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Discovery of Nonparties' Tangible Things Under the Federal Rules of Civil Procedure

*Sarah N. Welling**

I. Introduction

Federal Rules of Civil Procedure 26 through 37¹ describe procedures for pretrial discovery. While one may employ all the methods of discovery against parties,² discovery methods for nonparties are much more limited.³ For example, with the exception of the independent action under subdivision (c), the procedures detailed in Federal Rule 34 regarding production of tangible things do not apply to nonparties.⁴ Frequently, though, a litigant must discover tangible things in the possession, custody, or control of a nonparty.⁵ Although the federal rules do provide alternative methods for the discovery of nonparties' things, the whole discovery scheme for nonparties is rather clumsy.

First, in terms of the procedure for production, the rules have the effect of distinguishing mobile from immobile property.⁶ If the

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1 FED. R. CIV. P. 26-37.

2 Methods available against parties include depositions, FED. R. CIV. P. 27, 30, 31; interrogatories, FED. R. CIV. P. 33; requests for production and inspection, FED. R. CIV. P. 34; motions for physical and mental examinations, FED. R. CIV. P. 35; and requests for admissions, FED. R. CIV. P. 36.

3 Discovery procedures available against nonparties include depositions, FED. R. CIV. P. 27, 30, 31; independent actions for production and inspection, FED. R. CIV. P. 34(c); and subpoenas duces tecum, FED. R. CIV. P. 45(d)(1).

4 FED. R. CIV. P. 34(a) states that "[a]ny party may serve on any other *party* a request." (emphasis added).

5 *See, e.g.*, *Huynh v. Werke*, 90 F.R.D. 447 (S.D. Ohio 1981) (industrial molding machine in nonparty's factory); *Santa Fe Int'l Corp. v. Potashnick*, 83 F.R.D. 299 (E.D. La. 1979) (pipe on nonparty's barge); *Humphries v. Pennsylvania R.R.*, 14 F.R.D. 177 (N.D. Ohio 1953) (accident site owned by nonparty); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 378 A.2d 53 (1977) (poisonous fumes and vapors at nonparty's manufacturing plant); *see also* PRACTICING LAW INSTITUTE, NEW FEDERAL CIVIL DISCOVERY RULES SOURCEBOOK 128-29 (Litigation Sourcebook No. 4, W. Treadwell ed. 1972) [hereinafter cited as DISCOVERY SOURCEBOOK].

6 Throughout this article, the term "immobile" refers to anything which cannot be transported to a deposition. This includes things which are literally immobile, for example, real estate and fixtures, as well as things which are immobile as a practical matter, for example, a herd of cattle or a barge.

Inspection of such immobile things necessarily entails entry upon another person's prop-

property is mobile, a subpoena duces tecum under Rule 45(d) is the only available discovery method. If the property is immobile, it is discoverable only by independent action pursuant to Rule 34(c). This inadvertent distinction in procedure serves no policy. Moreover, each of the individual methods has drawbacks. The subpoena duces tecum is dependent upon a deposition, which is unnecessary and wasteful. The independent action is an obscure, historical discovery device which presents problems of jurisdiction and practical utility, and contravenes policies of the federal rules.

This article examines the federal approach to discovery of nonparties' tangible things, beginning with an examination of procedures for the production of mobile things. After concluding that the subpoena duces tecum is the only available method, the article discusses the central weakness of the subpoena duces tecum: its dependence on a deposition. Comparable state practice is then explored and state alternatives to the subpoena duces tecum are analyzed. This article further examines the federal rules' approach to inspection of immobile things. After a brief history of Rule 34(c), independent actions and their weaknesses are considered. Again, comparable state practice is examined for possible alternatives to the independent action. Ultimately, this article suggests that amendment of either Rule 34 or Rule 45 would eliminate the weaknesses in the federal rules' approach to discovery of nonparties' things, and that amendment of Rule 34 is the marginally preferable solution.

II. Mobile Things

A. *Current Practice Under the Federal Rules*

Federal Rule of Civil Procedure 34 does not provide for production of nonparties' things,⁷ as the terms of the rule limit it to parties.⁸

erty, and throughout this article the phrases inspection of immobile things and entry upon land are used interchangeably to denote the same concept.

7 Throughout this article, the term "thing" is used in accord with its plain meaning and so includes documents within its definition.

8 FED. R. CIV. P. 34(a) provides in relevant part: "Any party may serve on *any other party* a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . ., or to inspect and copy, test, or sample any tangible things . . .; or (2) to permit entry upon designated land . . ." (emphasis added).

The language of the rule is clear enough and courts have had no trouble concluding that Rule 34 applies only to parties. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 504 (1946) ("Rule 34, like Rule 33, is limited to parties to the proceeding . . ."); *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1403 (10th Cir. 1974); *Hilgenberg v. Neth*, 93 F.R.D. 325, 326 (E.D. Tenn. 1981); *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 487 (N.D. Ga. 1980); *Fleming v. Gardner*, 84 F.R.D. 217 (E.D. Tenn. 1978); *Haaf v. Grams*, 355 F. Supp. 542 (D.

To get production from nonparties, a litigant must use a subpoena duces tecum pursuant to Rule 45(d)(1).⁹ Following this procedure, a party arranges to depose the nonparty under Rule 30.¹⁰ Rule 30(a) provides that the attendance of witnesses at a deposition may be compelled by subpoena under Rule 45.¹¹ Rule 45(d) describes how to obtain a subpoena¹² and further states that the subpoena "may command the person to whom it is directed to produce and permit inspection . . . of designated books, papers, documents, or tangible things."¹³ Under this procedure, then, a litigant subpoenas the non-

Minn. 1973); *Continental Coatings Corp. v. Metco, Inc.*, 50 F.R.D. 382, 384 (N.D. Ill. 1970); *Jobson v. Henne*, 35 F.R.D. 37 (W.D.N.Y. 1964); *Seven-Up Co. v. Get Up Corp.*, 30 F.R.D. 550, 551 (N.D. Ohio 1962); *see also* FED. R. CIV. P. 34 advisory committee note ("Rule 34 as revised continues to apply only to parties.").

It is usually easily discernable who the parties are because their names must be listed in the summons and complaint. FED. R. CIV. P. 4(b) ("The summons shall . . . contain the names of the parties . . ."); FED. R. CIV. P. 10(a) ("In the complaint the title of the action shall include the names of all the parties . . ."). Sometimes, however, courts have been willing to rely on other factors to determine who is a party and therefore subject to Rule 34 Requests for Production. *See, e.g.*, *Conversion Chem. Corp. v. Dr.-ing Max Schloetter Fabrik Fuer Galvanotechnik*, 49 F.R.D. 126 (D. Conn. 1969) (garnishee is a party for purpose of Rule 34); *Standard Ins. Co. of New York v. Pittsburgh Elec. Insulation, Inc.*, 29 F.R.D. 185 (W.D. Pa. 1961) (wholly-owned subsidiary is a party for purpose of Rule 34). *See generally* 4A J. MOORE, J. LUCAS & D. EPSTEIN, *MOORE'S FEDERAL PRACTICE* ¶ 33.06 (2d ed. 1983) [hereinafter cited as 4A *MOORE'S FEDERAL PRACTICE*].

9 *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th Cir. 1975); *Jones v. Continental Casualty Co.*, 512 F. Supp. 1205, 1207 (E.D. Va. 1981).

10 The procedure for arranging a deposition is described in FED. R. CIV. P. 30(b)(1) (the litigant must set a time and place for the deposition and then send a written notice of the deposition to all other parties to the action).

11 FED. R. CIV. P. 30(a) states in part: "The attendance of witnesses may be compelled by subpoena as provided in Rule 45."

Note that this rule states a Rule 45 subpoena for a deposition may be served on *any witness*, which means that subpoenas for depositions are not limited to nonparties but may be used to compel the attendance of parties as well. *See, e.g.*, *Continental Coatings Corp. v. Metco, Inc.*, 50 F.R.D. 382 (N.D. Ill. 1970); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 717 (E.D. Pa. 1968); *cf.* *DISCOVERY SOURCEBOOK*, *supra* note 5, at 123 (Rule 45 is "clearly intended to be exclusively a non-party device. It is not intended that it shall be an alternative method of getting at parties.").

12 To obtain a subpoena, a litigant must file with the clerk in the district where the deposition is to be taken a copy of the notice of the deposition and a certificate of service of the notice. The clerk is then authorized to issue subpoenas for the persons named or described in the notice. FED. R. CIV. P. 45(d)(1).

13 FED. R. CIV. P. 45(d)(1) provides in part:

The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

If the subpoena includes a command to bring designated things, it is referred to as a subpoena duces tecum. *See* FED. R. CIV. P. 30(b)(1).

party for a deposition and requires the nonparty to bring designated things to the deposition.

Although the procedures of Rule 34 do not generally apply to nonparties, one part of that rule is relevant to nonparties; subdivision (c) states that Rule 34 does not preclude independent actions against nonparties for production of documents and things and permission to enter upon land.¹⁴ This language clearly seems to contemplate independent actions for production of documents, yet the only court to decide the issue has held that an independent action may not be used for discovery of documents due to the availability of subpoenas duces tecum under Rule 45(d).

In *Home Insurance Co. v. First National Bank of Rome*,¹⁵ the defendant in the underlying litigation filed an independent action under Rule 34(c) against a nonparty bank seeking production of notes, payment records, correspondence and memoranda. The court dismissed the independent action on the basis that Rule 34(c) was

designed to cover situations in which a party desires to enter on land that is not in the possession or control of a party or to inspect things that it is physically impossible to produce at the taking of a deposition, for example, a mine that is the site of a cave-in, or a large machine that is the source of an injury.¹⁶

Since the plaintiff in the discovery action was only seeking the production of documents, and the documents were physically susceptible to production at a deposition, the subpoena duces tecum was the proper method of discovery.

Home Insurance is the only decision which has specifically addressed the availability of an independent action under Rule 34(c) when the things to be discovered are mobile and therefore discoverable with a subpoena duces tecum under Rule 45(d).¹⁷ However, other courts have implied that they would reach the same result,¹⁸

14 FED. R. CIV. P. 34(c) provides: "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." This rule is discussed in detail in notes 88-99 *infra* and accompanying text.

15 89 F.R.D. 485, 488 (N.D. Ga. 1980).

16 *Id.* at 486.

17 Although the *Home Insurance* case dealt specifically with documents, the rationale for the decision makes clear that the holding would extend to all mobile things.

18 See *Stebbins v. EEOC*, 4 Empl. Prac. Dec. (CCH) ¶ 7930, at 6453 (D.D.C. 1972) (complaint filed under Rule 34(c) dismissed in part because availability of information through Rules 30 and 45 precluded necessity of resort to Rule 34(c) independent action); see also *Fisher v. Marubeni Cotton Corp.*, 526 F.2d 1338, 1341 (8th Cir. 1975) ("If the person is a non-party, production of documents can be compelled only by a subpoena duces tecum issued under Rule 45(d)(1)."); *Jones v. Continental Casualty Co.*, 512 F. Supp. 1205, 1207 (E.D. Va. 1981); *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 118 n.3 (E.D. Mich. 1977) ("A party

and the conclusion that Rule 34(c) independent actions cannot be used to discover mobile things because of the availability of Rule 45(d) subpoenas duces tecum is sound. From the courts' perspective, subpoenas duces tecum are better than independent actions because they consume fewer judicial resources.¹⁹ The number of available preliminary procedural challenges to a subpoena duces tecum are few compared to those possible for independent actions. Generally, a witness who receives a subpoena duces tecum may only challenge it on the limited procedural grounds that the subpoena was improperly issued or served.²⁰ In contrast, a witness who has been named a defendant in an independent action may not only argue that process was improperly issued or served, but also may raise other objections, including lack of jurisdiction over the subject matter,²¹ improper venue, and failure of the complaint to state a claim upon which relief can be granted.²² Thus, before the court ever reaches the merits of the discovering party's right to production,²³ the use of an independent action might confront the court with an array of preliminary is-

can compel a non-party to produce books, papers, documents or tangible things only by subpoena duces tecum issued pursuant to Rule 45 of the Federal Rules of Civil Procedure").

