

The Sedona Conference WG1 Possession, Custody, or Control Brainstorming Group Outline

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[Session 3] What's the Verdict: Updating The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control"

I. Overview of original paper with historical context, and cases that have cited original paper -

II. Dialogue points

A. Do the following new(er) topics warrant update of original paper (or are they "same wine, new bottle" applications of original construct):

1. Cloud Computing -

a) Current paper: Location, Access and Multi-tenancy

b) To be drafted

(1) Contract.

(a) Clickwrap? Negotiable?

(b) Define Duty to Preserve and preservation steps including timing of response

(c) Use of subcontractors? Adhere to all contract provisions

(d) Business continuation / Force Majeure

(e) Commitment re highest security protocols be maintained

c) Technical issues. Can present access/export issues related to format, migration, retention policies. Also software upgrades – are they backward compatible to address these issues?

d) Privacy and Security. Tailored to specific data store, e.g. HIPAA – could affect export options.

e) Jurisdiction

(1) Foreign – March 2018: Clarifying Lawful Overseas Use of Data ("CLOUD") Act and rendered the case moot. The CLOUD Act, which took effect in March 2018, amended the SCA to clarify that warrants issued under the SCA apply equally to domestic- and foreign-stored ESI. (U.S. v. Microsoft Corp., 138 S.Ct. 1186 (2018); 18 U.S.C. § 2713.)

2. (pseudo) ephemeral messaging -

a) The Rule 34 PCC paper is silent on ephemeral messaging.

Similarly, the Ephemeral Messaging paper is silent as to the PCC analysis.
b) With the increased use in ephemeral data, the BG should consider addressing the legal precedent that a party cannot be compelled to produce data that does not exist in combination with the obligation to preserve data by suspending automatic deletion.

c) The Ephemeral Messaging paper attempts to balance the valid business reasons for selection of such messaging platforms given the

encryption and automatic deletion feature against the competing regulatory and litigation needs for the data. The BG may consider proposing parties addressing possession of ephemeral data early during Rule 26 conferences and/or through stipulated agreements related to the discovery of ESI. For instance, there are orders addressing preservation of ESI that specifically call out that preservation need not include, absent a showing of good cause, ephemeral data that may be difficult to preserve without disabling the operating system.

d) Ephemeral messaging could be added to the “How new Technologies may Influence the Rule 34 Possession, Custody or Control Analysis” section of the Rule 34 PCC paper. Or, if the group continues to advocate for the Business Judgment Rule, a discussion could focus on providing deference to the business regarding the data management decision.

3. Data Privacy -

- a) International
 - (1) GDPR
- b) US Federal
 - (1) Legislation in the works, may be worth a footnote
- c) US State
 - (1) Comprehensive data privacy laws
 - (a) California,
 - (i) Most of the provisions of the California Privacy Rights Act (CPRA) become effective on Jan. 1, 2023. CPRA amended the California Consumer Privacy Act (CCPA), which had already created a number of individual rights modeled after the GDPR. CPRA created a new state agency, similar to data protection agencies in the EU countries charged with enforcing the GDPR.
 - (b) Colorado,
 - (i) The Colorado Privacy Act (CPA) becomes effective on July 1, 2023. In addition to creating rights patterned after the individual rights under GDPR, CPA requires data security and contract provisions for vendors and assessments for "high-risk" processing.
 - (c) Connecticut,
 - (i) The Connecticut Data Privacy Act (CDPA), like Colorado's new privacy law, goes into effect on July 1, 2023. CDPA likewise creates a suite of GDPR-like individual rights, and requires data minimization, security, and assessments for "high risk" processing.

