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

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Preface

Welcome to the public comment version of The Sedona Conference *Commentary on Rule 34 and Rule 45 Possession, Custody, or Control*, another major publication of The Sedona Conference Working Group Series ("WGS"). 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.

This Commentary reflects the culmination of over two years of dialogue, review and revision, including discussion at two of our Working Group 1 (WG1) midyear meetings. I thank all of the drafting team members for dedicating the hours needed to bring this publication to the public comment version. 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 Team Leader and Steering Committee Liaison.

Working Group Series output is first published in draft form and widely distributed for review, critique and comment, including in-depth analysis at Sedona-sponsored conferences. After sufficient time for public comment has passed, the editors will review the public comments and, to the extent appropriate, any changes in the law. The editors will determine what edits, if any, might be appropriate. Please send comments to info@sedonaconference.org, or fax them to 602-258-2499.

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 info@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
April 2015

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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.

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 trump conflicting state or federal privacy or other statutory obligations.

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 servers that a company owns 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 drafted and amended in 2006 to specifically include "electronically stored information," it was far easier to enforce these Rules along bright lines without the further need to specifically define possession, custody, or control.

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. In many instances, Documents and ESI are 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:

- 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 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?

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

[2] *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003).

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

[4] *Metropolitan Opera Association v. Local 100*, 212 F.R.D. 178 (S.D.N.Y. 2003).

- 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 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.[5] As a result, different circuits across the country have created an inconsistent body of case law and standards about what constitutes "control" over data.[6]

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. This is especially problematic given that in today's digital world, borders have broken down and many businesses and individuals alike 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, even though the producing party does not actually possess the Documents and ESI at issue, the producing party will be deemed to have Rule 34 "control" over Documents and ESI in the hands of a third party, thus imposing an obligation on the litigant to preserve, collect, search and produce the Documents and ESI in the hands of the third party. 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

[5] FED. R. CIV. P. 34(a), 45(a).

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

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").

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 rule is applied on a case-by-case basis.[7] The Legal Right Standard has been followed by some federal courts in the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits.[8]

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[7] *See, e.g., Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391,396 (D.N.J. 2011) (applying a Rule 34 control analysis to a request for a 30(b)(6) deposition and holding that the relationship between defendant corporation and non-party sister corporation was sufficient to establish control under *Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131 (3d Cir. 1988)). The *Sanofi-Aventis* court commented that "[t]he control test articulated by the Third Circuit in *Gerling International* 'focuses on the relationship between the two parties.'" *Id.* at 395 (emphasis added).

[8] *See, e.g.,* **3rd Circuit:** *Brewer v. Quaker State Oil Refining Co.*, 73 F.2d 324, 334 (3d Cir. 1995) (supra); **5th Circuit:** *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 821 (5th Cir. Tex. 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. Carus*, Case No. 10-cv-11805, 2013 WL 2149136, at *5 (E.D. Mich. May 26, 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); *U.S. v. Approx. $7,400 in U.S. Currency*, 274 FRD 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. 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."); *United States v. Three Bank Accounts Described As: Bank Account #9142908*, Nos. CIV. 05-4145-KES, CIV. 06-4005-KES, 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 Alliance & 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.)*, No. 98-15344, 191 F.3d 1090 (9th Cir. 1999), *cert. denied*, 2000 U.S. LEXIS 2213 (March 27, 2000); **10th Circuit:** *Am. 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 Al Naoimi v. Zaid*, 283 F.R.D. 639, 641 (D. Kan. 2012) (same); *Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint District No. 7*, --- F.R.D. ----, 2013 WL 5314428, at *3 (D. Kan. Sept. 23, 2013) (holding that plaintiff had not met its burden of proving defendant had necessary control because it "ha[d] not

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.[9] The obligation to notify the adversary about evidence in the hands of third parties can be traced to products liability litigation, in which the defendant manufacturer would be unable to inspect the product, or otherwise assert defenses based on plaintiffs' "misuse, alteration or poor maintenance" of the product.[10] The Legal Right Plus Notification Standard has been followed by some federal courts in the First, Fourth, Sixth,[11] and Tenth Circuits.[12]

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 the documents* if a party has the "practical ability" (what that means is discussed in greater detail

shown that the District has the legal right to obtain the documents requested on demand from former District Board members, staff, or employees").

[9] *See, e.g., Silvestri v. GMC*, 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").

[10] *Anderson v. Schwartz*, 179 Misc.2d 1001, 1003, 687 N.Y.S.2d 232, 237 (1999).

[11] 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. Carus*, Case No. 10-cv-11805, 2013 WL 2149136, *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);
- [Legal Right Plus Notification]: *Lexington Ins. Co. v. Tubbs*, No. 06–2847–STA, 2009 WL 1586862, at *3 (W.D. Tenn. June 2, 2009) (citing *Silvestri* and sanctioning plaintiff for failure to preserve evidence); *but see Adkins v. Wolever*, 692 F.3d 499, 505 (6th Cir. 2012) (noting that *Silvestri* is not binding precedent in the 6th Circuit and affirming, on other grounds, district court's order declining to issue spoliation sanction).

[12] *See, e.g.,* **1st Circuit:** *Perez v. Hyundai Motor Co*., 440 F.Supp.2d 57, 61 (D. P.R. 2009) (citing *Silvestri* 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 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." (*Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001)); **6th Circuit:** *Lexington Ins. Co. v. Tubbs*, No. 06–2847–STA, 2009 WL 1586862, at *3 (W.D. Tenn. June 2, 2009) (citing *Silvestri* and sanctioning plaintiff for failure to preserve evidence). *Compare with Adkins v. Wolever*, 692 F.3d 499, 505 (6th Cir. 2012) (noting that *Silvestri* is not binding precedent in the 6th Circuit and affirming, on other grounds, district court's order declining to issue spoliation sanction); *Hoffman v. CSX Transp., Inc*., No. 1:04CV293, 2006 WL 38954, at *2-3 (S.D. Ohio Jan. 5, 2006) (declining to use the federal spoliation standard espoused in *Silvestri* and using state law instead); **10th Circuit:** *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).

below) to obtain the Documents or ESI.[13] The Practical Ability Standard is followed by some federal courts in the Second, Fourth,[14] Eighth,[15] Tenth,[16] Eleventh[17] and District of Columbia Circuits.[18]

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[13] *In re NTL, Inc. Securities Litigation*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).

[14] Note that courts in the 4th Circuit have applied both the "Practical Ability Standard" and "Legal Right Plus Notification Standard," thus:

- [Practical Ability]: *Digital Vending Services International, Inc. v. The University of Phoenix*, No. 2:09cv555, 2013 U.S. Dist. LEXIS 145149 at *18 (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."); *Grayson v. Cathcart*, No. 2:07-00593-DCN, 2013 U.S. Dist. LEXIS 50011 at *11 (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 U.S. Dist. LEXIS 154126, at *4 (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.* No. 05-1721, 2006 U.S. App. LEXIS 12139, 181 F. App'x 373, 377-387 (4th Cir. May 17, 2006) ("Accordingly, the Kings failed to discharge their duty to afford American Power sufficient notice. See [*Silvestri v. General Motors*, 271 F.3d 583,] 591 [(4th Cir. 2001]("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."); *Ayers*, *supra* at *5 ("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.").

[15] Note that courts in the 8th Circuit have applied both the "Practical Ability Standard" and the "Legal Rights 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."); *United States v. Three Bank Accounts Described As: Bank Account #*9142908, Nos. CIV. 05-4145-KES, CIV. 06-4005-KES, 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 Alliance & 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).

[16] Note that courts in the 10th Circuit have applied both the "Practical Ability Standard," Legal Rights Standard," and "Legal Right Plus Notification Standard," thus:

- [Practical Ability]: *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474, 476 (D. Col. 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

2. Variances in Application of the Three Standards

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

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.");

- [Legal Right]: *Am. 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 Al Naoimi v. Zaid*, 283 F.R.D. 639, 641 (D. Kan. 2012) (criticizing *Ice Corp.* and reaching the same conclusion); *Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint District No. 7*, No.; 06-CV-2248-CM-DJW, 294 F.R.D 610, 2013 WL 5314428, at *3 (D. Kan. Sept. 23, 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).

[17] *ANZ Advanced Techs, LLC v. Bush Hog, LLC*, No. 09-00228-KD-N, 2011 U.S. Dist. LEXIS 22159 (S.D. Fla. Jan. 26, 2011) at *31 ("'[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.'").

[18] *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) (*infra*); **8th Circuit:** *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."); **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:** *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (holding 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	DC
Legal Right			X		X	X	X	X	X	X		
Legal Right Plus Notification	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:[19]

[19] *See, Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 540 *et seq.*, (D. Md. 2010).

LEGAL RIGHT STANDARD	
CIRCUIT	**STANDARD**
3rd Circuit	"within the party's control"[20]
5th Circuit	"the legal right to obtain the documents upon demand"[21]
6th Circuit	"the legal right to obtain the documents upon demand"[22]
7th Circuit	"control or custody of a document or thing"[23]
9th Circuit	"the legal right to obtain the documents upon demand"[24]
10th Circuit	"legal right to obtain the documents on demand"[25]

[20] *Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue*, 839 F.2d 131 (3d Cir. 1988) (The Third Circuit defines "control" as the "legal right to obtain documents on demand."); *Sanofi-Aventis v. Sandoz, Inc.*, 272 F.R.D. 391,396 (D.N.J. 2011) ("The control test articulated by the Third Circuit in Gerling International 'focuses on the relationship between the two parties.'" *Id.* at 395; *Power Integrations, Inc. v. Fairchild Semiconductor Int'l Inc.*, 233 F.R.D. 143, 146 (D. Del. 2005) (The court "[was] not persuaded that the Third Circuit has adopted as expansive a definition of 'control' as that used by courts in the Second Circuit."). But see *Barton v. RCI, LLC*, 2013 WL 1338235 (D.N.J. Apr. 1, 2013) (noting "'If 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.'" (citations omitted).

[21] *Enron Corp. Savings Plan v. Hewitt Associates, LLC*, 258 F.R.D. 149, 164 (S.D. Tex. 2009) ("[U]nder 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, LLC v. Odom*, Civ. No. 07-413-BAJ-CN, 2011 U.S. Dist. LEXIS 93091 (M.D. La. Aug. 18,. 2011) at *12 n6 (" 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'".) *Also see 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, n15 ("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.")

[22] *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. Carus*, Case 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).

[23] *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); *U.S. v. Approx. $7,400 in U.S. Currency*, 274 FRD 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); *McBryar v. Int'l Union of United Auto. Aerospace & Agr. Implement Workers of Am.*, 160 F.R.D. 691, 694 (S.D. Ind. 1993).

[24] *Dugan v. Lloyds TSB Bank, PLC*, No. 12-cv-02549-WHA (NJV), 2013 U.S. Dist. LEXIS 126369 (N.D. Cal. Sep. 4, 2013), at *4 ("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 U.S. Dist. LEXIS 53657, at *2, 2013 WL 1767960 (N.D. Cal. Apr. 15, 2013) (same).

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[26]
4th Circuit	"'owns and controls' and duty to notify opposing party of evidence in the hands of third parties"[27]
10th Circuit	possession, but if relinquished ownership or custody, must contact new custodian to preserve[28]

[25] *Noaimi v. Zaid*, 283 F.R.D. 639, 641 (D. Kan. 2012) (citation and quotation omitted).

[26] *In re New Eng. Compounding Pharm., Inc*., 13-2419, 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*, 12-10828, 2013 U.S. Dist. LEXIS 32290 (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*., 09-2140, 2011 U.S. Dist. LEXIS 146598 (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 (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.).

[27] *Ayers v. Sheetz, Inc.*, No.: 3:11-cv-00434, 2012 U.S. Dist. LEXIS 154126, at *5 (S.D. W. Va. Oct. 26, 2012).

[28] *Chavez v. Hatterman*, No. 06-cv-02525-WYD-MEH, 2009 WL 807440, at *2 (D. Col. Jan. 20, 2009).

PRACTICAL ABILITY STANDARD	
CIRCUIT	**STANDARD**
2nd Circuit	"right, authority or practical ability to obtain the documents at issue"[29]
4th Circuit	"right, authority or practical ability to obtain documents from non-party to the action"[30]
8th Circuit	"right, authority or practical ability to obtain documents from non-party to the action"[31]
10th Circuit	"any right or ability to influence the person in whose possession the documents lie"[32]
11th Circuit	"practical ability to obtain the materials on demand"[33]
D.C. Circuit	"the right, authority or practical ability to obtain the documents from a non-party to the action"[34]

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.

[29] *Alexander Interactive, Inc. v. Adorama, Inc.*, 12 Civ. 6608 (PKC) (JCF), 2014 U.S. Dist. LEXIS 2113, at *9 (S.D.N.Y. Jan. 6, 2014).

[30] *Digital Vending Services International, Inc. v. The University of Phoenix*, No. 2:09cv555, 2013 U.S. Dist. LEXIS 145149 at *18 (E.D. Va. Oct. 3, 2013).

[31] *New Alliance Bean & Grain Co. v. Anderson Commodities, Inc.*, 8:12CV197, 2013 U.S. Dist. LEXIS 64437 (D. Neb. May 2, 2013) at *9 ("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 (D. Minn. Jan. 31, 2005), at *8 n2 ("courts 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)).

[32] *Tomlinson v. El Paso Corp.*, 245 F.R.D. 474, 477 (D. Col. 2007); *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 521 (D. Kan. 2007).

[33] *ANZ Advanced Techs, LLC v. Bush Hog, LLC*, No. 09-00228-KD-N, 2011 U.S. Dist. LEXIS 22159 (S.D. Fla. Jan. 26, 2011) at *31 (" '[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.'"

[34] *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.'").

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.[35] 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."[36] Some courts have expanded the meaning of "practical ability" to mean the possibility that a party could potentially obtain the documents on demand.[37] 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."[38] Highlighted below are select areas where application of the Practical Ability Standard has led to unfair results.[39] 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

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 though such production causes the entity to violate foreign data privacy laws that may apply in one or more of the jurisdictions at issue. 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.[40] In this regard, the inequity of the Practical Ability Standard is perhaps felt

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[35] *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.").

[36] *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)).

[37] *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[.]"); *SEC 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").

[38] *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 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.").

[39] Our research has revealed 171 cases that have either applied or referenced the Rule 34 "practical ability" test. An index of those cases, current as of publication of this commentary, is attached as Appendix A.

[40] *S2 Automation LLC v. Micron Tech., Inc.*, No. CIV 11-0884, 2012 U.S. Dist. LEXIS 120097 (D. N.M. Aug. 9, 2012). *See also In re Ski Train Fire of November 11, 2000 Kaprun Aus.*, MDL DOCKET # 1428 (SAS)(THK), 2006 U.S. Dist. LEXIS 29987; 64 Fed. R. Serv. 3d (Callaghan) 594 (S.D.N.Y., May 16, 2006) (ordering discovery from U.S. subsidiary because court concluded that Austrian subsidiary of German parent would assist

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. The consequences for violating international laws can be severe.[41] Even so, the relatively broad discovery permitted by U.S. federal courts is in tension with international restrictions on data movement.[42]

Where courts apply the Practical Ability Standard in the cross-border discovery context, the outcomes are even more precarious for those compelled to collect and produce documents or data from a country where doing so would be impermissible and perhaps even constitute a crime.[43] However, courts in Legal Right jurisdictions have given greater deference to international considerations, especially when considering affiliate/"control" issues.[44] Toward this

parent in matter of concern to corporation.); *Orthoarm, Inc. v. Forestadent USA, Inc.*, No. 4:06-CV-730, 2007 U.S. Dist. LEXIS 44429 (E.D. Mo., June 19, 2007) (parent and subsidiary had "interlocking management structures, and subsidiary had produced other parent documents without claiming no control, therefore demonstrating ability to obtain documents from parent upon request).

[41] *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 (August 2008) at pp. 20–22 (describing criminal conviction for violation of French statute prohibiting disclosure of information required in foreign judicial proceedings), available at https://thesedonaconference.org/publications.

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

[43] *See, e.g., In re Flag Telecom Holdings, Ltd. Sec. Litig*., 236 F.R.D. 177 (S.D.N.Y. Apr. 19, 2006) (finding that individual defendant was obligated to obtain documents from his former employer and rejecting defendants' argument that plaintiffs themselves should seek production via the procedures set forth in the Hague Convention because defendants did not address comity in their papers); *Ssangyong Corp. v. Vida Shoes Int'l, Inc.*, 03 Civ. 5014, 2004 U.S. Dist. LEXIS 9101 (S.D.N.Y. May 19, 2004) (applying practical ability test 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, that confidentiality order would reduce hardship, that documents were very important to the litigation, and that strong prima facie showing of bad faith had been made); *Dietrich v. Bauer*, 95 Civ. 7051, 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. Aug. 9, 2000) (court finds Hague Convention procedures not required and that parent company exercised sufficient control over its wholly owned subsidiary and that parent company had obligation to produce documents under Rule 45). *But see, Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (S.D.N.Y. July 25, 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), 2012 U.S. Dist. LEXIS 160522 (S.D.N.Y., Nov. 7, 2012) (following production under the Hague Convention, the court subsequently declined to enforce the subpoena); *Pitney Bowes, Inc. v. Kern Int'l., Inc.*, 239 F.R.D. 62 (D. Conn. Nov. 30, 2006) (applying practical ability test 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).

[44] For example, in *United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39 (D.D.C. 2009), *aff'd in part and vacated in part on other grounds*, 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 auditing firm (Deloitte), even though the documents 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. Though both were members of a Swiss membership organization, it was unclear whether the firm had the legal right, authority or ability to obtain the documents on demand from the affiliate. The court also rejected the government's argument that the firm had the practical ability to obtain documents concerning a certain project, which both the firm and its affiliate had worked on, solely by virtue of the entities' close working relationship on that project. The court explained that close cooperation does not establish an ability, let alone a legal right or

end, courts in Legal Right 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."[45]

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."[46]

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, 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.[47] 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."[48] In contrast, courts that apply the Legal Right analysis provide for a narrower scope of discovery among sister entities.[49]

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authority, to acquire documents maintained solely by a legally distinct entity. The court also noted that the affiliate company refused to produce the documents, as requested by the firm, absent an order from a Swiss court. The court therefore denied the government's motion to compel.

[45] *See also, Ehrlich v. BMW of N. Am., LLC*, No. CV 10-1151-ABC (PJWx), 2011 U.S. Dist. LEXIS 90215 (C.D. Cal. May 2, 2011); *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).

[46] *SEC v. Strauss*, No. 09 Civ. 4150, 2009 U.S. Dist. LEXIS 101227 (S.D.N.Y. Oct. 28, 2009).

[47] *Wells v. FedEx Ground Package System, Inc.*, No. 4:10-CV-02080, 2012 U.S. Dist. LEXIS 141276 (E.D. Mo. Oct. 1, 2012).

[48] *Id.* at *4–*5.

[49] For example, in *7-Up Bottling Co.*, 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. *7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.)*, 191 F.3d 1090 (9th Cir. 1999), *cert. denied*, 529 U.S. 1037 (March 27, 2000). 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), *aff'd in part and vacated in part, remanded by*,

Other courts have combined the Practical Ability/Legal Right standards 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.[50]

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.[51]

610 F.3d 129 (D.C. Cir. 2010). Compare also, *Gerling International Ins. Co. v. Commissioner,* 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:

> 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.

[50] *See e.g. Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731, 2003 U.S. Dist. LEXIS 28263 (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, 307 (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 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.*, No. 3:09cv058, 2012 U.S. Dist. LEXIS 144735 (E.D. Va. Oct. 5, 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).

[51] *See e.g., SEC 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).

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 testimony that the JV entity had provided documents upon request 90% of the time.[52] 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.[53] Courts applying the Legal Right Standard to similar factual scenarios reached the opposite conclusion.[54]

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 the defendants in five years, and to submit an affidavit detailing their efforts.[55] 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.[56] Likewise, a court applying a Legal Right Standard denied plaintiffs' Motion to Compel text

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[52] *Kamatani v. BenQ Corp.*, No. 2:03-CV-437, 2005 U.S. Dist. LEXIS 42762 (E.D. Tex. Oct. 6, 2005).

[53] *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).

[54] *Al 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).

[55] *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 Litigation*, 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).

[56] *Miniace v. Pacific Martime Ass'n*, No. C 04-03506 SI. 2006 WL 335389 (N.D.Cal. February 13, 2006) (applying Legal Right Standard and, on that basis, denying production of documents in custody of former directors).

messages sent or received by a corporate-defendant's employees' personal cell phones that mentioned plaintiff and/or his allegations of discrimination, harassment and/or retaliation, 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.[57] 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 of their employees (and former employee) which may be deemed improper or "coercive."[58]

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.[59] 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.[60] In contrast, some courts applying the Legal Right Standard have found that former employees did not have Rule 34 "control" over documents in the possession of their former employer.[61]

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

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[57] *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 U.S. Dist. LEXIS 103369 (D. Kan. July 24, 2013).

[58] *See e.g., Can Employers Ask Applicants for Social Media Login Information*, Law Technology News, July 27, 2012 (available at: http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1342981750935&Can_Employers_Ask_Applicants_for_Social_Media_Login_Information=&et=editorial&bu=LTN&cn=LTN_Alert_20120727&src=EMC-Email&pt=Law%20Technology%20News&kw=Can%20Employers%20Ask%20Applicants%20for%20Social%20Media%20Login%20Information%3F) (last accessed 8/2/12).

[59] *In re Flag Telecom Holding, Ltd. Securities Litigation*, 236 F.R.D. 177 (S.D.N.Y. 2006).

[60] *Cf.*, *Diaz v. Wash. 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. 07-413-BAJ-CN, 2011 U.S. Dist. LEXIS 93091 (M.D. La., Aug. 18, 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).

[61] *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. District of Columbia*, 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.").

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.[62] 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.

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.[63] While employed by Accenture, plaintiffs performed 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: "If 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 normal day-to-day work, then that information is within Accenture's control."[64]

Several other courts applying the Practical Ability Standard have found that similar obligations exist between service providers and their customers.[65] Courts have also used a "relationship"

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[62] *Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 358 B.R. 45 (Bankr. S.D.N.Y. 2006).

[63] *Hageman v. Accenture, LLP*, No. 10-1759, 2011 U.S. Dist. LEXIS 121511 (D. Minn. Oct. 19, 2011).

[64] The 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:

> The 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 *10–11.

[65] *See Chevron Corp. v. Salazar*, 275 F.R.D. 437 (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*, 2007 U.S. Dist. LEXIS 77554 (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).

standard to determine Rule 34 "control" as between entities that conduct business with one another but otherwise have no corporate or legal relationship.[66] 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.[67] 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.[68]

Service provider cases in Legal Right 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.[69] The court reasoned that the appropriate vehicle to obtain these documents was via a Rule 45 subpoena.[70]

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[66] *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.").

