ecause of the important public policy concerns underlying the attorney-client privilege").

95. *See, e.g.*, Matthew Enterprise, Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015) (employee's phone was not in Rule 34 possession, custody, or control of employer).

4. Changing Locations/Jurisdictions

In the hard copy age, attorneys and clients could definitively determine the location of documents. In contrast, electronic documents may be physically stored in one jurisdiction, accessed and used for business purposes in a different (or multiple) jurisdiction(s), and stored for backup purposes in yet another jurisdiction. Electronic documents and data may also be stored on a variety of devices, including servers, hard drives, external media, handheld devices, backup tapes, portable hard drives, data archives, or employees' dual-use/BYOD personal devices.

As a result, lawyers and courts may struggle to determine the location of electronic documents as well as to identify the entity and/or individual properly charged with legal possession, custody, or control of electronic documents. Choice of law disputes may also arise over the body of law applicable to determine the privacy considerations that govern the preservation, access, collection, and production of electronic documents.

IV. THE SEDONA CONFERENCE PRINCIPLES ON POSSESSION, CUSTODY, OR CONTROL—WITH COMMENTARY

Principle 1: *A responding party will be deemed to be in Rule 34 or Rule 45 "possession, custody, or control" of Documents and ESI when that party has actual possession or the legal right to obtain and produce the Documents and ESI on demand.*

Comments:

A. Interpretation of Possession, Custody, or Control for Purposes of Rules 34 and 45 Should be Consistent across Federal Circuits

As noted above, the various federal circuits have defined Rule 34 or Rule 45 "possession, custody, or control" differently and inconsistently, leading to a lack of clarity for lawyers and organizations that must deal with information in multiple jurisdictions. The varying standards and often inconsistent application of the standards themselves have left parties without definitive guidance and a clear road map when attempting to make legal and defensible discovery decisions, and the courts without clear standards for adjudicating discovery issues. Further, the imprecision of the Practical Ability Test has resulted in inconsistent and, at times, inequitable results in many contexts.[96] The

96. For the most part, when addressing Documents held by third/non-parties the safe harbor contained in Rule 37(e) will not apply because a party will not have "control" over a non-party's "electronic information systems" to determine their operations (routine, good faith, or otherwise). This further underscores the problems with the current framework, whereby on the one hand a party may have Rule 34 "possession, custody, or control" over third-party data, but on the other hand, the Safe Harbor in the current rules does not apply because the party does not "control" the data. For example, in *GenOn Mid-Atl v. Stone & Webster*, 282 F.R.D. 346, 354 (S.D.N.Y. 2012), the plaintiff was found to have control over documents in the possession of a third-party litigation consultant that was expected to provide expert testimony at trial. The court held that "common sense" suggested that the plaintiff could have obtained the documents from the consultant merely by asking

problems with practical ability, and support for abandoning that standard are explored in more detail in Section III, *supra*.

B. A Framework for a More Objective Definition of "Control"

A more reliable, objective approach to fulfilling a party's Rule 34 and Rule 45 obligations would be to base the interpretation of the language "possession, custody, or control" on the definition of "control" as the legal right to obtain and ability to produce Documents and ESI on demand. Courts in the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits apply the Legal Right Standard set forth in Principle 1. That standard establishes that a party is deemed to have possession, custody, or control only if that party has: (1) actual possession of Documents and ESI; or (2) the legal right to obtain Documents and ESI. It is upon this well-established legal footing that this Commentary advocates that Rule 34 or Rule 45 "control" should be defined as the legal right to obtain Documents and ESI and ability to produce them on demand. This would also avoid the potentially unfair results from the application of the Practical Ability Standard, as detailed in Section III, *supra*.

1. Application of "Control" Under Relevant Legal Right Case Law

Illustrative of the definition of "control" in Principle 1 are recent cases decided by the Ninth Circuit where a contractual basis was lacking, such that "control" was found not to exist:

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for them, and that the consultant would have honored a request by the plaintiff that the documents be preserved. The plaintiff failed to direct the consultant to preserve the documents, and they apparently were destroyed by the consultant in its normal course of business. Although the court found that the plaintiff had functional control over the documents, it declined to issue sanctions because the plaintiff sufficiently demonstrated that the defendant was not prejudiced.

- *Ubiquti Networks, Inc. v. Kozumi USA Corp.*[97] In *Ubiquti*, the court denied a motion to compel defendants to obtain and produce documents from a consultant, a resident of Taiwan. Although the consultant had provided web design services to the defendant company, had an email account on the company's system (which had not been preserved), and was the brother of an individual defendant, the court found no evidence of a contract or any other legal basis upon which the defendants could legally compel the consultant to produce documents. In denying the motion to compel, the court reasoned: "'[a] party responding to a Rule 34 production request . . . is under an affirmative duty to seek that information reasonably available to [it] from [its] employees, agents, or others subject to [its] control.'"[98]
- *In re NCAA Student-Athlete Name & Likeness Litigation.*[99] In *In re NCAA*, the court held that "[n]either the NCAA Constitution nor the Bylaws grants the NCAA the right to take possession of its members' Documents and ESI," therefore, the NCAA had insufficient control over the documents to retrieve them from its member schools and produce them to the plaintiffs.[100]

The Ninth Circuit has also held that a "relationship" between entities is insufficient to impose Rule 34 "control" over

97. No. 12-cv-2582 CW JSC, 2013 WL 1767960 (N.D. Cal. Apr. 15, 2013).

98. *Cf.* Hageman v. Accenture, LLP, No. CIV. 10-1759 RHK/TNL, 2011 WL 8993423 (D. Minn. Oct. 19, 2011) (*supra* note 7 and accompanying text).

99. No. 09-CV-01967 CW NC, 2012 WL 161240, at *3 (N.D. Cal. Jan. 17, 2012) (citing *In re* Citric Acid Litig., 191 F.3d 1090, 1107 (9th Cir. 1999)).

100. *Id.* at *5.

Documents and ESI held by a third party without telltale hallmarks of control founded in a legal right to obtain the Documents and ESI from the third party. The plaintiff in *In re Citric Acid Litigation* had subpoenaed Coopers & Lybrand in the U.S. to produce documents from both the U.S. firm as well as a Coopers firm located in Switzerland. The court held that the U.S. firm did not have control over the Swiss firm, because:

> [a]lthough members use the 'Coopers & Lybrand' name, each firm is autonomous. Firms do not share profits or losses, nor do they have any management, authority, or control over other member firms. In addition, C&L-International does not exercise management, authority, or control over member firms. Of particular relevance to the case at hand, C&L-US does not have any economic or legal interest in C&L-Switzerland, and C&L-Switzerland has no such interest in C&L-US.[101]

Indeed, in holding that production would not be compelled pursuant to Rule 34, the court pointed out the impracticability of the Practical Ability Test:

> Ordering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents. . . . There is no mechanism for C&L-US to compel C&L-Switzerland to produce those documents, and it is not clear how [plaintiff] Varni wants C&L-US to go about getting the ECAMA documents, since C&L-Switzerland could legally—and without breaching any contract—continue to refuse to turn

101. *In re* Citric Acid Litig., 191 F.3d at 1106.

> over such documents. Because C&L-US does not have legal control over C&L-Switzerland's documents, Varni could not compel C&L-US to produce those documents.[102]

Another application of the Legal Right Standard can be seen in the context of the obligation to preserve websites referenced by hyperlinks within a document. Under the Legal Right Standard, there is no such duty to preserve hyperlinks. As the websites referenced by those links are maintained by generally unrelated third parties, the producing party has no legal right to obtain the content of those sites.[103]

2. Application of "Control" Under Restatement Law

The definition of Rule 34 "control" proposed in this Commentary is also supported by other well-established legal authorities that specifically define control consistent with the Legal Right Standard, including the Restatements. To be clear, by describing these various tort-based principles below, it is not this Commentary's intention to impose a tort-based test for Rule

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102. *Id.* at 1108.

