LAWYERS FOR CIVIL JUSTICE
and
THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

COMMENT
to the
THE SEDONA CONFERENCE
on
COMMENTARY ON RULE 34 AND RULE 45
"POSSESSION, CUSTODY, OR CONTROL"

June 15, 2015

Lawyers for Civil Justice[1] and the U.S. Chamber Institute for Legal Reform support the proposed Sedona Conference Commentary on Rule 34 and Rule 35 "Possession, Custody, or Control" ("Commentary"), particularly proposed Principle 1.

Currently, courts apply differing standards for determining whether a party has "possession, custody, or control" over electronic information, with some requiring proof that a party has a legal right to the requested information, while others impose an amorphous "practical ability" standard. Principle 1 would create a single national standard for making this determination, limiting "possession, custody, or control" to situations in which the party has actual possession or the legal right to obtain and produce the information. The change proposed by the Commentary would eliminate the imprecise "practical ability standard" and thereby increase consistency and fairness in discovery practice across United States courts. It should therefore be adopted.

The Commentary's proposal constitutes a modest clarification. After all, and as noted in the Commentary, courts consistently apply the phrase "possession, custody, or control" to include things which may not currently be in the party's physical possession (a concept which is itself becoming outdated), but which the party has the legal right to obtain. However, in some of those

[1] Lawyers for Civil Justice is a national coalition of defense trial lawyer organizations, law firms and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 25 years, LCJ has been closely engaged in supporting federal civil rules reform in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

cases, the court also invokes the undefined "practical ability standard" without a specific finding as to the existence of a legal right to the information sought.[2] Under the approach advanced by the Commentary, if a party has the legal right to obtain requested information, it would be required to exercise it. In other words, the Commentary leaves undisturbed the rule that if a party has a contractual right to obtain information, the party should likewise be deemed to ostensibly "control" the information when faced with a discovery request.

While the proposal advocated by the Commentary would not mark a radical change in discovery practice, it would establish a common national standard for determining whether a party has "possession, custody, or control" over electronic information. This is an important discovery reform. Currently, the courts that apply the nebulous "practical ability standard" engage in a highly subjective inquiry that downplay the importance of having actual any control over – or any legal right to – the information at issue. The proliferation of the "practical ability" concept has resulted in a checkerboard of widely divergent standards.[3]

There is little wisdom behind the "practical ability" standard. That framework has essentially encouraged discovery of information over which no party to the action has "possession, custody, or control." This is contrary to the rules. Moreover, Rule 45 is already in place for precisely these types of scenarios – i.e., where requested information is beyond the reach and control of the parties. If the goal is to discourage parties from structuring their document management systems to avoid having to produce documents in response to discovery requests, the Commentary's proposal would impose a uniform framework for the parties' evidence and arguments on the point which is fairer and more predictable than the current case-by-case application, in some courts, of the "practical ability standard."

Attempts to make an "end run" around the discovery rules should be discouraged, including by the imposition of sanctions in appropriate cases. But there is an inherent unfairness in applying a court-ordered compulsion to require X to obtain documents from Y when X can apply no legal compulsion to force Y to turn over the documents. And parties should not be encouraged by courts to apply pressure without legal justification – simply by virtue of having, for example, the upper hand in a business or employment relationship. As noted in the Commentary, an employer's request to an employee to turn over highly personal information to which the employer is not entitled, no matter how the request is phrased, would run a significant risk of being deemed "coercive." And one company's request for information from an affiliate, in the absence of a legal right to obtain the information, puts unfair pressure on both the party asking for documents and the party which has to respond. The party making the request cannot "back up" its request with any legal authority, despite the fact that it might itself face sanctions if the other party says "no." And the recipient of the request is forced to weigh the legal and nonlegal risks of non-production against the potential risks of disclosing information – likely including

[2] *See, e.g., Oriental Trading Co., Inc. v. Yagoozon, Inc.*, 2014 WL 4956382 (D. Neb. Oct. 1, 2014) (finding that party had "practical ability" to obtain the information from third-party but also suggesting that the party from whom information was requested likely had a legal right to obtain it).

[3] *Compare In re Vivendi Univ., S.A., Sec. Litig.*, 2009 WL 8588405 (S.D.N.Y. July 10, 2009) ("interlocking officers or directors, without a showing of actual control, does not establish the practical ability of the parent to obtain the documents of the subsidiary") *with SRAM, LLC v. Hayes Bicycle Group, Inc.*, 2013 WL 6490252 (N.D. Ill. Dec. 10, 2013) (finding "control" where "SRAM has provided undisputed evidence that the two companies share officers and directors and have interrelated corporate structures").

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

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

The approach suggested in the Commentary would remove the pressure on a party which has not itself received a discovery request to decide whether voluntary production of information is worth the risk. And it would avoid situations in which a party which has no legal right to obtain documents has to find some other way to get them under threat of contempt. Further, the suggested approach retains a mechanism to weed out attempts to structure document maintenance to avoid discovery obligations. Under the suggested approach, if a party demonstrates that it does not possess and is without the legal right to obtain requested information, the requesting party can challenge the claim if the relevant facts – generally the same kinds of things which would be cited in a "practical ability" determination – suggest that the party's lack of control is not merely the by-product of its business decisions but rather an attempt to avoid having control over documents it would prefer not to produce. Additionally, the requesting party can also use established legal avenues to obtain the information from the entity that physically possesses the information. That framework will allow courts to identify unjustified claims of "no control" in a structured and predictable way, without using the threat of sanctions against one person or entity to encourage "voluntary" production by another.