19 See *Pressed Steel Car Co. v. Union Pac. R.R.*, 240 F. 135, 137 (S.D.N.Y. 1917) (where subpoena duces tecum provides discovery, "principle of judicial parsimony" indicates that equitable bill of discovery will not lie).

20 Service is described in FED. R. CIV. P. 45(c); issuance is described in FED. R. CIV. P. 45(d). See, e.g., *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena held a nullity because served on plaintiff's counsel instead of plaintiff); *Sykes Int'l, Ltd. v. Pilch's Poultry Breeding Farms, Inc.*, 55 F.R.D. 138, 139 (D. Conn. 1972) (subpoena held void because served outside territorial limits of Rule 45(d)(2)).

21 See *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 488 (N.D. Ga. 1980) (independent action for discovery under Rule 34(c) dismissed for lack of jurisdiction over the subject matter); see also notes 142-46 *infra* and accompanying text.

22 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 34.22, at 34-79 n.1 ("[T]o the extent independent actions for discovery are permissible under the Rules, they would be governed by the Rules insofar as procedure is concerned."), cited with approval in *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 487 (N.D. Ga. 1980). Thus, all the objections provided in FED. R. CIV. P. 12 would be available.

23 Of course, a subpoena may also be challenged as calling for a production that is oppressive, burdensome, or unreasonable. See FED. R. CIV. P. 45(b); *Federal Trade Comm'n v. Texaco, Inc.*, 517 F.2d 137 (D.C. Cir. 1975), *reh'g en banc*, 555 F.2d 137, *cert. denied*, 431 U.S. 974 (1977); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *In re Electric Weld Steel Tubing Antitrust Litig.*, 512 F. Supp. 81 (N.D. Ill. 1981); *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 123-24 (E.D. Mich. 1977); *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605 (D.D.C. 1969). And a subpoena may be challenged as calling for privileged or confidential information, see FED. R. CIV. P. 26(b); *In re Fish & Neave*, 519 F.2d 116 (8th Cir. 1975); *Covey Oil Co.*, 340 F.2d at 997; *Ghandi*, 74 F.R.D. at 123-24; *Nader v. Butz*, 60 F.R.D. 381 (D.D.C. 1973). These objections, however, are directed to the substance of the discovery, and they would be available as challenges to either the subpoena duces tecum or independent action method of production.

sues which it presumably resolved in the primary litigation, and must now resolve again in ancillary litigation.²⁴ Since the scope of discovery is the same for the independent action and the subpoena duces tecum,²⁵ the independent action is simply a more cumbersome and less precise discovery method. An independent action achieves the same result as a subpoena duces tecum while consuming more of the courts' time in resolving unnecessary questions. Therefore, from a policy perspective, it is not unreasonable to limit litigants to one method, the subpoena duces tecum.

The conclusion that Rule 34(c) independent actions cannot be used for production of mobile things should not distress parties seeking discovery, since, for several reasons, the subpoena duces tecum provides a more attractive method of production than an independent action. First, the subpoena duces tecum procedure is simpler than filing another, separate action against a new defendant. Filing a new action requires the resolution of many preliminary questions²⁶ and the drafting of a valid complaint. In contrast, a subpoena duces tecum merely involves arranging a deposition, obtaining a subpoena form from the clerk, filling it in, and serving it on the deponent.²⁷ Second, a subpoena duces tecum is generally less expensive than an independent action for a party seeking discovery. The cost of service for a subpoena and for a summons and complaint is similar,²⁸ but the witness fees that accompany a subpoena will usually be less than the filing fees required for an independent action.²⁹ Furthermore, the subpoena approach is less costly than an independent action in terms of the time the discovering attorney must spend.³⁰ Finally, the sub-

24 Of course, if fewer questions are presented to the trial court, there are also fewer opportunities to burden the appellate courts. See Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 992-1000 (1961), regarding the appealability of discovery orders.

25 Independent actions would be governed by the federal rules, *see* note 22 *supra*, so the scope of discovery for both subpoenas duces tecum and independent actions would be governed by FED. R. CIV. P. 26.

26 For example, the person filing the suit must determine how to obtain jurisdiction over the subject matter, jurisdiction over the person, and venue.

27 See notes 9-13 *supra* and accompanying text for a detailed description.

28 Due to an amendment of FED. R. CIV. P. 4, a subpoena and a summons and complaint are now subject to similar service requirements: they may both be served by any person who is not a party and who is at least 18 years old. *See* FED. R. CIV. P. 4(c), 45(c).

29 A subpoena must be accompanied by "the fees for one day's attendance and the mileage allowed by law." FED. R. CIV. P. 45(c). Currently, these fees amount to \$30 per day and \$.20 per mile. 28 U.S.C. § 1821(b) (Supp. V 1981). The mileage will be limited by the territorial limits for deposition subpoenas in FED. R. CIV. P. 45(d)(2). The filing fee for an independent action is \$60. Therefore, unless the subpoena duces tecum production lasts two days, an independent action will generally be more expensive.

30 The procedure for obtaining a subpoena is described in notes 9-13 *supra* and accompa-

poena duces tecum offers a more certain and reliable method of achieving production. As discussed above, an independent action allows the defendant to make a battery of preliminary challenges, an opportunity which does not arise with a subpoena duces tecum. Moreover, Rule 45(d) subpoenas duces tecum are relatively well-defined by the courts compared to Rule 34(c) actions, which have attracted only slight judicial attention.³¹ Generally an attorney who merely wants an expeditious production would not opt for a seldom used procedure which entails complex preliminary issues.³²

For the nonparty, the subpoena duces tecum is also preferable to an independent action. While a nonparty who is served with a subpoena duces tecum and decides to resist the production would probably have to consult a lawyer to avoid the possibility of a contempt citation,³³ if the witness decides to comply with the subpoena,

nying text. Once this procedure is followed, the discovering attorney receives a standard form subpoena, which he must then arrange to have served on the deponent. This is a fairly quick process. In contrast, an attorney planning to use an independent action cannot merely get a form from the clerk but must draft a complaint and arrange for its service. The time saved in procuring a form as opposed to drafting a complaint would result in a less expensive production.

31 Only one reported federal decision construes Rule 34(c), *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485 (N.D. Ga. 1980). Other courts have referred to Rule 34(c) but without meaningful discussion. *See* *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1402 (10th Cir. 1974); *Stebbins v. EEOC*, 4 *Empl. Prac. Dec.* (CCH) ¶ 7930, at 6453 (D.D.C. 1972).

In addition, one state court has construed an identical state version of Rule 34(c). *See* *Beckwith v. Bethlehem Steel Corp.*, 182 N.J. Super. 376, 440 A.2d 1372 (1981); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 378 A.2d 53 (1977).

32 Indeed, assuming Rule 34(c) actions were available for mobile things, it is unclear as a practical matter why a party seeking production would ever choose that method over a subpoena duces tecum. In *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485 (N.D. Ga. 1980), the court seemed puzzled by and impatient with the plaintiff's attempt to use an independent action. The court stated:

The discovery rules clearly provide an adequate remedy to the plaintiff in this case. . . . Defendant has stated that it has no objections to being subpoenaed and to producing the documents which are sought by the plaintiff, if such production is done in such a manner as to protect the defendant in its relationship with its banking customers. As the plaintiff in this action has the right of subpoena and the bank, subject to the propriety of the subpoena, would have to respond and has no objection to so responding, it appears to this Court that this matter could and should be properly handled by a subpoena duces tecum entered in the case which is already in progress.

Id. at 488.

33 To object to the subpoena, the nonparty is required to serve written objections on the subpoenaing attorney within a certain time period. *FED. R. CIV. P.* 45(d)(1). If the nonparty is not familiar with this rule, he might decide to contest the subpoena by merely not complying instead of serving written objections. In that case, the nonparty might be liable for contempt under *FED. R. CIV. P.* 45(f).

he³⁴ can easily do so without the aid of an attorney.³⁵ In contrast, where the nonparty becomes the defendant in an independent action, the nonparty would most likely have to hire an attorney regardless of whether he opposed the production.³⁶

The *Home Insurance* court clearly reached the better result in deeming Rule 34(c) independent actions unavailable for discovery of mobile things. Yet this holding seems plainly inconsistent with the language of Rule 34(c), which refers to independent actions in regards to production of "documents and things and permission to enter upon land." The rule makes no distinction based on the mobility of the discovered items. Indeed, the reference in Rule 34(c) to "documents,"³⁷ which are invariably mobile, indicates that the rule specifically contemplates independent actions for mobile objects.

In justifying the *Home Insurance* decision, the court ignored this language and focused instead on the purpose of Rule 34(c), which the Advisory Committee Notes revealed.³⁸ But a better rationale for this holding, more consistent with the language of the rule, focuses on the limiting impact of the first two words of Rule 34(c). Rule 34(c) states: "This rule does not preclude an independent action" Clearly, "this rule" refers to Rule 34. While Rule 34 does not preclude an independent action, a court could find that Rule 45 does. Of course, Rule 45 would preclude independent actions only to the extent that it operates; and since Rule 45(d) concerns only mobile

34 For simplicity, the term "he" shall be used throughout the article as a non-gender-based reference.

35 The subpoena informs the deponent exactly where to appear, what time to appear, and what materials to bring.

36 Of course, if the person from whom production is sought seeks to obstruct the production, the subpoena duces tecum has the disadvantage of depriving him of the opportunity to interpose a multitude of time consuming preliminary objections before the court reaches the substantive question of whether the production is warranted. Since the only advantage of an independent action over a subpoena duces tecum benefits the unscrupulous witness, it is not a characteristic warranting preservation.

37 The term "documents" is defined in FED. R. CIV. P. 34(a) to include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."

38 89 F.R.D. at 486 ("It is clear from the text of the Advisory Committee Note that subdivision (c) was added to the Federal Rules to fill a specific void in the Rules. That is, it was designed to cover situations in which a party desires to enter on land that is not in the possession or control of a party or to inspect things that it is physically impossible to produce at the taking of a deposition, for example, a mine that is the site of a cave-in, or a large machine that is the source of an injury.") (citations omitted); *see also id.* at 488 (case is inappropriate for application of Rule 34(c) because it is "plainly not one which that Rule was originally intended to cover.").

things, it would only preclude independent actions for mobile things.³⁹

From the courts' perspective, the *Home Insurance* holding serves the policy of judicial economy. For the litigants seeking discovery, the unavailability of independent actions for production of mobile things presents no burden since the subpoena duces tecum method is simpler, less expensive, and more certain to produce results than an independent action. For the nonparty, the role of deponent is generally less expensive than that of defendant. Nevertheless, although the subpoena duces tecum is therefore the best and indeed the only way to compel the production of mobile things from a nonparty, one major drawback limits its efficacy: the subpoena duces tecum is dependent on a deposition.

B. *Weaknesses in the Federal Practice*

As previously mentioned,⁴⁰ under the subpoena duces tecum procedure for discovery of tangible things, a litigant must subpoena the nonparty⁴¹ for a deposition and require him to bring designated things. Rule 45(d) subpoenas duces tecum can only compel production of things in connection with a deposition; without a deposition, Rule 45(d) does not apply, and production cannot be required.⁴²

This deposition prerequisite has several drawbacks. Where the party seeking discovery only wants access to the things and does not need to depose anyone about them, a deposition wastes the time of everyone involved. The attorney seeking production must attend the deposition to get access to the things subpoenaed even if he has no

39 Where the discovery rules provide an adequate remedy, they occupy the field, and independent relief is not available. *See Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 488 (N.D. Ga. 1980) and cases cited therein. For a detailed discussion of preemption, see note 97 *infra*.

40 *See* text accompanying notes 8-13 *supra*.

41 The nonparty selected as the deponent need not be the owner of the things but must at least have custody or control over the things for the subpoena to be effective. *See Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 122-23 (E.D. Mich. 1977); *Mattie T. Johnston*, 74 F.R.D. 498, 502 (N.D. Miss. 1976); *United States v. International Business Mach. Corp.*, 71 F.R.D. 88, 91 (S.D.N.Y. 1976) ("[A] subpoena is enforceable only as to documents within the possession, custody or control of the subpoenaed person."); *Beegle v. Thomson*, 2 F.R.D. 82, 83 (N.D. Ill. 1941).