- (d) Utah,
 - (i) The Utah Consumer Privacy Act (UCPA) becomes effective on Dec. 31, 2023. It provides for certain GDPR-like individual rights, and also requires data security and contract provisions. But UCPA does not include expressly required risk assessments.
 - (e) Virginia
 - (i) The Virginia Consumer Data Privacy Act (VCDPA) becomes effective Jan. 1, 2023. It provides for certain GDPR-like individual rights. But in 2022, the "right-to-delete" was replaced with a right to opt out from certain processing.
 - (2) Limited data protection laws
 - (a) Alabama, Alaska, Arizona, Arkansas, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Jersey, New York, North Dakota, South Dakota, Tennessee, Texas, and Wisconsin
4. Whether party's ability to pay for upgraded version of platform implicates PC&C analysis (but see *Laub v. Horbawski* – answering question in legal right jurisdiction)

B. Whether Business Judgment Rule should be clarified or eliminated (is it still something Sedona should advocate for?)

C. Issues that warrant Appendix to original paper

- 1. Federal Law Update
 - a) Updated chart
 - b) Updated case law
- 2. State Law Update
 - a) Legal Rights
 - (1) Nevada - This court has yet to define "possession, custody, or control" within the meaning of the Nevada Rules of Civil Procedure. We now hold that a party has "possession, custody, or control" over documents, electronically stored information, or tangible things if the party has either actual possession of or the legal right to obtain the material. *Dep't of Tax'n v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 366, 366, 466 P.3d 1281, 1282 (2020)
 - (2) North Carolina
Rule 34 of the North Carolina Rules of Civil Procedure permits a party to request that any other party produce documents "within

the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.” N.C. Gen.Stat. § 1A-1, Rule 34(a) (2009). “ ‘[D]ocuments 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 of the materials or has the legal right to obtain the documents on demand.’ ” *Pugh v. Pugh*, 113 N.C.App. 375, 380–81, 438 S.E.2d 214, 218 (1994) (quoting *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D.Colo.1992)) (emphasis added). In this case, plaintiff has the legal right to obtain his medical records. Plaintiff contends that accessing records may be difficult from medical providers that are neither a party to this action or not *215 located within the state. Although this may be true, plaintiff has the right to obtain his medical records upon request pursuant to the Health Insurance Portability and Accountability Act (“HIPAA”). See 45 C.F.R. §§ 164.502(a)(2)(I), 164.524(a)(1) (2009). Furthermore, Wheatley's offer to obtain the medical records on plaintiff's behalf and at Wheatley's expense eliminates any legitimacy to plaintiff's perceived difficulty. Because plaintiff has a legal right to his medical records, they are considered to be within his “possession, custody or control” pursuant to our prior interpretation of Rule 34 of the North Carolina Rules of Civil Procedure, and the trial court did not abuse its discretion by compelling the production of such records. See *Pugh*, 113 N.C.App. at 380–81, 438 S.E.2d at 218.

Lowd v. Reynolds, 205 N.C. App. 208, 214, 695 S.E.2d 479, 484 (2010)

As the terms are used in Rule of Civil Procedure 34(a), “possession, custody, or control of the party” includes documents a party has “the legal right to obtain ... on demand.” See *Pugh*, 113 N.C. App. at 380, 438 S.E.2d at 218 (describing that test as the federal standard then applying it in the case at hand) (quotations and citation omitted).

¶ 64 Dunhill and Mr. Lindberg certainly had the legal right to obtain on demand their own bank and credit card statements. Therefore, they had possession, custody, or control of at least some of those 100,000 pages of records before the March 2019 Order's deadline.

Dunhill Holdings, LLC v. Lindberg, 2022-NCCOA-125, ¶¶ 63-64, 282 N.C. App. 36, 64, 870 S.E.2d 636, 659 (2022 case!)

(3) Kentucky

This is not to say that a business entity's records are always, or even likely, discoverable through a shareholder or partner. The decision to allow such discovery must be based on whether the shareholder truly has control, custody, or possession of the records in question.

As this Court has previously noted, “ ‘Control with respect to the production of documents is defined not only as possession but as the legal right to obtain the documents requested upon demand.’ ” Metropolitan Property & Cas. Ins. Co. v. Overstreet, 103 S.W.3d 31, 45 (Ky.2003) (quoting Cochran Consulting, Inc. v. Uwatec USA, Inc., 102 F.3d 1224, 1229–30 (Fed.Cir.1996)). Ordinarily, a mere shareholder or partner will not exercise such a degree of control over corporate records sufficient to satisfy the requirement of having a legal right to obtain them on demand, unless the relationship between the shareholder or partner and the business is so close as to make the business little more than an alter-ego. In such a case, the partner or shareholder enjoys the necessary legal control over the documents to subject them to discovery under CR 34.01.

