NONPARTY DOCUMENT DISCOVERY FROM CORPORATIONS AND GOVERNMENTAL ENTITIES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

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INTRODUCTION

A subpoena for the production of documentary evidence at a trial or hearing, commonly known as a subpoena duces tecum, has long been essential to the functioning of our judicial system.[1] However, prior to the enactment of the Federal Rules of Civil Procedure in 1938,[2] there was no general federal requirement that a nonparty produce documents for discovery purposes or for use at trial.[3] Rule 45 provides such

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1. *See* Amey v. Long, 103 Eng. Rep. 653, 658 (1808) (Lord Ellenborough, C.J., in holding a subpoena duces tecum to be a compulsory legal obligation, observed that "[t]he right to resort to means competent to compel the production of written, as well as oral testimony seems essential to the very existence and constitution of a Court of Common Law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them."); *see also* Wilson v. United States, 221 U.S. 361, 372-74 (1911) (holding that the production of documents may be compelled independently of custodian's testimony); 5a J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 45.01 (2d ed. 1986) [hereinafter MOORE's] (reviewing the amendment process to Federal Rule of Civil Procedure 45, from passage in 1938 through 1980, seen as clarifying and simplifying the subpoena process for tangible things); Welling, *Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure*, 59 NOTRE DAME L. REV. 110, 111 (1983) (concluding that, under the Federal Rules of Civil Procedure, the only means of discovery for nonparty's tangibles is through a subpoena duces tecum); Note, *Rule 34(c) and Discovery of Nonparty Land*, 85 YALE L.J. 112, 120-21 (1975) (Federal Rule of Civil Procedure 45 has allowed discovery of documents since 1938 and of nonparty's tangibles since 1946).

2. Congress authorized the Supreme Court to promulgate general rules of civil procedure for United States district courts and courts of appeal by the Act of June 19, 1934, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1982)). The Court adopted the original rules on December 20, 1937 and the Attorney General forwarded them to Congress on January 3, 1938. Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 647-49 (1938). The rules became effective on September 16, 1938. 28 U.S.C. § 2072 app. at 515 (1982).

3. *See* MOORE's, *supra* note 1, ¶ 45.05[1] (there was no express statutory provision requiring the production of documents in the possession of a person not a party to an

a procedure.[4] In particular, it permits "document discovery"[5] from a nonparty by authorizing the clerk of each district court to issue an ex parte subpoena commanding any person to produce documents designated in the subpoena for inspection at a deposition.[6] Document requests under rule 45 are subject to the scope and limitations of rule 26(b),[7] and may also be modified or vacated under subsection (b) of

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action).

4. *See* FED. R. CIV. P. 45(b). Rule 45 has been amended several times since its enactment. For a complete schedule of amendments to rule 45, see MOORE'S, *supra* note 1, ¶ 45.01[1].

5. *See* FED. R. CIV. P. 45(d)(1). Document discovery relates to "designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b)." *Id.*

6. *Id.* To obtain document discovery from nonparties, a litigant must use a subpoena duces tecum pursuant to rule 45(d)(1). *See id.* This procedure is available in conjunction with a deposition of a nonparty under rule 30(a). *See* FED. R. CIV. P. 30(a). Rule 30(a) provides that a subpoena, issued pursuant to rule 45, may be used to compel a witness to attend the deposition. *Id.* The litigant, therefore, may subpoena a nonparty for deposition and compel him to bring designated documents. *See* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1341 (8th Cir. 1975) (a nonparty may be compelled to produce documents only by a subpoena duces tecum issued pursuant to rule 45(d)(1)); United States v. Allen, 578 F. Supp. 468, 472 (W.D. Wis. 1983) (quoting *Fisher* for the same proposition), *aff'd sub nom.* Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982); Jones v. Continental Casualty Co., 512 F. Supp. 1205, 1206-07 (E.D. Va. 1981) (a subpoena duces tecum may be issued only in conjunction with the taking of the nonparty's deposition and not solely for discovery purposes); Ghandi v. Police Dep't of Detroit, 74 F.R.D. 115, 118 n.3 (E.D. Mich. 1977) (if the litigant has no intention of deposing the nonparty, a subpoena duces tecum under 45(d)(1) for production of documents is impermissible); Horenstein v. Gulf Oil Corp., 20 Fed. R. Serv. 2d (Callaghan) 1258, 1262 (D. Mass. 1975) (when one of the named deponents is no longer employed by the corporate defendant, subpoenas must be issued under rule 45); McLean v. Prudential S.S. Co., 36 F.R.D. 421, 426 (E.D. Va. 1965) (because 45(b) was meant to aid in the actual trial, the use of a subpoena duces tecum purely for discovery purposes, not in association with a deposition, should be quashed).