[67] *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).

[68] *Sedona Corp. v. Open Solutions, Inc*., 249 F.R.D. 19 (D. Conn. 2008). *See also Cummings v. Moran Shipping Agencies, Inc*., No. 3:09CV1393, 2012 U.S. Dist. LEXIS 40001 (D. Conn. March 23, 2012) (ordering plaintiff to make efforts 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 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. WDQ-11-1038, 2012 U.S. Dist. LEXIS 78445 (D. Md. June 5, 2012) (as bank account holder, defendant found to have practical ability to obtain bank records, but applying the R. 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).

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

[70] *See also, Haskins v. First Am. Title Ins. Co.*, No. 10-5044, 2012 U.S. Dist. LEXIS 149947 (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*., Nos. 02-272-MPT, 02-477-MPT, 2006 U.S. Dist. LEXIS 72724 (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 nonparties.[71]

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.[72]

Another recent case[73] also suggest 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

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[71] *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); *SEC v. Strauss*, No. 09 Civ. 4150, 2009 U.S. Dist. LEXIS 101227 (S.D.N.Y. Oct. 28, 2009) (discovery obligations trump "most other commitments"; practical ability means access); *Bleecker v. Standard Fire Ins. Co.*, *supra* (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).

[72] *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). 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.

[73] *Fisher v. Fisher*, Civil No. WDQ–11–1038, 2012 WL 2050785 (D. Md. June 5, 2012).

discovery. *Lynn* and *Fisher* thus indicate that physical control over documents should be the dispositive factor in determining the appropriate procedural discovery device.

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, and further complicate the practical problems associated with preserving and producing Documents and ESI that a party does not directly control.

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.[74] In this context, there are two major 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.

[74] 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." The NIST Definition of Cloud Computing (Draft), Peter Mell and Tim Grance, January 2011 (available at http://csrc.nist.gov/publications/drafts/800-145/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, but 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.[75]

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 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[76] and corporate sources. There is no question that

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[75] *See* Catherine Dunn, *Microsoft Reveals Law Enforcement Requests for Customer Data*, LAW TECHNOLOGY NEWS, March 26, 2013 ("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.") (available at: http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1364126383648&Microsoft_Reveals_Law_Enforcement_Requests_for_Customer_Data=&et=editorial&bu=LTN&cn=20130327&src=EMC-Email&pt=Law%20Technology%20News&kw=Microsoft%20Reveals%20Law%20Enforcement%20Requests%20for%20Customer%20Data&slreturn=20130227112412 (last accessed 4/2/13).

[76] *See e.g., Quagliarello v. Dewees*, No. 09-4870, 2011 U.S. Dist. Lexis 86914 (E.D. Penn. Aug. 4, 2011) (plaintiff's social media relevant to rebut emotional distress claims); *Equal Employment Opportunity Commission v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. In. 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");

individuals and corporations have control over the data which is created on these social media sites, however they do not host this data.

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 employee's 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."[77] 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 state privacy statutes.[78]

Ledbetter v. Wal-Mart Stores, Inc., 2009 U.S. Dist. Lexis 126859 (D. Colo. April 21, 2009) (court ordered plaintiffs to produce email and other communications from Facebook, MySpace and Meetup.com).

[77] *See e.g., Can Employers Ask Applicants for Social Media Login Information,* LAW TECHNOLOGY NEWS, July 27, 2012 (*available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1342981750935&Can_Employers_Ask_Applicants_for_Social_Media_Login_Information=&et=editorial&bu=LTN&cn=LTN_Alert_20120727&src=EMC-Email&pt=Law%20Technology%20News&kw=Can%20Employers%20Ask%20Applicants%20for%20Social%20Media%20Login%20Information%3F) (last accessed 8/2/12).

[78] *See e.g.:*

- *Making Sense of the Complex Patchwork Created by Nearly One Dozen New Social Media Password Protection Laws*, Littler ASAP, July 2, 2013 ("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.") (*available at* http://www.littler.com/publication-press/publication/making-sense-complex-patchwork-created-nearly-one-dozen-new-social-med) (last accessed Mar. 3, 2014)*; and*
- *New Jersey Becomes the Twelfth State to Enact Social Media Password Protection Legislation*, Littler ASAP, September 1, 2012 ("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.") (*available at* http://www.littler.com/publication-press/publication/new-jersey-becomes-twelfth-state-enact-social-media-password-protection) (last accessed Mar. 3, 2014).

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.[79]

3. The "Bring your Own Device to Work" Movement

"BYOD," or Bring Your Own Device is an increasingly popular corporate policy or practice whereby employees purchase and own the physical hardware device (i.e., a smartphone or tablet) that then is connected to a corporate information network system or otherwise used to conduct the company's business. There are a morass of issues that are created via BYOD initiatives.[80] As a general matter, however, 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,[81] 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.

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,

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[79] *See e.g., Three's a Charm: NLRB's Acting General Counsel Issues Third Guidance Document on Social Media and Approves One Policy*, Littler ASAP, June 5, 2012 (available at: http://www.littler.com/publication-press/publication/threes-charm-nlrb%E2%80%99s-acting-general-counsel-issues-third-guidance-docum) (last accessed 8/2/12) (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).

[80] For a thorough discussion of BYOD issues, *see The "Bring Your Own Device" to Work Movement: Engineering Practical Employment and Labor Law Compliance Solutions*, A Littler Report, May 2012, available at http://www.littler.com/publication-press/publication/bring-your-own-device-work-movement (last accessed 8/2/12).

[81] 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 (N.J. 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").

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.[82] The problems with practical ability, and support for abandoning that standard are explored in more detail in Section II, above.

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 Eighth and Ninth, as well as the Third, Fifth, Seventh and Eleventh Circuits apply

[82] 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 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.

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 II, above.

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:

- *Ubiquti Networks, Inc. v. Kozumi USA Corp.*[83] 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.'" *Compare Hageman v. Accenture, LLP, supra*.

- *In re NCAA Student-Athlete Name & Likeness Litigation.*[84] 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.[85]

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

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

[84] No. 09-cv-01967 CW (NC), 2012 U.S. Dist. LEXIS 5087 (N.D. Cal. Jan. 17, 2012), *citing In re Citric Acid Litigation*, 191 F.3d 1090, 1107 (9th Cir. 1999).

[85] *Id.* at *15.

> 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."[86]

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 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.[87]

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.[88]

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

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[86] *In re Citric Acid Litigation, supra,* at 1106.

[87] *Id.,* at 1108.

[88] *See, e.g. Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 U.S. Dist. LEXIS 67404 (N.D. Cal. Jan. 22, 2007) at *7 (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) (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 fn23 (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 compare U.S. v. Cyberheat, Inc.*, No. CV-05-457-TUC-DCB, 2007 U.S. Dist. LEXIS 15448 (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).

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

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: Physical & Emotional Harm § 56 provides that retained control for purposes of direct liability for negligence of an independent contractor can be established by a contractual right of control or by the hirer's actual exercise of control.[89]

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;[90]
- 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;[91] and
- A lessor of land retains control of a portion with a dangerous condition the lessor could have discovered and prevented harm.[92]

[89] *See* Restatement (Third) of Torts, Physical and Emotional Harm § 56 (2012).

[90] Restatement (Second) of Torts § 316 (1979).

[91] Restatement (Second) of Torts § 318 (1979).

[92] Restatement (Second) of Torts § 360 (1979).

In contrast, when a party cedes control to another, the Restatement recognizes a halt to liability for the party who has relinquished control.[93] 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…."[94]

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.

c. Judgments

The Restatements (Second) of Judgments also addresses the concept of "control."[95] 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.[96]

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 Section 219, a master will be liable for her servant's torts when the servant's conduct violated a non-delegable duty.[97]

Cases in the master-servant context are therefore instructive. For example, in *Schmidt v. Burlington Northern and Santa Fe Railway Co.*[98] the court analyzed control on the basis of an employer's right to control its employee's conduct "on the job." The court reasoned: "For 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 the right to exercise physical control of his daily work is insufficient."[99]

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[93] Restatement (Second) of Torts § 372 (1979).

[94] Restatement (Second) of Torts § 414 (1970).

[95] Restatement (Second) of Judgments §§ 37 and 39 (1982).

[96] Restatement (Second) of Judgments § 39 (1982).

[97] Restatement (Second) of Agency § 219 (1958).

[98] 605 F.3d 686 (9th Cir. 2010).

[99] *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 County*, No. 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).

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.[100] 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.[101]

C. 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 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

[100] *See Ramsey v. Gamber*, 469 Fed.Appx. 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. Workers' Comp. Appeal Bd.*, 563 Pa. 480, 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).

[101] *See e.g. JPMorgan Chase Bank, N.A. v. KB Home*, 2:08-cv-1711, 2010 U.S. Dist. LEXIS 56519 (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).

- 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 section C of the comment to Principle 1, whether a contractual relationship exists between a consultant and the organization such that access to the data exists.[102]

More particularly, the justification for placing the burden of demonstrating lack of control can be found in a similar provision of the Fed. R. Civ. P., Rule 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

[102] *See supra, Ubiquti Networks, Inc v. Kozumi USA Corp, infra* n.80.

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 Rule 34 principles, 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; in those situations where the requesting party has equal or superior access to the facts that bear upon whether or not the responding party has actual possession or the legal right to obtain the requested Documents and ESI, the burden should be applied accordingly.[103] Likewise, Principle 2 would not preclude a 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.[104] 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.

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.

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[103] *See e.g., Enviropak Corp. v. Zenfinity Capital, LLC*, 2014 WL 5425541, *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); *Securities and Exchange Commission 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.").

[104] *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 supplied); *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (Grimm, J.) ("[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.*, 2006 U.S. Dist. LEXIS 59316 (N.D. Ga. 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").

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.

Comment:

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."[105]

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.[106] The burden is on the party challenging the decision to establish facts rebutting the presumption.[107] Cases that apply the business judgment rule identify foundational principles that courts may apply, in a slightly modified manner, to adjudicate disputes 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;[108]

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[105] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citations omitted).

[106] 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.

[107] 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). www.thesedonaconference.org

[108] *See e.g. Seidman v. Clifton Sav. Bank, S.L.A.*, 205 N.J. 150, 166, 14 A.3d 36 (2011) ("Under the business judgment rule, there is a rebuttable presumption that good faith decisions based on reasonable business

- 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;[109]

- 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;[110]

- Courts will not overturn decisions concerning the management of Documents and ESI unless the decisions lack any rational business purpose;[111] and

- 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.[112]

The type of deference afforded by a modified business judgment rule analysis is already enshrined in electronic discovery case law.[113] 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.[114] 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 static information.'"[115] Rule 37(e) further buttresses the exercise of deference because it shields

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.").

[109] *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003).

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

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

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

[113] "[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 The Sedona Principles, No. 6). See also *Zubulake v. UBS Warburg* ("*Zubulake IV*"), 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

[114] *See E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, No. 3:09cv58, 2011 U.S. Dist. LEXIS 45888 (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).

[115] The Sedona Conference *Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible* (2008) 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).

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[116] 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 for purposes of applying the business judgment rule. *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 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.[117]

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 judgment rule presumptions, 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

[116] *See* Rules 26(c) and (f) and 37(d)(1)(B).

[117] The Sedona Conference *Commentary on Proportionality in Electronic Discovery*, 11 Sedona Conf. J. 289, 294 (2010). *See also Wood v. Capital One Servs*., LLC, No. 5:09-CV-1445 (NPN/DEP), 2011 U.S. Dist. LEXIS 61962 (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 U.S. Dist. LEXIS 121510 at *9 (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 U.S. Dist. LEXIS 45888 (E.D. Va. Apr. 27, 2011) (citing *Victor Stanley*'s 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, 523 (D. Md. 2010) ("whether 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.").

the action taken was in the best interests of the organization, by adducing actual evidence (not mere speculation)[118] in support of such a claim in accordance with the mandates of Rules 26(g) and 11.[119] Facts supporting an "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:

- 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.[120]

[118] *See, e.g., In Re Ford Motor Company*, 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 Mutual Insurance Co.*, No. 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 School Dist. v. Federal Transit Administration*, CV 12-9861-GW(SSx), 2013 U.S. Dist. LEXIS 165806, at *23-*24 (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 Authority, 10-CV-0544A (Sr)*, 2011 U.S. Dist. LEXIS 149156 (W.D.N.Y. Dec. 29, 2011), at *4-*5 ("Plaintiff'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," denying plaintiff's motion to compel.).

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

[120] 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.

- 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 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[121] should be adjusted as follows for the Rule 34 context:

TRADITIONAL BUSINESS JUDGEMNT RULE	**RULE 34 POSSESSION, CUSTODY OR CONTROL BUSINESS JUDGEMNT 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***[122] factors cited by courts applying the business judgment rule to adjudicate business disputes,[123] and in the right column contains suggestions for how the business judgment rule factors should be applied in the Rule 34 context.

[121] *See, e.g.*, *In re Abbott Laboratories Derivative Shareholders Litigation*, 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 (W.D. La. 2013); *In re PSE & G Shareholder Litigation*, 173 N.J. 258, 296, 801 A.2d 295, 319 (2002).

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

[123] *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); *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 Litigation*, 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 Medical 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 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
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"[124]
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[125]
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
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

[124] Reputable advisors include internal or outside advisors.
[125] Experienced and knowledgeable personnel include internal or outside resources.

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[126] rather than applying rigid, bright-line rules to resolve parties' Rule 34 and Rule 45 disputes over possession, custody, or control.

Principle 4:

Rule 34 and Rule 45 notions of "possession, custody, or control" should never be construed to trump conflicting state or federal privacy or other statutory obligations.

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 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 Federal Financial Modernization Act (15 U.S.C.A. §6802(a) *et seq.*, 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." The statute by its terms supersedes "any [s]tate statute, regulation, order, or interpretation" to the extent that they are inconsistent with state law. A number of

[126] 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 Group, 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)); *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."); *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc*., 244 F.R.D. 614, 621 (D. Col. 2007) (When deciding when the duty to preserve evidence arise, "[u]ltimately, the court's decision must be guided by the facts of each case"). *Compare also*, The Sedona Conference *Commentary on Legal Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265, 268 (2010) ("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." www.thesedonaconference.org

courts have interpreted this language to hold that GLBA pre-empts any inconsistent or contrary state law, rule, ordinance or court order.[127] Additionally, at least one court has extended GLBA non-disclosure requirements to third parties with whom the financial institution does business.[128]

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.[129] 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.[130] 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.[131]

Other federal statutes such as the Genetic Information Nondiscrimination Act of 2008 ("GINA"), Computer Fraud & Abuse Act ("CFAA") and Stored Communications Act ("SCA"), 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 Federal Rule of Civil Procedure 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.[132]

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[127] *See Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003) (GLBA pre-empts state statutes regulating insurance); *Cline v. Hawke*, 51 F. App'x 392 (4th Cir. 2002) (GLBA pre-empted certain West Virginia insurance regulations); *Bank of America v. City of Daly City, California*, 279 F. Supp. 2d 1118 (N.D.Cal. 2003) (GLBA pre-empted local ordinances); *General Motors Corp. v. Kilgore*, 853 So.2d 171 (Ala. 2002) (GLBA pre-empts Alabama law permitting discovery of certain information); *Equitable Life Assurance Society of the United States v. Irving*, 2003 WL 22098021 4 (Miss. 9/11/03) (Mississippi Supreme Court held that GLBA prohibits insurance companies from disclosing the names and addresses of their policyholders pursuant to a party's discovery requests.).

[128] *Union Planters Bank v. Gavel*, No. 02-1224 SECTION "T"(4), 2002 U.S. Dist. LEXIS 8782 (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).

[129] 45 CFR 164.512(e).

[130] *Id.*

[131] 45 CFR 160.203.

[132] *See e.g.*, Computer Fraud and Abuse Act, 18 USC § 1030; 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 Group*, No. 06-5754 (FSH), 2009 US Dist. LEXIS 88702 (D.N.J. Sep. 25, 2009).

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"). 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 personal social networking accounts like Facebook, Twitter and LinkedIn.[133]

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

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.[134] At least 58 countries have been identified as having some form of autonomous data protection laws.[135] The consequences for violating international laws can be severe.[136] 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

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[133] *See Patchwork of State Social Media Password Protection Laws Creates Challenges for Employers*, Littler ASAP, Phil Gordon, May 13, 2013 ("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"); "Christie signs bill banning N.J. companies from forcing workers to hand over social media passwords," The Star Ledger, Brent Johnson, August 29, 2013 ("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.") *available at* http://www.littler.com/2013/07/articles/state-privacy-legislation/patchwork-of-state-social-media-password-protection-laws-creates-challenges-for-emplo

[134] *See* 45 CFR 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.*; *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).

[135] *See* The Sedona Conference *International Overview of Discovery, Data Privacy & Disclosure Requirements* (September 2009) http://www.thesedonaconference.org/publications.

[136] *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,* at pp. 20-22.

whether the party actually has ownership over the Documents and ESI sought.[137] As a result, the relatively broad discovery permitted by United States federal courts is in direct conflict with international restrictions on data movement.[138]

Indeed, foreign data laws such as the European Union's (EU) Data Protection Directive, directly conflict with ESI disclosure obligation that are otherwise required pursuant to the Fed. R. Civ. P.[139] Under some circumstances, the failure to adhere to foreign data laws could lead to criminal prosecution. For example, a violation of the German Data Protection Act ("DPA"), drafted to comply with the EU's Data Protection directive, makes disclosure of information protected by the German DPA a criminal offense carrying substantial fines and/or jail terms.[140]

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 ESI and documents 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 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 purpose 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

[137] *See Data Protection Laws of the World Handbook* (Cameron Craig, Paul McCormack, Jim Halpert, Kate Lucente, and Arthur Cheuk of DLA Piper, eds., 2012).

[138] *Id.* at 23-26.

[139] *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*, *Official Journal of the European Communities* of 23 November 1995 No L. 281 p. 31.

[140] *See, e.g., In re Vitamins Antitrust Litigation*, No. 99-197TFH, 2001 WL 1049433 (D.D.C. 2001).

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,[141] 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 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.[142] 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.

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

[142] *See supra* note. 104.

Case	Year	Date	Jurisd.	Court	Judge	Cite Only?	Context	Pres. v. Prod.	Relevant Procedural	Description	Context Detail	*No Analysis of Test Provided*
Alexander Interactive, Inc. v. Adorama, Inc., 2014 US Dist LEXIS 2113, 2014 WL 61472 (S.D.N.Y. Jan. 6. 2014)	2014	1/6/2014	2nd	S.D.N.Y.	James C. Francis, IV, U.S.M.J.	no	business partner	production	Defendant filed motion to compel plaintiff to produce documents held by business partner.	Defendant filed motion to compel plaintiff to produce documents held by entity that subcontracted with plaintiff to create a website for defendant. The Court held that when a party has the practical ability to obtain documents in the possession of a third party, there is sufficient control to require the production of the documents. The court noted that - when assessing whether a party has the practical ability to obtain documents - courts generally consider whether there are "cooperative agreements" between the entities, the extent to which the non-party has a stake in the outcome of the litigation, and the non-party's past history of cooperating with document requests. The court found that given that the companies did not share any management or board members, there were no written agreements between the parties, and the third party had no apparent interest in the litigation, there was no evidence of a "sufficiently strong connection ... to support a finding of control."	separate entity retained to assist with performing services plaintiff agreed to provide to defendant	
Digital Vending Services, Inc. v. University of Phoenix, 2013 US Dist LEXIS 145149, 2013 WL 5533233 (E.D. Va. Oct. 3, 2013)	2013	10/3/2013	4th	E.D. Va.	Tommy E. Miller, U.S.M.J.	no	employer/employee	preservation	Defendant moved for sanctions as a result of plaintiff's managing director's failure to preserve data.	Defendant filed a motion for sanctions based upon the destruction of a thumb drive containing unique documents. The thumb drive had been in the possession of the party's managing director. The Court held "the ability to control is defined by the Fourth Circuit as when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." The Court found that because the defendant had the ability and authority to ask the managing director to preserve documents in his possession, it had control over the thumb drive and should have preserved it. Nonetheless, the Court determined that the defendant did not have a sufficiently culpable state of mind to impose sanctions.	managing director of party	
New Alliance Bean & Grain Co. v. Anderson Commodities, Inc., 2013 US Dist LEXIS 64437, 2013 WL 1869832 (D. Neb. May 2, 2013	2013	5/2/2013	8th	D. Neb.	Thomas D. Talken, U.S.M.J.	no	redecessor corporatic	production	Plaintiff moved to compel production of documents held by entity that purchased business from defendant.	Plaintiff served document requests seeking bank, profit, and loss statements that showed transactions between related entities. The relevant data was held by non-party purchaser of defendant's business entity. Defendant had previously produced documents in the possession of this third party. The court held that "[c]ontrol is defined as the legal right, authority, or ability to obtain upon demand documents in the possession of another." Despite that defendant had previously produced documents from the third party, the court held that plaintiff had failed to make any showing that defendant had possession, custody or control, or the legal right to obtain the documents.	entity that purchased the defendant's business unit	
Grayson v. Cathcart, 2013 US Dist LEXIS 50011, 2013 WL 1401617 (D.S.C. April 8, 2013)	2013	4/8/2013	4th	D.S.C.	David C. Norton, U.S.D.J.	no	corporate affiliate	production	Plaintiffs moved to compel production of documents in the possession of corporate affiliate.	Plaintiff served document requests seeking the production of documents in the possession of a corporate affiliate of defendant. Citing to Goodman, the court held that "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." The court held that the two entities were clearly related with overlapping directors and staff and that the defendants had used information from the affiliate when it was beneficial, thus, defendants had control over the entity.	corporate affiliate that provided services to defendant	
In re Vitamin C Antitrust Litig., Nos. 06-md-1738,05-cv-0453, 2012 U.S. Dist. LEXIS 166720 (E.D.N.Y. Nov. 21, 2012)	2012	11/21/2012	2d	E.D.N.Y.	Brian M. Cogan, U.S.D.J.	No	Contract Rship	Production	Defendant China Pharmaceutical Group. Co. Ltd. ("CPG") objected to Magistrate Judge James Orenstein's orders requiring CPG to produce certain documents contained in the work papers of Deloitte (Hong Kong), CPG's outside auditor and a third-party. CPG's objection was sustained and Magistrate Judge Orenstein's Orders were reversed to the extent they require CPG to produce Deloitte's work papers.	Magistrate Judge Orenstein had concluded in the lower proceeding that the Deloitte work papers and other audit-related documents prepared in connection with Deloitte's work as CPG's independent auditor were manifestly within CPG's control, and should therefore be produced by CPG. Judge Cogan, however, found no support for Plaintiffs' conclusory suggestion that the mere existence of an auditing relationship provided CPG with the right to obtain Deloitte's work papers. As for practical ability, the court found that Plaintiffs had not met their burden of proof: CPG denied the documents were in their possession, custody or control, and Plaintiffs had not shown, for instance, that Deloitte would turn the documents over if CPG asked. The court directed CPG to ask Deloitte to turn over the documents, but went no further, sustaining CPG's objection and reminding Plaintiffs that they should have sought the documents from Deloitte directly "years ago when discovery was ongoing."	auditor	
Ayers v. Sheetz, Inc., 2012 US Dist LEXIS 154126, 2012 WL 5331555 (S.D. W.Va. Oct. 26, 2012)	2012	10/26/2012	4th	S.D. W.Va.	Cheryl A. Eifert, U.S.M.J.	no	agency	preservation	Plaintiff moved for sanctions due to defendants' failure to instruct its alleged agent to preserve relevant information.	Plaintiff served document requests seeking documents in the possession of third parties the plaintiff contended were agents of defendants. Upon learning that the documents had been destroyed, the plaintiff sought sanctions, contending that the third parties were agents of defendant and thus defendant had a duty to preserve the evidence. The Court, citing to *Goodman and Victor Stanley,* held that "[c]ontrol 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." The court held that the plaintiff had failed to present any evidence to establish that defendant had the right, authority or practical ability to obtain complete files from defendant's alleged agents. The court further considered plaintiff's argument that defendant had a duty to notify plaintiff of the data in the third parties' possession. The court held that while defendant had a duty to notify the opposing party of evidence in the hands of third parties, but that there was no evidence that defendant was aware that the third parties had any relevant evidence.	insurer and business partner	