Edwards v. Hickman, 237 S.W.3d 183, 190 (Ky. 2007), as modified (Nov. 21, 2007)

Based on our analysis of general agency law and its interplay with CR 34.01, we hold that a principal is in control, for purposes of CR 34.01, of all information that is in the possession of its agents to which it is entitled to receive under principles of agency law. Although we have expressly limited the scope of this control to information that the principal is entitled to receive, it is important to note that this only includes information that is properly within the scope of the agency between the principal and agent. The principal has no right to obtain information outside the scope of the agency and, therefore, is not subject to discovery because the principal cannot be said to “control” it.

S. Fin. Life Ins. Co. v. Combs, 413 S.W.3d 921, 929 (Ky. 2013)

(4) Alabama

In light of BASF AG's actual refusal to provide the documents when requested to do so by Stryker, we conclude that the plaintiffs' reliance upon Robert's testimony that he expected that BASF AG would oblige and forward the documents if asked is insufficient evidence of “the legal right to obtain the documents requested upon demand.” Searock v. Stripling, 736 F.2d at 653.

Ex parte BASF Corp., 957 So. 2d 1104, 1108 (Ala. 2006)

(5) Iowa

BFG posits that the test for determining control is whether it has a legal right to obtain or demand materials held by MNA. See *Searock v. Stripling*, 736 F.2d 650, 653 (1984); see also *Gerling Int'l Ins. Co. v. Commissioner*, 839 F.2d 131, 140–41 (3d Cir.1988) (collecting cases).

The defendant's assertion is based primarily on interpretations of Federal Rule of Civil Procedure 34, the counterpart to our Rule 129, whereunder the courts concur that the concept of control embraces the legal right to obtain information. Cf. *Strom v. American Honda Motor Co.*, 423 Mass. 330, 667 N.E.2d 1137, 1141 (1996) (determining the existence of a legal right to obtain information is the first step toward finding control).

Generally, we agree with this proposition. (Also ruled that the relationship between BFG and MNA was not such to even employ “constructive control.”

Martin v. B.F. Goodrich Co., 602 N.W.2d 343, 345 (Iowa 1999)

(6) Delaware

In the Rule 34 context, [c]ontrol has been defined to include the legal right to obtain the documents requested upon demand. Thus, the key inquiry is whether the company has the power, unaided by the court, to force production of the documents.”⁴ Both state and federal courts in Delaware “decline[] to apply a broader definition of ‘control’ that would also include an inquiry into the practical ability of the subpoenaed party to obtain documents.

Theravectys SA v. Immune Design Corp., No. CIV.A. 9950-VCN, 2014 WL 5500506, at *2 (Del. Ch. Oct. 31, 2014)

(7) Texas

“Possession, custody, or control” of an item for purposes of discovery means that the “person either has physical possession of the item or has a right to possession of the item that is equal or superior to the person who has physical possession of the item.” *Id.* R. 192.7(b). According to the Texas Supreme Court, the phrase “possession, custody or control” within the meaning of Rule 192.3(b) includes not only actual physical possession, but constructive possession, and the right to obtain possession from a third party such as an agent or representative. *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex.1993). The right to obtain possession is a legal right based on the relationship between

the party responding to discovery and the person or entity that has actual possession. *Id.*; *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 487 (Tex.App.-Dallas 2011, pet. granted).

In re Summersett, 438 S.W.3d 74, 81 (Tex. App. 2013)

Hal's mere access to the relevant letters of recommendation does not constitute "physical possession" of the documents under the definition of "possession, custody, or control" set forth in Texas Rule of Civil Procedure 192.7(b). Cf. *In re Grand Jury Subpoena (Kent)*, 646 F.2d 963, 969 (5th Cir.1981) ("The [employee's] subpoena, if upheld, would be illegal because it would direct her to produce documents not in her possession, custody, or control. Because [employee] had mere access, her compliance with the subpoena would have required that she illegally take exclusive possession of [her employer's] documents and deliver them to the grand jury.") (emphasis in original); *Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501–02 (D.Kan.2001) (denying motion to compel defendant, president and minority shareholder of nonparty corporation, to produce nonparty corporation's documents in suit brought against defendant in his individual capacity). Thus, we conclude that the trial court abused its discretion in ordering Hal to produce the documents.

