Possession, Custody or Control

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"POSSESSION, CUSTODY OR CONTROL"

- MEANING(S)??
- CIRCUIT SPLIT & SEDONA CONFERENCE VIEW
- WHY WE USUALLY SHOULD NOT DENY HAVING "POSSESSION, CUSTODY OR CONTROL" IF WE HAVE PRACTICAL ABILITY TO OBTAIN THE DATA EVEN IF WE MIGHT BE ABLE TO PREVAIL ON THE LEGAL ARGUMENT

POSSESSION, CUSTODY OR CONTROL

Not “title” or “ownership”! But is “custody” akin to title rather than ability to obtain?

POSSESSION, CUSTODY OR CONTROL

Origin of phrase? Cannot find substantive definition for the full phrase or first use in context of discovery, subpoenas, etc. in civil litigation.

- Not used in Blackstone
- But the phrase & variants were in use in many states & some specialized federal statutes by FRCP original 1937 draft
- Earliest usage in 1820s-1850s were in context of property that had to be transferred to a receiver, child custody, habeas corpus rendition duties, & fugitive slave rendition duties.
- Not used in NYS 1848 Field Code (inspiration for FRCP & other modern civil procedure codes)

POSSESSION, CUSTODY OR CONTROL

Sometimes, modern usage makes no attempt to distinguish among the terms:

> (b) Possession, custody, or control of an item 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.

Tex. R. Civ. P. 192.7(b) (no mention of custody element)

Modern meaning of terms? Circuits split over "control" legal right of access on demand v. practical ability to access: Sedona Conference position.

POSSESSION, CUSTODY OR CONTROL

POSSESSION:

Physical possession

Constructive possession – how is that different from “control”?

POSSESSION, CUSTODY OR CONTROL

CONTROL

Circuits split over "control" legal right of access on demand v. practical ability to access: Sedona Conference position.

- Sedona Conference, **The Sedona Conference Commentary on Rule 34 and Rule 45; "Possession, Custody, or Control," https://thesedonaconference.org/publication/Commentary_on_Rule_34_and_Rule_45_Possession_Custody_or_Control (Aug. 2016) (advocates "legal right to obtain" definition**

POSSESSION, CUSTODY OR CONTROL

CONTROL

Sedona Conference view makes sense because of ambiguity of when a party has "practical ability" to obtain data

BUT, what if "legal right" denied. E.g., contractor, employee, lawyer, etc. simply refuse to turn over your data even though legally obligated to do so? Will you be sanctioned?

What if listserv host takes down data after you've requested it
Remedies: obstruction of justice prosecution, action for specific performance; bar ethics grievance, subpoena?

POSSESSION, CUSTODY OR CONTROL

CUSTODY

- Implies some sort of safekeeping, escrow, perhaps trust relationship to person (child, incompetent, prisoner) or thing (in custodia (held subject to court direction or control)
- CUSTODIAN SHOULD HAVE DUTY TO NOTIFY OWNER OR COURT, & ASSERT THEIR INTERESTS & OBJECTIONS.
- WHAT IF DISCLOSURE/PRODUCTION IS BEYOND SCOPE OF CUSTODIANSHIP?
- IF NOT SUCH DUTY, WHEN IS CUSTODY DIFFERENT FROM CONTROL?

POSSESSION, CUSTODY OR CONTROL

Is there an example of “custody” that is not also “control” or constructive possession if custodian doesn’t have duties to third party respecting the res?

I can’t think of any.

If custodian has such duties to third party, why should custodian have unconditional right to produce on demand or subpoena without involving that third party?

POSSESSION, CUSTODY OR CONTROL

- Why party should hesitate to deny "possession, custody or control"
  - Non-party will be subpoenaed by the other side & produce to your opponent
  - Opponent has right equal to you to review the subpoenaed data absent protective order (I've not seen such an order)
  - You won't have opportunity to review before production
  - You won't have opportunity to assert privilege or non-responsiveness

POSSESSION, CUSTODY OR CONTROL

- To preserve right to obtain data from Employees, Officers, Council Persons, Board & Commission Members (collectively, "EOCPB&CM"):
  - **Ordinance giving city right to obtain business-related communications from personal devices of EOCPB&CM (personnel manual or city manager directive might not bind council members & council/board/commission members)**
  - **Ordinance requiring that all e-communications from or to EOCPB&CM respecting city business be made from or copied to an account on a city network.**
  - **Tougher call: Ordinance requiring consent to inspect personal devices.**
  - **Ordinance authorizing attorney do demand ESI - Tex. Disc. R. Prof. Conduct 4.02(a) exception**

  ***See generally,* Sedona Conference, The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations, https://thesedonaconference.org/download-publication?fid=2977 (May 2018) (free registration required).**

POSSESSION, CUSTODY OR CONTROL

(a) In this chapter, "public information" means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

* * *

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;

Tex. Gov't Code § 552.002(a) .

POSSESSION, CUSTODY OR CONTROL

- To preserve right to obtain data from contractors & other agents of the city including lawyers:
  - In contract that city owns all work papers & work product and has right to obtain originals & all drafts & copies in any form (paper, ESI) on request at no cost to city.
  - Texas lawyers already ethically obligated to provide client files absent written agreement to the contrary, possibly subject to payment lien.
  - Texas accountants may push back: Occupations Code gives them ownership of working papers. *Might* be varied by contract to allow them to provide copies to client.
  - Distinguish from copyright: right to make & use future copies, particularly but not exclusively for profit: Contracts could distinguish the two bundles of rights (city access v. future sue & profit).
- Cities probably cannot contract away right to access their public or official records.

POSSESSION, CUSTODY OR CONTROL

- Remedies if employee or contractor refuses to produce to or to permit access by city?
- What measures must city take to avoid sanctions?
- Can trial court provide remedies v. non-parties (yes, subpoena and contempt powers) – City may have to offer to pay expenses
- But will court do so while preserving city right to review data before production to opposing party in litigation”

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