Deciphering "Control" of Documents Held By Third-Parties Under FRCP 34

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Federal Rule of Civil Procedure 34 refers to the responsibility of a party to preserve and produce documents in its "possession, custody or control." Although parties may dispute whether a document is discoverable, there is rarely a disagreement over whether it is in the party's possession or custody, as both refer to documents readily available to the party. There has been an element of ambiguity, however, as to what is meant by the "control" prong of this Rule. This is a particularly thorny issue when a demand is made for a party to produce documents that are held by a non-litigant. Depending upon the jurisdiction, a party's obligations can vary significantly, as can the ramifications for failure to produce or preserve certain documents.

Three standards interpreting what it means to have "control" over a document under Rule 34 have been adopted by federal jurisdictions: the Legal Right Standard, the Legal Right Plus Notification Standard, and the Practical Ability Standard. The Sedona Conference research group recently canvassed federal court decisions throughout the country in development of its paper, "Commentary on Rule 34 and Rule 45 'Possession, Custody, or Control.'" This research found that federal courts in the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits adopted the Legal Right Standard, which imposes the narrowest requirements upon the party responding to discovery or a subpoena, and generally holds that an entity has "control" over a document that is not otherwise in its possession or custody when it has a legal right to obtain it from the third-party.

An example of the Legal Right Standard is *Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint Dist. No. 7*, 294 F.R.D. 610, 613 (D. Kan. 2013), wherein the court held that "[d]ocuments are deemed to be within the possession, custody or control under Rule 34 if the party has actual possession, custody or control or has the legal right to obtain the documents on demand." In this case, the court declined to compel the defendant to produce documents in the possession of former District Board members, staff, or employees because there was no legal right to these documents, even if they could practically obtain them.

Jurisdictions adopting the Legal Right Plus Notification Standard include those in the First, Fourth, Sixth and Tenth Circuits. Note that District Court holdings are not uniform across entire circuits, resulting in the varying approaches found in the Sixth and Tenth Circuits here, as well as various jurisdictions adopting the Practical Ability Standard. The Legal Right Plus Notification Standard is very similar to the Legal Right Standard, but it imposes the additional requirement that a party identify (but not necessarily produce) documents that are in the possession of third-parties. This additional notification requirement provides the adversary with information pertaining to the location of additional documents so that it can obtain those documents through a Rule 45 subpoena.

In *King v. Am. Power Conversion Corp.*, 181 Fed. Appx. 373, 378 (4th Cir. N.C. 2006), the Fourth Circuit applied the Legal Right Plus Notification Standard when it held that, even when a party "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." The court upheld spoliation sanctions against the plaintiff as a result of a third party destroying the equipment at issue in the litigation because the plaintiff was negligent in failing to notify the defendant about the possibility of a claim regarding its product, prior to disposing it.

Finally, the broadest interpretation of "control" is the Practical Ability Standard, which requires a party to produce documents when it has the practical ability to do so, even when there is not a legal right to the documents. This approach has been adopted by jurisdictions in the Second, Fourth, Eighth, Tenth, Eleventh and DC Circuits, again with some cross-over within jurisdictions. An example of this standard can be found in *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474 (D. Colo. 2007), where the court held that "control" means "not only possession, but also the right, authority, or ability to obtain the documents."

Even under the broadest Practical Ability Standard, however, there are limitations upon what documents a party may be required to produce. For example, in *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350 (D. Md. 2012), the District of Maryland held that a party was not required to obtain an itemized telephone bill from its carrier because this information could easily be obtained by the requesting party through the use of a Rule 45 subpoena. In such cases where information can just as easily be obtained through the use of a subpoena by the requesting party, the entity to whom the request is directed may invoke the proportionality considerations of Rule 26 as a basis for objecting to such requests. The defendant did not have physical possession of certain electronically stored information, but the ERISA statute required that it be accessible in such a manner as to be "readily inspected or examined." As a result, the court held that the defendant had control and must produce the documents for which it was required by law to have access.

Until a uniform approach to the "control" issue is adopted, discovery requests calling for documents under a party's control must be analyzed under the appropriate standard depending upon the jurisdiction. Documents not in the possession or custody of the party may still be subject to production if the party has a means to obtaining them, but the scope of any such obligation will be jurisdiction-specific. Under any standard, however, a party may not be required to obtain documents when the requesting party has knowledge of their existence and location such that they can be obtained through less burdensome means, such as a subpoena. All of these factors must be considered to avoid the potential ramifications of failure to produce or preserve discoverable documents.

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