In re Kuntz, 124 S.W.3d 179, 184 (Tex. 2003)

b) Practical Ability

(1) Vermont

We agree with the New Mexico Supreme Court that the critical inquiry in determining Rule 34 "control" is "whether the party from whom the materials are sought has the practical ability to obtain those materials."

United Nuclear Corp., supra, 96 N.M. at 170, 629 P.2d at 246.

Applying this test we conclude that plaintiff has the practical ability to obtain the requested materials; hence she has control over them.

Castle v. Sherburne Corp., 141 Vt. 157, 166, 446 A.2d 350, 354 (1982)

(2) New Mexico

It is undisputed that neither United nor I&M was capable of procuring on its own the information and documents sought from the partners. Thus, the critical inquiry concerns only the first of the above mentioned principles—whether the party from whom the

materials are sought has the practical ability to obtain those materials. Because the inquiry is a pragmatic one, the phrases “available” and “possession, custody or control” should not be subjected to formalistic strictures which ignore the policy of liberal discovery and the practical realities of the particular situation at issue. See *Hart v. Wolff*, supra, 489 P.2d at 117. Thus, it is immaterial under Rules 33 and 34 that the party subject to the discovery orders does not own the documents, 11 or that it did not prepare or direct the production of the documents,¹² or that it does not have actual physical possession of them.

United Nuclear Corp. v. Gen. Atomic Co., 1980-NMSC-094, ¶ 58, 96 N.M. 155, 170–71, 629 P.2d 231, 246–47

(3) Alaska

While Rule 34 certainly has proper limits, the concept of ‘control’ should not be given a hypertechnical construction that will undermine the policy favoring liberal pretrial discovery. As the United States Supreme Court stated in *Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. Rogers*, 357 U.S. 197, 206, 78 S.Ct. 1087, 1092, 2 L.Ed.2d 1255 (1958): ‘Rule 34 (F.R.Civ.P.) is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case. Thus, though Hart may not have had the authority to force Metropolitan to produce the records for Wolff’s inspection, we believe the nature of Hart’s relationships with Arctic Bowl and with Metropolitan Mortgage were such that the court could infer that he had some influence over Metropolitan with respect to Arctic Bowl, Inc., and could have used that influence to produce the records.

Hart v. Wolff, 489 P.2d 114, 117–18 (Alaska 1971)

(4) New York

In a documentary discovery context, with expansive rules of disclosure, it is reasonable to conclude that the legislature would employ a broader “possession, custody or control” standard. Indeed, various courts have interpreted “possession, custody or control” to allow for discovery from parties that had practical ability to request from, or influence, another party with the desired discovery documents. As such, courts have interpreted “possession, custody or control” to mean constructive possession (see *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 [S.D.N.Y.1997] [“ ‘(C)ontrol’ 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”]; see also *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 [S.D.N.Y.1996]).

Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Com., 21 N.Y.3d 55, 62–63, 990 N.E.2d 114, 119 (2013)

Documents under a party's “control” within the use of that term in CPLR 3120 include documents as to which the party has “the legal right, authority, or ability to obtain upon demand documents in the possession of another. *Matter of Schaefer*, 2013 N.Y. Misc. LEXIS 1478 (Surr. Ct., Nassau County 2013) (documents in a party's ‘control’ include those in the physical possession of its accountant). Both the CPLR definition of “control” and the Federal Rule of Civil Procedure definition of the same term are broadly construed and include situations where the party “has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents.”

FRCP 34(a)(1) (documents to be produced include those within the “responding party's possession, custody or control”); *Golden Trade, S.R.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (SDNY 1992) (courts have sometimes 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); see also *Doe v. Hicks*, 2016 U.S. Dist. LEXIS 128679, p. 26 (D.Conn.2016) (control includes the “legal right or practical ability to obtain [documents] from another source on demand.”). Under the broad disclosure provisions of the CPLR, the Court of Appeals has given the phrase “control” in Rule 3120 a broad reading similar to that employed by the federal courts as it applies to the scope of required disclosure in New York. In *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62–63 (2013), the court noted “control” includes “constructive possession.”

