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

JAY C. CARLISLE\*

## 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.<sup>1</sup> However, prior to the enactment of the Federal Rules of Civil Procedure in 1938,<sup>2</sup> there was no general federal requirement that a nonparty produce documents for discovery purposes or for use at trial.<sup>3</sup> 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.<sup>4</sup> In particular, it permits "document discovery"<sup>5</sup> 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.<sup>6</sup> Document requests under rule 45 are subject to the scope and limitations of rule 26(b),<sup>7</sup> 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<sup>8</sup> and under rule 26(c).<sup>9</sup>

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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.<sup>10</sup> 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.<sup>11</sup> His decision, in part, relied on the Fifth Circuit Court of Appeals' opinion in *Cates v. LTV Aerospace Corp.*<sup>12</sup> *Cates* involved a wrongful death action where the plaintiff sought an accident report in the custody of the Navy, a nonparty.<sup>13</sup> 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.<sup>14</sup> On the other hand, in *Ghandi v. Police Department of Detroit*,<sup>15</sup> the Chief Judge of the United States District Court for the Eastern District of Michigan followed a different approach and rejected the *Cates* rationale.<sup>16</sup> 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 pre-trial 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.<sup>17</sup> 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.<sup>18</sup> 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;<sup>19</sup> however, this rule applies almost exclusively to the production of material under the custody or control of a party.<sup>20</sup> 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,<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Rule 45(e) sets forth the territorial limits for service of a subpoena for a hearing or trial.<sup>25</sup> 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,<sup>26</sup> "general principles of territorial jurisdiction require it to be served within the district in which it is issued."<sup>27</sup>

Proof of service of a notice to take a deposition<sup>28</sup> 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.<sup>29</sup> Prior to service of the subpoena upon the nonparty, the attorney designates the documents requested.<sup>30</sup> 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).<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Failure to designate a spokesperson, or to otherwise obey a subpoena, is punishable as a contempt of court.<sup>35</sup> At the court's discretion, sanctions may also be imposed against a nonparty organization under rule 37(d).<sup>36</sup> The party requesting discovery and the nonparty deponent may stipulate that the documents be produced without taking the deposition.<sup>37</sup>

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 non-party 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 non-party, 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.*<sup>38</sup> and *Ghandi v. Police Department of Detroit*.<sup>39</sup>

*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.<sup>40</sup> The action was instituted in the United States District Court for the Northern District of Texas.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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."<sup>49</sup>

The *Cates* decision has been followed by at least one district court in the Fifth Circuit. In *In Re North American Acceptance Corp.*,<sup>50</sup> 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).

suant to rule 30(b)(6).<sup>51</sup> Similarly, in *Laker Airways Ltd. v. Pan American World Airways*,<sup>52</sup> the United States District Court for the Southern District of New York applied the *Cates* rationale to quash a subpoena requesting documents from nonparty witnesses subject to the court's in personam jurisdiction.<sup>53</sup> The court held that because the nonparties' activities in connection with the dispute took place solely in the United Kingdom, they could not be compelled to produce documents in the custody of their offices outside the district.<sup>54</sup> In addition, the Eleventh Circuit Court of Appeals recently relied on *Cates* and *North American Acceptance* to affirm a lower court's decision to quash a subpoena for documents from a nonparty whose appointed agent had accepted service of process within the territorial limits of the district court that issued the subpoena.<sup>55</sup> In deciding *Ariel v. Jones*,<sup>56</sup> the Eleventh Circuit, positing personal jurisdiction, declined to enforce the subpoena duces tecum, because the agent's principal had custody of the documents in Colorado and did not have "sufficient contacts" with the Southern District of Florida.<sup>57</sup>

Notably, the *Laker* and *Ariel* courts<sup>58</sup> neither cited nor distinguished *Ghandi v. Police Department of Detroit*,<sup>59</sup> an earlier decision

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51. *Id.* at 614, 617. The district court framed the issue as "whether the territorial limitations imposed by [rule] 45(d)(2) apply to protect a nonparty corporation, served with a subpoena in a district outside of the state of its principal place of business, when the subpoena calls for the production in that district of documents located at its principal offices." *Id.* at 614-15. The court held that, even if it had personal jurisdiction over the nonparty corporations, because the local offices in Georgia did not "control" the documents kept in New York, the subpoenas duces tecum must be vacated. *Id.* at 617. The court added that "[i]n the absence of such control, therefore, even the existence of personal jurisdiction in this court is insufficient to create jurisdiction over the documents which are outside the district." *Id.*

52. 607 F. Supp. 324 (S.D.N.Y. 1985).

53. *Id.* at 326. The court rested its decision on its assertion that Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 45 F.R.D. 515 (S.D.N.Y. 1968), and *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973), "continue to reflect the law applicable to non-parties." 607 F. Supp. at 326. For a fuller discussion of *Elder-Beerman*, see *supra* note 49 and accompanying text.

54. 607 F. Supp. at 326.

55. See *Ariel v. Jones*, 693 F.2d 1058, 1060-61 (11th Cir. 1982).

56. *Id.*

57. *Id.* at 1058. The court of appeals held that the Florida district court did not abuse its discretion in quashing a subpoena duces tecum served on the nonparty United States Olympic Committee. Although the Committee had appointed an agent to receive process in Florida, such agent did not "control" the documents located at the Committee's headquarters in Colorado. Furthermore, the party seeking the documents appeared to have the ability to obtain them in another judicial district. *Id.*

58. See *Ariel v. Jones*, 693 F.2d 1058 (11th Cir. 1982); *Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985). For a discussion of *Laker* and *Ariel*, see *supra* notes 52-57 and accompanying text.

59. 74 F.R.D. 115 (E.D. Mich. 1977). Plaintiffs alleged that the city and federal de-

which rejected the *Cates* approach.<sup>60</sup> In *Ghandi*, the plaintiffs sought to discover various reports filed by informants of the Federal Bureau of Investigation ("F.B.I.") relating to their activities as members of a socialist political organization. In denying the F.B.I.'s motion to quash pursuant to rule 45(b), the Federal District Court for the Eastern District of Michigan addressed three basic objections asserted by the Bureau: (1) that the court was without jurisdiction to order the documents which were outside of Michigan and beyond the control of the F.B.I. Michigan field office;<sup>61</sup> (2) that compliance with the subpoena would be unduly burdensome;<sup>62</sup> and (3) that the information sought was irrelevant to the pending action.<sup>63</sup> Recognizing that the threshold issue was jurisdiction, the court held that service upon the F.B.I. was effective within the Eastern District of Michigan, and that pursuant to rule 30(b)(6), the court had jurisdiction to compel the Bureau as an entity, rather than just its Detroit field office, to designate a person to attend a deposition and to produce documents within the F.B.I.'s control, including those located outside of the district.<sup>64</sup>

The *Ghandi* court held that the location of the documents was irrelevant since it had in personam jurisdiction over the F.B.I. as an organization through the presence of its Detroit field office.<sup>65</sup> It rejected the F.B.I.'s argument, which was based upon the *Cates* holding, that a subpoena duces tecum issued under rule 45(d)(1) and directed to a governmental agency pursuant to rule 30(b)(6) can only compel the production of documents within the control of the local field office at the time the subpoena is served.<sup>66</sup> Noting that the F.B.I., rather

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defendants conspired to infiltrate their political organization in violation of the Civil Rights Act, 42 U.S.C. §§ 1983, 1985-1986 (1983), and in violation of the first through ninth amendments to the United States Constitution. See *Ghandi v. Police Department of Detroit*, 66 F.R.D. 385, 387 (E.D. Mich. 1975). Specifically, the plaintiffs sought to prove that a confidential informant of the F.B.I. became a member and representative of their organization, and that the Bureau and its affiliates illegally searched the party's offices and seized various items. *Id.* at 385. Although the plaintiffs originally named the F.B.I. as a defendant, the action was dismissed as to the Bureau on the grounds of sovereign immunity. *Id.* at 388.