Haskins, et al. v. First Am. Title Ins. Co., No. 10-5044, 2012 U.S. Dist. LEXIS 149947 (D.N.J. Oct. 18, 2012)	2012	10/18/2012	Fed.	N.J.	Joel Schneider, USMJ	No	Contract Rship	Preservation	Plaintiffs' motion to compel defendant to direct its agents to implement a litigation hold for the agents' closing documents	In a class action against an insurance company alleging a scheme to overcharge customers when they refinanced their residential mortgages, plaintiffs sought the insurance company's agents' closing files to determine if/why customers were overcharged. Defendant had entered into individual agency contracts with each agent, addressing the agent's duties and responsibilities, including the agent's maintenance of their files for Defendant. The court examined whether defendant had control under Rule 34 by determining whether it had the "legal right or ability to obtain the documents from another source upon demand" quoting Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142,160 (3d Cir. 2004). The court explained that a party has control if a contractual obligation requires a non-party to provide the requested documents upon demand. The court found that agent contracts contained language plainly indicating that defendant had control over and access to its agents closing files. "The contracts required the agents to maintain and carefully preserve documents for no less than 10 years and to 'make all Documentation available for inspection and examination by [defendant] at any reasonable time.'" Thus, because defendant had the legal right to obtain the agents' documents on demand, the defendant had control pursuant to Rule 34. Despite the fact that the documents remained the property of the agents, the court found that the defendant's continue right of access to and use of the agents' files established that it controls the files within the meaning of Rule 34. The court ordered defendant to serve a litigation hold letter on its agents who had contracts similar to those provided to the court.	Insurer/Agent
E.I. DuPont de Nemours & Co. v. Kolon Indus., No. 09-cv-058, 2012 U.S. Dist. LEXIS 144735 (E.D. Va. Oct. 5, 2012)	2012	10/5/2012	4th	E.D. Va.	Robert E. Payne, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Plaintiff DuPont filed a Renewed Motion to Compel Asset-related Discovery, seeking information to help collect on a judgment against Kolon entered in the S.D.N.Y.	DuPont sought customer information from wholly or partly owned subsidiaries of Defendants, but conceded that Defendants did not have custody or possession of this information. The court found, however, that Defendants had "practical ability" control over this information, as shown by Defendants' ownership interest, consolidated financial statements, and the related nature of the entities both before and after a corporate reorganization. The court ordered production of customer information for all 33 subsidiaries.	partly/wholly owned subsidiaries
Wells v. Fedex Ground Package Sys., No. 10-cv-02080, 2012 U.S. Dist. LEXIS 141276 (E.D. Mo. Oct. 1, 2012)	2012	10/1/2012	8th	E.D. Mo.	John A. Ross, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Plaintiffs filed motions to compel interrogatory responses and responsive production.	Defendant FedEx Ground objected to production of documents from sister-company FedEx Freight. The court held, however, that Defendant had the "practical ability" to obtain the documents as Ground and Freight were wholly-owned subsidiaries of FedEx Corp., and were therefore sister companies with a sufficient relationship to justify the production, which the court ordered. [Notably, Plaintiffs had apparently subpoenaed, and received, the same categories of production from another sister-company, FedEx Express; the court did not, however, require Plaintiffs to subpoena FedEx Freight as well.]	sister corporation
Ivory v. Tilton, No. 09-cv-01272, 2012 U.S. Dist. LEXIS 126914 (E.D. Cal. Sept. 6, 2012)	2012	9/6/2012	9th	E.D. Cal.	Gary S. Austin U.S.M.J.	No	Emp-Ee	Production	Plaintiff Ivory, a state prisoner in this *pro se*, *in forma pauperis* proceeding against an individual corrections officer, brought a motion to compel discovery.	The court briefly noted that it was evident that the Defendant corrections officer could not easily obtain copies of communications between the Inspector General of the state prisons agency and the prison facility where Plaintiff was incarcerated, and thus did not have the "practical ability" to produce the documents sought. In denying the motion, the court also upheld other objections to this (and other) discovery, including on grounds of relevance, breadth, and vagueness.	third-party employer of employee party
S2 Automation LLC v. Micron Tech., Inc., No. 11-0884, 2012 U.S. Dist. LEXIS 120097 (D.N.M. Aug. 9, 2012)	2012	8/9/2012	10th	D.N.M.	James O. Browning, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Defendant Micron brought an omnibus motion to compel the form, scope and content of discovery.	Plaintiff S2 objected, *inter alia*, to a request for documents from S2 Israel, which it described as not a wholly owned subsidiary of S2. The court had noted in a prior hearing that control existed if a parent corporation could "pick up the telephone" and have a "related entity" send it a given document, and that if S2 did not have such power over S2 Israel, it should enter an affidavit to that effect. The court now directed either the entry of such an affidavit, or the production of the requested documents.	wholly owned subsidiary
Lynn v. Monarch Recovery Mgmt., No. 11-2824, 2012 U.S. Dist. LEXIS 88839 (D. Md. June 27, 2012)	2012	6/27/2012	4th	D. Md.	Paul W. Grimm, U.S.D.J.	Yes	Contract Rship	Production	Plaintiff filed a motion to compel interrogatory responses, admissions, and responsive production.	Plaintiff Lynn, moved to compel, inter alia, itemized telephone bills from Defendant collection agency. Magistrate Grimm noted that as an account holder with its telephone service provider, Defendant likely had the "right, authority or practical ability" to obtain an itemized telephone bill, and may be compelled to do so. However, the court denied the motion to compel itemized telephone bills because that discovery could be more easily had via subpoena to the telephone carrier.	third-party service provider
Bush v. Ruth's Chris Steak House, Inc., No. 10-1721, 2012 U.S. Dist. LEXIS 86351 (D.D.C. June 18, 2012)	2012	6/18/2012	DC	D.D.C.	Barbara J. Rothstein, U.S.D.J.	Yes	Contract Rship	Production	Plaintiffs filed a motion to compel discovery.	The court stated the "right, control or practical ability" standard, but did not need to employ it in its analysis.	n/a
Fisher v. Fisher, No. 11-1038, 2012 U.S. Dist. LEXIS 78445 (D. Md. June 5, 2012)	2012	6/5/2012	4th	D. Md.	Paul W. Grimm, U.S.D.J.	No	Contract Rship	Production	Plaintiff filed a motion to compel discovery of financial documents.	Plaintiff sought discovery of bank records, which the Defendant said had either been produced, or were only in the possession of third-party financial institutions, Judge Grimm held that as an account holder, Defendant had the "right, authority or practical ability" to obtain the requested documents. However, applying the R. 26(b)(2)(C) balancing test, the court directed Plaintiff to seek these documents via subpoena to the financial institutions, except insofar as it would be less expensive for Defendant to obtain and produce these documents.	third-party service provider
Al Noaimi v. Zaid, 283 F.R.D. 639 (D. Kan. 2012)	2012	5/17/2012	10th	D. Kan.	Karen M. Humphreys U.S.M.J.	No	Parent/Sub/Affiliate	Production	Defendants filed a motion to compel discovery of corporate records.	Plaintiffs maintained that they did not have control over the corporate documents of two entities in which one individual Plaintiff had 20% ownership interest. In denying Defendants' motion to compel discovery, Judge Humphreys noted that "practical ability" was not the standard for control in its jurisdiction, and held that merely being a stockholder or officer in a corporation did not satisfy the control standard.	officer/part owner sued individually
Doe v. AT&T W. Disability Benefits Program, No. C-11-4603, 2012 U.S. Dist. LEXIS 67091 (N.D. Cal. May 14, 2012)	2012	5/14/2012	9th	N.D. Cal.	Donna M. Ryu, U.S.M.J.	Yes	Contract Rship	Production	Parties filed a joint discovery letter setting forth discovery disputes; following a hearing, the court filed this order summarizing its decisions.	The court cited the fact that "practical ability" is not the standard in the 9th Circuit, but found "control" under a reading of Defendant's contract with its third-party claim-management service provider.	third-party corporate service provider

GenOn Mid-Atl, LLC v. Stone & Webster, Inc., 282 F.R.D. 346 (S.D.N.Y. 2012)	2012	4/20/2012	2d	S.D.N.Y.	Frank Maas, U.S.M.J.	No	Contract Rship	Preservation	Defendant moved for sanctions, alleging spoliation by Plaintiff's third-party data expert, and the matter was referred to Judge Maas.	Litigation consultants FTI were retained by Plaintiff's counsel (with Plaintiff signing the contract for payment purposes only), to conduct audits of Defendant related to ongoing business with Plaintiff, and subsequently agreed to testify at trial with respect to their findings. After the district court ordered FTI to produce audit-related e-mail, FTI discovered that several months of e-mail had been lost owing to faulty back-up processes. As part of its assessment of spoliation, Judge Maas ruled that FTI had an ongoing relationship with Plaintiff (and counsel), and that "common sense" suggested that FTI would have complied with a timely request from Plaintiff to preserve the now lost information. However, the court denied spoliation sanctions on the ground that there was no prejudice to Defendant. The district court subsequently affirmed Jude Maas's ruling.	litigation consultants retained by counsel
Pilkington N. Am. v. Smith, No. 11-176, 2012 U.S. Dist. LEXIS 50877 (M.D. La. Apr. 11, 2012)	2012	4/11/2012	5th	M.D. La.	Docia L. Dalby, U.S.M.J.	Yes	Contract Rship	Production	Defendants moved to quash Plaintiff's subpoena to Defendant's accountant. Sister motion to motion to compel in 2012 US Dist. LEXIS 50877.	The court merely cited the "practical ability" standard in its overview of the law, but did not need to address it in ordering the accountant to produce the requested information.	n/a
Pilkington N. Am., Inc. v. Smith, No. 11-176, 2012 U.S. Dist. LEXIS 50886 (M.D. La. Apr. 11, 2012)	2012	4/11/2012	5th	M.D. La.	Docia L. Dalby, U.S.M.J.	Yes	Contract Rship	Production	Plaintiff moved to compel discovery of transaction records from Defendant. Sister motion to motion to compel in 2012 US Dist. LEXIS 50886.	The court merely cited the "practical ability" standard in its overview of the law, but did not need to address it in ordering Defendants to produce the requested information.	n/a
Commonwealth of the N. Mariana Islands v. Millard, Nos. 11-mc-99,11-mc-100, 2012 U.S. Dist. LEXIS 127085 (S.D.N.Y. Apr. 12, 2012)	2012	4/3/2012	2d	S.D.N.Y.	Lewis A. Kaplan, U.S.D.J.	Yes	Other	Other	Plaintiff moved for an F.R.C.P. 69 turnover order as part of its effort to collect on a judgment.	The court cited the federal "practical ability" standard in interpreting a "possession or custody" state rule, and determined that the absence of the word "control" in the state rule meant that the "practical ability" standard did not apply. Turnover order was denied.	n/a
Morris v. Lowe's Home Ctrs., Inc., No. 10-cv-388, 2012 U.S. Dist. LEXIS 44422 (M.D.N.C. Mar. 29, 2012)	2012	3/29/2012	4th	M.D.N.C.	L. Patrick Auld, U.S.M.J.	Yes	Other	Production	Defendant filed a motion to compel Plaintiff to turn over medical records held by her physician.	The court cited the "practical ability" standard, but did not apply it in determining that Plaintiff had an obligation to obtain and turn the medical records over.	party's physician
Cummings v. Moran Shipping Agencies, Inc., No. 09-cv-1393, 2012 U.S. Dist. LEXIS 40001 (D. Conn. Mar. 23, 2012)	2012	3/23/2012	3d	D. Conn.	Donna F. Martinez, U.S.M.J.	No	Other	Production	Defendant filed a motion to compel Plaintiff to produce records related to prior lawsuits and claims brought by Plaintiff.	Plaintiff Cummings attested that he had produced all documents in his possession. The court ruled that Cummings had to make efforts to obtain the documents sought by Defendant that were not in his possession, and if unable to obtain and produce responsive materials, to file an affidavit detailing his efforts.	(likely) counsel in past matters
Hosch v. United Bank, Inc., No. 09-cv-1490, 2012 U.S. Dist. LEXIS 18048 (D.S.C. Feb. 13, 2012)	2012	2/13/2012	4th	D.S.C.	Thomas E. Rogers III, U.S.M.J.	Yes	Other	Production	Defendant moved to compel, *inter alia*, Plaintiff's credit report.	After mentioning that control required "right, authority or practical ability," the court ruled that Plaintiff had to obtain, or authorize Defendant to obtain, the requested credit reports.	third-party credit bureau
In re NCAA Student-Athlete Name & Likeness Litig., No. 09-cv-01967, 2012 U.S. Dist. LEXIS 5087 (N.D. Cal. Jan. 17, 2012)	2012	1/17/2012	9th	N.D. Cal.	Nathanael Cousins, U.S.M.J.	No	Other	Production	Plaintiffs moved to compel discovery of documents held by member schools of defendant NCAA.	Plaintiffs moved to compel discovery from the NCAA, of documents held by its non-party member schools. The court denied the requested discovery, ruling that the NCAA did not have "control" of its member institutions for purposes of R. 34 discovery. The court noted that "practical ability" did not "square with Ninth Circuit precedent," and that Plaintiffs regardless had not met that standard merely by pointing to NCAA bylaws requiring member institutions to make "full and complete disclosure" of "any relevant information" to the NCAA upon its request.	independent members of party association
Shcherbakovskiy v. Seitz, No. 03-cv-1220, 2010 U.S. Dist. LEXIS 77715 (S.D.N.Y. July 30, 2010)	2011	12/14/2011	2d	S.D.N.Y.	Robert P. Patterson, Jr., U.S.D.J.	No	Other	Production	After a dismissal of Plaintiff's claims due to discovery sanctions and subsequent vacating and remand by the 2d Circuit, Defendant moved to affirm the discovery sanction and Plaintiff moved for partial summary judgment to dismiss one of Defendant's counterclaims.	Plaintiff argued that he did not have direct personal access to requested documents held by a third-party company he had founded and previously owned, because a confidentiality agreement prevented him from disclosing the documents without the board's approval and the board had denied his request. Even though Plaintiff was only a 45% owner and a non-executive director in 2003, when the documents were original due for production, the court found that the board members were likely beholden to Plaintiff. Further, the court found Plaintiff had the practical ability to obtain the documents as of 2009 because even though Plaintiff held no position with the company at the time, he made an informal request for documents and produced some with ease. The court found this fact probative of his practical ability to obtain the documents back in 2003. Ultimately, the court found a strong indication that Plaintiff concocted the 2003 board resolution denying his request. The sanction of dismissal was reimposed.	former board member and minority shareholder/company
Exco Operating Co., LP v. Arnold, No. 10-1838, 2011 U.S. Dist. LEXIS 138974 (W.D. La. Dec. 2, 2011)	2011	12/2/2011	5th	W.D. La.	Karen L. Hayes, U.S.M.J.	Yes	Other	Production	Defendant moved to compel discovery responses.	The court cited the "practical ability" standard, but did not need to apply the standard in granting the requested discovery.	n/a
Diaz v. Wash. State Migrant Council, 165 Wn. App. 59 (Wash. Ct. App. 2011)	2011	11/22/2011	Wa.	Ct. App.	Laurel H. Siddoway	No	Other	Production	In state law interlocutory appeal, plaintiff sought reversal of contempt finding for its board members' refusal to disclose immigration documents.	In an employment dispute involving a non-profit's former Executive Director, who claimed that his discharge was invalid or that, if valid, violated public policy, the former E.D. sought production of documents pertaining to the immigration status of the non-profit's board members. The non-profit asked its board members to provide personal documents of citizenship, but each declined to do so. The Plaintiff moved for an order of contempt. The trial court granted the motion and found default on liability, among other rulings. The non-profit moved for interlocutory appeal, arguing that, among other things, its directors lawfully invoked their Fifth Amendment rights and the organization's complete compliance with the ordered production of immigration documents was therefore "impossible." The court followed the federal practical ability standard, but found that a corporate director had no duty to make personal records available to the corporation that he or she serves. Thus, there had been no showing that the non-profit had the legal or practical ability to secure personal records belonging to directors and, consequently, the trial court had no basis for finding the organization in contempt for failing to produce the requested documents. Contempt finding reversed.	non-profit/board members

Costa v. Kerzner Int'l Resorts, Inc., 277 F.R.D. 468 (S.D. Fla. 2011)	2011	11/17/2011	11th	S.D. Fla.	Barry S. Seltzer, U.S.M.J.	Yes	Parent/Sub/Affiliate	Production	Plaintiffs moved to compel interrogatory responses and documents from Defendants' affiliated entities based in the Bahamas.	Defendants resisted discovery on the basis that the information sought was in the possession of its Bahamian affiliates. The court ruled that given the "established corporate and transactional connections" between Defendants and their affiliates, it was "unlikely" that Defendants did not have access to, and ability to obtain, the documents sought. The court also cited the "direct financial interest" in the case's outcome that the Bahamian affiliates had, in granting the motion to compel.	foreign office/affiliate	
Genentech, Inc. v. Trs. of the Univ. of Pa., No.10-2037, 2011 U.S. Dist. LEXIS 128526 (N.D. Cal. Nov. 7, 2011)	2011	11/7/2011	9th	N.D. Cal.	Paul S. Grewal, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Defendant moved to compel production of documents held by Defendant Genentech's parent company Roche.	Reiterating the 9th Circuit's rejection of the "practical ability" and rejecting Plaintiff University of Pennsylvania's attempt to compel production of documents from Genentech's European parent company, Judge Grewal ruled that a showing of "legal control", necessary to order the discovery sought, required a showing of a "legal right" to the documents sought. Finding that there was no showing of a "broad legal right" of Genentech to obtain these documents from parent Roche, the court denied the motion.	foreign parent	
May v. F/V Lorena Marie, No. 09-cv-00114, 2011 U.S. Dist. LEXIS 127008 (D. Ala. Nov. 2, 2011)	2011	11/2/2011	9th	D. Ak.	John D. Roberts, U.S.M.J.	No	Other	Production	Plaintiffs moved to compel production or in the alternative, assess spoliation sanctions against Defendant. The motion was tolled pending further discovery, after which discovery this opinion was issued.	Following belated production of the videos and photographs sought from Defendant's grandson, the court awarded the costs of the related motion practice to Plaintiffs. The court noted that the "practical ability" standard applied, but should not be "taken too far" by expecting a party to obtain documents that it "could obtain ... if it tried hard enough." Here, however, the court held, the Defendant had the ability to obtain the documents held by his grandson, who lived with him.	non-party family member	
Hageman v. Accenture, LLP, No. 10-1759, 2011 U.S. Dist. LEXIS 121511 (D. Minn. Oct. 19, 2011)	2011	10/19/2011	8th	D. Minn.	Tony N. Leung, U.S.M.J.	No	Contract Rship	Production	Plaintiffs moved to compel discovery of e-mail sent by Defendant Accenture using their client Best Buy's systems.	Although the e-mail information were store on best Buy servers and contractually owned by Best Buy, the court ordered Accenture to produce the requested information. The court held that Accenture had the practical ability to obtain this information as its employees could access this information as part of their daily work flow.	third-party client	
Two Guys Recycling, LLC v. Will Transp., Inc., No. 11-0048, 2011 U.S. Dist. LEXIS 111086 (W.D. La. Sept. 28, 2011)	2011	9/28/2011	5th	W.D. La.	Karen L. Hayes, U.S.M.J.	Yes	Other	Production	Plaintiff moved to compel more sufficient responses to its discovery requests.	The court cited the "practical ability" standard, but did not need to apply the standard in granting the requested discovery.	n/a	
Moore v. Firstsource Advantage, LLC, No. 07-cv-770, 2011 U.S. Dist. LEXIS 104517 (W.D.N.Y. Sept. 15, 2011)	2011	9/15/2011	2d	W.D.N.Y.	William M. Skretny, U.S.D.J.	No	Contract Rship	Production	Plaintiff moved to strike certain evidence,	Plaintiff moved to strike screenshots attached to an affidavit from third-party cable provider Time Warner which Defendant debt collector had included in their motion for summary judgment. Defendant argued that Plaintiff could have obtained that discovery from Time Warner directly. The court, however, noted that the written contract between Defendant and Time Warner included a mutual indemnification clause that required the two parties to cooperate in the event of a third-party suit against either, and accordingly, Defendant had the ability, and obligation, to obtain and produce these documents in discovery, which they admittedly had not. The court granted the motion, striking the Time Warner evidence.	third-party service provider	
Doe Run Peru S.R.L. v. Trafigura AG, No. 11-mc-77, 2011 U.S. Dist. LEXIS 154559 (D. Conn. Aug. 24, 2011)	2011	8/24/2011	3d	D. Conn.	Stefan R. Underhill, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel production initially sought under 28 U.S.C. § 1782 (regulating US discovery by litigants in foreign and international tribunals).	Non-US Plaintiff moved to have Defendant's US sister corporation TAG produce documents relevant to Plaintiff's Peruvian suit against Defendant. The court ruled that TAG did not have the "practical ability" to obtain and produce the documents sought because theirs was merely an "affiliate relationship" with "arms' length" transactions. The court denied the motion, despite evidence that TAG shared some executives with Defendant, had on occasion jointly met with Plaintiff, and had regular e-mail communication with Defendant, in part because of TAG's averment that it had formally requested the documents from Defendant and the request had been denied.	foreign sister corporation; foreign plaintiff seeking discovery	
Gucci Am., Inc. v. Weixing Li, No. 10-civ-4974, 2011 U.S. Dist. LEXIS 97814 (S.D.N.Y. Aug. 23, 2011)	2011	8/23/2011	2d	S.D.N.Y.	Richard J. Sullivan, U.S.D.J.	Yes	R. 45 Non-party	Production	Plaintiffs filed a motion to compel R. 45 subpoena responses from non-party Bank of China. R. 34 was not at issue.	Non-party Bank of China refused to produce subpoenaed documents located in its China-based offices, arguing that Chinese secrecy laws prevented this production. R. 34 was not at issue. The court overruled the objections and ordered production of the documents.	foreign office/affiliate	*No analysis*
Piazza's Seafood World, L.L.C. v. Odom, No. 07-413, 2011 U.S. Dist. LEXIS 93091 (M.D. La. Aug. 19, 2011)	2011	8/19/2011	5th	M.D. La.	Christine Noland, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production.	Plaintiff sought discovery of particular documents originating from a state agency, of which Defendant was formerly commissioner. While noting the "practical ability" standard in a footnote, the court denied the motion, citing the unrefuted testimony that as an ex-commissioner, Defendant no longer had custody or control of the documents sought.	employer/ex-employee	
Wells Fargo Bank, N.A. v. Lincoln Nat'l Life Ins. Co., No. 10-cv-703, 2011 U.S. Dist. LEXIS 86411 (N.D. Okla. Aug. 4, 2011)	2011	8/4/2011	5th	N.D. Okla.	T. Lane Wilson, U.S.M.J.	No	Other	Production	Defendant moved to compel production by Plaintiff trustee.	The court cited the "practical ability" standard, but did not need to apply it in granting the motion, by determining that Wells Fargo was more than a nominal party to the litigation, and would therefore need to produce documents within its control.	trustee	
Shell Global Solutions (US) Inc. v. RMS Eng'g, Inc., No. 09-cv-3778, 2011 U.S. Dist. LEXIS 85120 (S.D. Tex. Aug. 3, 2011)	2011	8/3/2011	5th	S.D. Tex.	Keith P. Ellison, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Defendant moved to compel production from Defendants' Dutch parent company.	While finding that Plaintiff and its parent coordinated, and cooperated in the management of, their intellectual property, the parent was not involved in the intellectual-property transaction at issue, and did not share officers or board members. Terming it a "close call," the court held that Defendant had not established Plaintiff's "practical ability" to obtain the information sought, and therefore denied the motion.	parent/subsidiary	