42 *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 118 n.3 (E.D. Mich. 1977); *United States v. International Business Mach. Corp.*, 71 F.R.D. 88, 90 (S.D.N.Y. 1976) ("[Rule 45] addresses subpoenas duces tecum in connection with depositions and neither authorizes nor addresses subpoenas duces tecum which are unconnected to a deposition proceeding . . ."); *McLean v. Prudential S.S. Co.*, 36 F.R.D. 421, 426 (E.D. Va. 1965); *McDowell Assoc., Inc. v. Pennsylvania R.R.*, 20 F.R.D. 219, 220 (S.D.N.Y. 1957); *Newmark v. Abeel*, 106 F. Supp. 758, 759 (S.D.N.Y. 1952); *Beegle v. Thomson*, 2 F.R.D. 82, 83 (N.D. Ill. 1941).

questions. As a practical matter, the attorneys for the other parties would also be required to attend the deposition, not to obtain access to the subpoenaed things,⁴³ but to protect their clients' interests in the event that some questions were asked.⁴⁴ For all the attorneys involved, the inconvenience is aggravated if they have to travel out of town to attend the deposition.⁴⁵ Finally, the subpoenaed nonparty should not have to attend a deposition if the discovering attorney merely wants to inspect or copy things.⁴⁶

The deposition requirement also wastes money. The additional time the discovering party's attorney must spend to attend a deposition significantly increases the cost of production.⁴⁷ Moreover, if the deposition requires the attorneys to travel,⁴⁸ the client must bear the cost for yet more of the attorney's time and the travel expenses.⁴⁹

43 FED. R. CIV. P. 30(f) provides in relevant part:

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. . . .

(2) Upon payment of reasonable charges therefor, the official shall furnish a copy of the deposition to any party or to the deponent.

44 A discovering attorney, even assuming he were inclined to do so, would not be able to predict with certainty whether he would have any questions for the deponent. Even if the attorney originally anticipates none, some questions might arise after his first contact with the subpoenaed thing. Furthermore, a discovering attorney who arrives at a deposition to find that none of the other parties' attorneys are attending might take advantage of this situation and manipulate the deponent (who as a nonparty may have no attorney and no interest to protect) to elicit some favorable testimony while there is no danger of objections by the other parties. Obviously it is risky for a party not to attend any deposition.

45 FED. R. CIV. P. 45(d)(2) provides:

A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

This rule requires the litigants to travel to the nonparty's place of residence or business if they want to depose him.

46 Of course, the nonparty can offer to produce the things without appearing at a deposition; and if the discovering attorney agrees, everything is fine. Indeed, if all litigation participants were agreeable and reasonable, all lawsuits would be settled. The real issue is what a party can force a nonparty to do. Currently, a party can force the nonparty to appear at a deposition even if the party has no questions and the nonparty offers to produce the things without a deposition.

47 As noted above, the discovering attorney will always have to attend and the other attorneys will have to attend, as a practical matter. See note 44 *supra* and accompanying text.

48 See note 45 *supra*.

49 In addition to paying for his attorneys' time and travel, the client must also pay fees to the nonparty deponent. FED. R. CIV. P. 45(c) provides in relevant part that "[s]ervice of a

Finally, a deposition requires physical arrangements not implicated by a document production: a room for the deposition,⁵⁰ an officer,⁵¹ and facilities for recording the deposition.⁵² Depositions are quite expensive.⁵³

Although an attorney might not need to ask questions regarding the subpoenaed things, more frequently the attorney does have some questions for the deponent.⁵⁴ Even if the attorney has questions for the deponent, however, the deposition prerequisite to production is disadvantageous in several respects. The chief problem concerns preparation. The attorney needs time to review the things to prepare effective questions for the deposition, but preparation is impossible when the attorney's first exposure to the things is at the deposition itself.⁵⁵

Under the current rules, the attorney who needs time to review the documents or things has three options, none of which satisfactorily solves the problem. If the response to the subpoena duces tecum encompasses relatively few documents, the attorney can arrange for the deponent and the other attorneys to wait in the deposition room or take a recess while he reviews the documents. This delay wastes the time of the deponent and other attorneys; moreover, if the attor-

subpoena upon a person . . . shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law." *See* note 29 *supra* (discussing the fee requirements of 28 U.S.C. § 1821(b) (Supp. V 1981)).

50 If the deposition can be scheduled at the discovering attorney's office, a conference room might be available at no additional cost. If the deposition has to be scheduled away from the discovering attorney's office, however, it might be necessary to rent a room. Locations for the deposition are governed by Rule 45(d)(2). *See* note 45 *supra*.

51 FED. R. CIV. P. 30(c) requires that the officer before whom the deposition is to be taken swear in the witness and record his testimony. After the deposition is taken, FED. R. CIV. P. 30(f) requires that the officer certify, seal, and file the deposition.

52 FED. R. CIV. P. 30(c) provides that "[t]he testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule." Subdivision (b)(4) provides that testimony may be recorded by "other than stenographic means." The other means typically include tape recording or videotaping. Regardless of whether the recording is done by a stenographer, a tape recorder, or a videotape machine, it costs money to make.

53 *See* Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 820 (1981) (describing depositions as a relatively costly way to obtain information).

54 As noted above, these questions may be anticipated or raised by the attorney's first contact with the thing. *See* note 44 *supra*.

55 Again, if the deponent is cooperative and eager to produce the things for the discovering attorney in advance of the deposition, the problem is avoided.

The problem of adequate preparation for the deposition does not arise when the deponent is a party since the litigants may use a Rule 34 Request for Production sufficiently in advance of the deposition to allow review of the documents and things before the deposition.

ney ultimately has no questions for the deponent, the entire gathering was unnecessary.

If the response to the subpoena duces tecum includes such a substantial number of documents or things that one attorney cannot reasonably ask the deponent and other attorneys to wait while they are reviewed,⁵⁶ the discovering attorney might bring associates to the deposition to assist with the document review. While one attorney is examining the opponent or one group of documents, the other attorneys could be reviewing the other documents for possible questions.⁵⁷ This approach is haphazard, since the attorneys reviewing documents will not hear the deponent's testimony and thus might miss areas of interest in the documents. Also, delay is inevitable while the first documents are being reviewed, and if the discovering attorneys decide they have no questions, again the whole procedure becomes wasteful.

Lastly, the discovering attorney may continue the deposition at a later date. This is the only feasible alternative where the production is voluminous or complex.⁵⁸ A continuation is the most desirable approach for the attorney seeking production, for it fosters the most unhurried and thorough preparation. But a continuation presents difficulties as well. The deposing attorney must risk the court precluding a continuation,⁵⁹ and the necessity of a continua-

56 See DISCOVERY SOURCEBOOK, *supra* note 5, at 122 ("By and large, if you want a goodly number of documents, you do not want to be presented with them at the deposition anyhow. You want to read them beforehand, so that everybody is not falling asleep during the deposition while the one side is examining the documents.")

57 Usually the subpoenaing attorney has some idea of how voluminous the response to the subpoena will be and can plan accordingly the number of associates to take the deposition. If the response is more voluminous than anticipated, however, the attorney may appear at the deposition alone and be unable to recruit help from his office. This will certainly be a problem if the deposition is being taken out of town.

The attorneys reviewing documents can either run into the deposition when they find an interesting document or thing and deliver it to the examining attorney, or they can take turns examining the deponent on documents they have reviewed. Either approach is disruptive and likely to produce a disjointed transcript.

58 Large or complex responses to subpoenas duces tecum are not unusual. See, e.g., *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997 (10th Cir. 1965) (subpoena required production of documents showing for the state of Utah during a designated period: (1) actual purchase price of all gasoline purchased; (2) actual sales price of all gasoline sold other than at retail; (3) volume of gasoline sold each month segregated by city with separate figures for regular and premium; and (4) number and location of service stations owned, operated, and leased by the nonparty deponent); *Banana Distrib., Inc. v. United Fruit Co.*, 19 F.R.D. 532, 533 (S.D.N.Y. 1956) (subpoena required production of all documents which recorded the quality, purchaser, and price for all shiploads of bananas entering New England, the Middle Atlantic States, portions of the Midwest and South, and Eastern Canada from 1946 to 1953).

59 The second sentence of FED. R. Civ. P. 30(a) indicates that generally leave of court

tion augments the waste of time and money.

None of these alternatives is satisfactory. It is crucial that the discovering attorney have time to examine the things and prepare questions for the deposition, because without adequate preparation, production of the things may be fruitless,⁶⁰ or at least of less value.⁶¹ Recognizing these impediments in the federal system, several states have taken steps to improve their own production procedures.

C. *Current State Practice*

Although most states have adopted the federal rules' system of deposition and subpoena duces tecum for the production of mobile things,⁶² several states attempting to improve this procedure have varied their rules to eliminate the deposition prerequisite.⁶³ States have basically taken two approaches. The first allows parties to serve Rule 45(d) subpoenas for the production of things alone, without a deposition.⁶⁴ The second approach permits Rule 34 requests for pro-

need not be obtained for a deposition. This provision has been interpreted to eliminate all technical objections to a second deposition of the same person. *See* 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.50 (2d ed. 1983) [hereinafter cited as 4 MOORE'S FEDERAL PRACTICE]. However, when the second deposition is "purely repetitious," the court may enter a protective order precluding the deposition. *Id.* at n.25; *see* Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981) (no abuse of discretion by district court in precluding second deposition when there were no new issues of material fact). Where the second deposition is necessary so that documents produced at the first deposition may be analyzed before the deponent is questioned, the second deposition will usually not be purely repetitious and should not be precluded by the court. *See In re Westinghouse Elec. Corp.—Uranium Contracts Litig.*, 570 F.2d 899, 902 (10th Cir. 1978) (abuse of discretion for district court to preclude third deposition where party had had no opportunity to question deponent on recently produced documents). While the risk that a second deposition would be precluded is minimal, it is nonetheless a risk.

60 For example, a business record is often unintelligible unless explained by someone familiar with it. Documents of this type rarely speak for themselves.

61 Even assuming the content of a document is self-explanatory, the document's value may decrease if the deponent cannot be questioned on it. Suppose in response to a subpoena duces tecum, a party receives a document that he wishes to introduce into evidence at trial. However, the records custodian is beyond the reach of subpoena under Rule 45(e). The party wishing to introduce the document must establish the document as a business record at the deposition or be precluded from introducing it into evidence. In this situation, the opportunity to examine the deponent on the document is crucial to the value of the document.

62 *See, e.g.*, KY. R. CIV. P. 45; TENN. R. CIV. P. 45; Utah R. CIV. P. 45; WYO. R. CIV. P. 45.

63 *See* ALA. R. CIV. P. 34; FLA. R. CIV. P. 1.351; GA. CODE ANN. § 9-11-34 (1982); IND. R. TRIAL P. 34(c); OKLA. STAT. ANN. tit. 12, § 3210(c) (West Supp. 1982); TEX. R. CIV. P. 167(4).

64 *See* FLA. R. CIV. P. 1.351, 30 FLA. STAT. ANN. § 1.351 (West Supp. 1983), discussed in notes 66-85 *infra* and accompanying text.

duction to be directed to nonparties as well as parties.⁶⁵ The first approach, which allows Rule 45(d) subpoenas to compel production of things independent of a deposition, was recently adopted by one state.

Rule 1.351 of the Florida Civil Rules of Procedure became effective in 1981.⁶⁶ The rule, entitled "Production of Documents and Things Without Deposition," provides that a party may seek inspection and copying of any documents or things within the scope of discovery from a nonparty by issuing a subpoena directing the production.⁶⁷ Under this rule, the discovering party serves the other parties with a notice of intent to issue a subpoena and a copy of the proposed subpoena at least ten days before issuance.⁶⁸ If, during the ten-day waiting period, any party objects to production under Rule 1.351, the discovering party must pursue the production under the traditional deposition and subpoena duces tecum procedure.⁶⁹ But if there are no objections, the subpoena is issued.⁷⁰

The subpoena must inform the nonparty that he has the right to

65 See ALA. R. CIV. P. 34; GA. CODE ANN. § 9-11-34 (1982); IND. R. TRIAL P. 34(c); OKLA. STAT. ANN. tit. 12, § 3210(c) (West Supp. 1982); TEX. R. CIV. P. 167(4). This second approach provides access to immobile as well as mobile things. See also text accompanying notes 153-208 *infra*.