60. For a fuller discussion of *Cates*, see *supra* notes 38-49 and accompanying text.

61. *Ghandi*, 74 F.R.D. at 119. The F.B.I. argued that the requested documents were located in various judicial districts throughout the United States and that the court lacked jurisdiction to enforce production of these documents. *Id.*

62. *Id.* at 124. The F.B.I. argued that the production of the documents would be time consuming, thereby making the request burdensome. *Id.*

63. *Id.* at 123.

64. *Id.* at 120.

65. *Id.*

66. *Id.* at 119-20. The court stated, "[t]he conclusion that documents located outside the judicial district may not be ordered produced within the district does not necessarily follow from the statement that this determination is controlled by Rule 45(d)(2) and not Rule 30(b)(6)." *Id.*

than its Detroit field office, was the "person" to whom the subpoena was directed, and construing rules 30 and 45 "to secure the just, speedy, and inexpensive determination of [the] action,"<sup>67</sup> the court found the F.B.I. to be a governmental agency as contemplated by rule 30(b)(6),<sup>68</sup> and held that the "contacts" maintained between the Bureau and the Eastern District of Michigan were sufficient to warrant service there under *International Shoe Co. v. Washington*.<sup>69</sup> Finding that the F.B.I. had no agency regulation describing a procedure by which documents sought may be obtained, and that the Bureau did not claim that the documents were in the exclusive custody of the Director of the F.B.I. or of the Attorney General of the United States,<sup>70</sup> the court directed that the documents be produced in Detroit.<sup>71</sup> Although

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67. FED. R. CIV. P. 1. The court stated that "[t]he only construction of Rule 45(d)(1) which is consistent with Rule 1 is that a subpoena duces tecum issued pursuant to Rule 45(d)(1) directs the deponent to produce for inspection and copying the documents within its custody named in the subpoena regardless of where the documents are actually located." *Ghandi*, 74 F.R.D. at 122.

68. *Ghandi*, 74 F.R.D. at 121 n.8.

69. 326 U.S. 310 (1945). In applying the "minimum contacts," "fair play and substantial justice" test of *International Shoe* to determine jurisdiction over the F.B.I., the *Ghandi* court noted: "Rules developed in relation to private corporations and other organizations may . . . be helpful in determining if a government agency has sufficient 'contacts' with a district to make it amenable to service there of a subpoena duces tecum." *Ghandi*, 74 F.R.D. at 121 n.7. The court said that the following test, quoted from *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 515 (S.D.N.Y. 1968), should apply to all 30(b)(6) organizations, including governmental agencies: "A foreign corporation doing business in a district is subject to all process, including subpoena, in the district, and if the documents are required in response to a subpoena, the court has the power to order their production even though they are physically located outside of the jurisdiction." 74 F.R.D. at 121 (quoting *Elder-Beerman*, 45 F.R.D. at 516).

70. *Ghandi*, 74 F.R.D. at 122. The court noted, however, that even if a district court outside of the District of Columbia has sufficient jurisdiction over the government agency to make service within the district of a subpoena issued by that court valid, the party seeking the documents may still be required by agency regulations to obtain them from the agency head, usually located in the District of Columbia.

*Id.* at 121 n.7. Such regulations are generally respected by courts. They serve to allow agency heads to make decisions regarding claims of executive privilege. See MOORE's, *supra* note 1, ¶ 45.07[2]. Two possible alternative bases exist for courts' declining to order production of documents in derogation of such agency regulations: (1) self-restraint in deference to the internal organization of the particular agency, and (2) a possible theory that the documents sought are in the *exclusive* control of the Secretary of State (or other Department) as a cabinet officer, rather than as an agent of the particular agency, thereby making service pursuant to rule 30(b)(6) ineffective as to him, and thus divesting the court of jurisdiction. See *id.*

71. *Ghandi*, 74 F.R.D. at 123. The court also summarily rejected the F.B.I.'s claim that the information subpoenaed was irrelevant to the pending action, noting that a rule 45(b) motion to quash is not the appropriate vehicle for asserting objections as to relevance. *Id.* at 123 n.9. According to the court, the more appropriate procedure is "the service of objections upon the deposing party, pursuant to Rule 45(d)(1)." *Id.* Moreover,



the Bureau also argued that its Detroit field office did not control documents maintained by the F.B.I. in other field offices or in Washington, D.C.,<sup>72</sup> Chief Judge Keith reasoned that the question was not whether the Bureau's Detroit branch controlled the documents located elsewhere.<sup>73</sup> Rather, the issue was whether he could compel the custodial entity to produce the nonparty documents in the district where the subpoena duces tecum was served.<sup>74</sup> He concluded that since the plaintiff could take the nonparty Bureau's deposition in Detroit, documents requested in conjunction with the deposition must be produced there irrespective of where they were located.<sup>75</sup>

## PART II. JURISDICTION TO COMPEL THE PRODUCTION OF NONPARTY DOCUMENTS LOCATED OUTSIDE THE TERRITORIAL LIMITS OF THE ORDERING COURT

Although the district court issuing a subpoena for nonparty document discovery has the inherent power to vacate or modify the subpoena under rules 45(b) and 36(c), such power is dependent on the

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the *Ghandi* court had serious reservations about the propriety of a nonparty raising relevancy objections, as a nonparty has virtually no interest in the outcome of the litigation. *Id.* at 123.

With equal brevity, the court addressed the Bureau's assertion that production of the documents would be time consuming and therefore burdensome. *Id.* at 124. It held that the F.B.I. did not show sufficient harm or embarrassment, or indicate such injurious consequences of compliance, as to require the court to quash the subpoena under rule 45(b). *Id.* However, the court did order the plaintiffs to modify their subpoena to order production of only those documents and materials "*taken from the offices, homes and private meetings of the plaintiffs,*" *id.* (emphasis added), instead of all those "relating to" the United States Labor Party and National Caucus of Labor Committees. *Id.* The court reasoned that the proper means for plaintiffs to learn how much information the government had gathered about the organization, and for what purpose, was by resorting to the remedies of the Freedom of Information Act. *Id.* Accordingly, the court ordered the F.B.I. to respond to the plaintiffs' subpoena, as modified, subject only to any claim of privilege that the F.B.I. could lawfully assert. *Id.*

The court also indicated that it would not have plaintiffs advance the cost of production, but that the F.B.I. could move for an assessment of costs after production, which costs would be awarded if found to be unduly burdensome. *Id.* at 125.

72. *Id.* at 119.

73. *Id.* at 120.

74. *Id.* at 122. In this regard, the court stated:

The number of F.B.I. personnel here, the wide scope of their activities, and the unitary structure of the organization, all lead this Court to conclude that service upon the Bureau in this district was proper, and the Court has jurisdiction to compel the production of documents within the custody and control of the Bureau though these documents may be located outside of the district.

*Id.*

75. *Id.* This analysis illustrates the notion that the court obtained in personam jurisdiction over the F.B.I. as an entity rather than merely personal jurisdiction over the particular agency branch.

court's power to order the production of documents in the first instance.<sup>76</sup> Where the court is without jurisdiction to serve the person to whom the subpoena is directed or where service is defective, the non-party may move to quash the subpoena.<sup>77</sup> He may also ignore the subpoena duces tecum and assert the defense of lack of jurisdiction at a subsequent contempt proceeding.<sup>78</sup> There is usually no jurisdictional

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76. A federal court's power to order production of the documents in the first instance depends on whether it has in personam jurisdiction over the party or person who has possession, control, or custody of the documents. See *In re Anschuetz & Co.*, 754 F.2d 602, 614 (5th Cir. 1985), *vacated on other grounds sub nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 107 S. Ct. 3223 (1987). As stated by the court in *Anschuetz*, [n]owhere in [the Federal Rules of Civil Procedure] is there the slightest suggestion that a party properly before the court may not avail itself of these discovery rights against another party within the jurisdiction of the court merely because the documents sought or the persons to be deposed are not located in the United States.