Chevron Corp. v. Salazar, 275 F.R.D. 437 (S.D.N.Y. 2011)	2011	8/3/2011	3d	S.D.N.Y.	James C. Francis IV, U.S.M.J.	No	R. 45 Non-party	Production	Plaintiff moved to compel privileged documents via subpoena to counsel for Defendants.	Having obtained a ruling that lead counsel in a related matter had waived attorney-client privilege with respect to categories of documents sought from him via subpoena, Plaintiff moved to compel related documents from several other subpoenaed counsel, all of whom were professionally affiliated with lead counsel to varying degrees, under the theory that lead counsel had the "practical ability" to obtain these documents, and that these documents thus fell within the scope of the privilege waiver. The court granted the motion for all but one of the subpoenaed counsel, noting that the R. 45 analysis here hinged on the same term of art ("possession, custody, or control") as R. 34 (and R. 16 of the Federal Criminal Procedure rules). The court granted discovery, *inter alia* , of the Gmail account of one lawyer, on the basis that she did not maintain a separate business account, and admittedly would turn over these documents if asked. the court also granted discovery of the e-mail and documents of lawyers at a firm that worked closely with lead counsel in litigating the underlying matter. In both cases, the court noted that lead counsel had the "practical ability" to obtain these documents not in his possession, and that the documents therefore fell with the scope of the subpoena to lead counsel.	co-counsel/ex-employees
White v. State Farm Mut. Auto. Ins. Co., No. 09-000991, 2011 U.S. Dist. LEXIS 86004 (M.D. La. Aug. 4, 2011)	2011	8/3/2011	5th	M.D. La.	Docia L. Dalby, U.S.M.J.	Yes	Other	Production	Defendants moved for contempt sanctions against Plaintiff, for failure to produce responsive documents.	The court cited the "practical ability" standard, but did not need to use it in determining that Plaintiff would have to make a reasonably thorough search of his documents to ensure that the documents sought were not in his possession.	n/a
United States v. Am. Express Co., No. 10-cv-4496, 2011 U.S. Dist. LEXIS 156580 (E.D.N.Y. July 29, 2011)	2011	7/29/2011	2d	E.D.N.Y.	Ramon E. Reyes, Jr., U.S.M.J.	No	Other	Production	Plaintiff U.S. states moved for a protective order quashing R. 33 and R. 34 discovery requests to non-party state agencies.	Defendant American Express served discovery requests on numerous state agencies, arguing that the various State Attorneys General had the practical ability to obtain these documents. The court recognized the "practical ability" standard, and described a "voluntary process" by which the Attorneys General could ask for, and receive, these documents from the state agencies, but granted the motion to quash nonetheless, rejecting the proposition that the possibility of obtaining the documents via the voluntary process qualified as a "practical ability" to do so. Judge Francis's decision was impelled particularly by his perception that to rule otherwise would impermissibly vitiate the Attorneys Generals' independence from state-agency and gubernatorial control.	non-party state agencies
Tiffany (NJ) LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011)	2011	7/25/2011	2d	S.D.N.Y.	Henry Pitman, U.S.M.J.	No	R. 45 Non-party	Production	Plaintiffs moved to compel R. 45 subpoena responses from non-party Chinese banks. R. 34 was not at issue.	Plaintiffs served s*ubpoenas duces tecum* on three Chinese banks. The court held the documents to be in the banks' custody and a control despite the fact that their New York branches were on separate computer systems than the Chinese offices which held the documents, but refused to compel production pending exhaustion of the Hague Convention option for acquiring the discovery sought. (Following production under the Hague Convention, the court subsequently declined to enforce the subpoena in November 2012).	foreign office/affiliate
Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010)	2011	6/14/2011	4th	D. Md.	Paul W. Grimm, U.S.M.J.	Yes	Contract Rship	Preservation	Plaintiff company filed a motion for terminating and other sanctions arising out of defendants' intentional destruction of evidence and other litigation misconduct.	Plaintiff sought sanctions for Defendant's destruction of evidence and other misconduct. Court explains that in the 4th and 2d Circuits, control means the party has " the right, authority, or practical ability to obtain the documents from a non-party to the action" and in the 4th, 1st, and 6th Circuits, there is also a duty to notify the opposing party of evidence in the hands of third parties. In contrast, the 3d, 5th and 10th Circuits do not extend "control" to evidence controlled by third parties. Ultimately, the Defendant did not dispute that it controlled the various evidentiary items that had been lost or destroyed. However, court includes a table at the end of its ruling that outlines the standard for spoliation sanctions by circuit, including the meaning of "control."	n/a
Cacace v. Meyer Mktg. (Macau Commer. Offshore) Co., No. 06-civ-2938, 2011 U.S. Dist. LEXIS 50753 (S.D.N.Y. May 12, 2011)	2011	5/12/2011	2d	S.D.N.Y.	George A. Yanthis, U.S.M.J.	No	Parent/Sub/Affiliate	Preservation	Plaintiffs moved for spoliation sanctions based on failure to preserve the documents of an affiliate's employee.	Plaintiff Cacace accused Defendant Meyer of failing to preserve documents from an individual employed by Meyer's Hong Kong-based affiliate. The court cited the "practical ability" standard, and explained that discovery of an affiliate's documents was required where the affiliate was an alter-ego of the party, or had a role in the transaction underlying the lawsuit. As neither was the case here, the court denied the sanctions motion.	foreign office/affiliate
Ehrlich v. BMW of N. Am., LLC, No. 10-1151, 2011 U.S. Dist. LEXIS 90215 (C.D. Cal. May 2, 2011)	2011	5/2/2011	9th	C.D. Cal.	Patrick J. Walsh, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel further discovery responses, seeking documents from Defendant BMW North America's German parent company.	Plaintiff Ehrlich asserted that Defendant corporation had the practical ability to obtain documents from its German parent, but the court noted that this standard had been rejected in the 9th Circuit, and that the parent company had already rebuffed Defendant's request for these documents. The court accordingly denied the motion, on the basis that ordering discovery from an entity beyond its jurisdiction would be "a futile gesture".	foreign parent
State v. Barger, 349 Ore. 553 (Or. 2011)	2011	4/21/2011	Or.	Sup. Ct.	W. Michael Gillette	Yes	Contract Rship	Other	In criminal proceeding, issue to be resolved was whether defendant had "control" over item for purposes of criminal liability (not for purposes of discovery).	Inapplicable, case involving "control" over child pornography images.	n/a
Soliday v. 7-Eleven, Inc., No. 09-cv-807, 2010 U.S. Dist. LEXIS 144034 (M.D. Fla. Nov. 17, 2010)	2011	4/20/2011	11th	M.D. Fla.	SHERI POLSTER CHAPPELL, U.S.M.J.	Yes	Emp-Ee	Production	Plaintiff moved to compel production of various documents.	Plaintiff employee in discrimination action moved to compel production of documents. Court ordered employer to do so and cites to practical ability test for "control" under Rule 34. Defendant employer did not contend that any requested documents were outside of its control. Motion was granted.	n/a

Scovin v. Great W. Life & Annuity Ins. Co., No. 02-cv-1161, 2006 U.S. Dist. LEXIS 71386 (D. Conn. Sept. 29, 2006)	2011	3/31/2011	2d	D. Conn.	Donna F. Martinez, U.S.M.J.	No	Other	Production	Plaintiff moved for sanctions, alleging that Defendants failed to comply with a court order by providing incomplete productions.	In this breach of contract and ERISA action, Plaintiff (former employee of Defendants) sought production of corporate documents, such as board meeting minutes. Plaintiff argued that Defendants' production was incomplete because Defendants did not seek records from its former corporate secretary, who likely possessed board meeting minutes. Defendants argued that they did not have control over the former corporate secretary because he had not worked for Defendants in five years. The court found that the very fact of this person being the former corporate secretary was sufficient to show that Defendants, as former corporate officers and/or directors, have control over documents in the former secretary's possession. The court also found that Defendants had not asked the former secretary for the documents. As a result, the court determined that Defendants failed to comply with the court's order and ordered Defendants to produce all responsive documents in the former secretary's possession and to submit an affidavit detailing these efforts. The court also found that Defendants failed to produce documents under the control of its counsel, reasoning that documents in possession of a party's attorney are within the party's possession, custody or control, and that those documents must be produced.	company/former board secretary and company/counsel
Leser v. U.S. Bank Nat'l Ass'n, No. 09-cv-2362, 2010 U.S. Dist. LEXIS 47365 (E.D.N.Y. May 13, 2010)	2011	3/18/2011	2d	E.D.N.Y.	Andrew L. Carter, Jr., U.S.M.J.	No	Other	Production	Defendant moved to compel production of documents in possession of company with whom Plaintiff was affiliated.	Defendant moved to compel Plaintiff to produce documents in the possession of two entities. Plaintiff argued that the documents were not in his personal files, i.e., in his possession. The court found that Plaintiff likely had access and the ability obtain these documents because: the address for the named entities was that of the Plaintiff's residence and work; and Plaintiff signed off on relevant documents on behalf of the other entities. In addition, while Plaintiff disputed that he owned or controlled either entity, the court noted that Plaintiff did not deny his affiliation with each (namely that he was the sole director and president of companies that control each the entities who possessed the documents at issue). Even though the court explained that Plaintiff may not own or control the entities in possession of the documents, his affiliation with them give him "control" over the request documents. The court says the Plaintiff confuses the rule's requirement of control over documents with control over entities in possession of them. The court ultimately denies the motion on relevancy grounds.	director of parent/sub
KeyBank Nat'l Ass'n v. Perkins Rowe Assocs., LLC, Nos. 09-497, 10-552, 2011 U.S. Dist. LEXIS 19635 (M.D. La. Feb. 25, 2011)	2011	2/25/2011	5th	M.D. La.	Stephen C. Riedlinger, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiff KeyBank moved to compel discovery, and for sanctions, against Defendants who failed to turn over documents held by third-parties owned or managed by one individual defendant.	Defendants asserted that they had no control over documents from related non-parties. Citing the "legal right or practical ability" standard in a footnote, the court went on to determine that individual Defendant Spinosa was either a manager, owner, or agent of all of the non-parties from whom discovery was sought, and that Defendants were required to produce these documents.	owned/managed entities
ANZ Advanced Techs., LLC v. Bush Hog, LLC, No. 09-00228, 2011 U.S. Dist. LEXIS 22159 (S.D. Ala. Jan. 26, 2011)	2011	1/26/2011	11th	S.D. Ala.	Katherine P. Nelson, U.S.M.J.	No	Other	Production	Defendant moved for sanctions arising out of plaintiffs' failure to turn over computer hard drives in the possession of its sister-corporation	After Plaintiff had admitted to fabricating certain documents and the court had ordered production of computer hard drives for forensic examination, one Plaintiff claimed that (a) some of the computer hard drives were in the possession of Indian authorities and could not be produced; and (b) the other Plaintiff claimed that it did not have control over the hard drives in the other Plaintiff's possession. Plaintiff's evidence on the status of these hard drives within India was found to be contradictory and unreliable. The court also found that the two Plaintiff sister companies jointly engaged in discovery conduct because they spoke with one voice throughout the case. The court rejected the Plaintiff entities' attempt to shield one entity from the discovery abuses of the other, because the alleged spoliators were central figures to both entities' claims, and each had spoken on behalf of both entities. The court found that one sister-company was obligated to produce the hard drives of the other. The court recommended that the action be dismissed with prejudice as an appropriate sanction against both entities..	corporation/sister-corporation
Monsanto Co. v. Hargrove, No. 09-cv-1628, 2010 U.S. Dist. LEXIS 46575 (E.D. Mo. May 12, 2010)	2011	1/11/2011	8th	E.D. Mo.	Carol E. Jackson, U.S.D.J.	No	Other	Production	Plaintiff moved for sanctions, alleging that Defendants failed to produce documents that the court previously ordered them to produce in response to plaintiffs' motion to compel.	In response to Plaintiffs' motion for sanctions, Defendants argued that they produced all of the documents in their possession that that the named individual Defendant had signed authorizations allowing Plaintiffs to acquire any of the documents that Plaintiffs requested. Although the court found that Defendants did not have physical possession of the documents, the court found they did have the legal authority to obtain the documents, as evidenced by the fact that they authorized Plaintiffs to acquire these records. The court found that Defendants willfully violated the prior court order compelling discovery responses and granted Plaintiffs' motion for sanctions and awarded attorneys fees and costs incurred in bringing the motion.	n/a
Hamilton Partners, L.P. v. Englard, 11 A.3d 1180 (Del. Ch. 2010)	2010	12/15/2010	Del.	Del. Ch.	J. Travis Laster, V.C.	Yes		Other	n/a	[Discusses practical ability test in the context of a derivative action (addressing merger-related issues), i.e., outside of discovery.]	n/a
Panolam Indus. Int'l v. F & F Composite Group Inc., No. 07-cv-1721, 2010 U.S. Dist. LEXIS 127843 (D. Conn. Dec. 3, 2010)	2010	12/3/2010	2d	D. Conn.	Donna F. Martinez, U.S.M.J.	Yes		Production	Defendant moved to compel production of documents	Only cites to practical ability standard.	n/a
DeSoto Health & Rehab, L.L.C. v. Phila. Indem. Ins. Co., No. 09-cv-599-FtM-99SPC, 2010 U.S. Dist. LEXIS 127877 (M.D. Fla. Nov. 22, 2010)	2010	11/22/2010	11th	M.D.Fla.	Sheri Polster Chappell, U.S.M.J.	No	n/a	n/a	n/a	Control under Rule 34 is not discussed at all in this decision.	n/a
Hayles v. Wheatherford, No. 09-cv-3061, 2010 U.S. Dist. LEXIS 125930 (E.D. Cal. Nov. 16, 2010)	2010	11/16/2010	9th	E.D. Cal.	John F. Moulds	No	Emp-Ee	Production	Plaintiff moved to compel production of documents held by the state prison that employed defendant doctors.	The court granted the motion to compel, holding that Defendants had the "practical ability" to "easily" obtain the requested policy and procedure documents from the prison where they worked.	employer/employee
Sebastian Holdings, Inc. v. Kugler, No. 08-cv-1131, 2010 U.S. Dist. LEXIS 120151 (D. Conn. Nov. 12, 2010)	2010	11/12/2010	3d	D. Conn.	Martinez, U.S.M.J.	Yes	Other	Production	Plaintiffs moved to compel discovery on a jurisdictional issue.	The court cited the "practical ability" standard, but did not need to apply the standard in granting the requested discovery.	n/a
Barack v. Am. Honda Motor Co., No. 09-cv-56, 2010 U.S. Dist. LEXIS 120244 (D. Conn. Nov. 12, 2010)	2010	11/12/2010	2d	D.Conn.	Donna F. Martinez, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel production of documents in possession of Defendants' subcontractor.	In this products liability action, Plaintiffs moved to compel production of component testing records in the possession of the Defendants' subcontractor, arguing that Defendants had the contractual right or practical ability to obtain the records. The court granted the motion to compel, stating that Defendants shall produce all responsive records in their control, which is to be construed broadly as a legal right, authority or practical ability to obtain the materials sought upon demand.	corporation/subcontractor

A. H. v. Knowledge Learning Corp., No. 09-2517, 2010 U.S. Dist. LEXIS 111242 (D. Kan. Oct. 19, 2010)	2010	10/19/2010	10th	D. Kan.	David J. Waxse, U.S.M.J.	No	n/a	n/a	Motion to exclude expert testimony	In this tort action involving alleged abuse of a child at a child care facility, there was no mention of "control" under Rule 34 or practical ability test whatsoever.	n/a
Sunrider Corp. v. Bountiful Biotech Corp., No. 08-1339, 2010 U.S. Dist. LEXIS 117347 (C.D. Cal. Oct. 8, 2010)	2010	10/8/2010	9th	C.D. Cal.	David O. Carter, U.S.D.J.	No	Other	Preservation	Defendants objected to magistrate judge's report and recommendation awarding terminating sanctions for failure to produce and preserve relevant documents from a third party.	In this copyright infringement action, the district court adopted the magistrate judge's report and recommendation granting terminating sanctions against the Defendant for various discovery abuses, including Defendants' failure to produce documents in the possession of a third party company. The magistrate judge had found that the named individual Defendant possessed or had control over these documents because at the time of the filing of the lawsuit he and his wife owned 70% of the company but they soon after transferred their interest to his sister-in-law. The individual Defendant claimed that he tried to obtain documents from the company, but gave conflicting testimony on this issue. In addition, documents produced later in discovery indicated that as a shareholder, he had access to the requested documents. The magistrate judge found that the Defendant had been rearranging his affairs to avoid having to produce documents and that this was akin to spoliation. In addition, the Defendant's sister-in-law testified that during discovery the company destroyed "non-essential documents," which the district court found constituted spoliation even though there was no showing that those discarded documents were relevant. The court also found that because the individual Defendant had been a majority shareholder, he had the necessary control over the third-party company's documents.	former shareholder/company
R.F.M.A.S., Inc. v. So, 271 F.R.D. 13 (S.D.N.Y. 2010)	2010	8/10/2010	2d	S.D.N.Y.	Michael H. Dolinger, U.S.M.J.	No	Other	Production	Plaintiff moved for spoliation sanctions for failure to permit inspection of jewelry pieces allegedly in the possession of third parties.	In this copyright infringement action, the court denied Plaintiff's motion for spoliation sanctions in which Plaintiff claimed that Defendant retained "control" over disputed jewelry pieces during discovery but failed to allow Plaintiff to inspect them. For an entity Plaintiff claimed had been in possession of the jewelry, the parties did not dispute that the jewelry had been provided to the entity on consignment by the Defendant. The court found that there was an insufficient record to demonstrate the relationship between the Defendant and the entity during the consignment period, including what rights, if any, the Defendant retained over the jewelry pieces on consignment. Thus, the court found that the jewelry on consignment was not under Defendants' "control," and declined to impose sanctions. The court explained that Plaintiff could have accessed the jeweler pieces at the time by propounding a subpoena on the entity that held the pieces on consignment.	consignor/consignee
Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, LLC, No. 05-civ-9016, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010)	2010	5/28/2010	2d	S.D.N.Y.	Shira A. Scheindlin, U.S.D.J.	No	Other	Preservation	Defendants moved for sanctions alleging that each plaintiff failed to preserve and produce documents.	In a securities litigation matter, the Defendants moved for sanctions based on failure to preserve and produce documents. For one Plaintiff, Hunnicutt, the court found that even though the former employee's files were not physically in the Plaintiff's possession, the Plaintiff had a duty to search that employee's files. Additionally, the court speculated that the Plaintiff "may also have had an obligation to request documents from its former employees ..., assuming it had the practical ability to do so." For these any other reasons, the court granted in part the motion for sanctions.	employer/former employee
JPMorgan Chase Bank, N.A. v. KB Home, No. 08-cv-1711, 2010 U.S. Dist. LEXIS 56519 (D. Nev. May 18, 2010)	2010	5/18/2010	9th	D. Nev.	Robert J. Johnston, U.S.M.J.	No	Other	Production	Defendant moved to compel production of documents possessed by third parties on whose behalf Plaintiff brought the instant action as an Administrative Agent.	In this contract lending dispute, Defendants moved to compel production of documents in the possession of lenders on whose behalf Plaintiff, as Administrative Agent, brought the instant action. Plaintiff argued that it was not obligated to search for responsive documents in the possession, custody or control of any of the lenders and that the vast majority of the 206 lenders it represented were simply passive investors who may have purchased their interests. The court found that Plaintiff was authorized to bring suit on behalf of the lenders and that this agency relationship was sufficient to find control for purposes of Rule 34. Motion to compel granted.	administrative agent/lender
Sweeney v. UNLV Research Found., No. 09-cv-01167, 2010 U.S. Dist. LEXIS 143869 (D. Nev. Apr. 30, 2010)	2010	4/30/2010	9th	D.Nev.	George Foley, Jr., U.S.M.J.	No	Other	Production	Defendant moved to compel Plaintiff to produce documents she created that were in the possession of state administrative agencies.	In this employment discrimination dispute, the Defendant sought production of documents relating to any administrative agency claim filed by Plaintiff against Defendant and all documents that Plaintiff submitted to local equal employment opportunity administrative agencies relating to the claims in her complaint. The court found Plaintiff did not have legal or practical control of documents in the possession of administrative agencies and had no obligation to obtain records from them to produce to Defendant. However, she was obligated to produce those that were actually in her possession or custody. The court granted Defendant's motion.	individual/administrative agency
Zewdu v. Citigroup Long Term Disability Plan, 264 F.R.D. 622 (N.D. Cal. 2010)	2010	2/12/2010	9th	N.D. Cal.	Maria-Elena James, U.S.M.J.	No	Other	Production	Plaintiff moved for sanctions for failure to produce documents allegedly under the control of defendant but in the possession of the insurance company.	In this ERISA dispute against a long term disability plan, Plaintiff claimed the plan had a conflict of interest. Plaintiff moved for sanctions after Defendant refused to produce documents in the possession of the insurance company whom Plaintiff claims wrongfully denied her benefits due to a structural conflict of interest. Defendant argued that it did not have control over the insurance company's documents and Plaintiff countered that the insurance company was functionally not a third-party. Nevertheless, the court refused to rule on the issue of control, finding a need for further briefing on the issue of Defendant's control over the requested documents and encouraged Plaintiff to subpoena the information. Plaintiff's motion for sanctions was denied.	plan administrator/insurance company
Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010)	2010	1/15/2010	2d	S.D.N.Y.	Shira A. Scheindlin, U.S.D.J.	Yes	n/a	n/a	n/a	[This is the slightly modified version of the prior Pension Committee decision. The modifications in this version did not concern the meaning of "control" under Rule 34.]	n/a
SEC v. Strauss, No. 09-civ-4150, 2009 U.S. Dist. LEXIS 101227 (S.D.N.Y. Oct. 28, 2009)	2009	10/28/2009	2d	S.D.N.Y.	Henry Pitman, U.S.M.J.	No	Other	Production	Defendant moved to compel from the government production of documents hosted in remote-access database under the possession of a third party but accessible to the government.	In an action by the SEC against an individual, the individual moved to compel production of documents in the possession of a third party under under investigation by the SEC. Deloitte & Touche (D&T) had provided the SEC with secure remote access to view a database of documents in response to an investigatory subpoena by the SEC. D&T did so with the understanding that the materials remained D&T's property and that they were being provided only for the purpose of the SEC's investigation. The court found that an agreement with a third-party granting a party access to documents, along with an actual mechanism for getting the documents, gives that party the "practical ability to obtain" the documents and so is sufficient to establish that party's control. The court explained that "access" is exactly what the phrase "the practical ability to obtain" seems to contemplate. Here the SEC also had the legal right to obtain the materials in the database due to its agreement. The court rejected the argument that in giving the Defendant access to the database it would violate the SEC's agreement with D&T, explaining that discovery obligations trump "most other commitments." Even so, the court denied the motion to compel on other grounds.	government/party under investigation by government