Richard v. Kerwin, 53 Misc. 3d 1213(A), 50 N.Y.S.3d 28 (N.Y. Sup. Ct. 2016)

Plaintiff failed to show that the subpoenaed documents were within HSBC's “possession, custody or control” (CPLR 5224[a–1]). Nor did it show that HSBC has the “practical ability” to request the documents from the foreign banks believed to have the documents

in their possession or to influence those banks to provide such documents (see *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62–63, 967 N.Y.S.2d 876, 990 N.E.2d 114 [2013]).

Mortimer Offshore Servs. Ltd. v. Manufacturas Orga Ltda, 198 A.D.3d 418, 419, 152 N.Y.S.3d 298 (2021)

(5) Missouri

The rule is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) provides that “[a]ny party may serve on another party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served ...” (emphasis added). Our Rule 58.01(a) is identical to Federal Rule of Civil Procedure 34(a).

The “[b]asic test of the rule is ‘control’ rather than custody or possession.” WILLIAM W. BARRON & HON. ALEXANDER HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 795 (Charles Alan Wright rev.1960); *Bifferato v. States Marine Corp.*, 11 F.R.D. 44, 46 (D.N.Y.1951) (“The true test is control and not possession.”). “‘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.” *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636–37 (D.Minn.2000). See also *United States v. Skeddle*, 176 F.R.D. 258, 261 n. 5 (N.D. Ohio 1997) (A court may require a party to produce documents held by a non-party if the party has the “practical ability to obtain the documents ... irrespective of his legal entitlement to the documents.”); *Scott v. Arex*, 124 F.R.D. 39, 41 (D.Conn.1989) (“The word ‘control’ is to be broadly construed....”). In *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo. banc 1992), Missouri applied the “control” test in relation to discovery in a murder case holding that it was error for the trial court to allow into evidence a coat with bullet holes that had not been disclosed to the defense.

Hancock v. Shook, 100 S.W.3d 786, 796–97 (Mo. 2003)

(6) Minnesota

Both the federal and Minnesota discovery rules allow a party to serve on any other party a request to inspect and copy any designated documents or to inspect, test or sample any tangible things “that are in the possession, custody or control of the party

upon whom the request is served."¹ Courts consistently hold that documents are deemed to be within a party's "possession, custody or control" for purposes of discovery if the party has actual possession, custody or control or has the legal right to obtain the documents on demand.² The concept of "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."³

Thus, in *Prokosch v. Catalina Lighting, Inc.*, the seller of a halogen lamp alleged to have started a fire did not have to produce documents relating to a consultant's pending patent for a lamp safety feature.

But the manufacturer was required to produce any patent-related documents over which it had "care, custody, or control," including documents that it did not physically possess, but which it was capable of obtaining upon demand. Likewise, the seller had to produce any documents that it was capable of obtaining from its suppliers and lamp manufacturers.

§ 10.9. Document requests, 27 Minn. Prac., Products Liability Law § 10.9 (2022 ed.)

3. Federal Circuit Update

- a) Courts in the Federal Circuit, like others, reference both the legal right and practical ability tests and have not definitely adopted one test over another.¹ Complicating matters further, the Federal Circuit also applies a unique choice of law analysis to certain special jurisdiction