103. *See, e.g.*, Phillips v. Netblue, Inc., No. C-05-4401 SC, 2007 WL 174459, at *2–3 (N.D. Cal. Jan. 22, 2007) (content of reference website links not considered to be within a party's possession, custody, or control); Ferron v. Echostar Satellite, Inc., 658 F. Supp. 2d 859, 864 (S.D. Ohio 2009) *aff'd*, 410 F. App'x 903 (6th Cir. 2010) (plaintiff failed to establish how defendant's failure to maintain website links constituted "bad faith" under the court's inherent sanction power); Philbrick v. eNom, Inc., 593 F. Supp. 2d 352, 372 n.23 (D.N.H. 2009) (court would not sanction defendant for failure to preserve website links where there was no evidence that defendant ever had such information, and plaintiff had also failed to preserve them). *But cf.* United States v. Cyberheat, Inc., No. CV-05-457-TUCDCB, 2007 WL 686678, at *8–9 (D. Ariz. Mar. 2, 2007) (FTC able to obtain images in emails from Hotmail email "trap accounts" where Microsoft maintained web link information within emails and could capture the corresponding web page).

34 possession, custody, or control. Rather, the reference is meant to be merely instructive.

a. Agency

The Restatement (Third) of Agency examines the issue of control from many perspectives as it pertains to the relationship of agency. In particular, § 1.01 cmt. f is instructive as it explains the concept of interim control:

> (1). Principal's power and right of interim control—in general. An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established.[104]

This concept of control presupposes that a principal has the legal right to be able to demand actions from its agent, thereby controlling what the agent shall and shall not do. This is consistent with the Rule 34 Legal Right Standard, and the Rule 34 standard this Commentary is advocating.

b. Torts

The Restatement (Third) of Torts on Physical & Emotional Harm, § 56, provides that retained control for purposes of direct liability for negligence of an independent contractor can be

104. Restatement (Third) of Agency § 1.01 cmt. f (2006).

established by a contractual right of control or by the hirer's actual exercise of control.[105]

Additionally, several other sections of the Restatement (Second) of Torts address the concept of "control." For example, control-based liability regimes founded in tort doctrine assign liability where:

- parents fail to control their children to prevent intentional harm to others;[106]
- actors fail to control third parties to prevent intentional harm where there is an ability to control third parties and the actor knows or should know of the need to control a third party;[107] and
- a lessor of land retains control of a portion with a dangerous condition the lessor could have discovered and prevented harm.[108]

In contrast, when a party cedes control to another, the Restatement recognizes a halt to liability for the party who has relinquished control.[109] Similarly, § 414 assigns liability to an actor for the torts of her independent contractor where the actor "retains the control of any part of the work."[110]

All of these concepts from the Restatement are consistent with the Rule 34 Legal Right Standard, and the Rule 34 standard this Commentary is advocating.

105. *See* Restatement (Third) of Torts § 56 (2012).

106. Restatement (Second) of Torts § 316 (1979).

107. Restatement (Second) of Torts § 318 (1979).

108. Restatement (Second) of Torts § 360 (1979).

109. Restatement (Second) of Torts § 372 (1979).

110. Restatement (Second) of Torts § 414 (1970).

c. Judgments

The Restatements (Second) of Judgments also addresses the concept of "control."[111] Under principles of the law of judgments, a non-party to an action who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of the issues decided.[112]

This too is consistent with the Rule 34 Legal Right Standard, and the Rule 34 standard this Commentary is advocating.

3. Examples of "Control" in the Agency Context

Under principles of agency law, a master's control over her agent is the lynchpin of liability. Under § 219, a master will be liable for her servant's torts when the servant's conduct violated a non-delegable duty.[113]

Cases in the master-servant context are therefore instructive. For example, in *Schmidt v. Burlington Northern and Santa Fe Railway Co.*[114] the court analyzed control on the basis of an employer's right to control its employee's conduct "on the job." The court reasoned:

> [f]or Schmidt to succeed under the sub-servant theory, he must show BNSF controlled or had the right to control his physical conduct on the job. It is not enough for him to merely show WFE was the railroad's agent, or that he was acting to fulfill the railroad's obligations; BNSF's generalized oversight of Schmidt, without physical control or

111. Restatement (Second) of Judgments §§ 37 and 39 (1982).

112. Restatement (Second) of Judgments § 39 (1982).

113. Restatement (Second) of Agency § 219 (1958).

114. 605 F.3d 686 (9th Cir. 2010).

> the right to exercise physical control of his daily work is insufficient.[115]

Likewise, under the doctrine of respondeat superior, a principal is vicariously liable for his agent's negligent acts done in the scope of the agent's employment so long as the principal controls the means and method by which the agent performs his work.[116] In the case of Rule 34 and Rule 45, it is equally well-reasoned to say that actual control over Documents and ESI is the lynchpin to any duty or obligation. Indeed, some courts have already looked to agency concepts when applying Rule 34.[117]

C. The Legal Right Standard is a Better Test

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115. *See also* Pinero v. Jackson Hewett Services, Inc., 638 F. Supp. 2d 632, 640 (E.D. La. 2009) (principal liable for actions of agent when the relationship of the parties includes the principal's right to control physical details of the actor as to the manner of his performance which is characteristic of the relation of master and servant); Ramos v. Berkeley Cty., No. CIV. A. 2:11-3379-SB, 2012 WL 5292895 (D.S.C. Oct. 25, 2012) (granting defendant's motion for judgment on pleadings, dismissing claims because defendant employer was state entity and subject to control of county authorities).

116. *See* Ramsey v. Gamber, 469 F. App'x 737 (11th Cir. 2012) (citing Martin v. Goodies Distribution, 695 So.2d 1175, 1177 (Ala.1997)); Ware v. Timmons, 954 So.2d 545, 549–50 (Ala. 2006). *See also* Universal Am–Can, Ltd. v. W.C.A.B. (Minteer), 563 Pa. 480, 490, 762 A.2d 328, 333 (2000) ("[C]ontrol over the work to be completed and the manner in which it is to be performed are the primary factors in determining [Rule 34 control] status."); Meyer v. Holley, 537 U.S. 280, 291, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003) (finding that courts have not imposed liability for failure to supervise in and of itself).

117. *See, e.g.*, JPMorgan Chase Bank, N.A. v. KB Home, No. 2:08-CV-1711-PMP-RJJ, 2010 WL 1994787 (D. Nev. May 18, 2010) (granting motion to compel because agency relationship was sufficient to find control for purposes of Rule 34); *cf.* Insignia Sys. v. Edelstein, No. 09-4619, 2009 U.S. Dist. LEXIS 98399 (D.N.J. Oct. 20, 2009) (denying motion to compel local counsel to produce documents in possession and custody of lead counsel because no agency relationship existed among counsel).

During the public comment period, the following comments were received:

- A comment was received from several judges that reside in a Circuit that applies the Practical Ability Standard indicating they do not agree with the Commentary's "adoption of the 'legal right standard' to the exclusion of the 'practical ability' standard," because:
  - "omitting the 'practical ability' test could lead to gamesmanship";[118]
  - the problem of document requests issued to a U.S. company in federal litigation to obtain information from a foreign affiliate, possibly in violation of foreign blocking statutes or data privacy laws, "is one of cross-border discovery generally, not of possession, custody or control in particular"; and
  - "[w]hile it may be useful to have a uniform standard in all federal circuits . . . this may be another area where lawyers are concerned about judicial discretion."[119]

118. The following example was given in the Comment:

> A party may regularly obtain needed information from an affiliate, but when sued state that it has no legal right to obtain information. Or worse, that same defendant may obtain the "good" documents or ESI from its affiliate, while declining to obtain the bad, claiming it has no legal right to compel production.

119. According to the Comment:

> While there may be outlier judges, or some reported cases that were wrongly decided, that is no reason to advocate

- A comment was received from an industry group that strongly supported the Commentary and in particular, Principle 1, for several reasons, including:
  - it would establish a common, national standard which is "an important discovery reform";
  - courts that apply "the nebulous 'practical ability standard' engage in a highly subjective inquiry that downplays the importance of having any control over—or any legal right—to the information at issue," resulting in a "checkerboard of widely divergent standards";[120]
  - the Practical Ability Standard leads to a "case-by-case" determination of matters vs. the Legal Right Standard which is "fairer and more predictable";
  - the practical ability framework encourages discovery of information over which no party to the action has "possession, custody

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abandonment of the practical ability test and the judicial discretion accompanying it.