Stansbury v. Brother Int'l Corp. (USA), No. 06-4907, 2009 U.S. Dist. LEXIS 98805 (D.N.J. Oct. 23, 2009)	2009	10/23/2009	3d	D.N.J.	Tonianne J. Bongiovanni, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Defendant moved for reconsideration of the magistrate judge's prior Order which ordered it to obtain documents from its parent company.	Defendant moved for reconsideration of the magistrate judge's prior Order which found that Defendant had the legal right, authority or ability to obtain documents requested by Plaintiffs that were in the possession of its Japanese parent company. Following the court's original order, the parent company took the position that it would not turn over the documents. Defendant argued that it did not have the practical ability to obtain the documents; that its parent company had a history of denying its requests for documents; the documents requested of the parent were the parent's own design and engineering documents; Plaintiffs never asked Defendant's Rule 30(b)(6) witness about the company's ability to obtain documents from the parent company; and even though the parent was paying the Defendant's litigation expenses, the parent had no other role in the litigation. The court found that the Defendant could have asked for the parent's documents prior to making its motion for reconsideration, and that the response was thus readily available at the time the parties initially briefed the issue before the magistrate judge's initial R&R Ultimately, the court found most persuasive the fact that the parent company was paying the Defendant's legal costs for the matter and might cover the cost of any settlement or judgment reached in the case. Request for Reconsideration denied.	parent/subsidiary
Insignia Sys. v. Edelstein, No. 09-4619, 2009 U.S. Dist. LEXIS 98399 (D.N.J. Oct. 22, 2009)	2009	10/22/2009	3d	D.N.J.	Lois H. Goodman, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents in response to a subpoena issued to local counsel	Plaintiff moved to compel production of documents in response to subpoenas issued to local counsel for parties in a separate action that had settled. The court noted that Plaintiff did not explain why it had failed to demonstrate that it could not obtain the documents from the parties themselves. The local counsel argued that the documents were not in their possession, custody or control, as the lead counsel had possession of the documents and that they had no power to compel lead counsel to production the documents. The court found no "control" over the documents at issue, as co-counsel's only relationship was that they were retained by the same party in a litigation. There was no suggestion in the record of a basis for an agency relationship or easy and customary access to documents in the ordinary Couse of business. The court concluded that Plaintiff failed to meet its burden to show that the local counsel had control over the documents and denied its motion to compel compliance with the subpoena.	counsel/co-counsel
Thayer v. Chiczewski, No. 07-C-1290, 2009 U.S. Dist. LEXIS 84176 (N.D. Ill. Sept. 11, 2009)	2009	9/11/2009	7th	N.D. Ill.	Arlander Keys, U.S.M.J.	Yes	Other	Production	Defendant moved to compel production of emails plaintiff sent from his webmail accounts.	In a civil rights action involving the arrest of Iraq war protestors, the city Defendant moved to compel production of emails from the Plaintiff's webmail accounts concerning the events that occurred on the day of his arrest. The Plaintiff claimed he deleted most of his emails and that the responsive emails no longer exist. The city then subpoenaed the webmail provider, who objected based on the Stored Communications Act. The Plaintiff also moved to quash the subpoena, which the court granted, but the court also suggested that the parties attempt to negotiate a narrower subpoena, which was eventually propounded by the city. The city filed a motion to compel and AOL failed to appear for the hearing. Instead, AOL joined Plaintiff's response brief in which it denied having access to the requested emails. The day before the city's response was due, Plaintiff informed the court that AOL did in fact have responsive emails. The court noted that it was unclear anyone with sufficient knowledge of AOL's operations was consulted proper to Plaintiff's prior misrepresentations to the court. The court ultimately granted the city's motion to compel. [No real discussion of "control".]	account subscriber/webmail provider
Safeco Ins. Co. of Am. v. Vecsey, 259 F.R.D. 23 (D. Conn. 2009)	2009	9/3/2009	2d	D. Conn.	Janet Bond Arterton, U.S.D.J.	No	Other	Production	Defendant moved to compel production of counseling records in the possession of plaintiff's therapist.	In this tort action, Defendant moved to compel, among other things, records of the Plaintiff's marriage counseling. Plaintiff asserted that she had sought the records but was unable to receive them despite numerous requests. The court cited the practical ability standard and found that bare assertions of Plaintiff's numerous requests for records was insufficient. The court noted that Plaintiff apparently assumed she was entitled to the records by her numerous requests for them and state law provides patients with a legal right to their treatment records. Thus, the court found that Plaintiff had "control" of her counseling records and failed to otherwise establish her lack of control over these records. The court granted Defendant's motion with respect to these records.	patient/therapist
Safeco Ins. Co. of Am. v. Vecsey, No. 08-cv-833, 2009 U.S. Dist. LEXIS 65769 (D. Conn. July 30, 2009)	2009	7/30/2009	2d	D. Conn.	Janet Bond Arterton, U.S.D.J.	No	Other	Production	Defendant moved to compel production of counseling records in the possession of plaintiff's therapist.	In this tort action, Defendant moved to compel, among other things, records of the Plaintiff's marriage counseling. The court cited the practical ability standard and found that bare assertions of Plaintiff's numerous requests for records was insufficient. The court granted Defendant's motion with respect to these records. [This ruling was substituted later, but the analysis and outcome with respect to control over these records was the same. Thus, the descriptions for both decisions are identical.]	patient/therapist
De Vos v. Lee, No. 07-cv-804, 2008 U.S. Dist. LEXIS 58817 (E.D.N.Y. July 29, 2008)	2009	7/29/2009	2d	E.D.N.Y.	ROANNE L. MANN, U.S.M.J.	No	Other	Production	The parties cross-moved for summary judgment	Upon review of the exhibits submitted by the parties in support of their cross motions for summary judgment in an action to enforce a prior judgment based on an alter ego theory against individual Defendants, the court determined that further document production was needed from Defendants. The Defendants had taken the position that they could not produce documents in the possession of their accountant. The court explained that documents in the possession of a party's accountant are within that party's control for purposes of Rule 34. The court put the Defendants on notice that they were in violation of their Rule 34 discovery obligations and ordered them to produce all responsive records in the possession of their accountant and warned them that failure to produce the documents could result in severe sanctions.	client/accountant
F & A APLC v. Core Funding Group, L.P., No. 07-543-D-M2, 2009 U.S. Dist. LEXIS 63602 (M.D. La. July 23, 2009)	2009	7/23/2009	5th	M.D. La.	Christine Noland, U.S.M.J.	Yes		Production	n/a	[Court motions practical ability test but includes no discussion about "control" or the relationship between the producing party and the entity/person in possession of the requested documents.]	n/a

In re Vivendi Universal, S.A., No. 02-civ-5571, 2009 U.S. Dist. LEXIS 131833 (S.D.N.Y. July 10, 2009)	2009	7/10/2009	2d	S.D.N.Y.	Henry Pitman, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiffs moved to compel production of documents in response to a subpoena	The Plaintiffs moved to compel production of documents from a U.S. subsidiary of a parent company that actually possessed the documents in Luxembourg. The court did not address the potential conflict with foreign law prohibiting the disclosure, but instead focused solely on the issue of practical ability and found that the subsidiary did not have the practical ability to obtain the documents from its parent company. The court explained the different analysis to be applied in the context of corporation-affiliate and parent-subsidiary, applying the standard for a parent-subsidiary relationship. The court cited the following facts in support of its determination that the subsidiary did not have the practical ability to obtain the documents: (a) while the subpoenaed entity was a wholly owned subsidiary of the parent company that possessed the documents and had both had several of the same people as executive officers, there was no showing of actual control or that the directors of the parent use the subsidiary as a mere instrumentality to further its interests; (b) There was no showing that the parent and subsidiary's day-to-day operations had anything in common; (c) Although the parent had access to the subsidiary's financial statements in order to include the subsidiary's earnings in the parent's financial statements, the documents at issue here were not financial, and thus the exchange of financial documents had little relevance to the types of documents sought here;(d) To the extent the subsidiary held shares of a transaction involving the parent company in escrow for another company, the subsidiary was not acting on behalf of the parent company in that transaction. Motion to compel denied.	parent/subsidiary
Goodman v. Praxair Servs., 632 F. Supp. 2d 494 (D. Md. 2009)	2009	7/7/2009	4th	D. Md.	Paul W. Grimm, U.S.D.J.	No	Contract Rship	Preservation	Plaintiff brought a spoliation sanctions motion for failure to preserve documents held by third-party consultants.	Plaintiff argued that having hired third-party consultants, Defendant Praxair had a duty to ensure preservation of relevant documents held by the consultant. However, the court did not find spoliation as to the third-party documents, citing a lack of evidence that the third-party and Praxair had a file-sharing relationship or some other legal control over the documents.	consultant
Pupo-Leyvas v. Bezy, No. 08-cv-207, 2009 U.S. Dist. LEXIS 53286 (S.D. Ind. June 24, 2009)	2009	6/24/2009	7th	S.D. Ind.	William G. Hussmann, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents in the possession of the state from a retired state official.	In this tort claim by a former inmate against a former warden, the Plaintiff moved to compel production of documents pertaining to his claim that he was injured while an inmate. The former warden argued that he was no longer working for the prison and had been sued in his individual capacity and thus no longer had responsive documents under his control. The court analyzed the warden's argument under the "legal right" standard, finding that as a retired employee, the Defendant had no legal right to control or obtain the documents which pertain to investigations and acts by employees and agents of the prison. The court also acknowledged that some courts in the Seventh Circuit have applied the practical ability test. The court rejected the notion that because the same attorney represented the warden and the prison in a related case that the warden had the practical ability to obtain the documents through his counsel's other client. The court noted that the Plaintiff could otherwise obtain the documents via the related action against the prison or by subpoena to the prison. However, the court leaves open the possibility of granting the motion to compel if the Plaintiff exhausts these other avenues (i.e., discovery in the action against the prison and a subpoena) and is unable to obtain the documents. Motion to compel denied.	former governmental agent/government
United States v. Deloitte & Touche USA LLP, 623 F. Supp. 2d 39 (D.D.C. 2009)	2009	6/9/2009	DC	D.D.C.	Richard J. Leon, U.S.D.J.	No	Other	Production	The government moved to compel production pursuant to a subpoena for documents in possession of affiliate company.	In a civil tax refund case, the government moved to compel production of documents in response to a subpoena aimed at the opposing party's auditing firm (Deloitte), even though the documents 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. Though both were members of a Swiss membership organization, it was unclear whether the firm had the legal right, authority or ability to obtain the documents on demand from the affiliate. The court also rejected the government's argument that the firm had the practical ability to obtain documents concerning a certain project, which both the firm and its affiliate had worked on, solely by virtue of the entities' close working relationship on that project. The court explained that close cooperation does not establish ability, let alone a legal right or authority to acquire documents maintained solely by a legally distinct entity. The court also noted that the affiliate company refused to produce the documents, as requested by the firm, absent an order from a Swiss court. The government's motion to compel was denied.	company/affiliate company
Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009)	2009	5/22/2009	2d	E.D.N.Y.	Viktor Pohorelsky, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Defendant moved to compel compliance with a subpoena for production of documents	In this Anti-Terrorism and Alient Tort Claims act case for damages arising from injuries sustained by deaths caused by suicide bombings in Israel, the Defendant sought to obtain documents about a charitable entity in Israel. The subpoena demanded from a subsidiary in New York documents in the possession of its parent corporation in Israel. The court found that the subsidiary did not have control over the documents. The court applied the standard "access" and "ability" analysis for parent-subsidiary relationships and noted that the subsidiary submitted evidence that it did not have access to its parent's documents in there regular course of business, the two entities had separate computer systems, they did not share confidential information concerning customers or transactions, and the subsidiary did not expect that its parent would provide it with documents that would help the subsidiary defend itself in a litigation. The court rejected the Defendant's argument that the parent's ability to obtain documents from the subsidiary establishes that the inverse was also true, i.e., that the subsidiary could obtain documents from the parent. Further, one example provided by Defendant of the parent providing documents to the subsidiary pursuant to a separately negotiated agreement only confirmed that that as a general matter the subsidiary did not have access to the parent's documents. Motion to compel denied.	parent/subsidiary
Colon v. Potter, No. 08-civ-75, 2009 U.S. Dist. LEXIS 43558 (D. Conn. May 21, 2009)	2009	5/21/2009	2d	D. Conn.	Donna F. Martinez, U.S.M.J.	Yes		Production	n/a	[Court mentions practical ability test and orders production without analysis of the facts.]	n/a
EBWS, LLC v. Britly Corp., 2009 Vt. Super. LEXIS 44 (Vt. Super. Feb. 23, 2009)	2009	2/23/2009	Vt.	Super. Ct.	Mary M. Teachout, Vt. Sup. Ct. J.	Yes	Other	Production	Plaintiff sough a contempt order for defendants failure to produce tax records and bank statements related to post-judgment discovery.	Plaintiff propounded post-judgment discovery requests seeking copies of Defendant's tax returns and bank statements for a 10 year period. Defendant produced three years' worth of documents, but contended that it did not have possession, custody or control over the remaining documents requested. The court disagreed, holding that the Defendant could simply request the documents from its bank and government agencies and pay the required fee. "It is well established that bank clients and taxpayers have the practical ability to induce their bank and the government to produce copies of past bank statements and tax returns" (citations omitted).	corporation/government and bank

Chesapeake Operating, Inc. v. Stratco Operating Co., No. 07-354-B-M2, 2009 U.S. Dist. LEXIS 13337 (M.D. La. Feb. 20, 2009)	2009	2/20/2009	5th	M.D. La.	Christine Noland, U.S.M.J.	No	Other	Production	Plaintiffs moved to compel production of documents in response to discovery requests.	In this contract dispute, Plaintiffs moved to compel production of documents. The court found that the documents were within Defendant's control because they could be demanded from a third party, such as its counsel. Notably, the court does not explain how or why the party's counsel or a third party would be in possession of the documents at issue, as the court did not discuss any evidence demonstrating that a third party (such as the Defendant's counsel) had actual possession of the documents. The court ordered the Defendant to produce the documents and to the extent they did not exist, the Defendant had to state as much in its responses.	party/counsel	
Wiwa v. Royal Dutch Petroleum Co., Nos. 96-civ-8386, 01-civ-1909, 02-civ-7618, 2009 U.S. Dist. LEXIS 61898 (S.D.N.Y. Feb. 17, 2009)	2009	2/17/2009	2d	S.D.N.Y.	Kimba M. Wood, U.S.D.J.	No	Other	Production	Defendants moved compel production of documents	In this class action, Defendants moved compel production of documents related to the activities of a student organization for whom certain members of the Plaintiff class, as well as a former Plaintiff, served as officers. The court applied the practical ability test and explained that control extends to the records of a corporation for which a party serves as an officer and that a party cannot evade her obligation to produce documents from that corporation by resigning. One current and one former Plaintiff (the former Plaintiff withdrew himself as a Plaintiff and class representative), founded and ran the third-party organization. The former Plaintiff testified at his deposition that he had paid witnesses and Defendants sought documents regarding the organization's involvement in paying witnesses and generally regarding the lawsuit. The court found that as officers of the organization the current and former Plaintiffs at issue had control over the organization's records. The court further found that the obligation persisted even after they ceased their leadership positions within the organization and despite the fact that one had been terminated as a Plaintiff. Moreover, the court found that although the termination of this person's status as a Plaintiff extinguished his obligation to respond, the other Plaintiff's obligation persisted. The Plaintiffs only argument in opposition was that the organization was a third party, that Plaintiffs ability to obtain the documents was limited and that Plaintiffs had made a reasonable effort to obtain the documents. The court granted the Defendant's motion to compel.	organization/officers	
SEC v. Stanard, No. 06-civ-7736, 2007 U.S. Dist. LEXIS 46432 (S.D.N.Y. June 26, 2007)	2009	1/27/2009	2d	S.D.N.Y.	Gerald Lynch, U.S.D.J.	No	Other	Production	Motion to compel SEC to produce documents related to the Department of Justice's case investigation.	Court denied motion, holding that while It is true that courts often find effective control when agencies are involved in a joint investigation, the USAO had actively refused to provide the FBI notes to the SEC or even to allow the SEC to copy them. Further, the SEC was an independent agency from the USAO. Thus, the court found that the investigations, while they may have overlapped, were not conducted jointly, and that the SEC had neither possession, custody, nor control of the FBI's notes.	government agencies	
Garner v. State Farm Mut. Auto. Ins. Co., No. C-08-1365, 2008 U.S. Dist. LEXIS 120266 (N.D. Cal. Dec. 19, 2008)	2008	12/19/2008	9th	N.D. Cal.	Edward M. Chen, U.S.M.J.	No	Other	Production	Motion to compel production of documents	Plaintiff moved to compel Defendant to produce documents in the possession of third parties [whose relationship was not explained in the decision]. The court applied the practical ability test but found that the Plaintiff failed to present any evidence that pursuant to a contract or other agreement with Defendant, any of the third parties had provided the Defendant with the right to obtain all documents from their files.	n/a	
Fairfield Fin. Mortg. Group v. Luca, No. CV06-5962, 2008 U.S. Dist. LEXIS 94159 (E.D.N.Y. Nov. 19, 2008)	2008	11/19/2008	2d	E.D.N.Y.	William D. Wall, U.S.M.J.	Yes		Production	n/a	[Court noted that Defendants failed to provide any information about the status of the documents other than to say that they were not in their possession.]	n/a	*No analysis*
Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008)	2008	8/22/2008	6th	E.D. Mich.	Gerald E. Rosen, U.S.D.J.	No	Contract Rship	Production	Defendants, a city and an employee, filed motions to preclude discovery of communications exchanged among certain officials and employees of the city via city-issued text messaging devices, arguing that the Stored Communications Act precluded the production in civil litigation of electronic communications stored by a non-party service provider.	Plaintiffs sought Defendants' relevant text messages from third-party Internet Service Provider "Sky-Tel". In a rather detailed piece of dicta, the court analyzes whether Plaintiffs' could have pursued the same discovery through a discovery request to the Defendants. In determining that Rule 34 would have been a suitable vehicle for the production of employee text messages, the Court noted that the 6th Cir. has held that documents are deemed within the "control" of a party if it has the legal right to obtain the documents on demand. Thus, a party has an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control. The court concluded that the City of Detroit had "control" over the text messages pursuant to a contractual relationship with SkyTel.	principal/agent	
In re Lozano, 392 B.R. 48 (Bankr. S.D.N.Y. 2008)	2008	8/13/2008	2d	S.D.N.Y.	Martin Glenn, U.S. Bankr. J.	No	Other	Production	Plaintiff debtors moved to compel current mortgagees under the loans to produce documents in the possession, custody or control of the loan originator.	Bankruptcy debtors claimed equitable interests in real properties and alleged that a broker for the originator of a mortgage loan secured by the properties duped the debtors into transferring title to the properties to a relative of the broker. The court surveyed the S.D.N.Y.'s many rulings related to "control" and held that the debtors had failed to show that Saxon and Wells Fargo had sufficient control over the documents to compel their production. The court was very reluctant to use the "practical ability" test, noting that "caution must be exercised when the notion of control is extended in this manner, however, because sometimes the party's ability to obtain compliance from nonparties may prove more modest than anticipated." In this case, the court ruled that the "practical ability" test would require that the assignee of the original mortgagee or the current loan servicer have a custom or regular practice of informally requesting and obtaining documents. Otherwise, there would have to be some other evidence of control. The judge denied the motion to compel further documents.	mortgagee/assignee	