Rule 45 permits the issuance of two kinds of subpoenas: 1) a subpoena duces tecum compelling a witness to produce documents and other mobile things, and 2) a subpoena ad testificandum compelling the attendance of a witness. Both types may be used in connection with the taking of depositions. *See* FED. R. CIV. P. 45(d). Documents cannot be obtained from a nonparty prior to trial if the litigant has no intention of deposing the nonparty to whom the subpoena is directed. *See* United States v. International Business Machs. Corp., 71 F.R.D. 88, 90 (S.D.N.Y. 1976) (rule 45(d) "neither authorizes nor addresses subpoenas duces tecum which are unconnected to a deposition proceeding"); Newmark v. Abeel, 106 F. Supp. 758, 759 (S.D.N.Y. 1952) (motion to quash granted when subpoena duces tecum is served on person not a party for discovery only).

7. FED. R. CIV. P. 26(b). This rule provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It

rule 45[8] and under rule 26(c).[9]

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is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. Rule 26(b) provides for liberal discovery. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (modern discovery mechanisms make a trial "more [of] a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("deposition-discovery rules are to be accorded a broad and liberal treatment"). *See generally* Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 59 (1971) (the 1970 amendments to the rules of discovery under the Federal Rules of Civil Procedure reduce the extensive motion practice of discovery which is now more general within rule 26 and controlled by sanctions which can be imposed under rule 37); Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576 (1954) (arguing for a continued liberal construction of the Federal Rules of Civil Procedure with the judicial power to control abusive use of discovery seen as sufficient to protect both litigants and nonparties).

8. FED. R. CIV. P. 45(b). Rule 45(b) permits the court to quash or modify the subpoena if it is unreasonable and oppressive, or to condition denial of a subpoena on the moving parties' payment of some or all of the production costs of requested documents. Since public policy favors procedures designed to reach the truth, the power of a subpoena has traditionally been viewed as an essential means of locating evidence for the factfinder and is subject to being vacated or modified only on the grounds of privilege. *See* McMann v. SEC, 87 F.2d 377, 378 (2d Cir.) (upholding the authority of the SEC to procure the account records of the plaintiff from his stockbroker on the ground that, unlike the attorney-client, priest-penitent, physician-patient, and husband-wife relationships, a broker-customer relationship does not create a privilege exempting account records from procurement under a subpoena duces tecum), *cert. denied*, 301 U.S. 684 (1937); *Ghandi*, 74 F.R.D. at 125 (F.B.I. claim of privilege does not require quashing a valid subpoena duces tecum of investigatory documents, which may be subjected to an in camera inspection at the discretion of the court); *In re* Equitable Plan Co., 185 F. Supp. 57, 60 n.2 (S.D.N.Y.) ("Strong public policy, expounded by . . . the Supreme Court . . . favors techniques and procedures designed to reach the truth. The power of subpoena is an essential instrument of evidence-locating and fact-finding. Only when the policy is in conflict with weightier policy is privilege against disclosure granted."), *modified sub nom.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960). For an example of a case in which a valid privilege was asserted, see Cooney v. Shipbuilding & Drydock Co., 288 F. Supp. 708, 718 (E.D. Pa. 1968) (upholding, to a limited extent, nonparty government agency's claim of privilege because plaintiff failed to demonstrate the necessity for production of investigatory records).