*Id.* (quoting *Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984)); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984) (if persons are subject to a federal court's jurisdiction, or if the court can compel them to produce documents under rule 37(d), then the court can order document production for a deposition irrespective of where the documents are located); see also *In re Folding Carton Antitrust Litig.*, 76 F.R.D. 420, 423 (N.D. Ill. 1977) ("It is well settled that a Rule 34 motion for the production of documents is entitled to broad and liberal treatment."); *Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y. 1970) ("production may be ordered when a party has the legal right to obtain papers . . . regardless of whether a paper is beyond the jurisdiction of the court"). The same principle is applicable under rule 45. *Ghandi*, 74 F.R.D. 115 (E.D. Mich. 1977); accord Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841, 843 (1986) [hereinafter Note, *Strict Enforcement*].

For a discussion of the distinction between judicial self-restraint in ordering production of documents located beyond the jurisdiction of the court and the lack of judicial jurisdiction to do so, see Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U.L. REV. 487 (1969); Roth, *Subpoena of Documents Located in Foreign Jurisdiction Where Law of Situs Prohibits Removal*, 37 N.Y.U. L. REV. 295 (1962); Note, *Personal Jurisdiction in Flux*, 69 CORNELL L. REV. 136, 136-43 (1983); see also Baade, *International Civil and Commercial Litigation: A Tentative Checklist*, 8 TEX. INT'L L.J. 5, 9-12 (1973); Note, *Extraterritoriality—Enforcement of United States Court Orders Conflicting with Foreign Law or Policy—Securities and Exchange Commission v. American Institute Counselors Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,388 (D. D.C. 1975), 17 HARV. INT'L L.J. 679 (1976) [hereinafter Note, *Extraterritoriality*].

77. FED. R. CIV. P. 45(b). This rule provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

*Id.*

78. See, e.g., *In re Tracy*, 106 F.2d 96 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939). Because discovery orders are generally not appealable, see 8 WRIGHT & MILLER, FEDERAL

issue where the person in control of the documents, whether or not a party, is a domiciliary of the territorial jurisdiction of the ordering court.<sup>79</sup> Similarly, no jurisdictional problem exists in most cases where the person to whom the subpoena is directed is a party to the action and has control of the documents, whether or not he is a resident of the jurisdiction, for in order to prosecute or defend the action, he must submit to the court's power.<sup>80</sup> However, when the documents sought are in the control of a nonparty and are outside the court's territorial jurisdiction, some judges have concluded that the court lacks enforcement jurisdiction to order their production.<sup>81</sup>

When a court seeks to compel persons outside of the jurisdiction to produce documents for inspection at a deposition of a person within the district, it resorts to an exercise of its "enforcement" jurisdiction: to wit, the power to order a person, pursuant to the law of the forum, to do or refrain from doing an act.<sup>82</sup> Enforcement jurisdiction is governed by various limitations<sup>83</sup> imposed by the principles of international law<sup>84</sup> and state territorial sovereignty.<sup>85</sup> Under traditional princi-

PRACTICE & PROCEDURE: CIVIL § 2006 (1971); MOORE's, *supra* note 1, ¶ 26.83[3], people seeking relief from subpoenas on the ground of impropriety of service may wish to ignore the order and present the defense of lack of jurisdiction at a subsequent proceeding. See MOORE's, *supra* note 1, ¶ 45.05[3].

79. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) ("[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment"); see also *Pennoyer v. Neff*, 95 U.S. 714 (1877) (standing for the fundamental proposition that a state has jurisdiction over all persons present within its territory). For a discussion of recent developments with respect to the "presence" doctrine, see *infra* note 99.

80. See *supra* note 74; see also Onkelinx, *supra* note 76, at 495 (quoting REPORT OF FIFTY-SECOND CONFERENCE, INTERNATIONAL LAW ASSOCIATION 113 (Helsinki 1966)).

81. See *supra* notes 40-57 and accompanying text.

82. See Onkelinx, *supra* note 76, at 495; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 comment a (1965). The problems associated with the exercise of enforcement jurisdiction compelling discovery should be distinguished from those problems encountered when a court exercises its enforcement powers in ordering nonresidents to comply with its judgments. In the latter case, the court is applying the law mandated by the forum's conflict of law rules, and the fundamental problems are the choice of law and the recognition of the judgment by a sister state. When a court seeks to compel discovery of documents located in another state, however, it is necessarily applying its own forum's procedural law, and the salient issue is whether the court has jurisdiction to do so.

83. See Onkelinx, *supra* note 76, at 489; RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 6-7 (1965).

84. The general principles of public international law apply with equal force between the sister states of the United States. See W. STORY, CONFLICTS OF LAWS § 539, at 450 (Arno Press ed. 1972) (1st ed. 1834); Roth, *supra* note 76, at 295 n.1; see also *Pennoyer v. Neff*, 95 U.S. 714 (1877). As stated in *Pennoyer*,

[t]he several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained

ples of international law, a condition precedent to a court's requiring a person to produce documents or to submit to a deposition is that it have "prescriptive" or "adjudicative" jurisdiction<sup>86</sup> over that person. A state "does not have jurisdiction to enforce a rule of law prescribed by it unless it has jurisdiction to prescribe the rule."<sup>87</sup> Thus, it is first necessary to determine whether a nonparty, in control of documents located outside the territorial jurisdiction of a district court but within the boundaries of the United States, is subject to the prescriptive jurisdiction of the ordering forum.

The limitations originally imposed by international law upon the scope of a nation's prescriptive jurisdiction,<sup>88</sup> and recognized under United States federal law<sup>89</sup> as applying between the sister states of the Union, were very rigid. The view that a nation's jurisdiction was restricted to its territorial borders was accepted by certain American judges when analyzing the jurisdictional limitations of states;<sup>90</sup> how-

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and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law . . . are applicable to them.

*Id.* at 722.

85. "'Sovereignty' presumes a state's exclusive right to regulate affairs within its borders. Thus, according to one view, one state might violate another's sovereignty by exercising jurisdiction over affairs occurring [sic] in the second state even without ordering violation of the second state's law." Note, *Extraterritoriality*, *supra* note 76, at 682.

86. As used in this Article, "prescriptive" jurisdiction means the power of a court to apply its forum's law to persons, as distinguished from the power to enforce that law. In addition, this Article treats the phrase synonymously with "legislative" jurisdiction or in personam jurisdiction. International law traditionally imposes different limits upon a state depending on whether it exercises its prescriptive jurisdiction or its enforcement jurisdiction. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 6-7 (1965). See generally Beale, *The Jurisdiction of Courts Over Foreigners*, 26 HARV. L. REV. 283 (1913) (examining the problems of jurisdiction of courts over foreigners (i) who are present within the jurisdiction; (ii) who are not within the jurisdiction; and (iii) who are attempting to bring suit within the jurisdiction); Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241 (1923) (discussing the limits of a state's jurisdiction and the extent of its power to make "extraterritorial" commands); Onkelinx, *supra* note 76, at 489-501 (discussing the limitations imposed by international law over a state's power, when it has in personam jurisdiction to compel a party to take action, or refrain from taking action, outside the jurisdiction).

87. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 7(2) (1965); see also *id.* § 6 comment a; Onkelinx, *supra* note 76, at 495-500.

88. See Onkelinx, *supra* note 76, at 489-95.

89. See *infra* notes 90-93 and accompanying text.

90. In *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), the United States Supreme Court posited the territorial theory of the scope of a nation's prescriptive jurisdiction:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such

ever, the case of *Pennoyer v. Neff*<sup>91</sup> elevated this theory to a constitutional level. Justice Field, writing for the majority, established two interrelated rules: (1) "that every State possesses exclusive jurisdiction and sovereignty over the persons and property within its territory";<sup>92</sup> and (2) "that no State can exercise direct jurisdiction and authority over persons or property without its territory."<sup>93</sup> There have since been several major incursions upon the rigidity of the territoriality theory, and various bases for extraterritorial prescription have been recognized. Examples are the jurisdictional principles of "nationality,"<sup>94</sup> "protection," and "universality."<sup>95</sup> Accordingly, principles of prescriptive jurisdiction have evolved to allow for broad assertions of jurisdic-

restriction.