Honda Lease Trust v. Middlesex Mut. Assur. Co., No. 05-cv-1426, 2008 U.S. Dist. LEXIS 60766 (D. Conn. Aug. 7, 2008)	2008	8/7/2008	2d	D. Conn.	Donna F. Martinez, U.S.M.J.	No	Other	Production	The dispute centers on Honda's insurance coverage in an underlying litigation and whether Honda diligently defended against the underlying claim or, as alleged by plaintiff, failed to adequately defend, thereby, increasing the defendant insurer's liability.	Defendant Insurer requested documents related to Plaintiff Honda's so-called "Fronting Policy". Honda responded that the documents were in the possession, custody and control of its "related entities." The court ruled the Defendant failed to prove that the documents were within Honda's possession, custody or control, or that Honda had the legal right of control or practical ability to obtain them upon demand.	non-party affiliated entity
Rathe Salvage, Inc. v. R. Brown & Sons, Inc., 2008 VT 99 (Vt. Aug. 1, 2008)	2008	8/1/2008	Vt.	Sup. Ct.	Denise Johnson, Vt. Sup. Ct. J.	No	Other	Production	Plaintiff corporation brought an action for fraud against defendants, a corporation and two individuals. The Superior Court entered a default judgment as to liability and final judgment as to damages against defendants as a discovery sanction. Both parties appealed.	Plaintiff owned a series of scrap yards and had an agreement with the Defendant to sell scrapped cars and parts to Canadian steel mills with a per-ton fee going to Plaintiff. Plaintiff terminated the relationship and sued alleging that Defendant under-reported the true weight of the scrap metal. In discovery, Plaintiff sought copies of original weigh slips from the Canadian steel mills. Defendant failed to provide copies and the court subsequently ordered the Defendant to produce the weigh slips subject to a confidentiality agreement. Notwithstanding, the Canadian steel mill refused to release the records and challenged a parallel Letter Rogatory proceeding in Canadian Courts. the Vermont Superior Court held that the weigh slips were in the Defendants' control and sanctioned them for their failure to produce them. The Superior Court reversed and remanding holding that Plaintiff presented no evidence that Defendants had the legal right to the documents or the practical ability to induce the company to produce the requested documents, citing, Gerling Int'l Ins. Co. v. C.I.R., 839 F.2d 131, 140 (3rd Cir. 1998)	employer/independent contractor
Hamstein Cumberland Music Group v. Estate of Williams, No. 06-cv-63, 2008 U.S. Dist. LEXIS 49589 (N.D. Okla. June 30, 2008)	2008	6/30/2008	10th	N.D. Okla.	Paul J. Cleary, U.S.M.J.	No	Other	Production	Plaintiff record company moved for sanctions against artist's estate, alleging gross misconduct and patently false discovery responses.	Plaintiff record company sued its former artist's estate to recover money owed from an outstanding arbitration award. In discovery, Plaintiffs sought documents related to the creation of the artist's "Wealth Preservation Trust." Defendant, the grantor of the trust, opposed the discovery on the grounds that she did not have the right to obtain documents from the Trustee of the Wealth Preservation Trust which was a separate entity called the Trust Company of Oklahoma ("TCO"). The court noted that the Defendant established the trust and appointed TCO as trustee which, giving the trust any reasonable reading, would give the Defendant the power and legal right to obtain documents in the possession, custody or control of TCO. Thus, the court extended the Rule 34 analysis to the Defendant and held that she may be liable for sanctions under Rule 37, including the cost incurred by Plaintiffs in issuing subpoenas to TCO.	grantor/trustee
Copterline Oy v. Sikorsky Aircraft Corp., No. 08-3185, 2008 U.S. Dist. LEXIS 47471 (E.D. La. June 19, 2008)	2008	6/29/2008	5th	E.D. La.	Daniel E. Knowles III, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Court granted non-party's motion to quash a subpoena holding that there was not a sufficient relationship to evidence "control" over the non-party subsidiary's documents.	Non-party Canadian entity Cadorath Aerospace, Inc. ("CAI") was issued a subpoena; however, the Plaintiff served the subpoena on counsel for CAI's US subsidiary Cadorath Aerospace Lafayette, LLC ("CAL"). Counsel was not a registered agent for CAI and the court held that the two companies did not share sufficient commonality to provide sufficient indicia of "control." In granting the motion to quash, the court ruled that it was doubtful that CAL had either the authority or the practical ability to obtain documents from CAI.	parent/subsidiary
Lumpkin v. Clark, No. 07-cv-02015, 2008 U.S. Dist. LEXIS 123093 (D. Colo. June 13, 2008)	2008	6/13/2008	10th	D. Colo.	Kathleen M. Tafoya, U.S.M.J.	Yes	Other	Production	Motion to compel production of documents under seal.	In a civil court action against the City of Denver and a city employee, the Plaintiff moved to compel the production of documents pertaining to the police department's investigation of Plaintiff's allegations. The city argued that it could not disclose the documents without being in volition of state criminal provisions associated with documents placed under seal. The court cited to the practical ability standard, but ultimately decided the issue on comity grounds, based on whether it should defer to the state court sealing order which was generated after deliberation and or a legitimate and recognized purpose. However, the court explained that it could order the Defendant to petition the state for access to the documents and ultimately did so.	state/state
Cohen v. Horowitz, No. 07-civ-5834, 2008 U.S. Dist. LEXIS 44488 (S.D.N.Y. June 4, 2008)	2008	6/4/2008	2d	S.D.N.Y.	Judge P. Kevin Castel, U.S.D.J.	No	Other	Production	Plaintiff moved to compel document production.	Plaintiff sought documents relating to non-party ASI and its corporate parent, Bituswiss S.A. ("Bituswiss"). ASI was a corporation wholly owned by Bituswiss. Both corporations were organized under the laws of Panama. Bituswiss had two shareholders, one of whom was Defendant Horowitz. The court found that Horowitz had the practical ability to obtain the records.	related entities
M'Baye v. N.J. Sports Prod., Nos. 06-civ-3439, 05-civ-9581, 2008 U.S. Dist. LEXIS 33422 (S.D.N.Y. Apr. 21, 2008)	2008	4/21/2008	2d	S.D.N.Y.	Deny Chin, U.S.D.J.	No	Contract Rship	Production	Defendants moved for Rule 37 sanctions for plaintiffs alleged failure to comply with a prior court order. Court granted sanctions for	Plaintiff was a boxer suing his promoter to obtain alleged money owed. In discovery, Defendants sought documents and contracts related to Plaintiff's claims and damages. Plaintiff produced what he had, but noted that other documents were in the possession of his former promoter who lived in Switzerland and with whom Plaintiff had no meaningful contact. The court previously granted Defendants' motion to compel the documents, but noted in this opinion that Plaintiff had done all that he could reasonably be expected to do, including hiring Swiss counsel and that the documents at issue were not in Plaintiff's possession, custody or control. While the court does not opine about the "practical ability" test (it's included in a citation to Shcherbakovsky v. Da Copo Al Fine, 490 F.3d 130, 138 (2d Cir. 1998)), it does concluded that Plaintiff had done all that he could to obtain the documents for production. The court, nonetheless, issued sanctions for violation of its order and precluded Plaintiff from offering any documents into evidence at trial that were not produced in discovery.	boxer/former promoter
Moreno v. AutoZone, Inc., No. C-05-4432, 2008 U.S. Dist. LEXIS 90699 (N.D. Cal. Apr. 1, 2008)	2008	4/1/2008	9th	N.D. Cal.	Edward M. Chen, U.S.M.J.	No	Other	Production	Discover dispute in which defendant asks that plaintiff be compelled to produce documents related to nonparty witnesses who submitted declarations in support of plaintiffs' motion for class certification.	The court rejected Plaintiff's contention that she could not be compelled to produce documents that were in the possession and custody of her former attorney, holding that Plaintiff should have the legal right to obtain the documents from counsel on demand. The court cited Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517, 519 (D. Colo. 2003) for the proposition that control includes not only the legal right, but has also been construed more broadly to include the practical ability to obtain the documents sought upon demand.	client/former attorney

Sedona Corp. v. Open Solutions, Inc., 249 F.R.D. 19 (D. Conn. 2008)	2008	3/28/2008	2d	D. Conn.	Thomas P. Smith, U.S.M.J.	No	Contract Rship	Production	A contract dispute arose between plaintiff software developer and defendant software provider, over the terms of a licensing agreement. The developer moved to compel discovery.	Defendant unsuccessfully argued that it could not obtain requested documents from its subcontractor. The court held that the contractual relationship places control of any documents created by the subcontractor with the Defendant. The court ordered the Defendant to produce any responsive documents in the possession of the subcontractor or provide Plaintiff's counsel with a detailed affidavit detailing the Defendant's attempts to obtain the documents, when these attempts were made and to whom.	principal/agent	
Huggins v. Fed. Express Corp., 250 F.R.D. 404 (E.D. Mo. 2008)	2008	2/15/2008	8th	E.D. Missouri	Stephen N. Limbaugh, Senior U.S.D.J.	No	Emp-Ee	Production	The passenger moved to compel the company to respond to discovery responses and the company, in turn, moved for a protective order.	Plaintiff passenger brought a vicarious liability claim against FedEx, the alleged employer of the offending truck driver. Court overruled Defendant FedEx's objections to Plaintiff's discovery requests, holding that FedEx could not escape its discovery obligations by claiming that its delivery drivers were not employees under the law. The court held that documents related to the drivers must be produced, as the term "control" under Rule 34 was not limited to legal ownership or physical possession, but also included a party's "practical ability" to obtain the documents.	employee/employer	*No analysis*
In re Hallmark Capital Corp., 534 F. Supp. 2d 981 (D. Minn. 2008)	2008	1/29/2008	8th	D. Minn.	Susan R. Nelson, U.S.M.J.	No	Other	Production	Applicant, the claimant in an Israeli arbitration against a company, filed a motion to compel the company's chairman of the board to produce documents. After producing some documents, the chairman contended he lacked possession, custody or control over the remaining documents at issue because they were in the sole possession and control of a partner in Israel.	Hallmark Capital Corporation ("HCC") was a claimant in an Israeli arbitration against Ultrashape, Inc., related to a dispute over investments made by Israeli Seed Partners ("ISP") and HCC's alleged commissions on the deal. The District Court permitted HCC to propound discovery to Ultrashape chairman Berman under 28 USC 1782. Berman produced certain documents, but claimed he was not in possession, custody or control of documents related to Ultrashape and that HCC would need to get the documents directly from ISP. The court disagreed and ordered the requested discovery, finding that Berman was a partner in ISP and that Berman failed to establish by any reliable evidence that his position as a "venture partner" would not permit him the same access to ISP documents that any "partner" generally would possess. The opinion noted that courts also require production if the party has the practical ability to obtain documents from a non-party "irrespective of his legal entitlement to the documents."	related entities/officer	
Bridgeport Music, Inc. v. UMG Recordings, Inc., No. 05-civ-6430, 2007 U.S. Dist. LEXIS 91957 (S.D.N.Y. Dec. 17, 2007)	2007	12/17/2007	2d	S.D.N.Y.	James C. Francis IV, U.S.M.J.	No	Other	Production	Defendants issued subpoena to non-party deponent, which Plaintiffs moved to quash.	Plaintiffs alleged that the Defendants infringed their copyrights in certain musical compositions by offering them for digital download. The court held that third-party deponent Levy was required to produce documents within his possession, custody and control. However, Levy was not required to produce documents that were in the possession of his former law firm, as there has been no showing that those documents were under his control. Opinion cites Ssangyong Corp. v. Vida Shoes International, Inc., 2004 U.S. Dist. LEXIS 9101, *4 (S.D.N.Y. May 20, 2004) ("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").	client/attorney	
Thomas v. Hickman, No. 06-cv-00215, 2007 U.S. Dist. LEXIS 95796 (E.D. Cal. Dec. 6, 2007)	2007	12/6/2007	9th	E.D. Cal.	Sandra M. Snyder, U.S.M.J.	No	Emp-Ee	Production	Motion to compel defendant doctors to produce documents related to patient treatment and billing.	Malpractice Defendants objected to document requests and contended that they were not in possession, custody or control of the documents and that since they were sued in their individual legal capacity, they had no legal right to obtain the documents from their employer hospital. The court agreed, holding that there was no indication that the documents requested, which involved contracts, investigations, complaints of medical care, or the policies for reviewing billings from contract physicians, would be within the possession, custody or control of the Defendant doctors in the course of their employment relationship. The sole Defendant that would possibly have qualified as having sufficient job responsibilities as to be in "control" over certain documents was no longer employed with the hospital. Accordingly, the court concluded that the Defendants could not be compelled to produce the documents at issue.	employee/employer	
Tomlinson v. El Paso Corp. , 245 F.R.D. 474 (D. Col. 2007)	2007	8/31/2007	10th	D. Col.	Michael E. Hegarty, U.S.M.J.	no	Contract Rship	Production	Plaintiff pension plan participants filed a motion to compel production of electronic pension plan data from defendant employer.	Plaintiffs sought electronic data regarding defendant's pension system that was in the possession of third-party record keeper. Judge Hegarty concluded that Rule 34(a) requires production "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." Judge Hegarty ordered defendant to produce the data because ERISA and Department of Labor regulations interpreting ERISA requires an employer to maintain and retain pension and welfare plan records and that the records are "accessible . . . in such a manner as they may be readily inspected or examined."	third-party record keeper	
Ice Corp. v. Hamilton Sundstrand Corp., 245 F.R.D. 513 (D. Kan. 2007)	2007	8/22/2007	8th	D. Kan.	K. Gary Sebelius, U.S.M.J.	No	Contract Rship	Production	Plaintiff corporation sued Defendant corporations, alleging breach of contract, breach of implied contract, unjust enrichment, negligent misrepresentation and misappropriation of trade secrets. Before the federal district court was Plaintiff's renewed motion to compel Defendants to execute business records releases directed to third parties.	Plaintiff sought manufacturing and design documents from Defendants and their contractor. The court held that Defendants had sufficient control over the documents to compel production, based on the terms of the master service agreement between Defendants and the contractors. The court further found that Defendants had the practical ability to obtain the documents.	parties to master service agreement	

M&T Mortg. Corp. v. Miller, No. CV-2002-5410, 2007 U.S. Dist. LEXIS 60610 (E.D.N.Y. Aug. 17, 2007)	2007	8/17/2007	2d	E.D.N.Y.	Marilyn D. Go, U.S.M.J.	No	Other	Preservation	Plaintiff moved for sanctions on the basis that Defendant failed to preserve discoverable documents.	Plaintiff home buyer sued Defendant seller, alleging fraud in the sale of the home, including Defendant's failure to obtain proper permits and inspection reports. Plaintiff moved for production of various housing permits and inspection paperwork. Defendant asserted that it did not possess or have control over certain documents obtained by its sub-contractors. The court held that Plaintiff did not provide sufficient evidence of "control", but denied the motion without prejudice, noting that the 2d Cir. defines control broadly to include inquiry into the practical ability of a party to obtain requested documents.	builder/government agencies	
Hardin v. Belmont Textile Mach. Co., No. 05-cv-492, 2007 U.S. Dist. LEXIS 57937 (W.D.N.C. Aug. 7, 2007)	2007	8/7/2007	4th	W.D.N.C.	Graham C. Mullen, U.S.D.J.	No	Emp-Ee	Production	Plaintiff objected to R. 45 subpoena (allowed in these circumstances) served by Defendant.	Plaintiff sued former employer, claiming fraud, wrongful termination, breach employment contract and wage-and-hour claims. Defendant served a subpoena on Plaintiff seeking direct access to his computers. (Under the jurisdiction, a Rule 45 subpoena may be served on a party in certain circumstances.) Plaintiff contended that he did not have possession, custody or control of the computers at issue because they belonged to his employer DentaCad, but Plaintiff was the sole owner of DentaCad. In rejecting Plaintiff's objections, the court ruled that under Rule 34, the element of "control" is construed broadly to include not only control by legal authority, legal right or the practical ability to obtain the documents. The court found that Plaintiff exercised control over the computers in question and that the computers were located in his home and used for work benefitting corporations he owned and operated.	officer/corporation	
Engel v. Town of Roseland, No. 06-cv-430, 2007 U.S. Dist. LEXIS 49373 (N.D. Ind. July 6, 2007)	2007	7/6/2007	7th	N.D. Ind.	Christopher A. Nuechterlein, U.S.M.J.	No	Other	Production	Plaintiff filed a second motion to compel seeking discovery sanctions after individual defendants failed to produce documents.	Plaintiffs filed a suit against Defendants, an Indiana town and two town officers. Plaintiffs requested documents, including tax returns and other financial documents, from the two Defendant town officials, who objected to the request on the grounds that they did not possess the documents. The court ruled that the Defendants had control over some of the materials requested, including tax returns and bank statements that the Defendants could most likely obtain with very little effort. The court granted Plaintiff's motion to compel and sanctioned the Defendants for their meritless discovery objections.	government official/government agencies and bank	*No analysis*
Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130 (2d Cir. 2007)	2007	6/25/2007	2d	App. Ct.	Ralph K. Winter, Circuit Judge	No	Other	Production	Plaintiff appealed a sanctions ruling arising out of his failure to produce documents in the possession of a third party.	In contract dispute, the district court had sanctioned Plaintiff for failing to produce certain documents in the possession of a third party company. On appeal, the court found that Defendant was entitled to production of the documents if Plaintiff has access to them and can produce them. The Plaintiff had denied both legal and practical ability to obtain the documents. The court remanded with guidance that if the district court finds that, contrary to Plaintiff's claim, the company with possession of the documents "is his alter ego or his investment in it is sufficient to give him undisputed control of the board, such a finding could support an order to produce." On the record present before the court, namely that Plaintiff was the Board chair and a minority shareholder of the third party company, a finding of "control" under Rule 34 could not be sustained. Thus, the court reversed and remanded	board chair and minority shareholder/company	
Orthoarm, Inc. v. Forestadent USA, Inc., No. 06-cv-730, 2007 U.S. Dist. LEXIS 44429 (E.D. Mo. June 19, 2007)	2007	6/19/2007	8th	E.D. Missouri	Charles A. Shaw, U.S.D.J	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel production of documents in the possession of Defendant's foreign parent.	The court held that the non-party parent documents were within the control of the Defendant subsidiary. The court found that both companies had an "overlapping" management style and that Defendant had produced other documents from its parent corporation without incident, which evidenced Defendant's "practical ability."	parent/subsidiary	
Colo. v. Warner Chilcott Holdings Co. III, Ltd., No. 05-2182, 2007 U.S. Dist. LEXIS 102652 (D.D.C. May 8, 2007)	2007	5/8/2007	DC	D.D.C.	John Facciola, U.S.M.J.	No	Other	Production	Defendant moved to compel discovery responses and production.	The court held that the State Attorney Generals were not in possession of state Medicaid information and that Defendant had not met its burden of showing that the AG had control over the documents of other state agencies. The court ruled that the Plaintiff would have to subpoena the documents from the state's Medicaid agency.	state AG/sister agencies	
United States v. Stein, 488 F. Supp. 2d 350 (S.D.N.Y. 2007)	2007	5/1/2007	2d	S.D.N.Y.	Lewis A. Caplan, U.S.D.J.	No	Other	Production	Defendants moved to compel the government to produce certain materials in the files of the accounting firm and the accounting firm moved to quash a subpoena by Defendants seeking the same information.	Defendants, several of whom were former partners of an accounting firm, were indicted for their involvement in abusive tax shelters. The accounting firm and the government had entered into a deferred prosecution agreement ("DPA"). The court held that the documents in the possession of the accounting firm were in the government's control pursuant to the DPA, as the government had the legal right and the practical ability to obtain the documents under the agreement.	government/contractual party	
Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc., No. 05-2164, 2007 U.S. Dist. LEXIS 22090 (D. Kan. Mar. 26, 2007)	2007	3/26/2007	10th	D. Kan.	Donald W. Bostwick, U.S.M.J.	Yes	Other	Production	Plaintiff moved to compel production of documents from entities owned by Defendants.	Court denied the motion, holding that Plaintiff failed to meet its burden of proof that the Defendants had any measure of "control" over the no-party entities.	related entities	
New York v. AMTRAK, 233 F.R.D. 259 (N.D.N.Y. 2006)	2007	2/23/2007	2d	N.D.N.Y.	Randolph F. Treece, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents from a non-party government agency.	The court held that Plaintiff Amtrak did not meet its burden to demonstrate that the State had control over the documents of certain governmental agencies that were legally separate and distinct from one another.	government agencies	
Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., No. 05-cv-64, 2007 U.S. Dist. LEXIS 12873 (D. Utah Feb. 22, 2007)	2007	2/22/2007	10th	D. Utah	David Nuffer, U.S.M.J.	No	Contract Rship	Production	Plaintiff filed a motion to compel disclosure of certain microcode.	While acknowledging the S.D.N.Y.'s "practical ability" standard, the court noted that the 10th Cir. has rejected it and instead focus more on the party's legal rights and the relationship between the party and the person or entity having actual possession of the documents. The court ruled that it did not have sufficient information about Defendant Dell's relationship with the microcode suppliers who may have the information requested by Plaintiffs. Nonetheless, the court ordered Dell to take reasonable, good-faith actions to facilitate the delivery of the microcode and to make a formal written request to its suppliers for the microcode, and to provide a copy of the request, and any response, to Plaintiffs.	principal/agent	*No analysis*
Allen v. Woodford, No. CV-F-05-1104, 2007 U.S. Dist. LEXIS 11026 (E.D. Cal. Jan. 30, 2007)	2007	1/30/2007	9th	E.D. Cal.	Lawrence J. O'Neill, U.S.M.J.	No	Emp-Ee	Production	Plaintiff moved to compel individual Defendants to supplement responses and produce documents related to medical treatment ordered by their prison employer.	Plaintiff inmate alleged a violation of her civil rights and sued the prison and warden. In response to discovery, prison officials, who were sued in both their individual and official capacity, took the position that they were not in possession, custody or control of documents related to contracts, investigations and complaints about medical care. The court disagreed and ordered the production, noting the Defendants had already produced some documents and thus evidenced their ability to obtain such documents. The court ruled further that the individual Defendants failed to specify why they were not authorized to release prison documents in litigation.	employee/employer	*No analysis*