9. FED. R. CIV. P. 26(c). Rule 26(c) provides for protective orders:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after

Decisional law interpreting rule 45 has yet to consistently determine when a nonparty corporation or governmental entity, subject to a district court's in personam jurisdiction, may be required to produce documents it controls that are physically located within the boundaries of the United States but outside of the district in which the subpoena was issued.[10] For example, the Chief Judge of the United States District Court for the Southern District of New York recently vacated a subpoena duces tecum, where the documents designated in it under rule 45(a) were not regularly maintained within the district by a nonparty under his jurisdiction.[11] His decision, in part, relied on the Fifth Circuit Court of Appeals' opinion in *Cates v. LTV Aerospace Corp.*[12] *Cates* involved a wrongful death action where the plaintiff sought an accident report in the custody of the Navy, a nonparty.[13] A subpoena

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being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id.

10. *See infra* text accompanying notes 11-17.

11. Laker Airways Ltd. v. Pan Am. World Airways, 607 F. Supp. 324 (S.D.N.Y. 1985). In a private antitrust action instituted by an insolvent British-based airline, Judge Brieant, now Chief Judge of the United States District Court for the Southern District of New York, quashed nonparty deposition subpoenas under Federal Rule of Civil Procedure 45 on Midland Bank and Samuel Montagu & Co., Ltd. The subpoenas sought information and documents from the nonparties in connection with an action pending in the United States District Court for the District of Columbia. *Id.* at 325. The court acknowledged that it had in personam jurisdiction over the nonparties but vacated the subpoenas on the ground that the persons served did not have custody of the documents, which were under the control of their affiliate offices in the United Kingdom. *Id.* at 325-26.

12. 480 F.2d 620 (5th Cir. 1973). Judge Brieant stated: "Essentially then the deposition subpoenas duces tecum seek to require Midland and Montagu, by officers having custody in the United Kingdom to produce in New York for use in the District of Columbia litigation, documents and records regularly maintained at their home offices in London. This is inappropriate." *Laker*, 607 F. Supp. at 326 (citing Cates v. LTV Aerospace Corp., 480 F.2d 620 (5th Cir. 1973); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); First Nat'l City Bank of New York v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960); Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515 (S.D.N.Y. 1968)).

Judge Brieant acknowledged that the subpoenas duces tecum were served on Midland's New York branch office, and upon Montagu's New York representative office, but concluded that the *Cates* line of cases "continue to reflect the law applicable to nonparties." *Id.*

13. *Cates*, 480 F.2d at 621. The widow and son of a Navy pilot killed in a plane crash named as defendants three private companies which manufactured the plane and some

had been issued in the Northern District of Texas, and the court held that, with the documents physically located in Virginia and under the constructive custody of the Secretary of the Navy in Washington, D.C., the subpoena could not require the Navy to produce the documents at a deposition to be taken in Dallas.[14] On the other hand, in *Ghandi v. Police Department of Detroit*,[15] the Chief Judge of the United States District Court for the Eastern District of Michigan followed a different approach and rejected the *Cates* rationale.[16] He ordered a nonparty to comply with a subpoena duces tecum requiring it to produce deposi-

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of its parts. The Department of the Navy was not made a party to the action. *Id.*

14. *Id.* at 622-24. Plaintiffs did not resort to the means of discovery provided in the naval regulations, which required that parties send a court order to the Secretary of the Navy indicating the desired documents. *See* 32 C.F.R. § 720.30(a) (1986).

15. 74 F.R.D. 115 (E.D. Mich. 1977).