*Id.* at 135. Although this statement describes a state's powers within its own territory positively, its impact is negative and necessarily restrictive of a state's powers beyond its territorial borders. If each state's powers within its territory are absolute, by definition, no state can exercise its powers within the borders of another state. This corollary to the rule stated in *Schooner Exchange* was expressly recognized by the Supreme Court in *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824), in which the Court stated that the laws of a nation "can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." *Id.* at 370. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Supreme Court applied territorial limitations to the jurisdiction of the several states of the United States as though the states were sovereigns governed by international law. The Court stated that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse." *Id.* at 720 (citation omitted).

91. 95 U.S. 714 (1877).

92. *Id.* at 722.

93. *Id.*

94. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam*, as he is personally bound to take notice of the laws that are applicable to him and to obey them."); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1)(a) (1965) ("[a] state has the jurisdiction to prescribe a rule of law attaching legal consequences to conduct of a national of the state wherever the conduct occurs").

95. The protective and universality principles authorize the assertion of jurisdiction over *aliens* for *acts committed abroad*. Under the protective doctrine, perpetrators of acts which threaten the security and integrity of a state are subject to the state's power. See, e.g., *United States v. ALCOA*, 148 F.2d 416, 443 (2d Cir. 1945) ("it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which a state reprehends"); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7) ("[O]ffenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there."), reprinted in 2 J. HUDSON, *WORLD COURT REPORTS* 38 (1935). Under the universality principle, jurisdiction is allowed if the acts rise to the level of *hostis humani generis*—crimes against humanity. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, reporter's note 2 (1965).

tion to cope with problems arising from increasing interstate and international trade.<sup>96</sup> Under present law, as enunciated by the United States Supreme Court in *International Shoe Co. v. Washington*,<sup>97</sup> the test for subjecting a "foreign" defendant to a court's prescriptive jurisdiction is that "he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>98</sup>

The *International Shoe* test has been refined by the Supreme Court in recent years.<sup>99</sup> The Court has noted that a person is subject to the in personam jurisdiction of a court only if he has purposefully availed himself of the privilege of conducting activity within a state, thereby invoking the state's benefits and protections.<sup>100</sup> Also, if purposeful conduct outside the forum is conducted for the purpose of deriving benefits from the forum state, it would be reasonably foreseeable

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96. See generally Carlston, *Antitrust Policy Abroad*, 49 Nw. U.L. Rev. 569, 575, 581 (1954) (discussing the application of United States antitrust law to business conduct abroad).

97. 326 U.S. 310 (1945).

98. *Id.* at 316 (citations omitted). An equally broad standard for determining the limits of a state's prescriptive jurisdiction in international law was proposed at the 1966 Helsinki Conference. Onkelinx, *supra* note 76, at 495.

99. See *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (placing goods in stream of commerce, with knowledge that they will enter the forum state, not sufficient to establish minimum contacts); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (nonresident defendant, who voluntarily entered into a contract having a substantial connection with the forum state, subject to that state's jurisdiction in a suit for breach of contract, even though he had never been in the forum state); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (drawing an important distinction between general and specific jurisdiction, implying that in cases of specific jurisdiction, i.e., when the suit arises out of or is related to the defendant's contacts with the forum state, fewer contacts are necessary); *Calder v. Jones*, 465 U.S. 783 (1984) (defendant was within the constitutional reach of the California courts, even though he had never been in California, because he intentionally committed acts in Florida with knowledge that the acts could injure the plaintiff in California); *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984) (defendant, an Ohio corporation, could reasonably anticipate suit in a New Hampshire court on a libel action based on the contents of its magazine, where defendant's magazine was circulated regularly in that state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (defendant's conduct and connection with the forum state must be such that he could reasonably anticipate being subject to suit in that state); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (defendant must have purposefully availed himself of the benefits and protections of the forum state's laws); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (abandoning the traditional approach to determining in rem and quasi in rem jurisdiction, which allowed the presence of property within the state to serve, without more, as a basis for exercising power over that property and holding that all assertions of state power were to be measured by the due process standard set forth in *International Shoe*).

100. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State.").

for the defendant to have to answer in the forum state.<sup>101</sup> If a defendant purposefully directs individual acts toward a particular forum, he may be subject to the state's long-arm jurisdiction.<sup>102</sup> The *International Shoe* test, as applied today, is two-pronged. First, the defendant must have the requisite minimum contacts and, second, the court must determine if asserting jurisdiction will offend the traditional notions of fair play and substantial justice. In making this determination, the court will consider many factors, including the forum state's interest in the matter, the convenience to the parties, and factors weighing on judicial economy.<sup>103</sup>

*International Shoe* is in a state of flux with regard to the issue of whether a state may exercise enforcement jurisdiction over an individual in all cases in which the individual is subject to the state's prescriptive jurisdiction.<sup>104</sup> Although jurisdiction to prescribe is a precondition

101. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (the fortuitous malfunction of defendant's product in Oklahoma did not provide a contact, tie, or relation with that state sufficient to justify its jurisdiction over defendant); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (father's consent to child living with mother in California was not a "purposeful act").

102. See *Calder*, 465 U.S. at 789-91 (since plaintiff knew his actions outside California would injure plaintiff within the state, California had jurisdiction over defendant).

103. See *World-Wide Volkswagen*, 444 U.S. at 292. The primary concern is the burden on the nonresident defendant, which must

be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

*Id.* (citations omitted); see also *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (since the defendant established a substantial relationship with the defendant's Miami headquarters, received fair notice that he might be subject to suit in Florida, and failed to show that Florida's exercise of jurisdiction over him would be fundamentally unfair, Florida's jurisdiction over the defendant did not violate due process).

104. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is certainly territorial. . . ."), reprinted in 2 J. HUDSON, *supra* note 95, at 35; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 7(1) (1962) ("A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases"); Mann, *The Doctrine of Jurisdiction in International Law*, in 1 REC. DES COURS 128 (1964). As explained by Mann,

[t]he problem of enforcement jurisdiction arises when a State acts in foreign territory itself or at least takes measures which, though initiated in its own territory, are directed towards consummation, and require compliance, in a foreign State. It is in line with the difference in the nature of the problems that entirely different legal principles govern legislative and enforcement jurisdiction respectively. A State which actually attempts to give effect to its legislation in

to a forum's jurisdiction to enforce, persuasive authority exists to support the proposition that enforcement jurisdiction is strictly confined to the territorial borders of the forum.<sup>105</sup> Such authority notwithstanding, the theory that jurisdiction over the person, in itself, is a valid basis for requiring him to produce documents located in another jurisdiction, is deeply rooted in United States federal case law<sup>106</sup> and has

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the territory of another State comes into conflict with the latter's sovereignty. The problems of enforcement jurisdiction, therefore fall to be considered exclusively from the point of view of the international rights of that State in which the enforcement takes place or is intended to take place.

*Id.*, quoted in Onkelinx, *supra* note 76, at 497-98 n.52 (emphasis added by Onkelinx); L. OPPENHEIM, INTERNATIONAL LAW § 144(a), at 327-28 (8th ed. 1955) ("States must not perform acts of sovereignty within the territory of other states.").

105. See *S.S. Lotus*, 1927 P.C.I.J. at 18, reprinted in 2 J. HUDSON, *supra* note 95, at 35; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 7 (1962); L. OPPENHEIM, *supra* note 104, at 327-28; Mann, *supra* note 104, at 128, quoted in Onkelinx, *supra* note 76, at 497-98 n.52.