Gordon Partners, et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.), 244 F.R.D. 179 (S.D.N.Y. 2007)	2007	1/30/2007	2d	S.D.N.Y.	Andrew J. Peck, U.S.M.J.	No	Parent/Sub/Affiliate	Preservation	In a securities fraud class action, certain Plaintiffs filed a motion for discovery sanctions, claiming that Defendant corporation and a non-party corporation allowed numerous documents and electronically stored information, including e-mails of 44 key players, to be destroyed.	The court granted Plaintiffs' motion, imposed an adverse inference instruction as a spoliation sanction, and awarded legal fees. The court rejected Defendant NTL Europe's contention that it did not have "control" over documents in the possession of a related non-party referred to as "New NTL". Judge Peck held that NTL Europe had both the legal right, "and certainly the practical ability," to obtain relevant documents from New NTL, and had the necessary "control" to able them to preserve and produce them in litigation.	related entities	
Yong Ki Hong v. KBS Am., Inc., No. 05-cv-1177, 2006 U.S. Dist. LEXIS 89700 (E.D.N.Y. Dec. 12, 2006)	2006	12/12/2006	2d	E.D.N.Y.	Kiyo A. Matsumoto, U.S.M.J.	Yes	Other	Production	Plaintiffs move to compel discovery and for sanctions against certain Defendants and to enforce a subpoena served on the New York State Attorney General.	Court reminded Defendants of their obligation to produce documents in their possession, custody and control, including those documents they had a legal right or the practical ability to obtain, citing *In re Flag Telecom Holdings, Ltd.* , 236 F.R.D. 177, 180 (S.D.N.Y. 2006).	n/a	
Pitney Bowes, Inc. v. Kern Int'l., Inc., 239 F.R.D. 62 (D. Conn. 2006)	2006	11/20/2006	2d	D. Conn.	Joan Glazer Margolis, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiff corporation commenced litigation against Defendant subsidiary corporation alleging patent infringement. Before the court was Plaintiff's motion to compel production of certain technical drawings and for sanctions.	Plaintiff requested design and manufacturing drawings from Defendant and was told that the documents were in the possession of Defendant's foreign parent. Court held that Plaintiff did not satisfy its burden of establishing that the documents were within the "control" of Defendant as Plaintiff offered no evidence that the documents are necessary for the Defendant's business or that the requested documents were routinely provided to it in the course of business. The court used the "practical ability" test as part of its Rule 34 analysis, stating that "the word 'control" under Rule 34 is 'broadly construed' such that a 'party controls documents that it has the right, authority or ability to obtain upon demand." The motion to compel was denied.	parent/subsidiary	*No analysis*
Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.), 358 B.R. 45 (Bankr. S.D.N.Y. 2006)	2006	11/13/2006	2d	S.D.N.Y.	Stuart M. Bernstein, U.S. Bankr. J.	No	Emp-Ee	Production	Plaintiff moved for sanctions given Defendant's refusal to produce documents potentially stored on third-party current employer's systems.	Plaintiff representative of unsecured creditors brought an adversary proceeding against former officer of a bankruptcy debtor, alleging that the debtor's forgiveness of a loan to the officer upon the officer's termination was a fraudulent transfer. Plaintiff sought applications, resumes and any other documents that Defendant prepared when he interviewed for his current position at GemPlus. Defendant maintained that he did not have an obligation to search documents at GemPlus. The court disagreed and ordered that he produce the GemPlus documents, holding that as a high-ranking officer and director of GemPlus, he failed to present evidence that he lacked the legal right or "at least" the practical ability to produce documents in his own personnel file.	officer/corporation	*No analysis*
Forestier v. City of Vancouver, No. C05-5042, 2006 U.S. Dist. LEXIS 72624 (W.D. Wash. Oct. 5, 2006)	2006	10/5/2006	9th	W.D. Wash.	Ronald B. Leighton, U.S.D.C.	No	Other	Production	Defendants filed motions to compel production of certain documents.	Plaintiffs, a minor pedestrian and her mother in a personal-injury action, argued that they did not have sufficient control to obtain the minor's own medical records related to her two-year hospital stay in France. The court ruled that the records were squarely within Plaintiff's control.	patient/hospital	*No analysis*
Inline Connection Corp. v. AOL Time Warner, Inc., C.A. Nos. 02-272, 02-477, 2006 U.S. Dist. LEXIS 72724 (D. Del. Oct. 5, 2006)	2006	10/5/2006	3d	D. Del.	Mary P. Thynge, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents under the "practical ability" standard.	Plaintiff patent holder in a patent infringement action moved to compel production of documents in the possession and control of third-party telephone companies. The court held that the patent holder failed to establish that Defendants had legal control of the documents, explaining: "It is not sufficient to show that Defendants had the 'practical ability' to obtain the documents; the patent holder instead had to show that Defendants had the legal right to obtain the documents on demand." The Defendant and the telephone companies were independent corporate entities and had no relationship that would give one control over the other.	corporation/independent third-party utility companies	
Steele Software Sys. v. Dataquick Info. Sys., 237 F.R.D. 561 (D. Md. 2006)	2006	10/2/2006	4th	D. Md.	Paul W. Grimm, U.S.M.J.	No	Other	Production	After receiving a judgment in its favor, Defendant judgment creditor moved to compel documents in the possession of Plaintiff judgment debtor's affiliates.	The court ruled that the documents sought by Defendant were under the "practical control" of Plaintiff and its owner, Scott Steele, particularly given that Defendant Steele was the president, owner and sole shareholder of all but one of the relevant entities, the lone holdout being run by his mother.	officer/affiliated corporation	
Union Pac. R.R. Co. v. Mike's Train House, Inc., No. 05-cv-575, 2006 U.S. Dist. LEXIS 56349 (D. Neb. Aug. 10, 2006)	2006	8/10/2006	8th	D. Nebraska	F.A. Gossett, U.S.M.J.	Yes		Production	Defendant filed a protective order arguing that it should not have to respond to Plaintiffs' request for production.	The court denied the motion for a protective order, finding the Defendant's requests for production were relevant.	n/a	
Hitachi, Ltd. v. Amtran Tech. Co, No. C-05-2301, 2006 U.S. Dist. LEXIS 52361 (N.D. Cal. July 18, 2006)	2006	7/18/2006	9th	N.D. Cal.	James Larson, U.S.M.J.	No	Contract Rship	Production	Defendant moved to compel documents from Plaintiffs' licensing agent.	The court found that Hitachi had sufficient authority through its agency agreement to demand that its agent produce relevant documents.	licensor/licensee	
Micron Tech., Inc. v. Tessera, Inc., No. C06-80096, 2006 U.S. Dist. LEXIS 42072 (N.D. Cal. June 14, 2006)	2006	6/14/2006	9th	N.D. Cal.	Howard R. Lloyd. U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel documents subpoenaed from third-party Silicon USA, Inc., including documents in the possession of Silicon USA's Taiwan manufacturer.	The court held that while Plaintiff patent holder established that both companies were closely related and that such information was likely sufficient under the "practical ability" test, the alleged nexus fell well short of the Ninth Circuit's "legal right" test.	related entities	

In re Ski Train Fire of November 11, 2000 Kaprun Aus., MDL Dkt. No. 1428, 2006 U.S. Dist. LEXIS 29987 (S.D.N.Y. May 16, 2006)	2006	5/16/2006	2d	S.D.N.Y.	Theodore H. Katz, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Plaintiffs moved for sanctions against Defendants, German parent corporation and its New York subsidiary, and for an order compelling the parent corporation to produce documentary discovery and deposition witnesses that were in the possession of/within the employ of another Austrian subsidiary.	The litigation concerned a fire on a ski train that occurred in Austria. The court found that although Defendant did not have a legal right to documents it did have "practical access" to its subsidiary's documents. As a practical matter, Siemens AG could secure documents from Siemens Austria because Siemens AG was responsible for the appointment of the Siemen's Austria Supervisory Board, which has the power to monitor and control the management board of Siemens Austria, which was responsible for the day-to-day operations of the company. Viewed in totality, the court concluded that the only reasonably conclusion to draw is that if Siemen's AG needed the assistance or cooperation of Siemens Austria in a matter of concern to the company, it would receive such assistance.	parent/subsidiary	
In re Flag Telecom Holdings, Ltd. Sec. Litig., 236 F.R.D. 177 (S.D.N.Y. 2006)	2006	4/19/2006	2d	S.D.N.Y.	William C. Conner, U.S.D.J.	No	Emp-Ee	Production	Motion to compel production of documents	In a securities fraud litigation, Plaintiffs sought, among other things, production of corporate records from a named individual Defendant, who had previously resigned his position as a corporate executive of a corporation. At the time the requests were served, he was still employed by the corporation. He argued that the documents were in the possession of his former employer and, he argued protected by E.U. law. Subsequent to the parties' briefing, the individual Defendant submitted a declaration stating that he was no longer employed by the corporation, though he left open the possibility he might consult for them. The court deferred to Second Circuit precedent requiring former executives to produce documents from his/her corporation. The court also rejected Defendants' argument that Plaintiffs seek production via the procedures set forth in the Hague Convention, because Defendants did not address comity in their papers. The court ordered Defendants to produce the documents requested.	Executive/Corporation	*No analysis*
Schaaf v. Smithkline Beecham Corp., 233 F.R.D. 451 (E.D.N.C. 2005)	2005	12/22/2005	4th	E.D.N.C.	James C. Dever III, U.S.D.J	No	Emp-Ee	Production	Cross-motions to compel production of documents from two third parties in response to subpoena and the third parties' motions to quash the subpoenas.	In employment discrimination matter, employee sought production of documents, pursuant to two separate subpoenas, under Rule 45. In the first subpoena, the employee sought records from an executive counseling and coaching company retained by the employer. The court found that the employee could obtain the desired information (*i.e.*, who received the counseling services) directly from the employer, and that the burden of the third-party subpoena was thus not required. The employee's second subpoena was directed to a human resources employee who worked for the employer. The court found that the subpoena was overly broad and that the proper party to serve discovery on was the employer itself. Subpoenas were quashed.	Consulting Firm/Client Company and Employee/Employer	
Large v. Mobile Tool Int'l, Inc., No. 02-cv-177, 2005 U.S. Dist. LEXIS 31987 (N.D. Ind. Dec. 8, 2005)	2005	12/8/2005	7th	N.D. Ind.	Roger B. Cosbey, U.S.M.J.	No	Contract Rship	Production	Motion to compel production of documents	In this products liability action, the Defendant sold to another corporation, via an Asset Purchase Agreement, the documents responsive to the Plaintiff's discovery request. The court found that the Defendant had the practical ability to obtain copies of the relevant documents from the purchaser and further noted that it would be patently unfair to permit Defendant access to the documents but require the Plaintiff to subpoena the purchaser as a non-party for the same. Motion to compel granted.	Company/Asset Purchasing Company	
Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc., 233 F.R.D. 143 (D. Del. 2005)	2005	12/2/2005	3d	D. Del.	Joseph J. Farnan, Jr., U.S.D.J.	No	Parent/Sub/Affiliate	Production	Motion to quash subpoena and combined objections to the subpoena	The court quashed a subpoena requesting a subsidiary corporation to obtain responsive information, to which it did not regularly have access, from its foreign parent corporation. The district court was not persuaded that the Third Circuit would adopt the Second Circuit's expansive definition of control. Moreover, the court noted that, the parties relied on Rule 34 cases but the request at issue was a Rule 45 subpoena. The court finally noted that the party seeking production could apply the processes of the Hague Convention to subpoena the Korean-based parent corporation, requesting the information directly from it.	Parent/Subsidiary	
Export-Import Bank of the United States v. Asia Pulp & Paper Co., 233 F.R.D. 338 (S.D.N.Y. 2005)	2005	11/17/2005	2d	S.D.N.Y.	James C. Francis IV, U.S.M.J.	No	Emp-Ee	Production	Shortly after discovery closed, Defendant moved to reopen discovery claiming that it had learned of relevant evidence in the last days of discovery and that it had been unable to schedule two depositions.	Plaintiff, a federal agency that promoted American exports by backing certain commercial loans, sued Defendant paper manufacturer to recover money due under several promissory notes. Defendant sought personal files of Plaintiff's former employee. Plaintiff contended that the information was not within their control. Analyzing the practical ability of corporations to obtain work-related documents from former employees, Judge Francis insisted that the Plaintiff corporation at the very least, ask its former employees to cooperate before asserting that they have no control over documents in the former employee's possession. Judge Francis found that there had been no evidence in the record that Plaintiffs had made an attempt to obtain the documents or that the former employee refused. The court further noted that the fact that the former employee had already been deposed may be an indication that the Plaintiff has the practical ability to obtain the relevant information.	employer/ex-employee	
Dorocon, Inc. v. Burke, No. 02-2556, 2005 U.S. Dist. LEXIS 38839 (D.D.C. Nov. 1, 2005)	2005	11/1/2005	DC	D.D.C.	Colleen Kollar-Kotelly, U.S.D.J.	Yes	Contract Rship	Production	Motion to compel	Court denied motion to compel the Plaintiff to produce credit card statements held by credit company due to the Defendant's lack of follow-up throughout the litigation on this issue.	Credit card company/credit card holder	
Kamatani v. BenQ Corp., No. 03-cv-437, 2005 U.S. Dist. LEXIS 42762 (E.D. Tex. Oct. 6, 2005)	2005	10/6/2005	5th	E.D. Tex.	T. John Ward, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Show Cause Hearing wherein plaintiff alleged defendant's failure to request information from third party entities.	Defendant failed to obtain records from a joint-venture entity of which it owned 49%. Defendant had "practical ability" to access technical documents from a third party pursuant to a contractual agreement with same and because there was testimony that the third party had previously provided the requested technical documents 90% of the time. Court also found that defendant failed to diligently request documents from another third party with whom it had a contractual relationship - even without "practical ability" to obtain the documents, Defendant still could have diligently sought the same via subpoena. Court issued sanctions against Defendant for various misrepresentations and other discovery misconduct.	parties to a contract	
Chicago Ins. Co. v. Wiggins, No. 02-73801, 2005 U.S. Dist. LEXIS 27159 (E.D. Mich. Aug. 12, 2005)	2005	8/12/2005	6th	E.D. Mich.	Patrick J. Duggan, U.S.D.J.	No	Contract Rship	Production	Plaintiff's objections to the sanctions order.	Plaintiff was ordered to produce relevant training materials, even if the materials were held by its counsel or training companies, because it had the practical ability to demand materials that its agents used to train its employees.	Counsel/client and contractual relationship between companies	
Wright v. Wright (In re Wright), Bankr. No. 04-94519, Adversary Proceeding No. 04-9156, 2005 Bankr. LEXIS 1881 (Bankr. N.D. Ga. Aug. 9, 2005)	2005	8/9/2005	11th	Bankr., N.D. Ga.	Homer Drake Jr., U.S. Bankr. J.	No	Other	Production	Plaintiff's motion for further sanctions.	A former spouse sought from her former husband numerous records related to his personal bankruptcy. As to one of the ex-wife's requests, the only one that related to the topic of "practical ability" and "control" under Rule 34, the court required the former husband to produce federal tax records that he could easily obtain from the IRS.	Taxpayer/IRS	*No analysis*
Kamatani v. BenQ Corp., No. 03-cv-437, 2005 U.S. Dist. LEXIS 42763 (E.D. Tex. Aug. 5, 2005)	2005	8/5/2005	5th	E.D. Tex.	T. John Ward, U.S.D.J.	No	Parent/Sub/Affiliate	Production	n/a	For a more robust discussion of this case, please see entry #125 above. In its August 5, 2005 order, the court discussed the same control issues involved in the Oct. 5, 2005 order.	n/a	*No analysis*

Van Cleave v. Travelers Property Cas. Co., 2005 ML 2035 (18th Dist. Mont. 2005)	2005	6/14/2005	Mont.	18th Dist.	Mike Salvagni, Mont. D. J.	No	Other	Production	Defendant filed a motion for extension of time within which to exchange expert witness disclosures, noting that it needed the plaintiff's X-ray and MRI films to select an expert. The plaintiff filed a motion in response and a motion in limine.	The court found that the Plaintiff had "control" of all her medical records, including her X-ray and MRI films and that those documents should have been produced. Therefore, the court granted Traveler's request for an extension of the witness disclosure deadline. As to the standard for "control" under Montana law, "Legal ownership of the requested documents or things is not determinative, nor is actual possession necessary if the party has control of the items."	Patient/doctor	
White v. Cinemark USA, Inc., No. 04-cv-0397, 2005 U.S. Dist. LEXIS 41814 (E.D. Cal. Mar. 28, 2005)	2005	3/28/2005	9th	E.D. Cal.	Craig M. Kellison, U.S.M.J.	Yes		Production	Defendant moved to compel the plaintiff's production of information and documents	In this single Plaintiff ADA litigation, there was only a cursory cite to Rule 34. No discussion on practical ability or control related to obtaining information from another entity was had.	n/a	
White v. Cinemark USA, Inc., No. 04-cv-0397, 2005 U.S. Dist. LEXIS 41809 (E.D. Cal. Mar. 28, 2005)	2005	3/28/2005	9th	E.D. Cal.	Craig M. Kellison, U.S.M.J.	Yes		Production	Defendant moved to compel the plaintiff's production of information and documents	This case has only a cursory cite to Rule 34. No discussion on practical ability or control related to obtaining information from another entity was had.	n/a	
Am. Rock Salt Co. v. Norfolk S. Corp., 228 F.R.D. 426 (W.D.N.Y. 2005)	2005	3/18/2005	2d	W.D.N.Y.	Leslie G. Foschio, U.S.M.J.	No	Parent/Sub/Affiliate	Production	Defendant moved for reconsideration of an order granting plaintiff's motion to compel answers to certain discovery requests.	In this breach-of-contract litigation, Plaintiff sought production of various documents from Defendant that were in the possession of third parties, one of which of which was a subsidiary of Defendant (50% ownership). The court cited the broad standard for control under Second Circuit precedent and looked to Defendant's SEC filings, the subsidiary's website, and other resources to determine that Defendant did in fact exercise sufficient control over the subsidiary for Rule 34 purposes and declined to reconsider its prior ruling ordering production.	Parent/Subsidiary	
*E*Trade Secs. LLC v. Deutsche Bank AG,* 230 F.R.D. 582 (D. Minn. 2005)	2005	2/17/2005	8th	D. Minn.	Arthur J. Boylan, U.S.M.J.	Yes	Other	Preservation	Plaintiff filed a motion for sanctions for discovery abuse by the securities corporations.	In a case involving fraudulent securities lending, the Plaintiff moved for sanctions, arguing that Defendant NSI had a duty retain any relevant information at the Nomura Canada (NC) site. The Plaintiff contended that Defendant had a duty to protect relevant information on Oct. 22, 2001, including information at NC, and that NC had its own duty to independently preserve on Jan. 3, 2002. NSI did not contest the Plaintiff's control argument under Rule 34. NC disputed the date on which its duty to preserve was triggered. The court did not squarely address the contentions that NSI had a duty to preserve NC's information in Oct. 2001, and instead held that NC had an independent duty to preserve as of January 3, 2002. The magistrate judge also recommended that the district court judge issue an adverse inference instruction as a sanction for NSI and NC's failure to preserve evidence.	Sister corporations	*No analysis*
*E*Trade Secs. LLC v. Deutsche Bank AG,* No. 02-3711, 2005 U.S. Dist. LEXIS 3038 (D. Minn. Jan. 31, 2005)	2005	1/31/2005	8th	D. Minn.	Arthur J. Boylan, U.S.M.J.	No	Contract Rship	Production	Motion to compel individual defendant to produce certain documents.	E*Trade sought cell-phone records and bank-account records from an individual Defendant. The court held that under Rule 34, because he could exercise his legal right to receive the records, Defendant was in "possession" of them for discovery purposes and ordered that he obtain and produce the same. Motion to compel granted. In a footnote, the court also noted that the Minnesota District Court has taken a more liberal approach applying the "practical ability" test as well.	Individual/Cell Phone Co.; Individual/Banking Co.	
Dunlap v. Graves, 2004 ML 4068 (18th Dist. Mont. 2004)	2004	8/23/2004	9th	D. Mont.	Mike Salvagni, Mont. D. J.	Yes	Other	Production	Defendant moved for a Protective Order	Defendant sought a protective order against a request for documents concerning entities that were not parties to this action. The court held that if Defendant possessed the requested documents, she was obligated produce them regardless of who "owns" them. If Defendant did not physically possess the documents, she still had to produce documents which she was legally entitled to obtain upon demand. Defendant's motion was granted and denied in part.	Joint venturers and/or partnerships	
Ssangyong Corp. v. Vida Shoes Int'l, Inc., No. 03-civ-5014, 2004 U.S. Dist. LEXIS 9101 (S.D.N.Y. May 20, 2004)	2004	5/20/2004	2d	S.D.N.Y.	Douglas F. Eaton, U.S.M.J.	No	Other	Production	Motion to compel production	In an action involving contract claims, the New York branch of a Hong Kong bank resisted subpoena of documents maintained at the Hong Kong headquarters, arguing (a) that it did not have access/possession/control over the documents and (b) that Hong Kong's common-law banking secrecy prohibited it from disclosing the documents. The court concluded that the documents were under the NY branch's control because it could obtain them. In a comity analysis, the court observed that Hong Kong's interest in bank secrecy was not very strong, that a confidentiality order would reduce any hardship for the bank, that the documents were very important to the litigation, and that a strong prima facie showing of bad faith had been made. The court ordered production of the documents.	U.S. branch/Foreign Parent Corporation	
Estate of J. Edgar Monroe v. Bottle Rock Power Corp., No. 03-2682, 2004 U.S. Dist. LEXIS 5737 (E.D. La. Apr. 2, 2004)	2004	4/2/2004	5th	E.D. La.	Daniel E. Knowles III, U.S.M.J.	No	Other	Production	Plaintiff filed motions seeking to compel defendants to produce documents	In an action for recovery of unpaid interest due on a note, Plaintiffs moved for production of relevant documents. The individual Defendants argued that they did not have control over their wives' assets and business interests such that they could obtain the documents requested by the Plaintiff in discovery. The court held that the husbands exercised sufficient sway and control over their wives' assets and business interests so as to require production. Additionally, as for one relationship - a family partnership - the court ruled that as a shareholder the husband could request the sought information from the family partnership (i.e., corporation). Motions to compel granted.	Spouse/spouse; and shareholder/family partnership	
In re Omeprazole Patent Litig., MDL Docket No. 1291, 2004 U.S. Dist. LEXIS 1188 (S.D.N.Y. Jan. 29, 2004)	2004	1/29/2004	2d	S.D.N.Y.	Barbara S. Jones, U.S.D.J.	Yes	Other	Production	Appeal of a special master's order, which required appellant to request production of documents from third parties.	In a patent litigation matter, the court reviewed the Special Master's order requiring Appellant to request and search for responsive documents from third parties with which it had a joint venture relationship and with which it shared ownership of data related to the lawsuit. The court agreed with the Special Master's application of the "practical ability" test and denied the appeal.	Joint venturers	
Handi-Craft Co. v. Action Trading, S.A., No. 02-cv-1731, 2003 U.S. Dist. LEXIS 28263 (E.D. Mo. Nov. 25, 2003)	2003	11/25/2003	8th	E.D. Mo.	Lewis M. Blanton, U.S.M.J.	no	Other	Production	Plaintiff filed motion to compel production of documents that defendant claimed were possessed by separate and distinct companies	Plaintiff sought discovery of documents related to defendant's counterclaim for lost profits. Court ordered defendant to produce documents that were in the possession of "highly interrelated" companies. The court held that "the appropriate test is not of legal entitlement, but of control or practical ability to produce the documents."	Related Entities	