¹*Ramirez v. Dep't of Homeland Sec.*, 975 F.3d 1342, 1351 (Fed. Cir. 2020) (when evaluating an appeal of a Customs and Border Protection officer's removal from duty and whether the failure of the Agency to produce certain medical documents violated his due process rights, the court analogized civil discovery and noted physical control does not end the inquiry, rather the court identified that "control" of materials sought in discovery means the legal right or practical ability to obtain them.) (internal citations and quotations omitted); *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-1230 (Fed. Cir. 1996) (in a patent dispute where the E.D. Texas district court sanctioned a party for not producing certain code that an affiliated company possessed overseas, the Federal Circuit reversed, finding there was not sufficient "control" under a "legal right" analysis to sanction the party. The decision contained a dissent that also applied the legal right analysis but concluded there was no abuse of discretion by E.D. Texas. Since this was a patent case out of the E.D. Texas, the court noted it would apply Fifth Circuit law for "matters not within the exclusive jurisdiction of the Federal Circuit." Confusingly, the court cited Eleventh Circuit caselaw for the "legal right" standard). See also *Jones v. United States*, No. 2020-2182, 2022 U.S. App. LEXIS 4204, at *11 (Fed. Cir. Feb. 16, 2022) (in appeal from civil case from the Court of Federal Claims, the court applied the "legal right" standard (without explicitly adopting it) when analyzing whether government had a duty to preserve evidence in a wrongful death claim under a Native American statute, the court noted "Like any other civil litigant, the government "controls" evidence under the duty to preserve where it has a legal right to obtain or control that evidence.").

issues like patent law that are appealed from regional district courts, relying on the precedent of the applicable regional circuit courts for certain procedural issues.² Thus, in these special jurisdiction cases, one should also review the circuit law of the regional circuit “housing the district court.”³

Lower specialty courts and administrative boards within the Federal Circuit such as the Court of Federal Claims (COFC the Court of International Trade (CIT) and the Armed Services Board of Contract Appeals (ASBCA)) have their own rules that are distinct from the Federal Rules of Civil Procedure. However, for discovery issues, including the language “possession, custody or control,” many of these lower courts and tribunals adopt identical language as the Federal Rules of Civil Procedure⁴ or may generally rely on the Federal Rules for guidance.⁵ Like the Federal Circuit, these tribunals have not addressed⁶ or definitely adopted one PCC test over another.⁷

4. [OTHER POINTS STILL BEING DEVELOPED BY ONGOING RESEARCH AND BRAINSTORMING DISCUSSION]

² Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit’s Choice-of-Law Rule*, 2020 ULR 475 (2020), available at <https://doi.org/10.26054/0d-efcs-d4g2> (“The court’s choice-of-law rule requires the court to defer to the regional circuit courts on issues of procedural law but not on issues of substantive patent law.”)

³ *Cochran Consulting, Inc. v. Uwattec USA, Inc.*, 102 F.3d 1224, 1228 (Fed. Cir. 1996) (“In matters not within the exclusive jurisdiction of the Federal Circuit we apply the discernable law of the regional circuit housing the district court.”).

⁴ Court of Federal Claims (RCFC) Rule 34, *Committee Notes, 2002 Revision*, (“RCFC 34 is identical to FRCP [Federal Rule of Civil Procedure] 34”), available at <https://www.uscfc.uscourts.gov/rcfc>; Court of International Trade Rules (CIT) *Preface* (“The Rules... are styled, numbered and arranged to the maximum extent practicable in conformity with the Federal Rules of Civil Procedure.”) CIT Rule 34(a) (permitting production from “the responding party’s possession, custody or control”), available at <https://www.cit.uscourts.gov/rules-and-forms>

⁵ *See, e.g., Appeal of Hai*, 2002-2 B.C.A. (CCH) P31,971, 157920 (A.S.B.C.A. Aug 23, 2002) (“Although the Federal Rules of Civil Procedure do not apply to the Board as an administrative tribunal, we can look to them for guidance, particularly in areas our rules do not specifically address.”).

⁶ *See, e.g., 4K Global-ACC Joint Venture, LLC v. DOL*, 2021 CIVBCA LEXIS 67, *38 (B.C.A. Feb. 10, 2021) (citing federal rules for the proposition that “text messages are discoverable if they are relevant, not privileged, and in the [party’s] custody, possession, or control” without analyzing any PCC tests).