66 30 FLA. STAT. ANN. § 1.351 (West Supp. 1983); Florida Bar, *In re* Rules of Civil Procedure, 391 So. 2d 165, 171 (Fla. 1980).

67 FLA. R. CIV. P. 1.351 provides:

(a) Request: Scope. A party may seek inspection and copying of any documents or things within the scope of Rule 1.350(a) from a person who is not a party by issuance of a subpoena directing the production of the documents or things when the requesting party does not seek to depose the custodian or other person in possession of the documents or things.

68 FLA. R. CIV. P. 1.351(b) provides:

(b) Procedure. A party desiring production under this rule shall give notice to every other party of the intent to serve a subpoena under this rule at least ten days before the subpoena is issued. The proposed subpoena shall be attached to the notice

69 FLA. R. CIV. P. 1.351(b) states:

If any party serves an objection to production under this rule within 10 days of service of the notice or the person upon whom the subpoena is to be served objects at any time before the production of the documents or things, the documents or things shall not be produced under this rule.

The Committee Note to the rule states that if there is an objection, "recourse must be had to Rule 1.310." Florida Rule 1.310, "Depositions Upon Oral Examination," is similar to Federal Rule 30; it provides for the traditional subpoena duces tecum method of production.

See also Note, *Civil Procedure*, 35 U. MIAMI L. REV. 855, 897 (1981) ("The rule prohibits production, however, if a party objects. The requesting party will have to serve a notice of deposition and subpoena duces tecum under rule 1.310.") (footnote omitted).

70 FLA. R. CIV. P. 1.351(c) ("If no objection is made by a party under subdivision (b), the clerk shall issue a subpoena for the production of the documents or things").

object to production⁷¹ and is not required to surrender the things.⁷² This information concerning his rights may enable the nonparty to respond without retaining an attorney.⁷³ Furthermore, one may only require production in certain counties with which the nonparty or the things themselves have significant contacts.⁷⁴ Alternatively, the subpoena may give the nonparty the option of producing the things by mail.⁷⁵ These provisions thus offer subpoenaed nonparties protection from an overly burdensome production.

As currently drafted, however, Rule 1.351 does not clearly indicate whether it allows inspection of immobile things. Subsection (1) defines the scope of Rule 1.351 by reference to Rule 1.350(a).⁷⁶ Similar to Federal Rule 34(a), Rule 1.350(a) provides for entry upon designated land or other property.⁷⁷ This provision suggests that Rule

71 FLA. R. CIV. P. 1.351(b) states that "[t]he proposed subpoena . . . shall state that the person who will be asked to produce the documents or things has the right to object to the production under this rule." If the subpoenaed nonparty objects at any time before production, the discovering party must proceed by the traditional deposition and subpoena duces tecum method. See note 69 *supra*.

72 Generally the duty to produce a thing does not include the duty to surrender the thing. See *State ex rel. Crawford v. Moody*, 477 S.W.2d 438, 440 (Mo. Ct. App. 1972); *State ex rel. Emge v. Corcoran*, 468 S.W.2d 724, 725-26 (Mo. Ct. App. 1971):

'Produce' is defined as 'to bring forward: lead forth: offer to view or notice: exhibit: show', Webster's Third New International Dictionary, Unabridged. It is not a synonym of 'turn over' or 'give.' The rule contemplates that the possession, custody and control shall remain in the party producing, and the moving party shall have the opportunity to inspect, copy or photograph. The rule does not contemplate that the moving party shall receive the possession, custody or control of the thing produced.

73 It was the intent of the drafters to design these subpoenas to maximize the opportunity of chances that the subpoenaed party respond without having to hire counsel. Telephone interview with S. Sammy Cacciatore, Jr., Chairman, Rule and Procedures Committee of the Florida Academy of Trial Lawyers, Inc. (Feb. 8, 1983). On this point, the Florida subpoenas are preferable to comparable federal subpoenas which make no mention of the right to object.

74 FLA. R. CIV. P. 1.351(c) provides: "The subpoena shall require production only in the county of the residence of the custodian or other person in possession of the documents or things or in the county where the documents or things are located or where the custodian or person in possession usually conducts his business." Federal Rule 45 has a similar provision which controls where a nonparty may be required to appear for a deposition, see FED. R. CIV. P. 45(d)(2).

75 FLA. R. CIV. P. 1.351(c) ("The subpoena may give the recipient an option to deliver or mail legible copies of the documents or things to the party serving the subpoena.").

76 FLA. R. CIV. P. 1.351(a) ("A party may seek inspection and copying of any documents or things within the scope of Rule 1.350(a) . . .").

77 FLA. R. CIV. P. 1.350(a) states in relevant part: "(a) Request; Scope. Any party may request any other party (1) to produce . . . designated documents. . . ; or (2) to inspect . . . tangible things . . . ; or (3) to permit entry upon designated land or other property. . . ." (emphasis added).

1.351 allows subpoenas for entry upon the property of a nonparty,⁷⁸ yet other provisions of Rule 1.351 contradict this conclusion. First, the language of Rule 1.351 refers only to subpoenas for the inspection and copying of documents and things. Although the inspection of a thing might arguably allow for entry upon land, when the right to enter upon the land of a party was established in Rule 1.350, the drafters used explicit language.⁷⁹ Moreover, Rule 1.351 authorizes subpoenas only for the “production” of documents or things, which suggests that the rule does not cover immobile property, since it cannot be “produced” at a designated place.⁸⁰

Subsection (e) provides another indication that Rule 1.351 does not allow subpoenas for inspection of immobile things. Subsection (e) states that “[t]his rule does not affect the right of any party to bring an independent action for production of documents and things or permission to enter upon land.”⁸¹ The specific mention of permission to enter upon land indicates that such entry is not already authorized and demonstrates the drafters’ intent to treat production of things and entry upon land as distinct propositions.⁸² Thus, in spite of some ambiguity regarding the scope of Rule 1.351, the better interpretation is that the rule applies only to mobile things and does not authorize entry upon land.

The voluntary character of Rule 1.351 is its major weakness. If any party or the subpoenaed nonparty objects to proceeding under Rule 1.351, the rule cannot be invoked and the discovering party must revert to the traditional deposition procedure.⁸³ Therefore, any party or nonparty can still force a deposition, although two objections might now be required: one to proceeding under Rule 1.351,

78 Also, Rule 1.351 refers merely to “Rule 1.350(a)”; the reference is not limited to 1.350(a)(1)(documents) or (a)(2)(tangible things). Thus, the reference to “Rule 1.350(a)” seems to incorporate (a)(3)(entry upon land).

79 See note 77 *supra*.

80 See *State ex rel. Crawford v. Moody*, 477 S.W.2d 438, 440 (Mo. Ct. App. 1972) (“produce” means to bring forward, lead forth; an order to produce does not authorize the discovering party to go onto property of nonparties).

81 FLA. R. CIV. P. 1.351(e).

82 The Florida Civil Procedure Rules Committee never considered establishing a subpoena for entry upon the property of nonparties and clearly did not intend for Rule 1.351 to be such a provision. Telephone interview with S. Sammy Cacciatore, *supra* note 73.

83 See note 69 *supra*. The person objecting to the use of Rule 1.351 need not give any cause or basis for the objection; the objection alone is sufficient to prohibit use of this rule. The drafters of the rule intended that no cause for an objection be required so that the rule could only be invoked for totally noncontroversial productions; if there was any controversy, any party or the deponent could force a deposition to be taken as part of the production. Telephone interview with S. Sammy Cacciatore, *supra* note 73.

and then one to employing the subpoena duces tecum method if no deposition were scheduled. This loophole renders the rule meaningless since it operates only when all the participants agree to it. Indeed, under traditional subpoena duces tecum procedure production can be accomplished without a deposition if everyone agrees. The paramount issue is not how to accomplish a production most efficiently when everyone cooperates, but rather how to accomplish a production most efficiently when one or more participants resist.

Rule 1.351 should be amended. Specifically, the provision which allows any person to object and thereby render the rule inapplicable should be deleted. Such an amendment would prejudice no one. The nonparty would only lose the right to object to the method of production, a right which should never have been accorded the nonparty anyway.⁸⁴ The nonparty's rights to object to the substance of the production would remain unaffected.⁸⁵ And this amendment would not prejudice the parties because any one of them who, after examining the things produced, felt that production alone was inadequate could subpoena the nonparty for a deposition. With this suggested change, the new Florida rule would effectively eliminate unnecessary depositions and become an efficient method for discovery of nonparties' mobile things.

84 It is absurd to give a witness who is not a party to the action the right to object to the method of production selected by the litigants. An analogous situation arises when a nonparty deponent objects to a subpoena on the basis that it calls for the production of irrelevant things. *See Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 123 (E.D. Mich. 1977) ("[T]he Court has serious reservations about the propriety of a nonparty deponent moving to quash a subpoena duces tecum on the ground that the information sought is not relevant to the pending action. It is not a party to the pending action and generally has no interest in the outcome.") (footnote and citations omitted); *see also Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 717 (E.D. Pa. 1968) (relevance and materiality are not appropriate concerns of nonparty deponents since they have no interest in the outcome of the case); *Schutte & Koerting Co. v. Fischer & Porter Co.*, 6 Fed. R. Serv. 45b.413, Case 2 (E.D. Pa. 1942) (nonparty witness not entitled to raise question of materiality in response to subpoena). Similarly, because the nonparty has no interest in the outcome, the method of production selected by the parties is not a proper topic of concern for the nonparty, and he should not be allowed to object to it.

85 The nonparty may object to the production on the basis that it is burdensome, oppressive, unreasonable, or would require disclosure of confidential or privileged information. *FLA. R. Civ. P.* 1.410(b), 1.280(b); *see also Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 997 (10th Cir. 1965); *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 123-24 (E.D. Mich. 1977); and note 23 *supra*.

III. Immobile Things

A. *Current Practice Under the Federal Rules*

As previously discussed, discovery of nonparties' mobile things in the federal system is achieved through a deposition and subpoena duces tecum under Rule 45(d).⁸⁶ But immobile things cannot be produced at a deposition and are therefore beyond the reach of a subpoena duces tecum.⁸⁷ Access to such immobile things requires entry on a nonparty's property,⁸⁸ and under the federal rules a nonparty cannot be compelled to permit such entry for inspection.⁸⁹ The only available method for compelling a nonparty to allow access to immobile things is an independent action for discovery pursuant to Rule 34(c).⁹⁰

1. History of Rule 34(c)

Rule 34(c) is relatively new. In 1967, the Advisory Committee proposed extensive amendments to Rule 34.⁹¹ As proposed, the rule made no mention of nonparties,⁹² but the Advisory Committee indicated its receptiveness to comments from the bar regarding the need for a provision concerning entry upon nonparties' land.⁹³ Comment

⁸⁶ See notes 7-39 *supra* and accompanying text.

⁸⁷ See note 6 *supra* for the definition of immobile.

⁸⁸ See, e.g., *Huynh v. Werke*, 90 F.R.D. 447 (S.D. Ohio 1981) (industrial molding machine in nonparty's factory); *Sante Fe Int'l Corp. v. Potashnick*, 83 F.R.D. 299 (E.D. La. 1979) (large quantities of pipe located on nonparty's barge); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 378 A.2d 53 (1977) (poisonous fumes and vapors at nonparty's manufacturing plant).

⁸⁹ *Huynh v. Werke*, 90 F.R.D. 447, 450 (S.D. Ohio 1981) ("The Federal Rules of Civil Procedure provide this Court with *no authority* to order a nonparty to permit entry upon land.") (emphasis in original); *Sante Fe Int'l Corp. v. Potashnick*, 83 F.R.D. 299, 301 (E.D. La. 1979); *Humphries v. Pennsylvania R.R.*, 14 F.R.D. 177, 181 (N.D. Ohio 1953). In contrast, a party may be compelled to permit entry under FED. R. CIV. P. 34(a)(2) ("Any party may serve on any other party a request . . . (2) to permit entry upon designated land or other property . . .").