120. The following example was noted:

Compare In re Vivendi Univ., S.A., Sec. Litig., No. 02 CIV. 5571 RJH HBP, 2009 WL 8588405, at *3 (S.D.N.Y. July 10, 2009) ("[I]nterlocking officers or directors, without a showing of actual control, does not establish the practical ability of the parent to obtain the documents of the subsidiary."), *with SRAM, LLC v. Hayes Bicycle Grp., Inc.*, No. 12 C 3629, 2013 WL 6490252, at *4 (N.D. Ill. Dec. 10, 2013) (finding "control" where "SRAM has provided undisputed evidence that the two companies share officers and directors and having interrelated corporate structures").

or control" and Rule 45 is already in place for precisely this type of scenario;

- there is "an inherent unfairness in applying a court-ordered compulsion to require X to obtain documents from Y when X can apply no legal compulsion to force Y to turn over the documents," and "parties should not be encouraged by courts to apply pressure without legal justification—simply by virtue of having, for example, the upper hand in a business relationship." Moreover, "a requirement that one entity 'voluntarily' disclose information to another, without the protection of a court order but under threat of sanctions imposed upon the requesting party, runs directly against both the legal trend of increased protection of individuals' information and the reality that more and more information about everyone is available somewhere, if only the right party is asked to produce it";[121] and

121. Examples noted in the comment included:

> [A]n employer's request to an employee to turn over highly personal information to which the employer is not entitled, no matter how the request is phrased, would run a significant risk of being deemed "coercive."
>
> [O]ne company's request for information from an affiliate, in the absence of a legal right to obtain the information, puts unfair pressure on both the party asking for documents and the party which has to respond. The party making the request cannot "back up" its request with any legal authority, despite the fact that it might itself face sanctions if the other party says "no." And the recipient of the request is forced to weigh the legal and non-legal risks of non-production against the potential risks of disclosing information—likely including financial

- the approach suggested in the Commentary contains a mechanism to "weed out attempts to structure document maintenance to avoid discovery obligations."[122]

Taking all of those comments into consideration, Sedona believes the Legal Right Standard espoused in the Commentary is a better standard. The Practical Ability Standard:

- is inherently vague—it does not give parties notice of what factors will impact a court's decision making;
- is unevenly applied, thus it leads (as noted in the industry group's submission and throughout the Commentary)—and has the potential to lead—to disparate results;

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and personal information in nearly any case, and sometimes also including health-related, educational, or other information subject to special protection—without even the "legal compulsion" which can sometimes justify such disclosure.

To the extent cross-border production is required, the potential application of non-U.S. law heightens the risk. But even within the U.S., a requirement that one entity "voluntarily" disclose information to another, without the protection of a court order but under threat of sanctions imposed upon the requesting party, runs directly against both the legal trend of increased protection of individuals' information and the reality that more and more information about everyone is available somewhere, if only the right party is asked to produce it.

122. According to the Comment:

> Under the suggested approach, if a party demonstrates that it does not possess and is without the legal right to obtain requested information, the requesting party can challenge the claim if the relevant facts . . . suggest that a party's lack of control is not merely the by-product of its business decisions but rather an attempt to avoid having control over documents it would prefer not to produce.

- produces results that can vary case-by-case and judge-by-judge, leading to what can be perceived as random results, or at least the potential for different results before different judges and/or where a case lands;
- in the cross-border context, can be used to override foreign data protection laws that may legally restrict the ability to produce data outside of the country in which it resides;[123]
- in the parent/subsidiary/affiliate context, does not appropriately consider corporate formalities that apply to legally distinct entities;

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123. Risk in this already uncertain area has escalated greatly since the Edward Snowden revelations concerning U.S. national security measures threw into question existing cross-border data transfer mechanisms, culminating in the EU/U.S. Safe Harbor agreement being struck down in October 2015 (*see* Schrems v. Data Protection Commissioner, Court of Justice of the European Union, Press Release No 117/15, The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid, 6 October 2015, http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf (with link to underlying decision)) and sparking growing enforcement activity from European data protection authorities including in France and Germany. *See, e.g.*, David Meyer, *Here Comes the Post-Safe Harbor EU Privacy Crackdown*, FORTUNE (Feb. 25, 2016), http://fortune.com/2016/02/25/safe-harbor-crackdown/.

Moreover, the stakes are set to rise further as data protection law reforms in Europe exponentially increase fines for violations. When finalized, it is anticipated that fines under the General Data Protection Regulation (GDPR) may be up to 4% of a company's total world annual gross revenue. *See* Committee on Civil Liberties, Justice and Home Affairs, Press Release, Data protection package: Parliament and Council now close to a deal, 15 December 2015, http://www.europarl.europa.eu/news/en/news-room/20151215IPR07597/Data-protection-package-Parliament-and-Council-now-close-to-a-deal.

Nor is this issue limited to Europe as countries around the globe develop tougher data protection regimens with higher fines.

- can create the appearance of unfairness—because it is unbounded by any clear (or "nebulous" as characterized by the Comment from the industry group) factors,[124] there is a potential for cases to be decided differently based purely on "discretion" of different judges;[125] and
- could lead to "futile" and unfair results.[126]

This is not a sound basis for making legal decisions.

In contrast, the Legal Right Standard:

- is grounded in clear, well-established factors (as well as other well-established legal authorities that define control consistent with the Legal

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124. Those may include amorphous concepts like the following over which there are no legal norms:

- "a degree of close coordination";
- "similar interests, missions or goals";
- "interests are sufficiently aligned and closely interrelated"; and
- a "sufficient nexus."

See, e.g., Gross v. Lunduski, 304 F.R.D. 136 (W.D.N.Y. 2014).

125. That is not to say there is not a fundamental and important need for judicial discretion in the U.S. Judicial system. As an example, the analytical framework of the modified business judgment rule discussed in Principle 3 is an area where individual judges should apply their discretion to those factors based upon the specific factual circumstances of cases.

126. *Accord* Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015) ("Even if the court were to order that Stevens Creek [car dealership] collect emails from its employees' personal accounts, Chrysler has not identified any authority under which Stevens Creek could force employees to turn them over. The Ninth Circuit has recognized that '[o]rdering a party to produce documents that it does not have the legal right to obtain will oftentimes be futile, precisely because the party has no certain way of getting those documents.'").

Right Standard, as detailed in this Commentary[127]);

- provides notice to the parties of those standards;
- offers consistency in how it should be applied; thus, the result should not depend on where a case lands;
- appropriately considers competing legal interests that can impact "control," including foreign data protection laws and corporate formalities that apply to legally distinct entities; and
- overall leads to fairer results (including with respect to the futility of complying with court orders).

As the new December 1, 2015 Amendments to the Rules of Civil Procedure expressly recognized, consistency across circuits through uniform, national standards is a laudable goal.[128] Parties' legal obligations should not depend on where a case is filed. The approach espoused in this Commentary achieves this important objective. Helping resolve the disparity among Circuits to bring a uniform, national standard to this important area of the law is also consistent with Sedona's mission of moving the law forward in a just and reasoned way.

Just as important, the Legal Right Standard provides clear guidance resulting in its consistent application, which also

127. There are no such parallels for the Practical Ability Standard.

128. One of the primary drivers of the 2015 amendments to Rule 37(e) was to "provide a uniform standard in federal courts." *See* FED. R. CIV. P. 37(e)(2), Committee Note (Dec. 15, 2015). *See also*, Advisory Committee Report, *supra* note 5, at B-14, B-17 ("Resolving the circuit split with a more uniform approach . . . has been recognized by the Committee as a worthwhile goal. . . . [The] primary purpose of [amended Rule 37(e)] is to eliminate the circuit split on [a key aspect of the rules].").

furthers Fed. R. Civ. P. 1's goal of "just, speedy and inexpensive determination of every action and proceeding."

Moreover, if a requesting party truly needs information that a responding party can demonstrate it does not have the legal right to obtain, the requesting party is not left without recourse—it can subpoena the Documents and ESI from the non-party that legally controls them via Rule 45, which squarely addresses the discovery of such non-party information. Stated another way, the approach espoused by this Commentary as a whole (including incorporation of the "Legal Right Plus Notification Standard" in Principle 5) fairly puts the onus on the party that claims it needs the information (via its request in the first instance) to obtain it via Rule 45.

