Navigating "Control" in a Matrix of ESI Discovery

By Brian A. Zemil, *Litigation News* Associate Editor

My last column discussed whether the recent amendments to Federal Rule of Civil Procedure 37 displaced the federal courts' inherent authority to impose sanctions for lost electronically stored information (ESI). A related issue is whether a party has control of, and potential liability for sanctions for loss of, ESI possessed by a third party. Rule 37 does not, however, refer to "control"—a term that the rules and advisory notes do not define.

This ambiguity has led courts to bootstrap Rule 34's control standard onto Rule 37 and use different tests to resolve control-related disputes. The inquiry is fact-specific and the legal standard varies by and even within jurisdictions. To minimize the risk of potentially case-ending sanctions, attorneys should proactively identify potential control-related disputes and tailor their litigation plans to account for the applicable legal standard.

Rule 34 refers to a party's responsibility to preserve and produce ESI in its "possession, custody, or control." Discoverable ESI resides in many different places, including network servers, websites, and the cloud. The advisory committee acknowledged that, when storing ESI in multiple places, parties face the specter of sanctions if their discoverable ESI is not preserved by nonparties.

To avoid sanctions, counsel needs to know who controls discoverable ESI. Courts have adopted three different tests to determine when a party "controls" documents outside its possession and custody: the Legal Right Standard, the Legal Right Plus Standard, and the Practical Ability Standard. Although distinct, each test focuses on the relationship between parties and the various third parties that house ESI. The three prevailing tests are not uniformly applied across circuits, and they even experience some crossover within the same jurisdiction. For example, courts in the Sixth and Tenth Circuits apply both the Legal Right Standard and the Legal Right Plus Standard, while various jurisdictions adopt the Practical Ability Standard.

Federal courts in the Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the Legal Right Standard. This test imposes the narrowest requirements relating to a party's ESI preservation and production obligations. These courts find "control" where a contract provides that a party owns the requested ESI or can access it upon request. Courts have also found that a legal right to obtain ESI exists by virtue of a principal-agent relationship (e.g., employer-employee, client-attorney, company-director).

Courts adopting the Legal Right Plus Standard are the First, Fourth, Sixth, and Tenth Circuits. Similar to the Legal Right Standard, this test additionally requires a party to disclose the identities of third parties that possess that party's discoverable ESI. Such disclosures enable adverse parties to subpoena the ESI they seek directly from the third-party custodian.

The Practical Ability Standard is the broadest application of control. It is used by courts in the Second, Fourth, Eighth, Tenth, Eleventh, and District of Columbia Circuits, but has been rejected by the Seventh Circuit. This pragmatic yet nebulous standard centers on whether a party has the "practical ability" to obtain the ESI, without requiring its legal ownership or possession. Under this standard, a party's access to ESI typically is sufficient to establish control. The decisions applying this test develop a body of control-type relationships between a party and nonparty in the context of employer and employee; service provider and account holder; principal and agent; client and customer.

Courts consider multiple factors when determining whether a party has the "practical ability" to produce documents in possession of a third party, including the relationship between the party and the custodian, how the custodian has handled the ESI in the past, and any other relevant circumstances impacting the custodian's willingness to give the documents to account holders in service provider relationships. *Rosehoff, Ltd. v. Truscott Terrace Holdings* involved the most common form of ESI—emails. There, a federal court found that a party had the practical ability to obtain ESI from the third-party server company because it previously cooperated with the subpoenaed party, voluntarily producing emails when requested.

Litigants should prepare early to navigate a legal landscape that lacks a uniform standard for determining control. The differing court approaches require counsel to conduct a jurisdiction-by-jurisdiction analysis, and in certain circuits a court-by-court assessment, to determine what standards apply. Be prepared by understanding the issues and starting early in a case to assess the scope of any control-related ESI obligations. Then prepare your client's Rule 26 initial disclosures, which require production of ESI in a party's possession, custody, or control supporting a claim or defense. Early preparation will help frame discovery-related control disputes and reduce the risk of case-ending sanctions.

If you find yourself litigating the issue, remember that courts will seek to balance the burden and cost of production with the relevance and importance of the requested ESI. Also, counsel should work with the client's corporate representatives to ensure that the Rule 30(b)(6) witness is knowledgeable about information under the corporate party's control, even if the ESI is in a nonparty's possession. LN

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