⁹⁰ *Huynh v. Werke*, 90 F.R.D. 447, 450 (S.D. Ohio 1981); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 505, 378 A.2d 53, 70 (1977); see also Note, *Rule 34(c) and Discovery of Nonparty Land*, 85 YALE L.J. 112, 114 (1975) ("[T]he availability of such discovery depends entirely on whatever independent action might be brought.").

⁹¹ Proposed Amendments to Rules of Civil Procedure, 43 F.R.D. 211, 255-56 (1967).

⁹² 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.").

⁹³ Proposed Amendments to Rules of Civil Procedure, 43 F.R.D. 211, 257 (1967) (Advisory Committee Notes to 1970 revision of Rule 34):

The rule as revised continues to apply only to parties. It has been suggested that the rule should authorize a court order to nonparties to permit entry on land, in appropriate cases. The need for this provision is not shown by the reported cases or

from the bar was received,⁹⁴ and subdivision (c) was added to Rule 34 under the Supreme Court's proposed amendments in 1970.⁹⁵ Subdivision (c) merely states that the rule does not preclude independent actions against nonparties. The Advisory Committee recognized that the amendment was not an "ideal solution" but implied that it would have to suffice for the present time.⁹⁶

2. Authority for Independent Actions

Rule 34(c) clarifies that the federal rules do not preempt independent actions for production against nonparties.⁹⁷ Rule 34(c)

by the commentators, but perhaps it will be shown by reports of difficulties from the bar.

94 The Committee received "something like half a dozen" comments from the bar. *DISCOVERY SOURCEBOOK*, *supra* note 5, at 128.

95 48 F.R.D. 459, 526 (1970). One commentator has dubbed subdivision (c) "the peculiar little tag at the end of Rule 34." *DISCOVERY SOURCEBOOK*, *supra* note 5, at 125.

96 FED. R. CIV. P. 34 advisory committee note, 48 F.R.D. at 487, 527 ("While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties."). *See also* *DISCOVERY SOURCEBOOK*, *supra* note 5, at 128 (remarks of Professor and Advisory Committee Reporter Albert Sacks):

So the question arose again. Should we put in an affirmative procedure for such discovery? Again we ran into all the difficulties. Time was pressing at this point. Not having a good procedure for affirmative discovery, the solution lay in saying, well, at least we can eliminate the pre-emptive character of Rule 34, making it clear that if such a discovery device can be fashioned independently of the rules, it would not be banned by Rule 34.

The note says very plainly that it would be better to have a different rule. But there are difficulties involved, and therefore, in the interim, this is being done. This is a rather candid statement of reasons.

97 FED. R. CIV. P. 34 advisory committee notes to subsection (c) state:

Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. . . . [T]his subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

According to the Advisory Committee's Note, some courts had dismissed independent actions on the basis that the rules were preemptive. *See also* *DISCOVERY SOURCEBOOK*, *supra* note 5, at 128 (noting reports of other cases where independent actions to enter nonparty land were held preempted by Rules 34 and 45). *Cf.* *Amand v. Pennsylvania R.R.*, 17 F.R.D. 290 (D.N.J. 1955) (independent action for discovery in aid of labor arbitration proceeding dismissed on the basis of preemption by the federal rules).

At any rate, today, courts deciding whether independent actions for discovery are preempted by the rules generally conclude that the answer depends on whether the rules provide an adequate remedy for the party seeking discovery. If the rules do not provide adequate discovery, an independent action will lie. *See* *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 506, 378 A.2d 53, 71 (1977) ("[T]he majority view is that modern rules and statutes relating to discovery do not abrogate equitable jurisdiction as to bills of discovery, and equity

does not create an independent action for discovery,⁹⁸ nor does it authorize independent actions.⁹⁹ Other sources of authority must be consulted to determine what constitutes an independent action for discovery.

The old equitable bill of discovery in aid of an action at law provides one source of authority for an independent action.¹⁰⁰ The equitable bill of discovery was developed to allow some pretrial dis-

may be resorted to where effective discovery cannot be obtained under the rules or statutes.") (citations omitted) (independent action for entry on nonparty land allowed because rules provided no discovery); *Lutz Eng'g Co., v. Sterling Eng'g & Constr. Co.*, 314 A.2d 8, 10 n.4 (R.I. 1974) ("The . . . Court still retains the power to entertain a complaint for discovery . . . where the . . . Rules of Civil Procedure do not provide a plain, adequate and complete remedy.") (independent action for discovery held not preempted by rules, but disallowed on other grounds). On the other hand, if the rules do provide an adequate remedy, an independent action for discovery will be dismissed. *See Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 488 (N.D. Ga. 1980) (independent action for discovery of documents dismissed in part because rules provided adequate remedy in the form of subpoena duces tecum). Thus, independent actions for discovery of nonparties' immobile things are not preempted by the rules since the rules provide no remedy in that situation. This analysis is consistent with Rule 34(c).

98 *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 488 (N.D. Ga. 1980); *see also* FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ."). *See generally* DISCOVERY SOURCEBOOK, *supra* note 5, at 126.

99 *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 487 (N.D. Ga. 1980) ("Rule 34(c) states that independent actions are not precluded; however, it contains no language authorizing such discovery."); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super 481, 485, 378 A.2d 53, 70 (1977) ("The parties agree that this rule [R. 4:18-1(c), the New Jersey counterpart of FED. R. CIV. P. 34(c)] in itself does not authorize an independent action for discovery, but merely serves the purpose of making it clear that [the rule] does not preclude actions for discovery against persons not parties.") (citations omitted); *see also* Note, *supra* note 89, at 114 n.18 (citing an interview with the Reporter of the Advisory Committee to the effect that the Committee did not intend to imply authorization for independent actions to discover nonparty land).

100 It is clear that the equitable bill of discovery was not abolished by the adoption of the Federal Rules; at most, it was rendered obsolete. *See* 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶¶ 26.03[3], 26.53; 4A MOORE'S FEDERAL PRACTICE *supra* note 8, ¶ 33.03[5]; Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 873 (1933). Moreover, if the equitable bill was ever preempted by the rules, *see* note 97 *supra*, it was revived in 1970 by the adoption of Rule 34(c). *See also* Note, *supra* note 89, at 114-15.

The equitable bill of discovery has been cited as basis for the Rule 34(c) independent action by the Advisory Committee, courts, and commentators. FED. R. CIV. P. 34(c) Advisory Committee Notes, *supra* note 97; *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 487-88 (N.D. Ga. 1980); *Wolfe v. Massachusetts Port Auth.*, 366 Mass. 417, 419 n.1, 319 N.E.2d 423, 424 n.1 (1974); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super 471, 505-07, 378 A.2d 53, 70-71 (1977); 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 26.53; Hughes & Anderson, *Discovery: A Competition Between the Right of Privacy and the Right to Know*, 23 U. FLA. L. REV. 289, 293 (1971); Note, *supra* note 89, at 114. Regarding the use of equitable actions generally, *see* J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE, CASES AND MATERIALS 665 (3d ed. 1980) ("Rule 34(c) does not preclude independent proceedings for

covery in actions at law.¹⁰¹ Historically, discovery was available in equity suits but was not permissible in common law actions.¹⁰² This dichotomy resulted from the different functions of the pleadings in law and equity actions. At law, pleadings were designed to prepare the case for a trial by reducing the issues to a single question of fact,¹⁰³ whereas equity pleadings were intended to assist the court in fashioning relief.¹⁰⁴ Equitable pleadings therefore included a recitation of the facts, a narrative of the evidence, and a set of interrogatories for the adverse party to answer, all of which served to reveal and focus the issues.¹⁰⁵ In contrast, pleadings at law became such rigid and formalized incantations that they failed in their function of eliminating unnecessary facts and actually tended to obscure the issues.¹⁰⁶

Because pleadings at law revealed so little information,¹⁰⁷ some

discovery under traditional equitable principles.”); *Beckwith v. Bethlehem Steel Corp.*, 182 N.J. Super. 376, 380-81, 440 A.2d 1372, 1374-75 (1981).

One commentator has suggested that other sources of authority for an independent action might be found in Rule 27(c) actions to perpetuate testimony and the All Writs Act, 28 U.S.C. § 1651 (1976). *See Note, supra* note 89, at 118. No court has ever mentioned either of these provisions in this context, and for reasons discussed in note 136, *infra*, neither provision is suitable as authority for an independent action for discovery of nonparties' immobile things.

101 *See generally* G. RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 1-17 (1932); Miller, *The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 437-55 (1938); Sunderland, *supra* note 100.

102 James, *Discovery*, 38 YALE L.J. 746 (1929).

103 W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARIAL SYSTEM* 27 (1968); G. RAGLAND, JR., *supra* note 101; Note, *supra* note 24, at 946.

104 G. RAGLAND, JR., *supra* note 101, at 6, 7.

105 A complaint in equity had nine parts. Miller, *supra* note 101, at 438 & n.266. The “starting part” contained a narrative of the facts, G. RAGLAND, JR., *supra* note 101, at 6, and the “charging part” contained a narrative of the evidence, *id.* at 14; *see Note, supra* note 24, at 947. Later, equitable complaints came to include an “interrogating part” which consisted of questions for the adverse party to answer. W. GLASER, *supra* note 103, at 28; G. RAGLAND, JR., *supra* note 101, at 6; Sunderland, *supra* note 100, at 866; Note, *supra* note 24, at 947. Thus the pleadings in equitable actions provided discovery as well as a basis for relief. G. RAGLAND, JR., *supra* note 101, at 15; Sunderland, *supra* note 100, at 866.

106 G. RAGLAND, JR., *supra* note 101, at 2 (plaintiffs' common law pleadings included “fictitious and vague allegations which were couched in antiquated terminology”; the pleadings were “more concerned with invoking the judicial process by incantation of the precise ritual than . . . in reciting the facts of the case.”); Sunderland, *supra* note 98, at 863-65 (pleadings obscured issues because the pleader did not have to reveal what kind of proof existed and because the pleader could allege facts without any intent to prove them); Note, *supra* note 24, at 946 (“As the common law developed, the pleadings tended to become formalized within a framework of rigid classes of actions; the factual allegations were replaced by statements of conclusions of law and fact, sometimes fictitious and seldom revealing much about the controversy.”) (footnotes omitted).

107 W. GLASER, *supra* note 103, at 27 (“Pleadings were supposed to tell the adversary the essential features of the pleader's case, but in practice they did not. Lawyers learned to reveal

form of discovery was needed in actions at law.¹⁰⁸ To meet this need equity courts developed the equitable bill of discovery.¹⁰⁹ With this development, a party to an action at law could file a bill in equity to obtain discovery related to the action at law. This method was the only significant means available to procure pretrial discovery in common law actions.¹¹⁰

The equitable bill of discovery in aid of an action at law was used for the same purpose in the federal system.¹¹¹ The federal courts provided practically no pretrial discovery in actions at law.¹¹² Federal statutes authorized depositions in only very limited circumstances,¹¹³ and parties who filed equitable bills often found them de-

as little as possible, hide the weaknesses in their cases, and save key evidence for the dramatic opportunities at trial.”).

108 *Id.* at 28; Note, *supra* note 24, at 947.

109 See generally W. GLASER, *supra* note 103, at 28-29; G. RAGLAND, JR., *supra* note 101, at 12-13 (1932); James, *supra* note 102, at 746-47; Sunderland, *supra* note 100, at 866-69; Note, *supra* note 24, at 947-48.

110 One other method did provide some discovery in common law actions: the bill of particulars. This pleading allowed the parties to obtain from each other additional information so as to limit the generality of the pleadings and to avert surprise at trial. See G. RAGLAND, JR., *supra* note 101, at 11; Sunderland, *supra* note 100, at 865; Note, *supra* note 24, at 947. The bill of particulars required the recipient to disclose the information that a reasonable person would need to prepare for trial but fell short of forcing real disclosure of evidence; it was a “feeble and restricted” contribution to discovery. Sunderland, *supra* note 100, at 865.