A final note: one court has already favorably cited the public comment version of this Commentary before this final version was released, for the proposition that the majority of circuits already follow the Legal Right Standard:

> What does it mean for a party to have control over data like the data disputed here? "Control is defined as the legal right to obtain documents upon demand." Like the majority of circuits, the Ninth Circuit has explicitly rejected an invitation "to define 'control' in a manner that focuses on the party's practical ability to obtain the requested documents."[129]

D. Illustrations of what Should and Should Not Constitute Rule 34 "Control" Under a Consistent Standard

The following is a non-exclusive list of illustrative examples where "control" for purposes of disputes under Rules 34 and 45

129. Matthew Enterprise, Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2015 WL 8482256, at *3 n.37 (N.D. Cal. Dec. 10, 2015).

will or will not exist under the proposed, uniform standard espoused by Principle 1 and this Commentary.

- Illustrative situations/examples where Rule 34 "control" exists:
    - actual possession of data
    - clear contractual right to access or obtain the data
    - deliberate decision to outsource critical business data
    - deliberate decision to move data to foreign jurisdiction for litigation advantage
    - individual obtaining information from their own ISP account (email, Facebook, etc.)
    - separate sister/parent-subsidiary corporation has a legal right to obtain Documents and ESI from its sister corporation
- Illustrative situations/examples where Rule 34 "control" does not exist:
    - customer relationships where there is no legal right to demand data from a customer
    - informal business relationships, i.e., the ability to "ask" for Documents or ESI
    - employer/employee relationships, e.g., employer does not have the legal right to obtain personal Documents and ESI from a director, officer, or employee's personal cell phone, personal email account, or personal social networking sites; employee does not have the legal right to demand or remove data from his/her employer

- former directors, officers, and employee relationships where no legal right to demand data exists
- separate sister/parent-subsidiary corporation does not have a legal right to obtain Documents and ESI from its sister corporation
- partial ownership, minority control situations where no legal right to demand data exists
- international affiliate subject to data privacy or blocking statutes (e.g., company compelled to collect and produce Documents and ESI or data from a country where doing so would be impermissible and perhaps a crime)

Principle 2: *The party opposing the preservation or production of specifically requested Documents and ESI claimed to be outside its control, generally bears the burden of proving that it does not have actual possession or the legal right to obtain the requested Documents and ESI.*

Comment:

Whether "Control" Exists must be Answered, in the First Instance, by the Responding Party

Principle 2 is born out of the wellspring of common sense, but grounded in well-established principles of jurisprudence pursuant to the Federal Rules of Civil Procedure. For example, it is a logical presumption that the responding party would have access to the facts necessary to determine control, e.g., to cite one of the examples listed in the comments to Principle 1, *supra* Section IV(D), whether a contractual relationship exists between a

consultant and the organization such that access to the data exists.[130]

More particularly, the justification for placing the burden of demonstrating lack of control can be found in a similar provision of Fed. R. Civ. P. 26(b)(2)(B) which states: "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, *the party from whom discovery is sought must show* that the information is not reasonably accessible because of undue burden or cost." (emphasis added)

Further, under Fed. R. Civ. P. 34, the party objecting to a discovery request has the obligation to state a reason for such objection, i.e., a lack of control over Documents and ESI requested.

However, this Principle generally applies when the responding party has greater knowledge of or access to the information that bears upon the inquiry. Where the requesting party has equal or superior access to the facts about whether the responding party has actual possession or the legal right to obtain the requested Documents and ESI, the burden should be applied accordingly.[131] Likewise, Principle 2 would not preclude a

130. *See* Ubiquti Networks, Inc v. Kozumi USA Corp, No. 12-cv-2582 CW (JSC), 2013 WL 1767960 (N.D. Cal. Apr. 15, 2013).

131. *See, e.g.*, Enviropak Corp. v. Zenfinity Capital, LLC, No. 4:14CV00754 ERW, 2014 WL 5425541, at *7 (E.D. Mo. Oct. 22, 2014) (denying plaintiff's motion to compel production of documents after defendant properly objected to the request as seeking information equally available in public records, because defendant did not control the documents requested and they were in the public domain); Sec. & Exch. Comm'n v. Samuel H. Sloan & Co., 369 F. Supp. 994, 995 (S.D.N.Y. 1973) (denying motion for production of transcript of administrative hearing because "[i]t is well established that discovery need not be required of documents of public record which are equally accessible to all parties").

requesting party from demonstrating that the responding party indeed has control in the appropriate case.

This Principle is also not intended to imply a general duty for a responding party to identify Documents and ESI that might be relevant in a case that are not within a party's "possession, custody, or control." Instead, it only applies to Documents and ESI that are "specifically requested," in accordance with the general mandates of Rule 34.[132] Stated another way, this Principle does not apply unless and until the requesting party has met its burden to be as specific as possible when requesting

132. *See, e.g.*, FED. R. CIV. P. 34(b)(1)(A) ("Contents of the Request. The request must describe with *reasonable particularity* each item or category of items to be inspected.") (emphasis added); Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 357–58 (D. Md. 2008):

> [Rule 26(g)] provides a *deterrent* to both *excessive discovery* and *evasion* by imposing a certification requirement that obligates each attorney to *stop and think about the legitimacy of a discovery request*. . . . [T]he rule aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party. Despite the requirements of the rule, however, the reality appears to be that with respect to certain discovery, principally interrogatories and document production requests, lawyers customarily serve requests that are far broader, more redundant and burdensome than necessary to obtain sufficient facts to enable them to resolve the case through motion, settlement or trial.

(emphasis in original); Frey v. Gainey Transp. Servs., No. CIVA 1:05CV1493 JOF, 2006 WL 2443787, at *9 (N.D. Ga. Aug. 22, 2006) (Courts frown on overly broad preservation/"spoliation" letters/demands that "lend itself to an effort on any plaintiff's part to sandbag a defendant in the event that any of those materials were not preserved."). *Accord* FED. R. CIV. P. 34(b) Committee Note (Dec. 15, 2015) (Although objections to Rule 34 requests must be stated with specificity under the amended Rule, "[a]n objection may state that a request is overbroad.").

information in discovery or making pre-litigation preservation demands.

During the public comment period, a very short comment was received stating that in the commenter's view, Principle 2 "shifts the burden of proof improperly." While we agree this Principle shifts the burden of proof to the responding party,[133] we believe this is a fair compromise and the correct result for several reasons:

- First, the burden is not a high one. If a party does not have actual possession or custody of Documents and ESI that are "specifically requested" under a proper Rule 34 request,[134] or the legal right to obtain such Documents and/or Data, a simple representation (via a meet-and-confer letter, declaration, discovery response, or deposition testimony) so stating this meets the burden. The burden would then switch to the requesting party to demonstrate that the

133. *See, e.g.*, Matthew Enterprise, Inc. v. Chrysler Grp. LLC, No. 13-cv-04236, 2015 WL 8482256 (N.D. Cal. Dec. 10, 2015) ("The party seeking production of the documents . . . bears the burden of proving that the opposing party has such control."); Alexander Interactive, Inc. v. Adorama, Inc., No. 12 CIV. 6608 PKC JCF, 2014 WL 61472, at *3 (S.D.N.Y. Jan. 6, 2014) ("Where control is contested, the party seeking production of documents bears the burden of establishing the opposing party's control over those documents."); St. Jude Med. S.C., Inc. v. Jassen-Counotte, 104 F. Supp. 3d 1150, 1159 (D. Ore. 2015) ("The burden is on the party seeking the production of documents to prove that the opposing or subpoenaed party has the requisite control."). *Accord In re* Porsche Cars N. Am., Inc., No. 2:11-MD-2233, 2012 WL 4361430, at *4 (S.D. Ohio Sept. 25, 2012) ("Speculation that one company has legal control over the documents of another company simply because they are related corporate entities is insufficient to establish control and compel discovery.").

134. *See* FED. R. CIV . P. 34 (b)(1)(A) ("Contents of the Request. The request must describe with reasonable particularity each item or category of items to be inspected.").

responding party indeed has the legal right to obtain the specific Documents and ESI they want, if they believe that is the case.