106. See *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908) (upholding constitutionality of a Vermont statute providing that a corporation doing business in the state may be compelled to produce books and papers relevant to a case before a Vermont tribunal, even if documents are located in another state); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968) (requiring compliance with subpoena for documents even though the bank's compliance would subject German branch of the bank to civil liability under German law); *First Nat'l City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959) (requiring Panamanian bank to produce records where no showing that production would violate Panamanian laws), *cert. denied*, 361 U.S. 948 (1960); *SEC v. Minas de Artemisa*, 150 F.2d 215 (9th Cir. 1945) (ordering corporation to produce books and records located in Mexico in response to SEC request); *In re Grand Jury Investigation of Shipping Indus.*, 186 F. Supp. 298 (D.D.C. 1960) (refusing to quash subpoenas directed at over 150 worldwide shipping firms, although documents sought were extensive and their production might require considerable time, expense, and inconvenience); *In re Equitable Plan Co.*, 185 F. Supp. 57 (S.D.N.Y.) (requiring New York agencies of foreign banks to produce documents called for in plaintiff's subpoenas, even though documents were physically located in branches outside the United States), *modified on other grounds sub nom. Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *Societe Internationale v. McGranery*, 111 F. Supp. 435 (D.D.C. 1953) (requiring plaintiff to produce documents of its subsidiary Swiss banking partnerships), *modified on other grounds sub nom. Societe Internationale v. Brownell*, 225 F.2d 532 (D.C. Cir. 1955), *rev'd on other grounds sub nom. Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952) (court modified subpoena demanding documents located in foreign countries according to rule 17(a) of the Federal Rules of Criminal Procedure); *In re Grand Jury Subpoenas Duces Tecum*, 72 F. Supp. 1013 (S.D.N.Y. 1947) (ordering Canadian corporation, in investigation conducted under the Sherman Act, to produce records and documents located outside United States). Commentors are in accord. See, e.g., G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 98-101 (3d ed. 1963) ("Power may be exercised for the purpose of ordering a defendant who is personally subject to the jurisdiction of the court to act or refrain from acting abroad."); Note, *Extraterritoriality*, *supra* note 76, at 681 ("In common law jurisdictions a court acting in personam possesses discretionary power to order a party to take or refrain from action in another sovereign state.").



been adopted by the Restatement (Second) Conflict of Laws.<sup>107</sup> Most recently, the Supreme Court reiterated in *Burger King Corp. v. Rudzewicz*<sup>108</sup> that, although the due process clause of the United States Constitution operates to restrict state power, its ultimate function is to preserve the individual's "liberty interest" rather than to protect state sovereignty concerns.<sup>109</sup> The Court held that jurisdiction exists when it has been decided that a defendant purposefully established minimum contacts with the forum state, but that these contacts, which must comport with "fair play and substantial justice," may, in appropriate cases, be considered in light of other factors serving at times to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.<sup>110</sup> The Court defined these factors in terms of " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and 'the shared interest of the several States in furthering fundamental substantive social policies.' "<sup>111</sup> The Court also held that, where a defendant who has purposefully directed his or her activities at forum residents seeks to defeat jurisdiction, he or she must present a compelling case that some of these factors would render jurisdiction unreasonable.<sup>112</sup>

In a related jurisdictional question, a controversy has recently evolved over the extent of the enforcement power of federal courts to compel nonparty document discovery when documents are located in foreign nations.<sup>113</sup> The majority view is represented by the reasoning in

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107. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 53 (1969) ("A state has power to exercise judicial jurisdiction to order a person, who is subject to its judicial jurisdiction, to do an act, or refrain from doing an act, in another state.").

108. 471 U.S. 462 (1985).

109. *Id.* at 472 n.13.

110. *Id.* at 477.

111. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

112. *Id.*

113. See *Compelling Discovery in Transnational Litigation*, 16 N.Y.U. J. INT'L L. & POL. 957 (1984); Pansius, *Resolving Conflicts with Foreign Nondisclosure Laws: An Analysis of the Vetco Case*, 12 DEN. J. INT'L L. & POL. 13 (1982) (Ninth Circuit used "wrong reasoning" to reach right result in enforcing IRS subpoena where disclosure violated Swiss law); Note, *Extraterritorial Discovery: An Analysis Based on Good Faith*, 83 COLUM. L. REV. 1320 (1983) (urging adoption of good-faith analysis in deciding whether to enforce domestic discovery orders that violate foreign nondisclosure laws); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982) (urging greater restraint in extraterritorial enforcement of discovery orders); Note, *Extraterritorial Discovery: Extension of Jurisdiction by the Eleventh Circuit*, 7 HASTINGS INT'L & COMP. L. REV. 595 (1984) (circuits differ in treatment of neutral subject of subpoena when sub-

*United States v. Bank of Nova Scotia*.<sup>114</sup> The subject bank was Canadian with branches in the United States and the Bahamas. A federal grand jury, investigating one of the Bahamian branch's customers for alleged tax and drug violations, issued a subpoena duces tecum to the bank's Miami branch requesting documents from the Bahamian branch.<sup>115</sup> The bank refused to comply with the order, contending that compliance would violate Bahamian bank secrecy laws.<sup>116</sup> The Eleventh Circuit Court of Appeals upheld civil sanctions against the bank for noncompliance. The bank first argued that requiring production in violation of Bahamian law would violate the bank's due process.<sup>117</sup> Responding to the bank's argument, the court stated that "traditional notions of fair play and substantial justice" were not violated, because businesses that voluntarily bring themselves into the United States must accept the legal responsibilities associated with their presence.<sup>118</sup> The minority view is articulated by the Seventh Circuit Court of Appeals in *United States v. First National Bank of Chicago*.<sup>119</sup> There, the IRS, conducting an investigation, issued a subpoena duces tecum

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ject's compliance with discovery order would contravene foreign law); Note, *Strict Enforcement*, *supra* note 76, (proposing universal sanctions to enforce documentary discovery abroad, regardless of foreign nondisclosure laws); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979) (maintaining that some conflict is inevitable between domestic discovery and foreign nondisclosure laws); *see also* Roth, *supra* note 76, (subpoena duces tecum should be quashed where compliance would violate foreign law); Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*, 14 VA. J. INT'L L. 747 (1974) (urging adoption of a general discovery agreement by the United States, Canada, and major Western European nations); Comment, *Ordering Production of Documents from Abroad in Violation of Foreign Law*, 31 U. CHI. L. REV. 791 (1964) (courts should evaluate the need for the documents, the strength of the domestic interest in production, the possible consequences of compliance, and the availability of alternatives).

114. 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983).

115. *Id.* at 1386.

116. *Id.* at 1386 & n.2.

117. *Id.* at 1388.

118. *Id.* at 1389 n.6 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *vacated on other grounds sub nom. Anschuetz & Co. v. Mississippi River Bridge Auth.*, 107 S. Ct. 3223 (1987).

Nowhere in these [Federal Rules of Civil Procedure] is there the slightest suggestion that a party properly before the court may not avail itself of these discovery rights against another party within the jurisdiction of the court merely because the documents sought or the persons to be deposed are not located in the United States. Indeed, the rules clearly contemplate their applicability abroad if the United States Court has jurisdiction.

*Id.* at 614 (quoting *Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984)); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984) (the fact that documents were situated in a foreign country did not bar their discovery).

119. 699 F.2d 341 (7th Cir. 1983).

to First National Bank, a third party, to produce bank account statements of two depositors at the bank's Athens, Greece branch.<sup>120</sup> Upon noncompliance, the IRS obtained a district court order to enforce compliance, but the court of appeals reversed the enforcement order.<sup>121</sup> The court found that the government had made a *prima facie* case for enforcement,<sup>122</sup> but stressed that factors of international law precluded enforcement.<sup>123</sup> At the same time, none of these factors, such as the Hague Convention or principles of comity between nations, operate to bar a federal court from compelling a nonparty to produce documents located outside the court's territorial jurisdiction but within the boundaries of the United States.<sup>124</sup>

### PART III. THE FAVORED APPROACH FOR PRODUCTION OF NONPARTY DOCUMENTS UNDER RULE 45

The general policy of federal discovery rules<sup>125</sup> and a long line of federal decisional law<sup>126</sup> requires that, absent extraordinary circumstances,<sup>127</sup> nonparties subject to a court's *in personam* jurisdiction are

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120. *Id.* at 342.