111 4 MOORE’S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-80 to 26-81 (equitable bill of discovery available in federal courts when plaintiff in bill needed more discovery than was allowed under federal statutes in action at law).

112 4 MOORE’S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-74; 4A MOORE’S FEDERAL PRACTICE, *supra* note 8, ¶ 35.03[1], at 33-19; James, *supra* note 102, at 449 & n.321.

Moreover, in spite of a statute which provided that federal procedures in common law actions had to conform to state procedures, the federal courts held that state discovery methods were not available in federal courts. *Ex parte Fisk*, 113 U.S. 713 (1885). See generally 4 MOORE’S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-74 & n.1.

113 Examination before trial was authorized by three methods. A deposition *de bene esse* could be taken if the witness would be unavailable at trial. A deposition could be taken under a *dedimus potestatem* order when necessary to prevent a failure or delay of justice. Finally, a deposition *in perpetuam rei memoriam* could be taken to perpetuate testimony, but only in equitable actions. See *Ex parte Fisk*, 113 U.S. 713, 722 (1885); 4 MOORE’S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-75 to 26-79; Note, *supra* note 24, at 949.

Regarding discovery of documents in federal court, production in actions at law was governed by statute, 28 U.S.C. § 636 (1946). See 4A MOORE’S FEDERAL PRACTICE, *supra* note 8, ¶ 34.03[1], at 34-16 to 34-17; G. RAGLAND, JR., *supra* note 101, at 187. The wording of the statute was ambiguous, and courts disagreed on whether the statute authorized production before trial or only at trial. See 4A MOORE’S FEDERAL PRACTICE, *supra* note 8, ¶ 34.03[1], at 34-17 & n.1; G. RAGLAND, JR., *supra* note 101, at 187. The Supreme Court settled the question in 1911 and held that production could be compelled only at trial. *Carpenter v. Winn*, 221 U.S. 533 (1911). Thereafter, depositions and subpoenas *duces tecum* were still available to compel pretrial production of documents, but since depositions were so limited, this method did not have a significant impact. See 4A MOORE’S FEDERAL PRACTICE,

nied on the basis that statutory discovery remedies were deemed sufficient.¹¹⁴ As the need for discovery in federal common law actions became more apparent, however, equitable bills of discovery were more frequently granted.¹¹⁵ Ultimately, the United States Supreme Court endorsed equitable bills of discovery and adopted comparatively liberal standards for their use.¹¹⁶

Equitable bills of discovery in the federal system were brought under Equity Rule 58.¹¹⁷ The scope of discovery under this rule was

supra note 8, ¶ 34.03[1], at 34-17 to 34-19; W. GLASER *supra* note 103, at 28; Note, *supra* note 24, at 950.

114 See, e.g., *Pressed Steel Car Co. v. Union Pac. R.R.*, 240 F. 135, 136 (S.D.N.Y. 1917); see also 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-80; 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 33.03[1]; James, *supra* note 102, at 747; Note, *supra* note 24, at 949.

115 See *Loft, Inc. v. Corn Prod. Ref. Co.*, 103 F.2d 1, 7 (7th Cir.), *cert. denied*, 308 U.S. 558 (1939) ("The recent decisions of federal courts indicate a liberal attitude toward the use of bills of discovery in equity proceedings ancillary to suits at law."); see also 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-80 to 26-81.

116 *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689 (1933). The Court allowed discovery of damages in a breach of contract action through an equitable bill of discovery. The Court stated:

Help for the solution of problems [of discovery] is not to be looked for in restrictive formulas.

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The rationale of the [equitable bill] remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs.

Id. at 693.

117 *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 693 (1933); *Arms & Drury, Inc. v. Burg*, 90 F.2d 400, 402 (D.C. Cir. 1937); *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2d Cir. 1935); *Pressed Steel Car Co. v. Union Pac. R.R.*, 241 F. 964, 966-67 (S.D.N.Y. 1917); see 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 26.03[1], at 26-81 to 26-82.

Federal Equity Rule 58 was adopted in 1912 and governed equitable bills of discovery until 1938 when the Federal Rules of Civil Procedure supplanted it. Rules of Civil Procedure, 308 U.S. 645 (1939); see *Nichols v. Sanborn Co.*, 24 F. Supp. 908 (D. Mass. 1938) (Equity Rule 58 abrogated by adoption of Federal Rules 26-37). Federal Equity Rule 58 provided in part:

The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party

limited in several ways.¹¹⁸ For example, the courts held that Equity Rule 58 prohibited fishing expeditions; before a party could discover facts, he had to know they existed.¹¹⁹ Furthermore, a party could only discover facts related to his own claim or defense and not facts exclusively related to the adverse party's case.¹²⁰ A party could discover material or ultimate facts but not evidentiary facts.¹²¹ Today these historical limits on the scope of discovery available under equitable bills of discovery have no impact in the federal system. An independent action for discovery today would be governed by the federal rules,¹²² and therefore, the scope of discovery would be governed by Federal Rule 26, which has rejected each of these limits on the scope of discovery.¹²³

shall file more than one set of interrogatories to the same party without leave of the court or judge.

The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary.

118 See generally 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 33.03.

119 Indianapolis Amusement Co. v. Metro-Goldwyn-Mayer Distrib. Corp., 90 F.2d 732 (7th Cir. 1937); Keenan v. Texas Prod. Co., 84 F.2d 826 (10th Cir. 1936). See generally 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 33.03[2]. The courts' attitude towards fishing expeditions for production of documents was clearly expressed by Judge Learned Hand in Pressed Steel Car Co. v. Union Pac. R.R., 241 F. 964, 967 (S.D.N.Y. 1917):

If the defendant can be brought to acknowledge the possession of any documents which appear to be pertinent to the issues, it will be required to produce them, but not until it does. Any other rule would enable the plaintiff to fish among all the documents which the defendant may have for the purpose of picking out those on which it chooses to sue. Such a course is wholly unauthorized, not only under the old practice (Langdell, §§ 204, 205), but equally under rule 58, which requires a party to produce only those documents which contain evidence material to the case or defense of his adversary.

120 May v. Midwest Ref. Co., 10 F. Supp. 927 (D. Me. 1935); Chicago Flexible Shaft Co. v. Neupert Prod. Corp., 7 F. Supp. 362 (W.D.N.Y. 1934). *Contra*, Bankers Util. Co. v. David H. Zell, Inc., 15 F. Supp. 1072 (S.D.N.Y. 1936); Clairemont Sterilized Egg Co. v. Kasser Egg Process Co., 14 F.2d 143 (N.D. Cal. 1926). See generally 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 33.03[3].

121 May v. Midwest Ref. Co., 10 F. Supp. 927 (D. Me. 1935); Gasoline Prod. Co. v. American Ref. Co., 12 F.2d 98 (D. Del. 1926); Pressed Steel Car Co. v. Union Pac. R.R., 241 F. 964, 966 (S.D.N.Y. 1917). See generally 4A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 33.03[5].

122 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 26.53; see also FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . .").

123 FED. R. CIV. P. 26 provides in relevant part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privi-

One other restriction might still limit the equitable bill's efficacy as a basis for independent action, however. Although the equitable bill would provide for entry upon land,¹²⁴ generally it would only lie against parties.¹²⁵ Historically, an equitable bill of discovery would not lie against a mere witness.¹²⁶ Rather, the person from whom dis-

leged, 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 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.

Under Rule 26, it is no longer a valid objection to a discovery request that it is speculative or constitutes a "fishing expedition"; by its terms, the rule specifically allows discovery of the "existence" of things or persons with knowledge, and the courts have interpreted the rule to disallow the fishing expedition objection. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Banco Nacional de Credito Ejidal, S.A. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 11 F.R.D. 497 (N.D. Cal. 1951) (Rule 26 not subject to restriction on ground that examination constitutes fishing expedition).

Rule 26 also allows discovery of any matter regardless of "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Thus the limit under Equity Rule 58 which foreclosed a party from discovering facts relating to his opponent's case has been abolished; *see Hickman v. Taylor*, 329 U.S. 495 (1947); *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300 (5th Cir. 1973) (open disclosure of all potentially relevant information is "keynote" of discovery provisions of Rule 26); *Smith v. Piper Aircraft Corp.*, 18 F.R.D. 169 (M.D. Pa. 1955) ("[E]ither party may compel the other to disgorge whatever facts he has in his possession, if not otherwise privileged.").

Finally, Rule 26 allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action regardless of whether the matter will be admissible at trial. Rule 26 thus abolishes the distinction between material or ultimate facts and mere evidentiary facts. *See Sopkin v. Missouri Nat'l Life Ins. Co.*, 222 F. Supp. 984 (W.D. Mo. 1963) (detailed information as to factual claims and legal contentions may be secured under Rule 26).

124 *See, e.g.*, *Thornburgh v. Savage Mining Co.*, 23 F. Cas. 1113 (C.C.D. Nev. 1867) (No. 13,986). *See generally* *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U.S. 160, 172 (1894) ("[C]ourts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property . . ."); 6 J. WIGMORE, EVIDENCE § 1862, at 632 (Chadbourn rev. 1976).

125 6 J. WIGMORE, *supra* note 124, § 1856d, at 562 ("The principle of a bill of discovery was never considered to be applicable to *third persons not parties*. . .") (emphasis in original). *See generally* DISCOVERY SOURCEBOOK, *supra* note 5, at 128 (Equity Rule 58 allowed bill of discovery against parties only); Note, *supra* note 89, at 115 (bill in equity for discovery ran only against parties).

126 *See Dehne v. Hillman Inv. Co.*, 110 F.2d 456, 458 (3d Cir. 1940) ("At common law a bill of discovery was demurrable if it lay against a defendant who was a mere witness."); *Wolfe v. Massachusetts Port Auth.*, 366 Mass. 417, 419, 319 N.E.2d 423, 425 (1974), *relying on* *American Sec. & Trust Co. v. Brooks*, 225 Mass. 500, 502, 114 N.E. 732, 733 (1917); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 507, 378 A.2d 53, 71 (1977) ("It is clear that a 'mere witness' cannot be named a defendant in an action for discovery.") (citations omitted); 1 J.

covery was sought had to be a party to the main litigation¹²⁷ or at least have an interest in the litigation.¹²⁸ This "mere witness" rule was applied in both state¹²⁹ and federal courts.¹³⁰ Although this rule has various exceptions¹³¹ and modern courts seem inclined to find some way around the rule,¹³² only two jurisdictions have explicitly rejected it.¹³³

B. *Weakness in the Federal Practice*

This mere witness rule seriously undermines the equitable bill as authority for independent actions. Unlike the expansion of discovery which Rule 26 achieves, the extension of equitable bills of discovery to nonparties is more troublesome because mere application of the present federal rules would not accomplish it. Instead, the courts would have to make the extension with no specific authority in the rules. While it seems clear that the federal courts have the inherent power to extend the bill of discovery to nonparties,¹³⁴ such an exten-

POMEROY, EQUITY JURISPRUDENCE § 199, at 286 (4th ed. 1918) ("[M]ere witnesses cannot be joined as defendants and obliged to answer.").

127 See note 125 *supra*.

128 *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 507, 378 A.2d 53, 71 (1977) (bill of discovery allowed against nonparty corporation because it had pecuniary interest in action); see also 1 J. POMEROY, *supra* note 126, § 199, at 285 ("[N]o person can properly be made a defendant in the suit for a discovery, or compelled as such to disclose facts within his knowledge, unless he has an interest in the subject matter of the controversy in aid of which the discovery is asked."); 27 C.J.S. *Discovery* § 10, at 21 (1959) (bills of discovery not confined to parties and will lie against one with interest in subject matter of main action).

129 See, e.g., *Wolfe v. Massachusetts Port Auth.*, 366 Mass. 417, 420, 319 N.E.2d 423, 425 (1974) (mere witness rule reiterated but bill of discovery allowed as within exception to rule).
130 See, e.g., *Dehne v. Hillman Inv. Co.*, 110 F.2d 345, 458 (3d Cir. 1940) (bill for discovery dismissed against company because it was not party to primary litigation).

