

*The Sedona Conference
Commentary on Rule 34 and Rule 45
“Possession, Custody, or Control”
(July 2016)*

Rule 34 and Rule 45 of the Federal Rules of Civil Procedure 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.” However, the Rules are silent on what “possession, custody, or control” means, and the case law is unclear and inconsistent. This inconsistency often leads to sanctions for unintended and uncontrollable circumstances. 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 electronically stored information.

This Commentary introduces and explains five practical “Principles on Possession, Custody, or Control”:

- Principle 1. A responding party will be deemed to be in Rule 34 or Rule 45 “possession, custody, or control” of Documents and ESI when that party has actual possession or the legal right to obtain and produce the Documents and ESI on demand.
- Principle 2. The party opposing the preservation or production of specifically requested Documents and ESI claimed to be outside its control, generally bears the burden of proving that it does not have actual possession or the legal right to obtain the requested Documents and ESI.
- Principle 3(a). When a challenge is raised about whether a responding party has Rule 34 or Rule 45 “possession, custody, or control” over Documents and ESI, the Court should apply modified “business judgment rule” factors that, if met, would allow certain, rebuttable presumptions in favor of the responding party.
- Principle 3(b). In order to overcome the presumptions of the modified business judgment rule, the requesting party bears the burden to show that the responding party’s decisions concerning the location, format, media, hosting, and access to Documents and ESI lacked a good faith basis and were not reasonably related to the responding party’s legitimate business interests.
- Principle 4. Rule 34 and Rule 45 notions of “possession, custody, or control” should never be construed to override conflicting state or federal privacy or other statutory obligations, including foreign data protection laws.
- Principle 5. If a party responding to a specifically tailored request for Documents or ESI (either prior to or during litigation) does not have actual possession or the



legal right to obtain the Documents or ESI that are specifically requested by their adversary because they are in the “possession, custody, or control” of a third party, it should, in a reasonably timely manner, so notify the requesting party to enable the requesting party to obtain the Documents or ESI from the third party. If the responding party so notifies the requesting party, absent extraordinary circumstances, the responding party should not be sanctioned or otherwise held liable for the third party’s failure to preserve the Documents or ESI.

This Commentary reflects the culmination of over three years of dialogue, review, public comment, and revision, and incorporates the collective expertise of a diverse group of lawyers and representatives of firms providing consulting and legal services to both requesting and responding parties in civil litigation.

The full text of *The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,”* July 2016, is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/Commentary_on_Rule_34_and_Rule_45_Possession_Custody_or_Control.

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