121. *Id.*

122. *Id.* at 343.

123. *Id.* at 346 (recognizing the importance of Greece's interests, as served by that country's bank secrecy laws).

124. See *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 120-21 (E.D. Mich. 1978) (absent extraordinary circumstances, the court, having personal jurisdiction over a nonparty subject to a rule 45 subpoena *duces tecum* for documents, has the power to order their production even though they are physically located outside the jurisdiction). For a fuller discussion of *Ghandi*, see *supra* notes 58-75 and accompanying text.

125. See *United States v. Nixon*, 418 U.S. 683, 709-10 (1974) ("Privileges against forced disclosure [are] exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth."); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("The deposition-discovery rules are to be accorded a broad and liberal treatment"); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394, 1396 (D.D.C. 1973) ("It has long been held that the deposition-discovery rules are to be accorded broad and liberal treatment, and that subject to certain specific limitations, discovery is to be allowed as to any matter that is relevant to the subject matter of the action."); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2007, at 38 (1970) ("wide scope of discovery permitted by the federal rules"). Broad and liberal discovery is consistent with rule 1 of the Federal Rules of Civil Procedure: "These rules govern the procedure of the United States district courts . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

126. See *United States v. Procter and Gamble Co.*, 356 U.S. 677, 682 (1958) (discovery procedures "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); see also *supra* note 125. See generally C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 398-416 (3d ed. 1976); Blair, *supra* note 7; Holtzoff, *supra* note 7.

127. For examples of extraordinary circumstances, see *United States v. Procter and Gamble Co.*, 356 U.S. 677 (1958) (production of court transcripts not required when se-

also subject to all forms of process, including a rule 45 subpoena duces tecum.<sup>128</sup> This position is buttressed by a plethora of related federal statutes which require parties and nonparties to produce documents from any place in the United States at any designated place of hearing.<sup>129</sup>

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crecy of grand jury proceeding was in jeopardy); *Hickman*, 329 U.S. at 507 (disclosure not required when the information sought was in the trial notes of the opposing lawyer).

128. See *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *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). In each of these cases, the Second Circuit was reluctant to extend jurisdiction to discovery of third-party extraterritorial material, but rested its decisions solely on the grounds that a nonparty should not be forced to violate foreign law. The cases strongly suggest that absent international considerations, the jurisdiction of the trial court would reach all documents under the control of the persons ordered to produce them. See also *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (rule 34 requires a party to produce documents located in foreign country); MOORE's, *supra* note 1, ¶ 45.05[2], at nn.7-9.

129. See 15 U.S.C. § 25 (1982) (to restrain violations of the Clayton Antitrust Act, the district court has the power to bring before it parties residing in other districts); 15 U.S.C. § 49 (1982) (Federal Trade Commission may require the attendance of witnesses and production of documentary evidence "from any place in the United States at any designated place of hearing"); 15 U.S.C. § 50 (1982) (making it an offense to refuse to testify or submit documentary evidence upon the request of the Federal Trade Commission); 15 U.S.C. § 155 (1982) (China Trade Act Registrar may require by subpoena the attendance of any witness and production of documents from any place within China at any designated place of hearing in China); 15 U.S.C. § 1399 (1982) (to restrain violations of Motor Vehicle Standards, the district court may subpoena witnesses and documents; the subpoenas may run into any other district); 15 U.S.C. § 2610 (1982) (authorizing Administrator of the Environmental Protection Agency, in administering the control of toxic substances, to require by subpoena the attendance of witnesses and production of documents); 16 U.S.C. § 1174 (Supp. III 1985) (in any case involving the conservation and production of North Pacific Fur Seals, the Secretary of Commerce may by subpoena require the attendance of witnesses and production of documents); 16 U.S.C. § 2407 (1982) (authorizing the Director of the National Science Foundation to issue subpoenas for the attendance of witnesses and production of papers, books and documents at hearings to assess penalties for violations of Antarctica Conservation Act of 1978); 18 U.S.C. § 3502 (1982) (Federal Bureau of Investigation personnel may serve subpoenas issued under the authority of the United States); 19 U.S.C. § 1333 (1982) (authorizing the United States International Trade Commission to require production of documents from any place in the United States at any designated place of hearing); 21 U.S.C. § 337 (1982) (to enforce or restrain violations of the Food, Drug and Cosmetic Act, subpoenas for witnesses who are required to attend a court in any district may run into any other district); 22 U.S.C. § 2709 (Supp. III 1985) (special agents of the Department of State and the Foreign Service may obtain and serve subpoenas issued under the authority of the United States); 26 U.S.C. § 6902 (1982) (Tax Court may require by subpoena the production of documents within the United States); 26 U.S.C. § 7428(d) (Supp. III 1985) (in any action brought in the district court of the United States for the District of Columbia for declaratory judgment relating to the tax status of organizations under § 501(c)(3), a subpoena requiring the attendance of a witness at a trial or hearing may be served at any place within the United States); 26 U.S.C. § 7456 (1982 & Supp. III 1985)

Once a federal court has in personam jurisdiction over an organizational nonparty,<sup>130</sup> who is properly noticed for a deposition under rule 30(b)(6),<sup>131</sup> the court should be able to compel production of any

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(Tax Court personnel may require by subpoena the production of documents from any place in the United States at any designated place of hearing); 28 U.S.C. § 1783 (1982) (A United States court may order the issuance of a subpoena requiring the production of documents by a United States national or resident in a foreign country); 28 U.S.C. § 2521 (1982) (subpoenas requiring the production of documents may be issued in accordance with the rules and regulations of the United States Claims Court); 29 U.S.C. § 657 (1982) (Secretary of Labor may require production of evidence in furtherance of occupational safety and health investigations); 30 U.S.C. § 811(a)(3) (1982) (Secretary of Labor may require by subpoena production of evidence in connection with proceedings to promulgate rules for health or safety standards in coal and other mines); 30 U.S.C. § 813(b) (1982) (Secretary of Labor may issue subpoenas for production of documents for purpose of investigating any accident or other occurrence relating to health and safety in coal or other mines); 30 U.S.C. § 823(e) (1982) (Federal Mine Safety and Health Review Commission may compel the production of documents in connection with hearings before it); 30 U.S.C. § 1264 (1982) (regulatory authorities for the control of the environmental impacts of surface coal mining may subpoena the production of documentary materials); 31 U.S.C. § 716(c) (1982) (Comptroller General may subpoena the books, documents, records, and papers of a person not in the United States Government to which the Comptroller has access by law or agreement); 43 U.S.C. § 13 (1982) (outstanding procedure by which the Secretary of Interior and officers of any United States land office shall comply with subpoenas to produce documents in any United States court or in any court of record of any state).

130. Rule 30(b)(6) defines an organizational nonparty as "a public or private corporation or a partnership or association or governmental agency." Fed. R. Civ. P. 30(b)(6). The rule makes clear that service is binding on the organizational deponent named in the subpoena and not only the branch through which it was served.