- As noted above, the burden of proof is intended to be fluid; if the requesting party has equal or superior access to information about the responding party's legal right to obtain the requested Documents and ESI, then the burden should shift to the requesting party. In short, the parties and the court have a collective responsibility to address these issues, which follows how responsibilities are allocated when addressing similar proof issues under the Federal Rules.[135]
- Finally, Sedona wants to ultimately have a balanced approach to these issues and believes this is a fair trade-off for achieving a national standard. While responding parties will no longer be unfairly burdened with having to preserve, search, review, and produce Documents and ESI they have no legal right to obtain, there is a now a small burden placed on them to demonstrate they do not have the legal right to do so

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135. *See, e.g.*, FED. R. CIV. P. 26(b), Committee Note (Dec. 15, 2015) (emphasis added):

> Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.
>
> Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. *The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.*

> when faced with a specifically tailored request for such Documents and ESI.

Principle 3(a): *When a challenge is raised about whether a responding party has Rule 34 or Rule 45 "possession, custody, or control" over Documents and ESI, the Court should apply modified "business judgment rule" factors that, if met, would allow certain, rebuttable presumptions in favor of the responding party.*

Principle 3(b): *In order to overcome the presumptions of the modified business judgment rule, the requesting party bears the burden to show that the responding party's decisions concerning the location, format, media, hosting, and access to Documents and ESI lacked a good faith basis and were not reasonably related to the responding party's legitimate business interests.*

Comments:

A. Rule 34 Application of the Business Judgment Rule

> The business judgment rule is an acknowledgment of the managerial prerogatives of [ ] directors [of a corporation] under [a state statute]. It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.[136]

136. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (internal citations omitted).

As applied in the context of possession, custody, or control of Documents and ESI, the business judgment rule would acknowledge the managerial prerogatives of an enterprise in managing its Documents and ESI if it acts on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the organization. Once this showing is made, absent demonstrable proof that decisions concerning the management of Documents and ESI lacked a good faith business basis, those decisions will be respected by the courts.[137] The burden is on the party challenging the decision to establish facts rebutting the presumption.[138] Cases that apply the business judgment rule identify foundational principles that courts may apply, in a slightly modified manner, to adjudicate disputes

137. In the context of motion practice concerning electronic discovery disputes, pre-litigation decisions by an organization concerning the treatment of Documents and ESI may be documented and supported by sworn affidavits of fact submitted by an affiant who is competent and authorized to make such affidavits.

138. The business judgment rule arises and is typically applied in the context of corporate transactions. This Commentary seeks to translate the deference that courts grant to a corporate board's business decisions into deference that courts should grant to an entity's pre-litigation decisions concerning IT systems and information management in the context of electronic discovery. The authors note that in contrast to board decisions concerning corporate transactions, lower-level personnel within an organization typically make pre-litigation IT and information management decisions. For this reason, this Commentary does not advocate a literal application of each aspect of the business judgment rule to an entity's or organization's pre-litigation decisions.

For a thorough discussion of information management in the context of eDiscovery, *see* The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Information%20Governance.

concerning Rule 34 possession, custody, or control of Documents and ESI, including:

- a rebuttable presumption that good faith decisions concerning the management of Documents and ESI are not subject to discovery;[139]
- absent a colorable rebuttal of the presumption, courts will not substitute their judgment for that of the responding party if the decision can be attributed to a rational business purpose;[140]
- the presumption shields good faith business decisions that are reasonably prudent and believed to be in the entity's best interest at the time they are made;[141]
- courts will not overturn decisions concerning the management of Documents and ESI unless the decisions lack any rational business purpose;[142] and

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139. *See, e.g.*, Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 166, 14 A.3d 36, 45 (2011):

> Under the business judgment rule, there is a rebuttable presumption that good faith decisions based on reasonable business knowledge by a board of directors are not actionable by those who have an interest in the business entity. The rule protects a board of directors from being questioned or second-guessed on conduct of corporate affairs, except in instances of fraud, self-dealing, or unconscionable conduct; it exists to promote and protect the full and free exercise of the power of management given to the directors. Stated differently, bad judgment, without bad faith, does not ordinarily make officers individually liable.

140. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003).

141. Oberbillig v. W. Grand Towers Condo. Ass'n, 807 N.W.2d 143, 154 (Iowa 2011).

142. Laborers' Local v. Intersil, 868 F. Supp. 2d 838, 846 (N.D. Cal. 2012).

- the rebuttable presumption shields entities from allegations of spoliation arising from good faith business decisions made in an informed and deliberate manner. However, entities may be susceptible to a spoliation finding where their decisions demonstrate bad faith.[143]

The type of deference afforded by a modified business judgment rule analysis is already enshrined in electronic discovery case law.[144] In the eDiscovery context, courts have already recognized the type of presumptions that are allowed by the business judgment rule, by similarly deferring to an entity's data management decisions.[145] This type of deference to good faith business decisions also acknowledges that the management of ESI, including in the context of preservation and spoliation, "cannot be analyzed in the same way as similar claims involving

143. TSG Water Res., Inc. v. D'Alba & Donovan Certified Pub. Accountants, P.C., 260 F. App'x 191, 197 (11th Cir. 2007).

144. "[Because] there are many ways to manage electronic data, litigants are free to choose how this task [preservation] is accomplished" and responding parties are "best situated" to evaluate the detailed procedures, methodologies, and technologies "appropriate for preserving and producing their own electronic data and documents." The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281, 284 (2008) (citing Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212, 218 (S.D.N.Y. 2003) and Principle 6 of The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2nd ed. 2007), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles).

145. *See* E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc., No. 3:09CV58, 2011 WL 1597528 (E.D. Va. Apr. 27, 2011) (deferring to producing party's decision after the onset of litigation to shorten retention period of email in view of evidence that party's preservation process was reasonable and undertaken in good faith).

static information."[146] Rule 37(e) further buttresses the exercise of deference because it shields entities from spoliation liability when the routine, good faith operation of electronic information systems causes the loss of information after the onset of a duty to preserve.

Further, the Federal Rules' meet and confer obligations, particularly with respect to scope of discovery, issues about disclosure of Documents and ESI, protective orders, and motions to compel[147] should obviate the need for formal discovery into pre-litigation business decisions about the management of Documents and ESI for purposes of applying the presumptions of the business judgment rule. In situations where the modified business judgment presumptions are being invoked, those rules should encourage parties to informally exchange general information about the circumstances under which the pre-litigation decision(s) concerning management of the Documents and ESI at issue were made. *However, it is important to note that those considerations only apply if a responding party is relying upon the modified business judgment rule presumptions.* Stated another way, this Principle is not intended to create a general right to inquire about or conduct discovery into pre-litigation business decisions about a party's management of Documents and ESI; it is only if the modified business judgment rule is being asserted that such disclosures may be required to capitalize on the presumptions. Likewise, litigants and the courts can use Rule 26(b)(2)(C)(iii) as a proxy for one of the main tenets of the

146. The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, *supra* note 144, at 285 (quoting Lee H. Rosenthal, A Few Thoughts on Electronic Discovery After December 1, 2006, 116 YALE L. J. POCKET PART 167 (2006), http://yalelawjournal.org/forum/an-overview-of-the-e-discovery-rules-amendments).

147. *See* FED. R. CIV. P. 26(c) and (f) and FED. R. CIV. P. 37(d)(1)(B).

business judgment rule, namely the application of a rebuttable presumption that good faith decisions concerning the management of Documents and ESI are not subject to discovery.[148]

To summarize, the presumption that an entity made good faith pre-litigation business decisions concerning the management of its Documents and ESI shall apply when: (1) after asserting an intention to rely upon the modified business

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148. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality. *See also* Wood v. Capital One Servs., LLC, No. 09-CV-1445 NPM/DEP, 2011 WL 2154279, at *5, 7 (N.D.N.Y. Apr. 15, 2011) (noting that "the scope of discovery is defined in the first instance by relevance to the claims and defenses in a case" and, applying proportionality principles, denying plaintiff's motion to compel production of emails and other ESI where "the relevance of the specific discovery sought is marginal, and the information sought is not likely to play an important role in resolving the material issues in the case"); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (ordering a phased discovery schedule "to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action"); E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., No. 3:09CV58, 2011 WL 1597528, at *10 (E.D. Va. Apr. 27, 2011) (citing *Victor Stanley*'s, *infra* following case citation, discussion of proportionate preservation conduct and denying motion for spoliation sanctions where responding party took reasonable measures to preserve information and could not have reasonably known that certain custodians' emails would be relevant to the other side's defenses); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522–23 (D. Md. 2010):

> [W]hether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done—or not done—was proportional to that case and consistent with clearly established applicable standards. . . . [A]ssessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.