⁷ *See, e.g., Cormack v. United States*, 117 Fed. Cl. 392, 401-02 (2014) (requiring production from a subsidiary because a party had the “requisite power to obtain” documents thus making the party “able and required to comply with [the] discovery requests . . .”); *Quinn v. United States*, 35 Fed. Cl. 80, 83 (1996) (“If the producing party has the legal right or the 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.”);

D. How other Sedona Topics / Commentaries interface with other papers/Brainstorming Groups –

1. BYOD - (gap: current paper does not address PC&C – refers back to PC&C paper – may be an area this updated paper needs to address) (i.e., how to separate work from personal if you do collect/have the right to collect)
 - a) The current Rule 34 PCC paper only briefly references BYOD, so any update will need to more fully address the continued hurdles facing BYOD collections, as it only generally references that “the lines concerning personal data and responsibility become blurred.” The Sedona Conference, Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,” 17 Sedona Conf. J. 467, 526 (2016).
 - b) Because BYOD data likely will be of interest to the Mobile Device BG, we will want to coordinate guidance provided on the competing issues with BYOD data, especially if “practical ability” continues to prevail in many jurisdictions.
 - c) The lack of possession and custody combined with the probability of overcollection of irrelevant data that may contain, among other protected data, protected health or financial information, creates a continued struggle for collection if the responding party is deemed to have “control”. Comment 3.b. of the BYOD paper contains a good analysis of this murky area of the law that either could be updated or referenced by the Rule 34 PCC paper. *See* The Sedona Conference, Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations, 19 Sedona Conf. J. 495, Cmt. 3.b. (2018)).
2. Mobile Devices
 - a) See BYOD
3. IoT -

Federal Rule of Civil Procedure 34 allows parties to serve on other parties a request for documents within their “possession, custody, or control.” While this topic is discussed at length in *The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control”* and *“The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition,”* IoT ESI presents some distinct considerations.

- a) Who is the owner or custodian of the IoT ESI?

Determining who is the owner or custodian of IoT ESI for purposes of determining possession, custody, or control can be challenging and will necessarily vary by IoT ESI categories. The “owner” may often be a combination of the service provider and the user (individual or organization). An understanding of the relevant service terms and conditions may be a helpful part of this analysis.

Also helpful is an understanding of where the relevant data is generated. For example, the IoT device, the user activation Device, WMP, or some combination

thereof. This may help demonstrate practical control over the IoT ESI. Parties, and courts, may look to local law, decisional authority, or terms of service.

b) Possession, custody, or control

There has been an explosion of distributed or “cloud” computing, remote ESI hosting, Software as a Service, mobile data platforms, wearables data, smart home devices, industrial IoT ESI, infrastructure IoT ESI, and other Internet-connected devices. Ascertaining possession, custody or control of such IoT ESI will require a case-by-case determination, and will necessarily vary with the category of IoT ESI, and a concurrent determination of accessibility to a producing party. The principal issues to consider are:

- The physical location of the device and the data it creates.
- The location of the data created by the device.
- The reasonable access a party has to the device, or to a device component or sub-component, etc. and the data it generates.
- The retention policy of the manager of the device and the data it creates.
- Whether data physically held on the device and the data it creates is reasonably accessible.
- Whether data on local network-attached storage is reasonably accessible.
- Whether data stored offsite/in the cloud is reasonably accessible.
- Who possesses the data stored offsite/in the cloud?
- Who created the data, user or device based on default settings?
- The function within the ordinary course of business (in the context of Rule 34) of the device and the data it creates.
- Any resources that aggregate or otherwise log and/or process information from the device.
- Any resources that duplicates data created by the device.
- Accessibility (or demonstrable lack thereof).

These considerations not only should apply to any IoT ESI category, but should be used as guidelines for proportionality determinations, and ultimately determining whether a party must produce documents sought by a requesting party. The weight accorded to these factors will also vary depending on which test—either the legal right test or the practical ability test—the court employs to define possession, custody, or control for the discovery sought by the requesting party.

4. International -

- a) No overlap
- b) More of stress and attention paid to it b/c becoming a bigger issue / not a different take
- c) Appendix v. New/Updated Paper

This working draft document was created for discussion purposes only for the 2023 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to dbl@sedonaconference.org

III. If PCC becomes a drafting team, then should the Team re-visit the core recommendation from the original paper?

IV. Call to Action: Should Sedona submit a letter to Rules Committee noting ongoing Circuit Split and suggesting this is ripe for clarification / Action?

DRAFT