131. 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 subpoena of organizations as entities, there existed a possible theoretical distinction 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 agent. *First Nat'l City Bank v. IRS*, 271 F.2d 616, 618 (2d Cir. 1959); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952). Under the former characterization, the subpoena would be effective as to all documents within the control of the organizational entity. *Wilson v. United States*, 221 U.S. 361 (1911). As further explained in *Wilson*:

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). The apparent purpose of the Advisory Committee in adding rule 30(b)(6) was to

document requested under rule 45, provided that it is under the control of the designated organizational entity.<sup>132</sup> Even if rule 30(b)(6) and rule 45(d)(2) are read *in pari materia*, as in the *Cates* case,<sup>133</sup> such an application does not warrant the conclusion that nonparty documents located more than 100 miles outside the judicial district cannot be ordered produced within the district.<sup>134</sup> The 100-mile limit imposed by rule 45(d)(2) refers solely to an area within 100 miles of the place the nonresident deponent is served with the subpoena.<sup>135</sup> Under rule 30(b)(6), the nonresident who has to travel is designated by the institutional deponent and does not have to be personally served with a subpoena.<sup>136</sup> Rule 45(d)(2) is therefore inapplicable to such nonresidents designated by the organizational entity under rule 30(b)(6) and, therefore, creates no bar to a subpoena duces tecum requiring production of documents located outside the 100-mile limit. This interpretation of rule 45 is appropriate in light of the Advisory Committee's stated purpose in adding rule 30(b)(6).<sup>137</sup>

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remove the ambiguity surrounding subpoenas of nonparty organizations under rule 45(d)(1), and to make service effective as to corporate documents wherever found.

132. For a definition of "control," see *infra* notes 148-54 and accompanying text.

133. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973). The *Cates* court held that a subpoena under rule 30(b)(6) could not require a nonparty governmental agency to produce documents not in the custody of agency units within the territorial jurisdiction of the ordering court. *Id.* at 621, 623. The court reasoned that rule 30(b)(6) requires *in pari materia* consideration of rule 45(d)(2). *Id.* at 623. The court held that the then territorial 40 miles limited the distance which nonparty deponents could be required to travel. *Id.* For a fuller discussion of *Cates*, see *supra* notes 40-49 and accompanying text.

134. *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 120 (E.D. Mich. 1977) (rule 45(d)(2) "defines where a person will be required to attend a deposition but does so within rather broad limits . . . . Alternatively, this Rule provides that the Court may order a deposition to be taken at a place convenient to both the witness being deposed and the party seeking this pre-trial discovery.") (citing *Producers Releasing Corp. de Cuba v. PRC Pictures Inc.*, 176 F.2d 93, 95 (2d Cir. 1949)).

135. FED. R. CIV. P. 45(d)(2).

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.

*Id.*

136. For a further discussion of rule 30(b)(6), see *supra* note 31 and accompanying text.

137. See FED. R. CIV. P. 30(b)(6) advisory committee's note (1970 amendment). As designed,

[t]he new procedure should be viewed as an added facility for discovery . . . . It will reduce the difficulties not encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. The provision should also assist

Prior to the addition of rule 30(b)(6) in 1970, a subpoena duces tecum served upon the officer of an organization was arguably operable only as to him.<sup>138</sup> The effect and purpose of subsection (6) was to make a subpoena by such service operative with respect to the organizational entity.<sup>139</sup> Similarly, the intent of the drafters of subsection (6) was that no principle of law should exist to prevent service of a subpoena duces tecum upon an organization as an entity.<sup>140</sup> To this end, rule 34(c), which permits independent actions against nonparties for the production of documents,<sup>141</sup> has been narrowly construed by courts to apply only to parties.<sup>142</sup> In fact, whenever possible, nonparty document discovery under rule 45 has been used to supplant independent actions under rule 34(c).<sup>143</sup> Therefore, assuming in personam jurisdiction, the physical location of documents should not ordinarily prevent a court from exercising its enforcement powers under rule 45.<sup>144</sup>

Courts following the *Cates* approach<sup>145</sup> confuse the problem of acquiring personal jurisdiction over the custodian of the nonparty documents with the issue of where depositions and the production of documents may be ordered. Rule 45 contains no jurisdictional limitations regarding the reach of a court's subpoena power.<sup>146</sup> The only question is whether the nonparty exercises sufficient "control" over the documents located outside the territorial limit of the district court so as to make it subject to the court's enforcement power under rule 45.<sup>147</sup> Con-

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organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.

*Id.* (citations omitted).

138. For a further discussion of applicable interpretation and procedure prior to the adoption of rule 30(b)(6), see *supra* note 131.

139. For a further discussion of rule 30(b)(6) and its effect and purpose, see *supra* notes 130-31 and accompanying text.

140. For a more detailed discussion of rule 30(b)(6) and its interpretation, see *supra* notes 31-32 and accompanying text.

141. FED. R. CIV. P. 34(c) ("This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.").

142. See *Welling*, *supra* note 1, at 111 n.8 (indicating that the language of the rule is clear and that courts have had no trouble concluding that rule 34 applies only to parties).

143. *Id.* at 113; see also *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485 (N.D. Ga. 1980).

144. See *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 120 (E.D. Mich. 1977) (holding that the location of the documents was irrelevant once the court had in personam jurisdiction over the F.B.I. as an organization through the presence of its Detroit field office).

145. For a discussion of cases in accord with the *Cates* approach, see *supra* notes 50-57 and accompanying text.

146. See FED. R. CIV. P. 45.

147. See *MOORE'S*, *supra* note 1, ¶ 45.05[2], at 45-29 n.7.

trol is determined as of the time the subpoena duces tecum is served on the organizational entity.<sup>148</sup> Control, for discovery purposes, means not only physical possession of a document,<sup>149</sup> but also the legal right to obtain the requested document.<sup>150</sup> This right may exist even where a document has been lost or destroyed.<sup>151</sup> The requesting party is only required to allege a prima facie case of control.<sup>152</sup> The actual location of the document has no bearing on a finding of control;<sup>153</sup> yet some courts consider control in terms of how important the document is to the subject matter of the litigation.<sup>154</sup>

Although the test is control and not location,<sup>155</sup> a distinction is made among three situations: (1) a federal court may order a domiciled organization to produce documents in the custody of a subsidiary located outside the 100-mile limit of the court;<sup>156</sup> (2) a federal court may order a branch or subsidiary doing business within its district to produce documents of its head office or other branches located outside the 100-mile limit of the court;<sup>157</sup> and (3) a federal court not hearing the principal litigation may order an agent to produce documents under the custody of an organization which is located within the territorial limits of another district court.<sup>158</sup>

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148. *F.T.C. v. Blaine*, 308 F. Supp. 932, 933 (N.D. Ga. 1970).

149. *United States v. International Business Machs. Corp.*, 71 F.R.D. 88, 91 (S.D.N.Y. 1976).

150. *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

151. *See Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984) (defendant cannot "shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad"). Obviously, if the documents have been lost or destroyed through no fault of the person or entity from whom they are sought, the court will not order their production or impose sanctions. However, if the requested documents are not found, the person or entity from whom they are sought must submit a detailed affidavit to the court explaining what steps were taken to find the documents, why they could not be found, what steps were taken to determine what happened to them, and what the investigation revealed happened to them. *See id.*

152. *Hart v. Wolff*, 489 P.2d 114, 117 (Alaska 1971).

153. *In re Harris*, 27 F. Supp. 480, 481 (S.D.N.Y. 1939).

154. *See In re Anshuetz & Co.*, 754 F.2d 602, 614 (5th Cir. 1985) (noting that principles of comity limit the court's power to compel discovery), *vacated on other grounds sub nom. Anshuetz & Co. v. Mississippi River Bridge Auth.*, 107 S. Ct. 3223 (1987); *In re Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir.) (grand jury's need for information given great weight), *cert. denied*, 463 U.S. 1215 (1982); *Cooper Indus.*, 102 F.R.D. at 919-20 (noting that the need for information is one factor to be considered when applying principles of comity to discovery requests).

155. *See supra* note 147 and accompanying text.

156. *See Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 636-37 (D. Md. 1978).

157. *See Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977).