(internal citation and quotation omitted).

judgment rule presumption, the entity meets its obligation to make good faith Rule 26 disclosures concerning pre-litigation decisions that were made about Documents and ESI and (2) absent indicia of bad faith. Once that showing is made, if the requesting party wants to challenge the presumption, it bears the burden to demonstrate that the producing party's pre-litigation decisions about Documents and ESI were made in bad faith, i.e., the entity did not act on an informed basis, or in good faith, and in the honest belief that the action taken was in the best interests of the organization, by adducing actual evidence (not mere speculation)[149] in support of such a claim in accordance with the mandates of Rules 26(g) and 11.[150] Facts supporting an

149. *See, e.g.*, *In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order allowing discovery of certain databases where there was no factual finding of "some non-compliance with discovery rules by Ford"); Scotts Co., LLC v. Liberty Mut. Ins. Co., No. CIV. A. 2:06-CV-899, 2007 WL 1723509 (S.D. Ohio June 12, 2007) (mere suspicion that defendant was withholding ESI is an insufficient basis to permit discovery on discovery, including forensic searches of defendant's computer systems, network servers, and databases); Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008) (rejecting a request for additional discovery because speculation that other electronic documents existed does not overcome a Rule 26(g) certification); Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin., No. CV 12-9861-GW SSX, 2013 WL 6154168 (C.D. Cal. Nov. 7, 2013) (belief that destroyed emails would demonstrate failure to comply with federal law too speculative to justify additional discovery); Rusk v. New York State Thruway Auth., No. 10-CV-0544A SR, 2011 WL 6936344, at *2 (W.D.N.Y. Dec. 29, 2011) (denying plaintiff's motion to compel as "[p]laintiff's speculation that additional e-mails exist is insufficient to overcome counsel's declaration that a search for responsive documents has been conducted and that responsive documents have been disclosed").

150. The Advisory Committee's Notes to Rule 26(g) explain that the rule "parallels the amendments to Rule 11" and "requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection." FED. R. CIV. P. 26(g) Advisory Committee Notes (1983). Further, "[t]he duty to make a 'reasonable inquiry' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable

"improper purpose" attack against the presumption could include business decisions that render the information more difficult or expensive to access for litigation without offering a corresponding business advantage, or downgrading the "usability" of electronic information without a corresponding business reason for doing so.

B. Appropriate Modifications of the Business Judgment Rule for Rule 34 and Rule 45 Analysis of Possession, Custody, or Control

To be fairly applied in the Rule 34 and Rule 45 "possession, custody, or control" context, some adjustments need to be made to the traditional business judgment rule factors. These include the following:

- First, the business judgment rule's traditional "abuse of discretion" standard should be eliminated in this context, in favor of the "control" paradigm advanced earlier in this Commentary.[151]
- Second, the traditional form of the business judgment rule requires courts to honor the organization's directors' business judgment absent an abuse of their discretion. In the context

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under the circumstances. It is an objective standard similar to the one imposed by Rule 11." *Id.*

151. Further, when a court attempts to adjudicate motive, it is difficult to apply the business judgment rule's "abuse of discretion" test because it distracts from the analysis of the entity's underlying good or bad faith. Under a modified business judgment rule adapted to provide an analytical framework to adjudicate disputes concerning the possession, custody, or control of Documents and ESI, the entity and its personnel would enjoy a presumption that business decisions taken within the scope of their duties were made in the good faith and honest belief that the action taken was in the best interests of the company. Determination of the entity's intent (i.e., their "good faith" or not) take a back seat to determining whether the entity made a legitimate business decision, regardless of intent.

of Rule 34 possession, custody, or control, however, IT executives and other personnel with decision-making authority are not directly analogous to members of boards of directors, who are company executives of the highest level. In contrast, personnel charged with decision making regarding the management of electronic information typically occupy a lower rung in corporate managerial hierarchies.

- Third, the traditional factors that courts have examined to determine whether a company properly exercised its business judgment[152] should be adjusted as follows for the Rule 34 context:

TRADITIONAL BUSINESS JUDGMENT RULE	RULE 34 POSSESSION, CUSTODY, OR CONTROL BUSINESS JUDGMENT RULE
Pre-decision conduct	Same
The decision-making method	Same
The decision-makers themselves	Same
Formality of the decision	Business basis of the decision
Impact of the decision on the directors, the company, and the shareholders	Impact of the decision on the possession, custody, or control of Documents and ESI

In particular, set forth below is a table that in the left column recites ***non-exclusive***[153] factors cited by courts applying the

152. *See, e.g.*, *In re* Abbott Laboratories Derivative Shareholders Litig., 325 F.3d 795, 806 (7th Cir. 2003); Ocilla Indus., Inc. v. Katz, 677 F. Supp. 1291, 1298 (E.D.N.Y. 1987); Herald Co. v. Seawell, 472 F.2d 1081, 1101 (10th Cir. 1972); *In re* Gulf Fleet Holdings, Inc., 491 B.R. 747, 770 (Bankr. W.D. La. 2013); *In re* PSE & G S'holder Litig., 173 N.J. 258, 296, 801 A.2d 295, 319 (2002).

153. The table is not intended to serve as an exhaustive, exclusive, or mandatory 'checklist' of requirements or analytical factors.

business judgment rule to adjudicate business disputes,[154] and in the right column contains suggestions for how the business judgment rule factors should be applied in the Rule 34 context.

TRADITIONAL BUSINESS JUDGMENT RULE FACTOR	RULE 34 POSSESSION, CUSTODY, OR CONTROL BUSINESS JUDGMENT RULE FACTOR
Whether the decision was made with requisite care and diligence	Adopt as is
Whether the decision was an exercise in arbitrariness, favoritism, discrimination, or malice	Adopt as is
Whether the decision was made after reasonable inquiry	Adopt as is
Whether the decision was made after reasonable investigation and in a cool, dispassionate, and thorough fashion	Adopt as is

154. *See* Baldwin v. Bader, 585 F.3d 18, 22 (1st Cir. 2009); Cia Naviera Financiera Aries, S.A. v. 50 Sutton Place South Owners, Inc., 510 F. App'x 60, 63 (2d Cir. 2013); Halebian v. Berv, 644 F.3d 122, 131 (2d Cir. 2011); *In re* Lemington Home for Aged, 659 F.3d 282, 292 (3d Cir. 2011), *as amended* (Oct. 20, 2011), *subsequent mandamus proceeding sub nom. In re* Baldwin, 700 F.3d 122 (3d Cir. 2012); Dellastatious v. Williams, 242 F.3d 191, 194 (4th Cir. 2001); Bolton v. Tesoro Petroleum Corp., 871 F.2d 1266, 1274 (5th Cir. 1989); Priddy v. Edelman, 883 F.2d 438, 443 (6th Cir. 1989); *In re* Abbott Laboratories Derivative Shareholders Litig., 325 F.3d 795, 807 (7th Cir. 2003); Potter v. Hughes, 546 F.3d 1051, 1059 (9th Cir. 2008); Hoye v. Meek, 795 F.2d 893, 896 (10th Cir. 1986); TSG Water Resources, Inc. v. D'Alba & Donovan Certified Public Accountants, P.C., 260 F. App'x 191, 198 (11th Cir. 2007); Pirelli Armstrong Tire Corp. v. Retiree Med. Benefits Trust, 534 F.3d 779, 791 (D.C. Cir. 2008).