16. *Id.* at 119-20. The *Ghandi* case involved a motion filed by the Federal Bureau of Investigation to quash a subpoena duces tecum for the production of documents. *Id.* at 117. It arose out of an allegedly unlawful surveillance of various socialist party members by Detroit police authorities, F.B.I. agents, and former Department of Justice officials. Ghandi v. Police Dep't of Detroit, 23 Fed. R. Serv. 2d (Callaghan) 351, 352 (E.D. Mich. 1977). The United States District Court for the Eastern District of Michigan ordered the F.B.I., a nonparty, to comply with a subpoena duces tecum requiring it to produce pretrial deposition documents within its custody and control, regardless of whether the documents were physically located beyond the territorial jurisdiction of the court, and without regard to the F.B.I. Detroit field office's lack of control over the documents. *Ghandi*, 74 F.R.D. at 125. The F.B.I. had been served in Detroit as an entity, and not as a local office, with a notice of a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6), in addition to a subpoena advising it to designate persons to testify on its behalf and to produce documents under Federal Rule of Civil Procedure 45(d). *Id.* at 118. The court stressed that "the location of the documents is of less importance than the jurisdiction of this court over the agency in control of the documents." *Id.* at 120. The court explained that it had jurisdiction over the F.B.I. through the F.B.I.'s presence in Detroit to order it, pursuant to rule 30(b)(6), to designate persons to answer at a deposition. Consequently, documents kept by the F.B.I. outside the district were also within the range of the court's subpoena power. *Id.* at 120. Chief Judge Keith stated that:

> If service upon the F.B.I. within this district was valid, than [sic] the Bureau, and not just its Detroit Field Office, is required . . . to designate a person to attend the deposition to testify on behalf of the Bureau, and to produce the documents subpoenaed, including those located outside of the district.

Id.

Judge Keith distinguished the *Cates* case. He stated that the decision of the *Cates* court that rule 45(d)(2), rather than rule 30(b)(6), determines where depositions may be taken and where documents may be produced, does not necessarily lead to the conclusion that documents located outside the judicial district may not be ordered produced within the district. *Id.* at 119-20. As this question had not yet been decided in the Sixth Circuit Court of Appeals and the court was not bound to follow another circuit's decisions, Judge Keith rejected *Cates*. *Id.* at 122 (citing United States v. Motte, 251 F. Supp. 601, 605 n.3 (S.D.N.Y. 1966) (a decision of a court of appeals of a circuit other than that in which the district court sits is not binding on the district court)). For a further discussion of *Ghandi*, see *infra* notes 58-75 and accompanying text.

tion documents physically located outside the district.[17] Thus, each chief judge reached a different result solely on the basis of how he interpreted the jurisdictional restrictions set forth by rule 45.

This Article will analyze the various approaches courts follow when deciding if a nonparty can be compelled to produce documents located outside the judicial district where a rule 45 subpoena duces tecum is issued.[18] Part I will review the procedure for nonparty document discovery and discuss the decisional law applying the enforcement provisions of rule 45. Part II will analyze the jurisdictional principles used by federal district courts to determine when documents under the control of nonparties, and not located within the territorial limits of the court, should be produced for discovery purposes. Part III will recommend the appropriate approach to be followed by federal district courts when asked to enforce the nonparty subpoena provisions of rule 45.

PART I. PROCEDURE FOR DISCOVERY OF DOCUMENTS IN THE CONTROL OF NONPARTIES

Document discovery is generally authorized by rule 34;[19] however, this rule applies almost exclusively to the production of material under the custody or control of a party.[20] Nonparty document discovery is

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17. *Ghandi*, 74 F.R.D. at 125.

18. *See infra* notes 38-75 and accompanying text.

19. FED. R. CIV. P. 34. Rule 34 states in pertinent part:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents . . . or to inspect and copy, test, or sample any tangible things which constitute or contain matters *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* . . . .

Id. (emphasis added).

The scope of discovery of documents, whether from a party under rule 34 or from a nonparty under rule 45(b) and (d), is as broad as rule 26(b) will permit, and reaches all documents within the custody and control of the organization ordered to produce them. There remain a few important differences between party- and nonparty-document discovery.

First, as stated in rule 45, a nonparty cannot be required to produce documents for inspection or copying without service of a notice of deposition and a subpoena. Under rule 34(b), requests may be served by any party on another party without leave of the court. Second, it is not necessary to serve a subpoena duces tecum on an institutional deponent who is a party and has been noticed for a deposition under rule 30(b)(6); rather, production of documents may be compelled by service of a request under 30(b)(5), which requires compliance with the procedure of rule 34. Third, rule 34 requests for documents can be issued independently of a taking of a deposition, while rule 45 requires that testimony be given.