158. *See Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985). The district court's refusal to enforce the subpoena was based on the local branch's total lack of involvement in the dispute; it was not based on the court's belief that, because it was not hearing the principal litigation, it lacked the power to enforce



With respect to the first situation, the decisional law is clear. If an organization under the subpoena duces tecum has the power, either directly or indirectly, to appoint or elect a majority of the directors of another corporation, it has the control necessary to secure the documents requested by the subpoena.<sup>159</sup> The relevant consideration is not the location of the documents, but the relationship between the organization on which the subpoena is served and its subsidiary, branch, or representative possessing the document. If the former has control over the latter, the courts will look through the organizational entity.<sup>160</sup> With respect to the second situation, in which a subpoena duces tecum is served on a branch of an organization to produce documents under the custody or supervision of organizational persons located elsewhere, the solution initially seems less clear because it is often difficult to contend that the branch has control over the organizational entity.<sup>161</sup> However, if the organization has minimum contacts with the forum through the activities of its branch, the court has jurisdiction over the organization as an entity and can compel it to produce documents, irrespective of where they are located.<sup>162</sup> The question is not whether the branch office controls the documents, but whether the entity having custody of the documents can be compelled to produce them in the district where the subpoena was granted.<sup>163</sup> With respect to the third situation, in which a subpoena issued in a district not hearing the principal case is served on a nonparty's branch or agent and the nonparty has custody of the documents at a location outside of the district,<sup>164</sup> courts frequently mischaracterize the solution as one of control.<sup>165</sup> To the extent that control should be viewed solely in terms of the nonparty entity's possessory rights to the documents, the focus should be on whether it is unduly burdensome to compel the nonparty to produce the documents in the district that issued the subpoena.<sup>166</sup>

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the subpoena in appropriate circumstances. See *id.* at 326-27.

159. See *Hubbard*, 78 F.R.D. at 637 (parent had control of documents in the possession of its wholly-owned subsidiaries).

160. See *id.*

161. For a discussion of the type of relationship among entities that will lead to a finding that one controls the others, see *supra* notes 159-60 and accompanying text.

162. See *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977).

163. See *id.*

164. For an example of this factual scenario, see *Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985).

165. See *Ariel v. Jones*, 693 F.2d 1058 (11th Cir. 1982); *Laker Airways Ltd. v. Pan Am. World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985); see also *supra* text accompanying notes 40-57.

166. *Ghandi*, 74 F.R.D. at 123-24. The *Ghandi* court opined that a third-party deponent may properly seek to have a subpoena duces tecum quashed or modified only if it is "burdensome, oppressive, unreasonable or seeks the disclosure of confidential information." *Id.* at 124. For a complete discussion of *Ghandi*, see *supra* notes 58-75 and accom-

Consequently, when a subpoena duces tecum is served on a non-party under the second and third situations discussed, the district court issuing the subpoena can retain jurisdiction to coordinate and supervise the nonparty discovery under rule 26.<sup>167</sup> Rather than quashing the subpoena, the court can exercise its supervisory powers under rule 26 to order the documents produced at a deposition anywhere in the United States.<sup>168</sup> This method saves time, contributes to the speedy resolution of disputes arising under rule 26,<sup>169</sup> and does not force a party seeking documents under rule 45 to have subpoenas issued in each district where the documents may be located.<sup>170</sup> Further, this approach, which was first implicitly suggested by the *Ghandi* court,<sup>171</sup> is in harmony with the Advisory Committee's stated purpose in adding rule 30(b)(6): "The new procedure should be viewed as an added facility for discovery . . ."<sup>172</sup> Similarly, it will minimize the po-

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panying text.

167. FED. R. CIV. P. 26(c). Under rule 26(c), the court in which the action is pending or the court in the district where the deposition is to be taken may, upon motion by the person from whom discovery is sought,

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.

*Id.* For a discussion of the issuing court's jurisdiction in compelling nonparty discovery, see *supra* notes 58-75 and accompanying text.

168. FED. R. CIV. P. 26(c). The issuing court's power to make protective orders includes the power to order "that the discovery may be had only on specified terms and conditions, including a designation of the time or place." *Id.* The *Ghandi* court applied the "minimum contacts" requirement set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), in deciding whether a branch office of an agency could be compelled to produce documents held outside of that office but under the control of the agency. *Ghandi*, 74 F.R.D. at 120. For a further discussion of the *Ghandi* court's findings, see *supra* notes 69-75 and accompanying text.

169. FED. R. CIV. P. 26. If a person refuses to comply with a subpoena duces tecum issued pursuant to rule 26, he may be deemed in "contempt of the court from which the subpoena issued." FED. R. CIV. P. 45(f).

170. See *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977). For a discussion of *Ghandi*, see *supra* notes 58-75 and accompanying text.

171. For a discussion of the *Ghandi* court's application of its supervisory powers to compel discovery by nonparties, see *supra* notes 58-75 and accompanying text.

172. FED. R. CIV. P. 30(b)(6) advisory committee's note (1970 amendment). The drafters of the Federal Rules sought to achieve several benefits by adding this subdivision: to ease the difficulties in determining whether a particular employee or agent qualified as a "managing agent;" to discourage the practice of "bandying" by officers or agents when they disclaim knowledge of facts clearly known to other persons in the organization; and to lighten the burden on corporations imposed when many officers are deposed for the

tential for courts to confuse their enforcement jurisdiction with the question of nonparty control of documents sought by a rule 45 subpoena duces tecum.<sup>173</sup>

### CONCLUSION

The "traditional notions of power and jurisdiction" on which the *Cates* court based its decision are not viable in today's interdependent world.<sup>174</sup> It is no longer uncommon for acts in one jurisdiction to have great effects in another. Trends in jurisdictional law have clearly reflected this reality.<sup>175</sup> Thus, only two prerequisites are necessary for the application of rule 45 in nonparty document discovery. First, the nonparty organization must be subject to the ordering court's in personam jurisdiction under the *International Shoe* test of "fair and substantial justice."<sup>176</sup> Second, the nonparty organization must have control over the documents.<sup>177</sup> This approach provides judicial reinforcement of the purpose of rule 30(b)(6) and rule 45.<sup>178</sup> It is also consistent with the stated policy of the federal rules to "secure the just, speedy, and inex-

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same trial because of uncertainty as to whom is responsible for the information which is sought. *Id.* The pertinent part of rule 30(b)(6) reads as follows:

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. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.

FED. R. CIV. P. 30(b)(6).

173. For a fuller discussion of the use of a subpoena "duces tecum" on a nonparty witness, see *supra* notes 21-37 and accompanying text; see also *supra* notes 58-75 and accompanying text (discussing *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115 (E.D. Mich. 1977), which properly focused on the court's enforcement jurisdiction).

174. See *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). As the Second Circuit remarked:

With the growing interdependence of world trade and the increased mobility of persons and companies, the need arises not infrequently, whether related to civil or criminal proceedings, for the production of evidence located in foreign jurisdictions. It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has *in personam* jurisdiction of the person in possession or control of the material.

*Id.* at 900-01.

175. See *supra* notes 99-112 and accompanying text.

176. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). For a discussion of refinements to the *International Shoe* test, see *supra* notes 99-112 and accompanying text.

177. For a discussion of the definition of "control" for discovery purposes, see *supra* notes 147-54 and accompanying text.

178. See *supra* notes 58-75 and accompanying text.

pensive determination of every action,"<sup>179</sup> and dispels the confusion created by decisional law suggesting that courts in nonparty document discovery proceedings have a jurisdictional base over the custodian of documents requested by a subpoena duces tecum.<sup>180</sup> In addition, it correctly focuses the court's analysis on where depositions and production of documents may be ordered,<sup>181</sup> and encourages federal courts to responsibly exercise their new supervisory powers under rule 26.<sup>182</sup>

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179. FED. R. CIV. P. 1. For an example of a court using this rationale, see *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 122 (E.D. Mich. 1977); see also *supra* notes 58-75 and accompanying text (discussing *Ghandi*).

180. See *supra* notes 40-57 and accompanying text (discussing case law requiring a jurisdictional basis for the production of documents by a nonparty).

181. See *supra* notes 130-37 and accompanying text (analyzing the court's power to order the production of far-away documents and witnesses for depositions within the issuing court's district).

182. See *supra* notes 167-73 and accompanying text (discussing the court's supervisory power under rule 26).