131 See, e.g., *Arms & Drury, Inc. v. Burg*, 90 F.2d 400, 402 (D.C. Cir. 1937) (bill will lie against nonparty to obtain names of proper defendants); *Finance Co. of Am. v. Brock*, 80 F.2d 713 (5th Cir. 1936) (bill will lie against corporate officers to aid action against corporation); *Post & Co. v. Toledo, C. & St. L. R.R.*, 144 Mass. 341, 11 N.E. 540 (1887) (same); *Wolfe v. Massachusetts Port Auth.*, 366 Mass. 417, 420, 319 N.E.2d 423, 425 (1974) (bill will lie against public instrumentality to aid action by private plaintiff); *Walker v. Pennsylvania R.R.*, 134 N.J. Eq. 544, 36 A.2d 497 (1944) (bill will lie against nonparty to obtain names and addresses of proper parties).

132 See, e.g., *Wolfe v. Massachusetts Port Auth.*, 366 Mass. 417, 420, 319 N.E.2d 423, 425 (1974) (exception created to allow bill to lie against public instrumentality); *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 507, 378 A.2d 53, 71 (1977) (bill allowed against private corporation on the basis that it had an interest in the main action.).

133 See *Therrien v. Public Serv. Co.*, 108 A.2d 48, 51 (N.H. 1954); *Beckwith v. Bethlehem Steel Corp.*, 182 N.J. Super. 376, 382, 440 A.2d 1372, 1375 (1981).

None of the reported decisions on this mere witness rule offers any rationale for it. Probably it reflects a notion that nonparties have a right not to be inconvenienced and drawn into others' litigation unless they have some interest in it.

134 See DISCOVERY SOURCEBOOK, *supra* note 5, at 128 (Albert Sacks, Professor and Advi-

sion would repudiate considerable precedent.¹³⁵ The drastic judicial extension necessary before the independent action could fulfill the purpose contemplated by Rule 34(c) renders the equitable bill of discovery a weak source of authority for an independent action.¹³⁶

Even assuming that the courts could extend the equitable bill to provide discovery against nonparties, the broader concept of an independent action is problematic. To file an independent action in federal court, the plaintiff would have to demonstrate jurisdiction over the subject matter of the action.¹³⁷ One might argue that ancillary jurisdiction would exist,¹³⁸ but no court has accepted this principle,¹³⁹ and the one court which has confronted such a jurisdictional

sory Committee Reporter, commenting that court may extend bills of discovery to nonparties by "reading the prior history rather liberally"); Note, *supra* note 89, at 114 n.18 (relating interview with Reporter Sacks indicating that Advisory Committee intended to leave shaping of discovery device to courts).

135 See notes 125-34 *supra* and accompanying text.

136 As mentioned in note 100 *supra*, one commentator has suggested two other possible sources of authority for a Rule 34(c) independent action for discovery: the Rule 27(c) action to perpetuate testimony and the All Writs Statute, 28 U.S.C. § 1651 (1976). See Note, *supra* note 89, at 118. Each of these provisions has a characteristic which renders it unsuitable as authority for an independent action to discover nonparties' immobile things. The action to perpetuate testimony can be used only to discover facts known to exist, see 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 210-11 (5th ed. 1941). The All Writs Statute can be used for discovery only in actions to which the federal rules do not apply, see *Neuwirth v. Merin*, 267 F. Supp. 333 (S.D.N.Y. 1967). See also Note, *supra* note 89, at 118-19.

137 See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 (1982) ("Subject matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power . . .").

138 See Note, *supra* note 89, at 117 n.32 (ancillary jurisdiction over subject matter would exist for Rule 34(c) independent actions by analogy to Rule 27(a) petitions to perpetuate testimony).

139 No court has decided whether an independent action for production under Rule 34(c) is cognizable based on ancillary jurisdiction.

Historically, the equitable bill of discovery did operate on ancillary jurisdiction. *Eichel v. United States Fidelity & Guar. Co.*, 245 U.S. 102 (1917); *Loft, Inc. v. Corn Prod. Ref. Co.*, 103 F.2d 1, 9-11 (7th Cir.), *cert. denied*, 308 U.S. 558 (1939); *Baush Mach. Tool Co. v. Aluminum Co. of Am.*, 63 F.2d 778, 779-80 (2d Cir.), *cert. denied*, 289 U.S. 739 (1933). But historically the equitable bill of discovery ran only against parties, and these cited decisions consider ancillary jurisdiction only with respect to parties. The fact that the equitable bill was filed against a party to the primary action was clearly a factor in the Second Circuit's decision in *Baush Machine* to grant ancillary jurisdiction: "The suit [for discovery] is between the same parties, and is in aid of . . . the action at law, and is brought within the same jurisdiction. These facts are sufficient for jurisdictional purposes." *Id.* at 779-80. Whether ancillary jurisdiction would be extended to actions against nonparties is a different question. *Cf.* *Union Solvents Corp. v. Butacet Corp.*, 2 F. Supp. 375 (D. Del. 1933), interpreted by the Advisory Committee to hold that an equitable bill to perpetuate testimony, the precursor of Rule 27(a) petitions to perpetuate testimony which may lie against nonparties, did not operate on ancillary jurisdiction but required independent grounds. 4 MOORE'S FEDERAL PRACTICE, *supra* note 59, ¶ 27.03 at 27-12 n.4; see Note, *supra* note 89, at 117 n.32.

question did not mention ancillary jurisdiction.¹⁴⁰ If the plaintiff could not establish independent jurisdictional grounds¹⁴¹ and ancillary jurisdiction were held not to exist, the plaintiff would be forced to pursue the discovery action in state court.

Independent actions present yet another hurdle in procuring personal jurisdiction over the nonparty from whom discovery is sought.¹⁴² If the nonparty can be served with process within the state where the principal action is pending,¹⁴³ or outside the state based on a long-arm statute,¹⁴⁴ jurisdiction is established. But if the nonparty is beyond the reach of service by these methods, the plaintiff would have to file the independent action in a forum other than the one where the principal litigation is pending. In this event, the plaintiff would have to establish independent grounds for jurisdiction over the subject matter of discovery, as the court would most likely deny ancillary jurisdiction.¹⁴⁵ Thus, the plaintiff might be unable to estab-

140 *Home Ins. Corp. v. First Nat'l Bank of Rome*, 89 F.R.D. 485 (N.D. Ga. 1980).

141 For independent grounds, the plaintiff would have to establish either the presence of a federal question under 28 U.S.C. § 1331 or diversity of citizenship under 28 U.S.C. § 1332. The plaintiff might have difficulty showing jurisdiction under § 1331 as the single court which has construed Rule 34(c) specifically held that it did not provide federal question jurisdiction. *Home Ins. Co. v. First Nat'l Bank of Rome*, 89 F.R.D. 485, 488 (N.D. Ga. 1980) (“[P]laintiff’s reliance on Rule 34(c) as the basis for jurisdiction in this case is misplaced. That rule does not create a federal cause of action . . .”). The plaintiff might likewise have difficulty establishing jurisdiction under § 1332 because even if diversity were present, the plaintiff would still have to show that the matter in controversy — presumably the production — exceeded \$10,000.

142 *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power . . .”).

143 *FED. R. CIV. P. 4(f)* (“All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held . . .”).

144 *See, e.g., N.Y. CIV. PRAC. LAW § 302(a)* (McKinney 1976); *UNIF. INTERSTATE AND INT’L PROCED. ACT § 1.03*, 13 U.L.A. 466 (1962). Most long-arm statutes include ownership of property within the state as a basis for asserting personal jurisdiction over nonresidents. *See, e.g., N.Y. CIV. PRAC. LAW § 302(a)(4)* (McKinney 1976); *UNIF. INTERSTATE AND INT’L PROCED. ACT § 103(a)(5)*, 13 U.L.A. 466 (1962). Thus if the primary litigation were pending in the jurisdiction where the nonparty’s immobile property was located, personal jurisdiction for the independent action could be obtained over the nonparty on the basis of this ownership under the state long-arm statute.

145 There is no reported case extending ancillary jurisdiction to a bill of discovery filed in a forum other than the primary forum. On the contrary, there is some authority implying that ancillary jurisdiction would exist for a discovery bill *only* if it were litigated in the same forum as the principal action. *See Loft, Inc. v. Corn Prod. Ref. Co.*, 103 F.2d 1, 9-10 (7th Cir.), *cert. denied*, 308 U.S. 558 (1939) (ancillary jurisdiction extended to equitable bill of discovery in part because bill was filed in the same court as primary action); *Baush Mach. Tool Co. v. Aluminum Co. of Am.*, 63 F.3d 778, 779-80 (2d Cir.), *cert. denied*, 289 U.S. 739 (1933). In *Baush Machine*, the Second Circuit stated:

lish both subject matter and personal jurisdiction in the same forum.¹⁴⁶

Aside from these jurisdictional problems, the independent action also entails practical drawbacks. The necessity of a subsidiary action to prosecute the primary action means increased expense for everyone, increased burden on already clogged courts, and delay in the primary litigation.¹⁴⁷ Moreover, the rules' reliance on an independent action leaves the discovering attorney with only obscure and obsolete historical remedies as authority for the action.¹⁴⁸

[I]t is not clear that a bill of discovery may be brought in any district where the corporation is found or does business regardless of the district where the suit at law, which the bill is meant to aid, is pursued. . . . However, the bill of discovery [in the instant case] is in aid of an action at law *in the same district*, and we think is dependent and ancillary for jurisdictional purposes, and jurisdiction over the bill may be sustained because of the jurisdiction had over the action at law. The suit is between the same parties, and is in aid of the claim of damages in the action at law, and is brought *within the same jurisdiction*. These facts are sufficient for jurisdictional purposes.

Id. (emphasis added); see also Note, *supra* note 89, at 117 n.34.

Aside from the fact that there is no authority supporting the extension of ancillary jurisdiction to an equitable bill of discovery filed outside the forum of the primary litigation, it seems unlikely that a court would ever be inclined to find ancillary jurisdiction for comparable independent actions filed outside the principal forum. Where the independent action is in a different forum, many advantages of ancillary jurisdiction like judicial economy and avoidance of piecemeal litigation are lost.

146 Ironically, the Advisory Committee noted that one reason it chose not to provide for production by nonparties in Rule 34 was that the jurisdictional problems were "very complex." FED. R. CIV. P. 34(c) advisory committee notes from 1970 Amendment. Certainly the jurisdictional problems of providing for discovery within Rule 34 are no more complex than the jurisdictional problems presented by reliance on an independent action. See also J.B. LEVINE, DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSAL 105-06 (1982).

Aside from these jurisdictional problems, reliance on an independent action might present a question under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). If the primary action was based on diversity jurisdiction, arguably the parties to the subsidiary independent action for discovery would be required to rely on state law as authority for the independent action. This argument is not persuasive. With the exception of the instant situation, the process and rights of discovery are defined in detail in the federal rules. The considerations which compel the conclusion that discovery is procedural in all these other contexts should lead to the same conclusion regarding independent actions for discovery. See generally *Hanna v. Plumer*, 380 U.S. 460 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941). Thus the parties to the independent action would rely on federal law in defining the independent action.

147 For discussion of the drawbacks of independent actions, see text accompanying notes 19-36 *supra*.

148 An attorney researching inspection of nonparties' immobile property is left with little guidance. Rule 34(c) itself is skeletal and the Advisory Committee's Notes are cursory. See note 97 *supra*. Since Rule 34(c) was adopted in 1970, few courts have construed it. See note 31 *supra*. Once the attorney discovers that Rule 34(c) does not create or authorize independent actions, he is left to research historical remedies in a search for authority for an independent action. Moreover, once the attorney identifies the equitable bill of discovery as a

Finally, the independent action approach undermines the goals of the federal rules, which seek "the just, speedy and inexpensive determination of every action."¹⁴⁹ An independent action for discovery is neither speedy nor inexpensive.¹⁵⁰ Reliance on an independent action also contravenes specific policies of the discovery rules. The discovery rules were designed "to replace the unrelated and haphazard devices which had developed by a process of historical accretion with an integrated and efficient system of pretrial investigation,"¹⁵¹ but bringing an independent action for discovery of a nonparty's immobile property is not an efficient means of discovery.¹⁵² In view of all these weaknesses inherent in the independent action, it is not surprising that several states have acted to avoid these problems in their own discovery systems.