20. *See id.* Rule 34 does not provide for production of nonparties' documents, as the terms of the rule limit documents to those of a "party." *Id.* Although subdivision (c)

governed by rule 45,[21] which requires the clerk of the district court to issue a subpoena duces tecum for the purpose of discovery and inspection of documents at a deposition of the nonparty.[22] The scope of nonparty document discovery under rule 45 is limited by the rule itself and by the scope and protective provisions of rule 26.[23] Rule 45(b) permits a party to command the person to whom it is directed to produce for inspection at the deposition all items designated in the subpoena.[24] Rule 45(e) sets forth the territorial limits for service of a subpoena for a hearing or trial.[25] However, since no specific provision is made under rule 45 for service of a deposition subpoena for documents from a non-

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states that rule 34 does not "preclude . . . independent action[s] against a person not a party for production of documents and things and permission to enter upon land," courts have held that an independent action may not be used for discovery of documents due to the availability of a subpoena duces tecum under rule 45(d). *See* Hickman v. Taylor, 329 U.S. 495, 504 (1946) (only method of examining materials prepared for possible litigation by adverse party's counsel is by deposing counsel under rule 26 and attempting to compel production of materials under rule 45); *see also* Wimes v. Eaton, 573 F. Supp. 331, 334 (E.D. Wis. 1983) (party restriction in rule 34 ameliorated by availability of other discovery mechanisms applicable to nonparties, including rule 45(d)(1)); Smith v. Parmely, 558 F. Supp. 161, 162 (E.D. Tenn. 1982) (rule 34 cannot be used to force nonparties to produce verified copies of statements given to nonparty police officer by defendant, although a subpoena may be obtained by use of rule 45); Home Ins. Co. v. First Nat'l Bank of Rome, 89 F.R.D. 485, 487 (N.D. Ga. 1980) (rule 34(c) does not cover production of notes, payment records, correspondence, and memoranda by nonparty, particularly when adequate remedies, such as a subpoena duces tecum, are available under discovery rules); FED. R. CIV. P. 34(c) advisory committee's note ("Rule 34 as revised continues to apply only to parties.").

21. FED. R. CIV. P. 45.

22. *Id.* Rule 45(a) states, in pertinent part:

> Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

Id.

23. For a further discussion of these restrictions, see *supra* notes 7-9 and accompanying text.

24. FED. R. CIV. P. 45(b) ("[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein").

25. FED. R. CIV. P. 45(e)(1). This rule states in pertinent part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held.

Id.

party,[26] "general principles of territorial jurisdiction require it to be served within the district in which it is issued."[27]

Proof of service of a notice to take a deposition[28] authorizes the clerk of the district court for the district in which the deposition is to be taken to issue blank document subpoenas for the persons named or described in the notices.[29] Prior to service of the subpoena upon the nonparty, the attorney designates the documents requested.[30] The procedure for a party taking the deposition of a nonparty public or private corporation or government agency is set forth in rule 30(b)(1) and (6).[31]

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26. *See* FED. R. CIV. P. 45(d). Rule 45(d)(2) fixes the place where a person is required to attend a deposition and does not apply to service. *See In re* Guthrie, 733 F.2d 634 (4th Cir. 1984) (neither rule 45(e) nor 45(d) apply to service). Rule 45(d)(2) provides that "[a] person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court." FED. R. CIV. P. 45(d)(2).

27. MOORE'S, *supra* note 1, ¶ 45.06[1], at 50; *see* Elder-Beerman Stores Corp. v. Federated Dep't Stores Corp., 45 F.R.D. 515 (S.D.N.Y. 1968) (corporation not doing business in a district cannot be compelled to respond to a subpoena served in that district); *In re* Equitable Plan, 185 F. Supp. 57 (S.D.N.Y.) (New York agencies of foreign banks required to produce documents specified by subpoena terms, even though documents located outside United States), *modified on other grounds sub nom.* Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); *In re* Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947).