TRADITIONAL BUSINESS JUDGMENT RULE FACTOR	RULE 34 POSSESSION, CUSTODY, OR CONTROL BUSINESS JUDGMENT RULE FACTOR
Whether the methods and procedures followed in gathering and analyzing information prior to making a decision were restricted in scope, shallow in execution, a mere pretext, half-hearted, or a sham	Adopt as is
Whether the decision was made independently	Adopt as is
Whether the decision-maker was assisted by counsel or other "reputable outside advisors"	Whether the decision-maker was assisted by "reputable advisors"[155]
Whether the decision was made in reliance on advice of experienced and knowledgeable counsel	Whether the decision was made in reliance on advice of experienced and knowledgeable personnel[156]
Whether the decision was delegated to a person who was not properly supervised	Adopt as is
Whether the decision-makers complied with any applicable legal duties	Adopt as is
Whether the decision was documented	Adopt as is
The speed with which the decision was made	Adopt as is
Whether the decision was the result of collusion between a director and an outsider	Whether the decision was demonstrably the result of an improper attempt to render information less useable or accessible to achieve tactical advantage in litigation

155. Reputable advisors include internal or outside advisors.

156. Experienced and knowledgeable personnel include internal or outside resources.

TRADITIONAL BUSINESS JUDGMENT RULE FACTOR	RULE 34 POSSESSION, CUSTODY, OR CONTROL BUSINESS JUDGMENT RULE FACTOR
Whether the decision was made with a "we don't care about the risks" attitude	Adopt as is
Whether the decision promoted directors' personal interests	Not applicable
Whether benefits accruing to the directors from the decision were made available to other shareholders on equal terms	Not applicable
Whether the decision was fair	Not applicable

Importantly, it is recognized that the business judgment rule was created to protect members of the Boards of Directors, not rank-and-file executives, managers, or other decision-makers. Courts should translate the rule to fit the circumstances of electronic discovery when applying it to pre-litigation decisions made by an entity's personnel below the board of director level concerning the management of electronic information. When a corporate document/data storage or retention decision is made by a person whose legal duties arise from the employment relationship instead of membership on the board, examination of the decision should legitimately include inquiry into why the decision-maker was authorized to make the decision. The question of "why" reflects directly on the issue of whether the company acted "in good faith."

Finally, like other areas of electronic discovery, the business judgment rule provides courts with an analytical framework to

conduct case and fact specific inquiries[157] to resolve parties' Rule 34 and Rule 45 disputes over possession, custody, or control.[158]

C. The (Re)Emergence of Information Governance

During the past several years, there has been a renewed recognition that one of the most effective ways to streamline eDiscovery in litigation, including the associated costs, is to better organize massive volumes of data in the first instance, or

157. Determining when the duty to preserve is triggered is always a fact-specific analysis that depends on the unique circumstances of each case. *See generally* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (The "analysis [of when the duty to preserve arises] depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.") (citing Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010), *abrogated by* Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012)); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522 (D. Md. 2010) ("[T]he duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty 'cannot be defined with precision.'") (internal quotation omitted); Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc., 244 F.R.D. 614, 621 (D. Colo. 2007) (When deciding when the duty to preserve evidence arises, "[u]ltimately, the court's decision must be guided by the facts of each case."). *Cf. also* The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 268 (2010), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Legal%20Holds ("The basic principle that an organization has a duty to preserve relevant information in anticipation of litigation is easy to articulate. However, the precise application of that duty can be elusive.").

158. This is an area where individual judges can apply their discretion in applying the business judgment factors.

what is sometimes referred to as a focus on the left-hand side of the EDRM (Electronic Discovery Reference Model).[159]

The Sedona Conference has specifically published a Commentary on those issues.[160] The *Commentary on Information Governance* notes that the benefits of establishing an information governance program include: "enhanced compliance with legal obligations for records retention, privacy and data security, and e-discovery, as information policies and processes are rationalized, integrated, and aligned in accord with the organization's information governance strategy."[161]

Applying the modified business judgment factors in the context of Rule 34 and 45 possession, custody, or control decisions will further the goal of encouraging the expansion of information governance programs to help reduce eDiscovery costs in litigation, which is again consistent with the mandates of Fed. R. Civ. P. 1.

Principle 4: *Rule 34 and Rule 45 notions of "possession, custody, or control" should never be construed to override conflicting*

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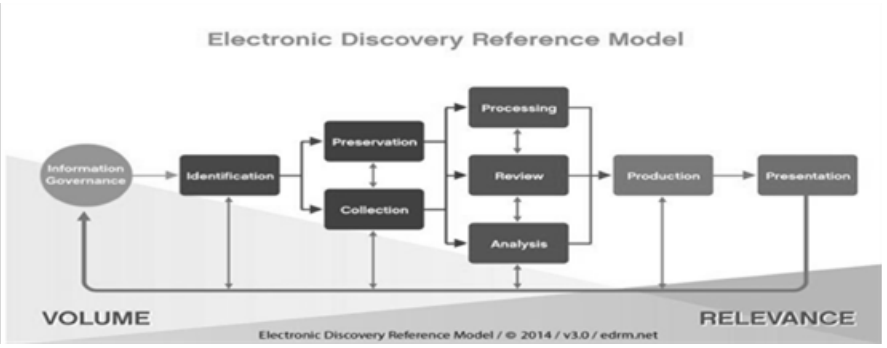

160. *See* The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125, 134 (2014), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20Commentary%20on%20Information%20Governance.

161. *Id*. at 134.

state or federal privacy or other statutory obligations, including foreign data protection laws.

Comments:

The mere fact that a party may be deemed to have possession, custody, or control over certain Documents or ESI is not necessarily dispositive of whether the Documents and ESI ultimately can or should be produced. State and federal statutory limitations, privacy laws, or international laws may preclude or limit disclosure of the kind of Documents or ESI sought. Thus, the possession, custody, or control analysis should also factor in federal and state statutory non-disclosure obligations, along with foreign data protection laws, to ensure that discovery obligations are not inconsistent and do not force non-compliance. This is particularly true when the scope of discovery implicates disclosure of information involving consumers' rights and privacy considerations.

A. Examples of Overriding Statutory Restrictions

For example, the Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley Act (GLBA), precludes financial institutions from "disclos[ing] to a nonaffiliated third party any nonpublic personal information, unless such financial institutions provide or have provided to the consumer a notice that complies with section 6803 of this title."[162] The statute by its terms supersedes "any [s]tate statute, regulation, order, or interpretation" to the extent that they are inconsistent with state law.[163] A number of courts have interpreted this language to hold that GLBA preempts any inconsistent or contrary state law, rule, ordinance, or court order.[164] Additionally, at least one court

162. 15 U.S.C.A. § 6802(a) (1999).

163. 15 U.S.C.A. § 6807(a) (1999).

164. *See* Bowler v. Hawke, 320 F.3d 59 (1st Cir. 2003) (GLBA preempts state statutes regulating insurance); Cline v. Hawke, 51 F. App'x 392 (4th Cir. 2002)

has extended GLBA non-disclosure requirements to third parties with whom the financial institution does business.[165]

Similarly, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations restrict the release of individually identifiable "protected health information" by health care providers to litigants and may be in conflict with discovery obligations.[166] Among other things, HIPAA precludes health care providers from responding to "a subpoena, discovery request, or other lawful process that is not accompanied by an order of court or administrative tribunal" unless the health care provider "receives satisfactory assurance . . . from the party seeking the information" of "reasonable efforts" to (i) provide appropriate notice to the affected patient or (ii) secure a qualified protective order.[167] However, HIPAA by its terms establishes a floor, not a ceiling, thus more restrictive state statutes (meaning those under which the patient is afforded greater protection from disclosure) are not preempted.[168]

Other federal statutes such as the Genetic Information Nondiscrimination Act of 2008 (GINA),[169] Computer Fraud & Abuse

(GLBA preempted certain West Virginia insurance regulations); Gen. Motors Corp. v. Kilgore, 853 So. 2d 171 (Ala. 2002) (GLBA preempts Alabama law permitting discovery of certain information).

165. Union Planters Bank v. Gavel, No. CIV. A. 02-1224, 2002 WL 975675 (E.D. La. May 9, 2002), *vacated on other grounds,* 369 F.3d 457 (5th Cir. 2004) (holding that GLBA precludes a third party from complying with a subpoena absent consent of the defendant's customers where the third party's business was financial in nature).

166. 45 C.F.R. § 164.512(e) (2016).

167. *Id.*

168. 45 C.F.R. § 160.203 (2016).

