

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

The question of possession, custody, or control in production

BY GEORGE BELLAS & MICHAEL RIZO

Rule 26(a) of the Federal Rules of Civil Procedure (F.R.Civ.P.) allows for the discovery of “documents, electronically stored information (ESI), and tangible things” in the responding party’s “possession, custody, or control.”¹ Using the same language, Rules 34(a) and 45(a) obligate a party responding to a document request or subpoena to produce ESI in that party’s “possession, custody, or control.”² Unfortunately, the F.R.Civ.P. do little to define the meaning of “possession, custody or control,” leaving parties to determine the definition from case law.

Within the 7th Circuit possession, custody, or control has been broadly interpreted to be a legal right standard, which requires a party to preserve, collect, search, and produce documents and ESI which the party has a legal right to obtain.³ Caselaw in the 7th Circuit has deemed a party to have possession, custody, or control under the legal right standard “only if that party has (1) actual possession of documents and ESI; or (2) the legal right to obtain documents and ESI.”⁴

The Illinois Supreme Court Rules do not use the same language as the F.R.Civ.P, but are interpreted to reflect the same standard of control.⁵ Illinois Supreme Court Rule 214 requires a party to produce “all materials in the party’s possession.”⁶

“Possession” has been interpreted by Illinois case law as “possession, custody, or control” and thus Illinois practitioners may use the F.R.Civ.P. as authoritative for the purposes of discovery in Illinois.⁷

Rules Limiting Obligation to produce ESI

The ESI a party is obligated to produce is limited by Rule 26(b) of the F.R.Civ.P., allowing the scope of discovery to include “any non-privileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”⁸ Proportionality, although not plainly stated, is considered under Rule 26(b)(2) (C) stating “[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”⁹

The recent amendment to Rule 26(b) removed the phrase “reasonably calculated

to lead to the discovery of admissible evidence,” which allowed requesting parties to “swallow any other limitation to the scope of discovery.”¹⁰ The phrase has been replaced with the phrase “information within the scope of discovery need not be admissible in evidence to be discoverable,” preserving the intent of the removed language: “valid discovery cannot be opposed solely on the basis that it does not lead to admissible evidence.”¹¹ Rule 26 further limits the production of ESI in a party’s control if it is not “reasonably accessible because of undue burden or cost.”¹²

Rule 34(b) limits ESI production by requiring a request to produce to “describe with reasonable particularity each item or category of items to be inspected.”¹³ This limits the undue burden created by blanket or overly broad requests for any and all ESI that could be relevant to a case. When producing ESI “a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.”¹⁴ Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced, but does not require a request for production to specify in which form ESI should be produced (i.e. Word, PDF, containing original meta data,

etc.).¹⁵ If a form is not specified, “a party must produce the ESI in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms” and “need not produce the same [ESI] in more than one form.”¹⁶ Lack of a specified form does not allow production of ESI in a form “that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.”¹⁷ If ordinarily maintained ESI is “searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.”¹⁸

Under this framework, the legal right standard provides recourse for when a party lacks “control” of a requested document. The requesting party may “subpoena the documents and ESI from the nonparty that legally controls them via Rule 45, which squarely addresses the discovery of such non-party information.”¹⁹

Obligation to Produce Limited by State, Federal, and Foreign Laws

The obligation to produce requested electronically stored information can be restricted by “conflicting state or federal privacy or other statutory obligations, including foreign data protection laws.”²⁰ Although a party may “control” ESI under the legal right standard, “State and federal statutory limitations, privacy laws, or international laws may preclude or limit disclosure of . . . ESI sought.”²¹ For instance 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.²²

Further, 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.²³ These foreign blocking statutes may cause the broad discovery allowed by the F.R.Civ.P. to be in direct conflict with international restriction on data movement.²⁴

Benefits of legal right standard

The definition of control established by caselaw in the 7th Circuit is “supported by other well-established legal authorities that specifically define control consistent with the legal right standard, including the Restatements.”²⁵ In relation to Tort based principles, the legal right standard of control comports with the Restatement (Third) of Agency, which states:

- (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.²⁶

This is consistent with the legal right standard such that the 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.

The Restatement (Third) of Torts on Physical & Emotional Harm, 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.”²⁷

Additionally, the Restatement (Second) of Torts addresses the concept of “control.” It states “control based liability regimes founded in tort doctrine assign liability where parents fail to control their children to prevent intentional harm to others; where 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; and where a lessor of land retains control of a portion with a dangerous condition the lessor could have discovered and prevented harm.”²⁸

A more familiar legal theory that comports with the legal right standard is that of “control” in the agency context, or respondeat superior. 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.

This familiar framing of the concept of control allows the legal right standard to be “fairer and more predictable” as well as “weed out attempts to structure document maintenance to avoid discovery obligations.”²⁹ That is to say, once a party has demonstrated it does not have the legal right to obtain requested information, “the requesting party can challenge the claim if the relevant facts . . . suggest that a party’s lack of control is not merely the by-product of business decisions but rather an attempt to avoid having control over documents it would prefer not to produce.”³⁰ The legal right standard not only defines control in “clear, well-established factors,” but also “provides notice to the parties of those standards, offers consistency on how it should be applied, and appropriately considers competing legal interests that can impact ‘control.’”³¹ ■

1. Fed. R. Civ. P. 26(a).
2. Fed. R. Civ. P. 34(a)(1);45(a)(1)(A)(iii).
3. The Sedona Conference, The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,” 17 Sedona Conf. J. 477, 483 (2015).
4. *Id.* at 529.
5. Committee Comments to 2014 Revision to Ill. Sup. Ct., R 214.
6. Sup. Ct., R 214.
7. *Central Nat’l Bank v. Baime*, 112 Ill.App.3d 664 (1982); *Wiebusch v. Taylor*, 97 Ill.App.3d 210 (1981)
8. Fed. R. Civ. P. 26(b)(1).
9. Fed. R. Civ. P. 26(b)(2)(C).
10. Advisory Committee Notes to 2000 Amendments to Fed. R. Civ. P. 26
11. *Id.*
12. Fed. R. Civ. P. 26(b)(2)(B).
13. Fed. R. Civ. P. 34(b)(1)(A).
14. Fed. R. Civ. P. 26(b)(2)(E)(i).
15. Fed. R. Civ. P. 34(b)(1)(C).

16. Fed. R. Civ. P. 26(b)(2)(E)(ii)-(iii).
17. Advisory Committee Notes to 2006
Amendments to Fed. R. Civ. P. 34
18. *Id.*
19. Sedona, *supra*, at 544
20. *Id.* at 566.
21. *Id.*

22. *Id.* at 567.
23. *Id.* at 570.
24. *Id.* at 570.
25. *Id.* at 476.
26. Restatement (Third) Of Agency § 1.01 cmt.
f (2006).
27. Restatement (Third) Of Torts § 56 (2012)

28. Restatement (Second) Of Torts § 316, 318
& 360 (1979).
29. Sedona, *supra*, at 540
30. *Id.*
31. *Id.* At 543.

**THIS ARTICLE ORIGINALLY APPEARED IN
THE ILLINOIS STATE BAR ASSOCIATION'S
TRIAL BRIEFS NEWSLETTER, VOL. 61 #6, JANUARY 2017.
IT IS REPRINTED HERE BY, AND UNDER THE AUTHORITY OF, THE ISBA.
UNAUTHORIZED USE OR REPRODUCTION OF THIS REPRINT OR
THE ISBA TRADEMARK IS PROHIBITED.**