28. *See* FED. R. CIV. P. 45(d)(1). This rule states in pertinent part that

> [p]roof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

Id. Rules 30(b) and 31(a) set forth the procedure for giving notice to take oral depositions and depositions upon written questions.

29. *See* FED. R. CIV. P. 45(a) ("The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.").

30. *Id.*

31. *See* FED. R. CIV. P. 30(b)(1), (6). Rule 30(b)(6) provides:

> A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

FED. R. CIV. P. 30(b)(6). In 1970, subdivision (b)(6) was added to rule 30 as an alternative means of examining a corporation, partnership, association, or governmental agency. The new procedure was intended to "supplement[] the existing practice whereby the examin-

The notice may name a specific person to be deposed or may designate the organization as the deponent, and the organization so named must then appoint one or more persons to testify on its behalf.[32] A subpoena

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ing party designates the corporate official to be deposed" and to "reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a 'managing agent.'" FED. R. CIV. P. 30(b)(6) advisory committee's note. Rule 30(b) was subsequently amended in 1971 to make it clear that the new provision was applicable to deposing both party and nonparty organizations. *See* FED. R. CIV. P. 30(b)(6) advisory committee's note (1971 Amendment).

Prior to the addition of rule 30(b)(6), documents in the custody of nonparty organizations could be subpoenaed only under rule 45(d)(1), which was susceptible to two interpretations. Without the benefit of a rule which specifically authorized the subpoena of organizations as entities, a possible theoretical distinction existed between characterizing the organizational entity, merely served through its conduit agent, as the "person" to whom the subpoena was directed, and characterizing the agent as the deponent. Under the latter characterization, the subpoena would be effective only respecting documents within the control of the agency. *See, e.g.,* First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959) (where officer or agent of corporation has power to cause branch records to be sent from branch to home office for any corporate purpose, it has enough control to respond to subpoena's document request), *cert. denied,* 361 U.S. 948 (1960); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952) (if a corporation has the power to elect a majority of directors of another corporation, it is the "parent" corporation and therefore has control necessary to secure documents from subsidiary that are demanded by subpoena). Under the former characterization, the subpoena would be effective as to all documents within the control of the organizational entity. *See, e.g.,* Wilson v. United States, 221 U.S. 361 (1911):

> Where the documents of a corporation are sought the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena *duces tecum* should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity, and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice.

Id. at 374-75; *In re* Grand Jury Subpoena Duces Tecum, 72 F. Supp. 1013 (S.D.N.Y. 1947) (test of whether to excuse a corporation from producing documents and records located outside the United States is whether it has control of those documents, not where they are located). The purpose of the Advisory Committee in adding rule 30(b)(6) was to remove the ambiguity surrounding subpoena of nonparty organizations under rule 45(d)(1), and to make service effective as to corporate documents wherever found. FED. R. CIV. P. 30(b)(6) advisory committee's note.

32. FED. R. CIV. P. 30(b)(6). This rule provides that in its notice to take a deposition, a party may name the organizational entity as the "person" to be deposed and describe with reasonable particularity the matters on which examination is requested. It is then the duty of the organization to designate a spokesperson who consents to testify on its behalf as to matters known or reasonably available to it. If the organization is a party to the litigation, notice alone is sufficient to compel it to comply. In the case of a nonparty, however, a subpoena must be issued pursuant to rule 45 in addition to notice advising the organization of its duty to designate someone to testify for it at a deposition under rule 30(b)(6). If documents are requested, a subpoena duces tecum "may command the person to whom it is directed to produce and permit inspection and copying of desig-

duces tecum may also be issued pursuant to rule 45 to inform the organization of its duty to designate someone to testify for it at a deposition.[33] If documents are requested, a deposition notice must be served with a subpoena requesting the nonparty to permit the inspection and copying of books, papers, documents, or other tangible things within the scope of rule 26.[34] Failure to designate a spokesperson, or to otherwise obey a subpoena, is punishable as a contempt of court.[35] At the court's discretion, sanctions may also be imposed against a nonparty organization under rule 37(d).[36] The party requesting discovery and the nonparty deponent may stipulate that the documents be produced without taking the deposition.[37]