169. Pub. L. No. 110–233, 122 Stat. 881 (May 21, 2008).

Act (CFAA),[170] and Stored Communications Act (SCA),[171] and their state equivalents, likewise impose strict limitations on disclosure of data and further limit the manner in which such data may be obtained, which may be in conflict with discovery obligations. For example, under Fed. R. Civ. P. 34, a court may find that an employer has sufficient control over corporate data on dual-use devices (devices used by an employee for both business and personal purposes, also known as "bring your own device" (BYOD)) and is obligated to preserve and produce such relevant information. However, under some circumstances, employers may risk liability for reviewing certain information stored on an employee's dual-use device regardless of the employer's policy or of the employee's purported "consent," leaving employers in an unwinnable discovery catch-22.[172]

Likewise, employers who access information stored on a dual-use device, even with the employee's authorization, could still be exposed to liability for statutory breaches under certain circumstances due to the nature of the data stored on the device, for example, if the employer accessed information protected by GINA or the American's With Disabilities Act (ADA).[173] In addition, many states have enacted some type of social media password protection laws, which prohibit employers from requiring employees to disclose user names and passwords for

170. 18 U.S.C. § 1030.

171. 18 U.S.C. §§ 2701–2712.

172. *See, e.g.*, Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2008); computer trespass laws that have been enacted by all 50 states; Pure Boot Camp, Inc. v. Warrier Fitness Boot Camp, LLC, 587 F. Supp. 2d 548 (S.D.N.Y. 2008); Pietrylo v. Hillstone Restaurant Grp., No. CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

173. 42 U.S.C. § 12112 *et seq.* (1995).

personal social networking accounts like Facebook, Twitter, and LinkedIn.[174]

Thus, while a responding party may have control over certain Documents or ESI based on the manner and location in which they are stored, production of such information in the course of litigation must be reconciled with overarching privacy considerations by which a responding party is statutorily bound. Accordingly, courts evaluating whether a responding party has possession, custody, or control should give deference to state and federal statutes limiting or precluding disclosure, and litigants should not be punished in discovery disputes for complying with such laws.

B. International Law must also be Considered

174. *See* Philip L. Gordon & Joon Hwang, *Making Sense of the Complex Patchwork of State Social Media Password Protection Laws Creates Challenges for Employers*, LITTLER (May 13, 2013), http://www.littler.com/making-sense-complex-patchwork-created-nearly-one-dozen-new-social-media-password-protection-laws ("In a single season, spring 2013, seven states enacted social media password protection legislation, bringing the total number of states to 11 since Maryland enacted the first such law in May 2012. Bills are pending in more than 20 other states. The current roster of states, dominated by the Rocky Mountain Region and the Far West, is as follows: Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah and Washington. New Jersey appears poised to join this group as the state's legislature amends a bill conditionally vetoed by Governor Christie in May."); Brent Johnson, *Christie signs bill banning N.J. companies from forcing workers to hand over social media passwords*, THE STAR LEDGER (August 29, 2013), http://www.nj.com/politics/index.ssf/2013/08/christie_signs_bill_banning_nj_companies_from_forcing_workers_to_hand_over_social_media_passwords.html ("Gov. Christie signed a bill today that will ban New Jersey companies from forcing workers to hand over user names or passwords to their social media accounts. Under [the legislation], companies will be fined $1,000 if they request or demand access to workers' or potential employees' accounts on websites like Facebook, Twitter, LinkedIn and Pinterest.").

The same analysis is necessary when parties seek foreign data that may be subject to data privacy and blocking statutes that operate to legally preclude discovery and/or movement of private data across the border into the United States.[175] At least 58 countries have been identified as having some form of autonomous data protection laws.[176] The consequences for violating international laws can be severe.[177] Moreover, a party may believe it owns ESI under United States law, but in fact may not own it under the laws of various foreign jurisdictions. As such, where international law is implicated, the question is not limited to whether a party simply has custody, but also whether the party actually has ownership over the Documents and ESI sought.[178] As a result, the relatively broad discovery permitted by United States federal courts is in direct conflict with international restrictions on data movement.[179]

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175. See 45 C.F.R. § 164.512(e); The Sedona Conference, Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery, supra note 48; see also Moze Cowper and Amor Esteban, E-Discovery, Privacy, and the Transfer of Data Across Borders: Proposed Solutions for Cutting the Gordian Knot, 10 SEDONA CONF. J. 263 (2009).

176. *See* The Sedona Conference, *International Overview of Discovery, Data Privacy & Disclosure Requirements*, THE SEDONA CONFERENCE (Sept. 2009), https://thesedonaconference.org/publication/International%20Overview%20of%20Discovery%20Data%20Privacy%20and%20Disclosure%20Requirements.

177. See The Sedona Conference, Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and e-Discovery, supra note 48.

178. *See Data Protection Laws of the World Handbook* (Cameron Craig, Paul McCormack, Jim Halpert, Kate Lucente, and Arthur Cheuk of DLA Piper, eds., 2012), http://www.edrm.net/resources/data-privacy-protection/data-protection-laws.

179. *Id.* at 23–26.

Indeed, foreign data laws such as the European Union's (EU) Data Protection Directive, directly conflict with ESI disclosure obligations that are otherwise required pursuant to the Fed. R. Civ. P.[180] Under some circumstances, the failure to adhere to foreign data laws could lead to criminal prosecution. For example, a violation of the German Federal Data Protection Act (BDSG), drafted to comply with the EU's Data Protection directive, makes disclosure of information protected by the German BDSG a criminal offense carrying substantial fines and/or jail terms.[181]

As discussed above, a responding party can find itself in a Catch-22 where it must collect and produce Documents and ESI pursuant to United States law but doing so would be impermissible and perhaps a crime in foreign jurisdictions. For this reason, courts evaluating possession, custody, and control in cases involving cross-border corporate families or in which Documents and ESI are otherwise protected by international laws should defer to international data privacy and blocking statutes by which a litigant may also be bound.

Principle 5: *If a party responding to a specifically tailored request for Documents or ESI (either prior to or during litigation), does not have actual possession or the legal right to obtain the Documents or ESI that are specifically requested by their adversary because they are in the "possession, custody, or control" of a third party, it should, in a reasonably timely manner, so notify the requesting party to enable the requesting party to obtain the*

180. *See* Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC); http://ec.europa.eu/justice/policies/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf.

181. *See, e.g.*, *In re* Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433 (D.D.C. June 20, 2001).

Documents or ESI from the third party. If the responding party so notifies the requesting party, absent extraordinary circumstances, the responding party should not be sanctioned or otherwise held liable for the third party's failure to preserve the Documents or ESI.

Comment:

As discussed throughout this Commentary, there are various situations in which a responding party does not own or "control" the Documents or ESI that have been requested, and instead is claiming that such Documents and ESI are in the hands of a third party.

For example, an employer may become aware that a custodian used a dual-use/BYOD personal device, personal webmail, or a personal social media account to communicate about the facts underlying the lawsuit and those sources may contain relevant information. The employer, however, does not have Rule 34 "control" as espoused by this Commentary. In accordance with the Legal Right Plus Notification Standard, a responding party claiming it does not own or "control" relevant Documents and ESI is required to timely notify the requesting party,[182] which allows the requesting party the opportunity to obtain those Documents and ESI from the third party.

From a practical standpoint, this approach enables the requesting party, who has the greatest need and incentive to preserve the information, to learn about the existence of the data at around the same time as the responding party, and to have the same ability as the responding party to take steps to attempt to preserve or obtain access to the Documents or ESI from third parties through subpoenas or other mechanisms. If a responding party complies with its notice obligations, it should not be

182. Charter Oak Fire Insurance Co. v. Marlow Liquors, 908 F. Supp. 2d 673, 679 (D. Md. 2012) (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001)).

sanctioned if third parties do not cooperate with preservation or production efforts.

The concept of this Principle applies to pre-litigation demands for preservation as well, thus the language "either prior to or during litigation."

Moreover, similar to the discussion in the comment to Principle 2, this Principle is also not intended to imply a general duty for a responding party to identify Documents and ESI that might be relevant in a case that are not within a party's possession, custody, or control. Instead, it only applies to Documents and ESI that are "specifically requested," in accordance with the general mandates of Rule 34.[183] Stated another way, this Principle does not apply unless and until the requesting party has met its burden to be as specific as possible when requesting information in discovery or making pre-litigation preservation demands.

183. *See supra* note 133.