Benbow v. Aspen Tech., Inc., No. 02-2881, 2003 U.S. Dist. LEXIS 17936 (E.D. La. Oct. 8, 2003)	2003	10/8/2003	5th	E.D. La.	Daniel E. Knowles III, U.S.M.J.	No	Other	Production	Defendant filed motion to compel Plaintiffs to produce documents	Defendant argued that Plaintiffs must search their transaction attorney's files and produce all non-privileged documents response to its discovery requests. Defendant also argued that Plaintiffs had control over requested corporate documents. Plaintiffs countered that they produced or identified all documents that were in the possession of their counsel and in their possession related to the corporate documents, and that the Defendant had access to corporate documents related to a Purchase Agreement. The court denied the motion to compel, but ordered that Plaintiffs supplement their response to confirm they have produced all responsive documents in their possession, including all documents within their own attorney's possession.	Minority Investors/Corporation; Client/Attorney	
Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517 (D. Colo. 2003)	2003	6/17/2003	10th	D. Colo.	Craig B. Shaffer, U.S.M.J.	No	Parent/Sub/Affiliate	Preservation	Plaintiff moved to compel production of documents responsive to a subpoena served on a non-party.	Plaintiff company alleged, among other things, fraud, breach of contract, and promissory estoppel against Defendants. Plaintiff subpoenaed documents from third-party Rothschild & Sons (Denver), seeking relevant documents from other Rothschild entities in Germany and the United Kingdom. While the court recognized that the element of control can be satisfied by a legal right to the documents or the practical ability to obtain documents coupled with the ability to enforce compliance, it held that the Plaintiff failed to demonstrate either.	Related Entities	
United States ex rel. Stewart v. La. Clinic, No. 99-1767, 2003 U.S. Dist. LEXIS 9401 (E.D. La. June 4, 2003)	2003	6/4/2003	5th	E.D. La.	Daniel E. Knowles III, U.S.M.J.	Yes	Other	Production	The parties filed cross-motions to compel discovery.	In a qui tam action under the False Claims Act, the Defendant doctors served a general objection that certain patient records, etc. were not in their "possession." The court held that considering the relationship between the doctor Defendants and the Louisiana Clinic, the doctors could obtain documents responsive to the Plaintiffs' discovery requests. Defendants were compelled to produce records in their control.	Doctor/Clinic	
Hancock v. Shook, 100 S.W.3d 786 (Mo. 2003)	2003	3/19/2003	Mo.	Sup. Ct.	William R. Price, Mo.S.C.J.	No	Other	Production	Plaintiff's appeal of an award.	In this tort action, Plaintiff argued that the trial court erred when it refused to allow him to present evidence located by a witness after his cross examination. The Missouri Supreme Court held that the trial court did not err in refusing to allow the farmer to present this evidence because the farmer had failed to produce the evidence during discovery. The farmer had practical control over his designated expert witness, and therefore the practical ability to obtain the lab reports. Therefore, the trial court properly refused to allow the expert to supplement his previous testimony in light of the additional documents.	Party/Expert Witness	*No analysis*
SPX Corp. v. County of Steele, Nos. C1-00-350, CX-01-342, 2002 Minn. Tax LEXIS 21 (Minn. Tax Ct. Aug. 19, 2002)	2002	8/19/2002	Minn.	Minn. Tax Ct.	Kathleen H. Sanberg, U.S. Bankr. J.	Yes	Other	Production	motion to compel responses to discovery.	Petitioner, tax payer, argued that it did not have an obligation to produce records maintained by its real estate agent, because the real estate agent was no longer Petitioner's agent. The court disagreed and held that Petitioner must request that the real estate agent provide information that is responsive to the discovery requests because it was the Petitioner's agent at the time the Petitioner sold the land. The Petitioner was also ordered to produce all non-privileged documents related to the sale that were retained by its attorney.	Property Owner/Attorney; Property Owner/Real Estate Agent	
Triple Five of Minn. v. Simon, 212 F.R.D. 523 (D. Minn. 2002)	2002	3/19/2002	8th	D. Minn.	Jonathan Lebedoff, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents	In a breach-of-contract dispute, Plaintiff sought production of a series of documents in the possession of Defendants' attorneys. The court held that Defendants were required to produce valuation documents held by their tax attorneys. The court also ordered Defendants to provide notes and documents authored or received by their in-house counsel for in camera review by the court, so that the court could assess whether they were covered by the attorney-client privilege.	Client/Attorney	*No analysis*
Am. Maplan Corp. v. Heilmayr, 203 F.R.D. 499 (D. Kan. 2001)	2001	9/19/2001	10th	D. Kan.	John W. Lungstrum, U.S.D.J.	No	Other	Production	Defendant objected to a magistrate judge's order granting the plaintiff's motion to compel discovery.	In this non-compete/non-solicit action, the Defendant objected to the magistrate judge's order to the extent that it required him to produce corporate books, records and other documents of the new corporation, for which the Defendant was president and a minority shareholder, but which was not a party to the lawsuit. The court reversed the magistrate judge's order, explaining that while the Defendant may have the practical ability to obtain the documents sought, he did not have the legal authority to produce them: the new company retained the right to confidentiality over the documents sought. Moreover, the court held that the appropriate vehicle for Plaintiff was a non-party subpoena under Rule 45.	President & Minority Shareholder/Corporation	*No analysis*
Am. Maplan Corp. v. Heilmayr, No. 00-2512, 2001 U.S. Dist. LEXIS 26597 (D. Kan. July 27, 2001)	2001	7/27/2001	10th	D. Kan.	David J. Waxse, U.S.M.J.	No	Other	Production	Plaintiff's Motion to Compel	Magistrate Judge's order on issue of production of corporate records reversed. See entry #147 above.		
Dietrich v. Bauer, 198 F.R.D. 397 (S.D.N.Y. 2001)	2001	1/18/2001	2d	S.D.N.Y.	Robert W. Sweet, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Movant (non party) sought reconsideration pursuant to Fed. R. Civ. Pro 60(b)(1) and a local rule of a prior order compelling it to produce documents.	Movant non-party Allied Irish Bank (AIB) sought reconsideration of an order in a previous proceeding compelling it to produce documents held by AIB (UK), a subsidiary of AIB. *See* entry #150 below. AIB contended that the court erred in defining control as possessing "legal right, authority or practical ability" to obtain the documents sought, and urged that the proper standard was "legal right" alone. The court denied motion for reconsideration.	Parent/subsidiary	
Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726 (E.D.N.C. 2000)	2000	8/16/2000	2d	S.D.N.Y.	Malcom J. Howard, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved to compel defendant to completely respond to discovery and for an award of sanctions.	Defendant had hired an independent claims adjuster, Colonial Catastrophe Claims Corp. to adjust the claim for the property in dispute. Plaintiff sought production of documents used by Defendant or Colonial. Defendant objected that the documents sought to be produced were not in the possession or the control of the Defendant or were public records and thus readily available to the Plaintiff. The court rejected the practical ability test, explaining that adopting the "ability to obtain" test would usurp FRCP principles, allowing parties to obtain documents from "non-parties who were in no way controlled by either party." The court denied the motion to compel, noting that the appropriate vehicle to obtain these documents was by R. 45 subpoena.	Corporation/ Independent Contractor	
Dietrich v. Bauer, No. 95-civ-7051, 2000 U.S. Dist. LEXIS 11729 (S.D.N.Y. Aug. 16, 2000)	2000	7/25/2000	N.Y.	S.D.N.Y.	Robert W. Sweet, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Plaintiff moved for an order to compel non-party foreign bank to produce documents pursuant to the subpoena	The Plaintiff moved for an order compelling non-party Allied Irish Bank (AIB) to produce documents held by its wholly owned subsidiary AIB UK. The court held that AIB, as the parent company, exercised sufficient control over AIB UK to require AIB to produce the requested documents, under Rule 45. Court finds that Hague Convention procedures are not required because issues of comity were argued by AIB.	Parent/subsidiary and sister corporations.	

SEC v. Credit Bancorp, Ltd., 194 F.R.D. 469 (S.D.N.Y. 2000)	2000	7/25/2000	2d	S.D.N.Y.	Robert W. Sweet, U.S.D.J.	No	Parent/Sub/Affiliate	Production	Intervenor moved to compel a non party to produce documents responsive to subpoenas.	An intervenor to the action subpoenaed a third party for documents pertaining to corporate shares delivered to an account for Defendant Credit Bancorp. The third party responded that it did not have an account for Defendant Credit Bancorp. The intervenor challenged this representation, contending that the third party's Credit Suisse account contained securities for the same corporation. Credit Suisse would only confirm that it had an account with pooled assets, but refused to confirm whether Defendant Credit Bancorp's assets were included in the pooled account, citing Swiss bank privacy laws. The court explained that "control" could be established if the third party, in the ordinary course of business, had access to the information in the possession of its sister corporation. The court found that the third party did not have such access. Even though the third party was required to by regulations to maintain many of the types of records requested by the intervenor, it was unclear whether it was obligated to maintain or secure access to records specific to Defendant. Thus, the court found that the third party did not have control of the requested documents and the motion to compel was denied.	Parent/subsidiary and sister corporations	*No analysis*
Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633 (D. Minn. 2000)	2000	5/24/2000	8th	D. Minn.	Raymond Erickson, C.M.J.	No	Other	Production	Plaintiff's motion to compel and for sanctions.	In this products liability action, Plaintiff sought documents from Defendant that would establish whether Defendant was a manufacturer of halogen lamps. To the extent Defendant had "care, custody, or control" over responsive documents, the court directed Defendant to produce them. Court's direction encompassed documents that Defendant might not physically possess, but which it was capable of obtaining upon demand from its consultant or distributors. The motion was granted in part.	Client/Consultant; Company./Distributors	
7-UP Bottling Co. v. Archer Daniels Midland Co. (In re Citric Acid Litig.), 191 F.3d 1090 (9th Cir. 1999)	1999	9/1/1999	9th	App. Ct.	Diarmuid F. O'Scannlain, 9th.C.J.	No	Contract Rship	Production	Appeal of a summary judgment ruling in favor the defendant on the issue of whether the district court improperly denied plaintiff's motion to compel a third party to produce documents in the possession of a co-member of an international organization	In this class action alleging a price-fixing conspiracy among manufacturers of citric acid, the Court of Appeals upheld a lower court's denial of the Plaintiff's motion to compel a third party accounting/auditing entity to produce documents in the possession of a Swiss co-member of an international organization of accounting firms. The court found that the third party did not have legal control over the Swiss company's documents. The court applied the legal control analysis and rejected the practical ability test under FRCP 45, explaining that "[o]rdering a party to produce documents that it does not have the legal right to obtain with oftentimes be futile, precisely because the party has no certain way of getting those documents."	Co-members of an international organization permitting use of a brand name	
Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302 (M.D.N.C. 1998)	1998	7/31/1998	4th	M.D.N.C.	Russell A. Eliason, U.S.M.J.	No	Other	Production	Plaintiff moved to compel production of documents in the possession of defendant's sister corporation	Plaintiff sought production of documents in the possession of Defendant's sister company. Defendant argued that it had no right, authority or practical ability to obtain the documents. The court considered (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 corporation in the litigation. The court ordered production of the documents from the sister corporation finding that both had the same parent, the parent corporation exerted control over both corporations, officers were exchanged between the parent and sister corporations; and documents were exchanged during the ordinary course of business. "	Sister corporations	
Asset Value Fund Ltd. Pshp. v. Care Group, No. 97-civ-1487, 1997 U.S. Dist. LEXIS 17968 (S.D.N.Y. Nov. 12, 1997)	1997	11/12/1997	2d	S.D.N.Y.	James C. Francis IV, U.S.M.J.	Yes	Other	Production	Defendant moved to quash subpoena of documents from its counsel	In a breach of contract/breach of fiduciary duty case, Defendant moved to quash a subpoena for production of documents by defense counsel. The court quashed the subpoena because "the Defendant stated in its papers that it has already produced or logged as privileged all documents from both the Defendant's and counsel's files.	Party/Counsel	
United States v. Skeddle, 176 F.R.D. 258 (N.D. Ohio 1997)	1997	7/28/1997	6th	W.D. Ohio	James G. Carr, U.S.D.J.	No	Other	Production	Criminal Defendants moved to compel production of documents produced to the grand jury by a company of which defendants were formerly officers.	In this criminal matter, Defendants filed motions for discovery of documents produced to the grand jury by a company of which Defendants were formerly officers. Defendants' motion for an order compelling production of materials subpoenaed by the grand jury from the company but not submitted by it to the grand jury was denied; but the government was ordered to produce any materials obtained from the company but not presented to the grand jury and in its possession to the extent such materials were subject to disclosure pursuant to criminal rules of procedure. The government was also obligated to request that the company retain the documents in their present state pending final disposition of the proceedings, including appeals, if any. The court noted the similarity between the criminal procedure rule and Fed. R. Civ. P. 34(a), and cited civil court cases involving “control” under Rule 34. The court found that while the government may not have “legal right” to retrieve documents it returned to the company, it was reasonable to assume the government had the “ability to obtain them on demand.”	Government/Company that previously complied with a grand jury subpoena	
United States v. Marsten Apts., No. 95-cv-75178, 1997 U.S. Dist. LEXIS 14388 (E.D. Mich. June 16, 1997)	1997	6/16/1997	7th	E.D. Mich.	Paul J. Komives, U.S.M.J.	No	Other	Production	Motion to Compel Production	In this fair housing discrimination action, the government moved to compel production of documents that were previously ordered to be produced. Court previously ordered Defendant to produce (1) payroll records of all former employees of Defendants for the past seven years; (2) the names, last known addresses, and social security numbers of all former employees of Defendants at any apartment complex; and (3) the social security numbers and last known addresses of former African-American tenants at apartment complexes owned or managed by Defendants. Defendants were ordered to produce outstanding documents within their control or otherwise certify that they were unable to locate required documents. .	No discussion of context - note two corporations and four individuals are named defendants.	

Bank of New York v. Meridien Biao Bank Tanz., 171 F.R.D. 135 (S.D.N.Y. 1997)	1997	3/21/1997	2d	S.D.N.Y.	James C. Francis IV, U.S.M.J.	No	Contract Rship	Production	Plaintiffs moved to compel defendant to produce documents possessed by its assignor	Plaintiff moved to compel Defendant to produce documents in the possession of its assignor. (After a reorganization, the original Defendant's litigation rights were assigned to a new entity.) The court found that during reorganization assignee knew it would receive the assignment, as reflected by these facts: the assignee's Counsel appeared on behalf of the assignor and explained at the time that it was the original Defendant's assignee; the assignee paid substantial sums to the assignor's balance sheet, in exchange for which it received the assignor's claims for recovery against Plaintiff. The court also found that even though the assignment occurred almost 1+ years after the filing of the complaint, the assignee had been previously aware that it would be a party to the present action and "undoubtedly" knew most of the documents needed to defend and prosecute claims were in the assignor's files. The court noted that although the assignee planned to take the place of the assignor, the assignment agreement contained no explicit assurance that the assignor would have the ability to obtain all necessary docs to satisfy FRCP 34 obligations. Even so, the court found that the assignment should not permit abandonment of responsibility for producing the assignor's documents after the assignor had already exercised discovery rights for almost 1 year without hindrance. The assignor received the full benefit of litigation by selling its interest via assignment and while documents may be in the assignor's possession, it would be anomalous for the assignor to receive discovery advantages pre-Assignment while leaving Plaintiff no avenue to pursue information it needed to litigate. The court found that the assignor knew it had far-reaching discovery obligations, which extended to files of entities it eventually replaced, but nevertheless entered case via an assignment that provided it no means to obtain from the assignor the documents necessary to meet FRCP obligations. The court also noted the assignee's ability to obtains docs from the assignor when requested, and that the assignor appeared to be fully cooperating with the assignee's requests for other relevant documents. Plaintiff's motion to compel was granted.	Assignee/Assignor
In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996)	1996	11/27/1996	2d	S.D.N.Y.	Robert W. Sweet, U.S.D.J.	No	Emp-Ee	Production	Plaintiffs moved to compel Defendants to produce deposition transcripts within defendants' control as well as documents in the possession of the federal government	Plaintiffs moved to compel Defendants to produce deposition transcripts from Civil Investigation Demand depositions as well as evidentiary materials referenced therein. Defendants argued that the materials were not within their "possession, custody, or control." Court followed the practical ability test and found that the deposition transcripts already in Defendants' possession must be produced. In addition, with respect to Defendants' employees' deposition transcripts not in Defendants' possession, the court noted that those employees were entitled by law to copies of their CID deposition transcripts and that to the extent Defendants exercised control over current & former employees, it must produce transcripts of their depositions. The court reasoned that a current or former employee may be under Defendants' control for FRCP purposes where employee was: 1) briefed by a company representative or counsel prior to CID deposition or debriefed after deposition; 2) represented by counsel recommended, retained, or paid for by a company rep or counsel; or 3) informed by rep of Defendant or defense counsel of the possibility of ordering a copy of their CID transcript. The court ordered each Defendant to identify current or former employees who were deposed and to produce to Plaintiffs, at Plaintiffs' expense, transcripts of depositions of those current and former employees under Defendants' control (as defined by court). Plaintiffs also sought production of a settlement memorandum in the possession of the Department of Justice. Plaintiffs argued Defendants had legal right to obtain the documents (and all CID evidence collected by government) pursuant to DOJ regulations set forth in the Antitrust Division Manual (i.e., if civil action commenced based on info obtained by CID, Defendants in that action may invoke their full discovery rights under FRCP and obtain CID info relevant to their defense). The court found that the manual language afforded Defendants in government antitrust actions an opportunity to defend against such actions, but that to interpret the language to allow Plaintiffs to obtain discovery of CID materials for use against Defendants in a private action distorted the regulations and imposed injustice on Defendants. Court denied the motion to compel documents in the possession of the Department of Justice.	Former and current employee/employer; investigated entity/government
Cabot v. United States, 35 Fed. Cl. 80 (Fed. Cl. 1996)	1996	2/5/1996	Fed.	Fed. Cl.	Thomas J. Lydon, Senior Judge	No	Other	Production	The government moved to compel production of documents from plaintiff.	Plaintiffs-taxpayers filed suit against the Defendant government seeking a tax refund. The government moved to compel production of documents from one Plaintiff, including those pertaining to a bank loan personally guaranteed by the Plaintiff. Plaintiffs argued that one set of documents were not in their control, as the relevant files were under the charge of a California Superior Court appointed Receiver following the dissolution of a Plaintiff's former counsel's law firm. The Receiver explained that the files were in storage but inaccessible due to lack of funds. The court observed that the state court order required the receiver to secure the files in a manner that the Plaintiff could have access, and to permit the Plaintiff to obtain files. Accordingly, the court found that Plaintiff had a legal right to the documents sought and should have produced them when first requested. Plaintiff had "control". The second set of documents sought pertained to a line of credit personally guaranteed by one of the Plaintiffs. These had been produced at Defendant's deposition of an individual who served as an attorney and officer of Rolair, a company with which a Plaintiff was affiliated. Argument was raised that defense counsel lost the documents as follows: Defense counsel had marked the documents for copying and turning over with other documents. Counsel gave marked documents to deponent, which were then given to an assistant at Plaintiff's counsel's office for copying. The Plaintiff argued that the documents were returned to defense counsel before counsel left and that defense counsel lost them in transit. The defense counsel argued that the Plaintiff's counsel lost them or failed to copy them at the deposition and that as a result Plaintiff should now try to obtain a copy of the loan document. Defendant's motion to compel production of documents was granted because they were relevant.	Client of Company under Receivorship/Receivor; Guarantee/guarantor

Golden Trade, S.r.L. v. Lee Apparel Co., 143 F.R.D. 514 (S.D.N.Y. 1992)	1992	8/17/1992	2nd	S.D.N.Y.	Michael A. Dolinger, U.S.M.J.	no		Other	production	Defendants moved to compel productions of files held by foreign patent agents of plaintiff's licensee	Plaintiff Golden Trade granted a foreign corporation exclusive licensing rights under a patent. The foreign corporation, in turn, gave an exclusive sub-license for the United States to the Plaintiff Greater Texas Finishing Corporation. The sub-license agreement states that if Greater Texas files a lawsuit against patent infringers, then the foreign corporation was required to undertake "its best efforts" to give Greater Texas "information necessary" to proceed with the infringement suit. Greater Texas then filed suit. The court ordered Golden Trade and Greater Texas to produce communications between the foreign patent licensee and patent agents it had retained to prosecute patent applications in foreign countries, as well as the files retained by those agents. The court held that Rule 34 requires production if the party "has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents." The court concluded that plaintiffs had sufficient control over the documents because of the terms of the sub-license agreement and because the foreign corporation had a financial interest in the outcome of the litigation, "further ensuring its cooperation" with the document request. Plaintiffs were directed to request the foreign corporation to obtain the relevant files form its patent agents and produce them to defendants.	patent licensee
Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984)	1984	7/17/1984	11th	11th Cir.	John Cooper Godbold, Frank Minis Johnson, and Thomas Alonzo Clark (opinion by Johnson)	yes		Other	Production	Plaintiff filed motion for sanctions against defendant for failure to produce documents supporting plaintiff's counterclaim	Plaintiff, at his deposition, had volunteered to obtain copies of certain repair invoices for defendant. Defendant served request for production seeking repair invoices that "include not only documents in the possession of the Defendant, but also the ones which the Defendant can easily obtain as testified to in his deposition." The 11th Circuit held that the district court had abused its discretion in dismissing the counterclaim as a sanction for not producing the receipts and invoices. It did not "appear from this record" that plaintiff had control over the repair invoices because his deposition testimony did not support the conclusion that he had the "legal right to obtain the documents on demand." The court continued to state, however, that "the primary dispositive issue" in assessing the propriety of Rule 37 sanctions is whether plaintiff "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."	repair contractor/service relationship
In re Folding Carton Antitrust Litig., 76 F.R.D. 420 (N.D. Ill. 1977)	1977	9/21/1977	7th	N.D.I.L.	Edwin Albert Robson, U.S.D.J. and Hubert Louis Will, U.S.D.J.	no		employer/employee	production	Plaintiffs moved to compel production in the custody of defendants' former employees	Plaintiffs served document requests demanding production of documents in the possession of former employees. Court held that the test under Rule 34 is "whether the party has a legal right to control or obtain" documents, but then directed defendants to contact former employees who still receive compensation in cash or in kind. The court concluded that "while the right to withhold payment does not ipso facto mean that defendants will be able to procure the documents, it is clearly an indicia of control."	former employees who still receive compensation in cash or in kind

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2000	4
1999	1
1998	1
1997	4
1996	1
1995	0
1994	0
1993	0
1992	0
1991	0
1990	0
1989	0
1988	0
1987	0
1986	0
1985	0

Cite Only?	Context	Pres. v. Prod.
Yes	Emp-Ee	Preservation
No	Parent/Sub/Affiliate	Production
	Contract Rship	Other
	Other	