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nated books, papers, documents, or other tangible things which constitute or contain matters within the scope of examination permitted by Rule 26." FED. R. CIV. P. 45(d)(1). *See* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (8th Cir. 1975) (subpoena duces tecum is necessary to compel production of documents from nonparties); Horenstein v. Gulf Oil Corp., 20 Fed. R. Serv. 2d (Callaghan) 1258 (D. Mass. 1975) (plaintiffs entitled to discovery of all documents that were relevant and sufficiently described, despite fact that production would be burdensome).

33. *See* FED. R. CIV. P. 30(b)(6).

34. *See* FED. R. CIV. P. 45(d)(1); *see also* Ghandi v. Police Dep't of Detroit, 74 F.R.D. 115, 118 (E.D. Mich. 1977) (proper subpoena is entitled "Deposition Subpoena to Testify or Produce Documents or Things").

35. *See* FED. R. CIV. P. 45(f). Rule 45(f) provides that "[f]ailure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." *Id.*

36. FED. R. CIV. P. 37(d). Rule 37(d) provides in pertinent part:

> If . . . a person designated under Rule 30(b)(6) . . . fails (1) to appear before the officer who is to take his deposition . . . (2) to serve answers or objections to interrogatories . . . or (3) to serve a written response to a request for inspection . . . the court . . . may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Id.

Subdivision (b)(2) of rule 37 provides in pertinent part:

> If . . . a person designated under Rule 30(b)(6) . . . fails to obey an order to provide or permit discovery . . . the court . . . may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

FED. R. CIV. P. 37(b)(2)(A)-(C).

37. There is no specific requirement under subdivisions 30(a) and (b)(1) that a nonparty be subpoenaed to a deposition. *See* Less v. Taber Instrument Corp., 53 F.R.D. 645

The principal cases discussing a court's power to compel a nonparty, subject to in personam jurisdiction, to produce "discovery documents" located outside the court's territorial limitations but within the boundaries of the United States are *Cates v. LTV Aerospace Corp.*[38] and *Ghandi v. Police Department of Detroit.*[39]

Cates was the first decision involving rule 30(b)(6), as added in 1970, to reach a court of appeals. It involved a wrongful death action arising from the crash of a United States Navy plane in Okinawa.[40] The action was instituted in the United States District Court for the Northern District of Texas.[41] Plaintiffs sought to obtain the Navy "Aircraft Accident Report" pursuant to rule 30(b)(6) by serving a subpoena directed to the Navy upon the commanding officer of the Dallas Naval Air Station.[42] The report was located at the Naval Safety Center in Norfolk, Virginia, and in the constructive custody of the Secretary of the Navy in Washington, D.C., according to naval regulations.[43] The plane crash occurred in Okinawa and there was no connection between

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(W.D.N.Y. 1971). The consequence of using a subpoena rather than a simple notice is that the discovering party must pay witness fees. *See* FED. R. CIV. P. 45(c). However, if a nonparty deponent is not subpoenaed and fails to appear, that deponent cannot be compelled to attend and the discovering party may risk paying the reasonable expenses incurred by another party in attending the deposition. *See* FED. R. CIV. P. 30(g)(2). Further, failure to respond in accordance with a subpoena for deposition issued under rule 30(b)(1) carries the same sanctions as a failure to respond to a subpoena issued under subdivision (b)(6) of rule 30. FED. R. CIV. P. 37(d) (authorizing sanctions, including contempt orders, against person designated under rule 30(b)(6) for failure to appear for deposition, serve answers to interrogatories, or serve a written response to a request for inspection); FED. R. CIV. P. 45(f) (failure of any person to obey a subpoena without an adequate excuse deemed a contempt of court). If a nonparty organization, without adequate excuse, fails to comply with a subpoena, the organization itself, and not the designated spokesman, may be punished for contempt of court pursuant to rule 45(f). FED. R. CIV. P. 45(f). It is important to note that unlike rule 30(b)(6) designees, mere employees are not regarded as spokesmen for the organization and, therefore, sanctions cannot be imposed against the organization for its employees' failure to attend a deposition. Cleveland v. Palmby, 75 F.R.D. 654, 657 (W.D. Okla. 1977); W.R. Grace & Co. v. Pullman, Inc., 74 F.R.D. 80, 83 (W.D. Okla. 1977).

38. 480 F.2d 620 (5th Cir. 1973).

39. 74 F.R.D. 115 (E.D. Mich. 1977).

40. *Cates,* 480 F.2d at 620.

41. *Id.*

42. *Id.* at 621. Plaintiffs attempted to obtain an aircraft accident report by addressing a subpoena duces tecum to the Department of the Navy and serving it upon the Commanding Officer of the Dallas Naval Air Station. The subpoena was accompanied by a notice for deposition issued pursuant to rule 30(b)(6), which requested the Department of the Navy to designate someone to appear for the taking of the deposition. *Id.* The Navy, however, refused to comply with this procedure, arguing that the applicable naval regulations, codified in 32 C.F.R. § 720.30(a), require a discovering party seeking unclassified naval records to send a copy of a court order calling for their production to the Secretary of the Navy or other custodian of the records. 480 F.2d at 622-23.

43. 480 F.2d at 622.

the commanding officer of the Dallas Naval Air Station and the plane crash or the accident report, and the Navy was not a party to the action.[44] The plaintiffs argued that since the commanding officer was physically present within the district, documents located outside of the district should be produced at his deposition.[45] The court of appeals held that neither the language in rule 30(b)(6) nor that contained in the advisory committee notes required that a nonparty produce in one judicial district documents in the custody of the head of the organization located in another judicial district.[46] The court reasoned that rule 30(b)(6) required *in pari materia* consideration of rule 45(d)(2), which then limited to forty miles the distance that nonparty deponents could be ordered to travel.[47] Insofar as rule 30(b)(6) only provides a procedure to use in determining the proper person to depose and does not address the issue of where the deposition is to be taken or where the documents are to be produced, the court held that rule 45(d)(2) was controlling.[48] Significantly, the court of appeals also held that allowing production of records in the custody and control of nonparties in foreign judicial districts would violate "traditional notions of power and jurisdiction."[49]

The *Cates* decision has been followed by at least one district court in the Fifth Circuit. In *In Re North American Acceptance Corp.*,[50] the court held that nonparty Delaware corporations having their principal places of business in New York and local offices in Georgia could not be required to comply with deposition subpoenas issued in Georgia calling for the production of documents and witnesses designated pur-

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44. *Id.*

45. *Id.* at 623.

46. *Id.*

47. *Id.*

48. *Id.* The court of appeals concluded that rule 30(b)(6) does not give the district court issuing the subpoena the power to "require that documents, in the custody or control of the head of an agency located outside the judicial district, be brought into the judicial district." *Id.* Thus, the court held that a person designated by an organization pursuant to rule 30(b)(6) could not be required to travel outside the limits imposed by rule 45(d)(2). *Id.*

49. *Id.* at 624. In support of this proposition, the court cited Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515, 518 (S.D.N.Y. 1968). In *Elder-Beerman,* the district court held that a nonparty Georgia corporation, which was not doing business in New York, could not be compelled to answer a subpoena issued by the district court in New York with respect to a federal antitrust action in Ohio. *Id.* at 518. In dicta, the court observed that even if the Georgia corporation could be said to be doing business in New York for purposes of personal jurisdiction in a case where it was a defendant, "it would not automatically follow that a sufficient nexus to permit it to be subject to subpoena as a non-party witness in New York would be established." *Id.* The court further suggested that in deciding whether it had jurisdiction, "a different [and presumably stricter] standard might apply to non-party subpoenas." *Id.* at 516.

50. 21 Fed. R. Serv. (Callaghan) 612 (N.D. Ga. 1975).