C. *Current State Practice*

The current federal scheme limits the scope of Rule 34 to parties and utilizes an independent action to provide access to nonparties' immobile things. Most states have simply taken the same approach as the federal rules,¹⁵³ but six states have adopted provisions which allow the filing of a request or motion for production against nonparties.¹⁵⁴ The states which in essence have extended Rule 34 to non-

possible source of authority, probably through the reference in the Advisory Committee's Notes, *see* note 97 *supra*, the attorney discovers that historically it ran only against parties, and that the court must be persuaded to make a significant expansion of the authority.

149 FED. R. CIV. P. 1.

150 *See* notes 19-36 *supra* and accompanying text.

151 Note, *supra* note 89, at 119.

152 The use of an independent action under Rule 34(c) is also contrary to the trend to extrajudicial discovery evident in Rules 34(a) and (b). In 1970, the same year subdivision (c) was adopted, the motion requirement was deleted from subdivisions (a) and (b). As one commentator noted, "It was surely inconsistent to provide extrajudicial discovery of *parties'* land in one section of Rule 34 and at the same time to resurrect independent actions for discovery on *nonparties'* land in another section." Note, *supra* note 89, at 119 (emphasis in original).

153 *See, e.g.*, TENN. R. CIV. P. 34, 45; UTAH R. CIV. P. 34, 45; WYO. CT. R. 34, 45. Some states have made minor variations. *See, e.g.*, OR. R. CIV. P. 43 (variation on FED. R. CIV. P. 34); KY. R. CIV. P. 45 (variation on FED. R. CIV. P. 45).

154 This was the suggestion made by the Advisory Committee on the federal rules. In its Notes to Rule 34(c), the Committee stated that the "ideal solution" to the problem of discovery of nonparties' immobile things was "to provide for discovery against persons not parties in Rule 34."

Today, the Illinois rules on production of things are essentially the same as the federal rules. Illinois Supreme Court Rule 214 is analogous to Federal Rule 34 in that it limits requests for production to the parties to the action and then provides that independent actions against nonparties are not precluded. ILL. REV. STAT. ch. 110A, § 214 (Smith-Hurd 1968 & Supp. 1982). Illinois Supreme Court Rule 204 is analogous to Federal Rule 45 in that it

parties include Alabama,¹⁵⁵ Georgia,¹⁵⁶ Indiana,¹⁵⁷ New

provides for discovery of things from nonparties by deposition and subpoena duces tecum. ILL. REV. STAT. ch. 110A, § 204 (Smith-Hurd 1968 & Supp. 1982). The extent of similarity between the two systems is evident from the Committee Comments following Illinois Supreme Court Rule 214, which might as well be describing the federal system.

The request procedure may be utilized only when discovery is sought from a party to the action. Discovery of documents and tangible things in the custody or control of a person not a party may be obtained by serving him with a *subpoena duces tecum* for the taking of his deposition. The last paragraph of the rule was added to indicate that the rule is not preemptive of an independent action for discovery in the nature of a bill in equity. Such an action can be employed, then, in the occasional case in which a party seeks to inspect real estate that is in the custody or control of a person not a party to the main action.

ILL. REV. STAT. ch. 110A, § 214 (Smith-Hurd 1968 & Supp. 1982) (Committee Comments).

Illinois' system was not always so similar to the federal system. Prior to 1974, Illinois Supreme Court Rule 214 provided that "any party may move for an order directing any other party or person to produce . . . documents, objects, or tangible things." ILL. REV. STAT. ch. 110A, § 214 (Smith-Hurd 1968) (emphasis added). In 1974, this rule was amended. The phrase "or person" was deleted and the language referring to independent actions was added. Thus while several states have moved to extend their counterparts of Rule 34 to nonparties, *see* text accompanying notes 155-208 *infra*, Illinois has moved to limit its counterpart of Rule 34.

155 ALA. R. CIV. P. 34 provides in relevant part:

Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope*. Any party may serve on any other party a request and on any person not a party a subpoena (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), 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 person upon whom the request or subpoena is served; or (2) to permit entry upon designated land or other property in the possession or control of the person upon whom the request or subpoena is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure*

. . . .

(2) Subpoena To A Person Not A Party

(A) NOTICE. A party who desires to obtain production of documents or things or permission to enter upon land or other property from a person not a party shall serve a notice to every other party of the intent to serve a subpoena upon the expiration of 15 days from the service of the notice and the proposed subpoena shall be attached to the notice. The court may allow a shorter or longer time. Such notice may be served without leave of court upon the expiration of 45 days after service of the summons and complaint or other mode of service under Rule 4 through Rule 4.4 upon any defendant, except that leave is not required within the 45-day period if a defendant has previously sought discovery. Any person or party may serve an objection to the issuance of the subpoena within 10 days of the service of said notice and in such event the subpoena shall not issue. The party serving the

notice may move for an order under Rule 37(a) with respect to such objection. If no objection is timely served, the clerk shall cause the subpoena to be issued upon the expiration of 15 days from the service of the notice or upon the expiration of such other time as may have been allowed by the court.

(B) SUBPOENA. The subpoena shall be directed to a person at a stated address and, if the name of the person is not known, the subpoena shall give a general description sufficient to identify the person or the particular class or group to which the person belongs. The subpoena shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The subpoena shall specify a reasonable time no less than 15 days after service unless the court orders otherwise, and the manner of making the inspection and performing the related acts. Such activities with reference to documents or tangible things shall take place where the documents or tangible things are regularly kept or at some other reasonable place designated by the recipient. The subpoena may give the recipient an option to deliver or mail legible copies of documents or things to the party serving the subpoena, but the recipient may condition the preparation of copies on the payment in advance of the reasonable cost of making such copies. Any other party shall have the right to be present at the time of compliance with the subpoena. The subpoena shall advise the recipient of the right to object at any time prior to the date set forth in the subpoena for compliance therewith. Such objection shall be communicated in writing to the party serving the subpoena. The party serving the subpoena may move for an order under Rule 37(a) with respect to any objection to or the failure to comply with a subpoena or any part thereof.

156 GA. CODE ANN. § 9-11-34 (1982) provides in relevant part:

Production of documents and things and entry [upon] land for inspection and other purposes.

(a) Scope. Any party may serve on any other party a request:

(1) To produce and permit the party making the request . . . to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilation from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of subsection (b) of Code Section 9-11-26.

. . . .

(c) Applicability to nonparties. This Code section shall also be applicable with respect to discovery against persons, firms, or corporations who are not parties, in which event a copy of the request shall be served upon all parties of record; or, upon notice, the party desiring such discovery may proceed by taking the deposition of the person, firm, or corporation on oral examination or upon written questions under Code Section 9-11-30 or 9-11-31. The nonparty or any party may file an objection as provided in subsection (b) of this Code section. If the party desiring such discovery moves for an order under paragraph (a) of Code Section 9-11-37 to compel discovery, he shall make a showing of good cause to support his motion.

157 IND. R. TRIAL P. 34 provides in relevant part:

York,¹⁵⁸ Oklahoma,¹⁵⁹ and Texas.¹⁶⁰

The states which have extended Rule 34 to nonparties take

Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(A) *Scope*. 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 (including without limitation, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which intelligence can be perceived, with or without the use of detection devices) 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; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(B).

(C) *Application to non-parties*. A witness or person other than a party may be requested to produce or permit the matters allowed by subdivision (A) of this rule. Such request shall be served upon other parties and included in or with a subpoena served upon such witness or person. The request shall contain the matter provided in subdivision (B) of this rule. It shall also state that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by submitting to its terms, by proposing different terms, by objecting specifically or generally to the request by serving a written response to the party making the request within thirty [30] days, or by moving to quash as permitted by Rule 45(B). Any party, witness or person upon whom the request properly is made may respond to the request as provided in subdivision (B) of this rule. If the response of the witness or person to whom it is directed is unfavorable, if he moves to quash, if he refuses to cooperate after responding or fails to respond, or if he objects, the party making the request may move for an order under Rule 37(A) with respect to any such response or objection. In granting an order under this subdivision and Rule 37(A)(2) the court shall condition relief upon the prepayment of damages to be proximately incurred by the witness or person to whom the request is directed or require an adequate surety bond or other indemnity conditioned against such damages. Such damages shall include reasonable attorneys' fees incurred in reasonable resistance and in establishing such threatened damage or damages.

158 N.Y. CIV. PRAC. R. 3120 (McKinney 1970) provides in relevant part:

Discovery and production of documents and things for inspection, testing, copying or photographing

(a) As against party:

1. After commencement of an action, any party may serve on any other party notice:

(i) to produce and permit the party seeking discovery, or someone acting on his behalf, to inspect, copy, test or photograph any specifically designated documents or any things which are in the possession, custody or control of the party served, specified with reasonable particularity in the notice; or

(ii) to permit entry upon designated land or other property in the possession, custody or control of the party served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon.

somewhat divergent approaches. The fundamental difference in their procedures is the extent of court involvement in the production. Two states, Alabama and Indiana, have adopted rules quite similar

.....

(b) As against non-party. A person not a party may be directed by order to do whatever a party may be directed to do under subdivision (a). The motion for such order shall be on notice to all adverse parties; the non-party shall be served with the notice of motion in the same manner as a summons. The order shall contain, in addition to such specifications as the notice is required to contain under paragraph two of subdivision (a), provision for the defraying of the expenses of the non-party.

159 OKLA. STAT. ANN. tit. 12, § 3211 (West Supp. 1982) provides in relevant part:

Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

A. SCOPE. 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 including, but not limited to, writings, drawings, graphs, charts, photographs, motion picture films, phonograph records, tape and video recordings, records and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form, or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of subsection B of section 3 of the Discovery Code and which are in the possession, custody or control of the party upon whom the request is served; or
2. To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon, within the scope of subsection B of section 3 of the Discovery Code.

.....

C. 1. INSPECTION OF PROPERTY OF NONPARTY. Upon motion of any party showing that he has a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials and upon notice to the other parties to the action and to the person in possession, custody or control of the property involved, a court may make any order in regard to property in the possession, custody or control of a person who is not a party to the action that it could make under subsection A of this section in regard to property in the possession, custody or control of party to the action.

2. PROCEDURE. Upon filing the motion to discover, the party requesting discovery shall give notice to all other parties by serving a copy of the motion and notice for hearing upon each party or his attorney. The person in possession or control of the property shall be served as required for service of summons. The notice shall state the date, time and place of the hearing on the motion and the date shall be not less than ten (10) days after the service on the person in possession, custody or control. The court in its discretion may set a shorter time. If the motion is granted the order shall specify the time, place, manner, scope and conditions of making the inspection and performing any related acts permitted under subsection A of this section. The order may further provide that adverse parties may perform any act that the requesting party could have performed after the requesting party has completed his discovery.

160 TEX. R. CIV. P. 167 provides in relevant part:

to Federal Rule 34, but have varied their rules to allow service of a subpoena on nonparties.¹⁶¹ Production in these states is therefore primarily extrajudicial: the clerk issues the subpoena, and the court only gets involved if a motion to compel or motion for protective order is filed.¹⁶² In Georgia, the production scheme is even more extrajudicial; the Georgia rule does not require a subpoena, but merely states that a party may request production from a nonparty.¹⁶³ In contrast, the provisions of three states require routine court involvement in all productions. New York, Oklahoma, and Texas allow production from nonparties by motion and order only.¹⁶⁴

The extrajudicial procedure is better than the motion and order system because it consumes less court time over the long term.¹⁶⁵ Obviously, under either procedure if the nonparty objects, the court will

Discovery and Production of Documents and Things for Inspection, Copying or Photographing

The scope of discovery permitted herein is as provided by Rule 186a and subject to the protections of Rule 186b:

1. PROCEDURE: Any party may serve on any other party a REQUEST:

(a) to produce and permit the party making the REQUEST, or someone acting on his behalf, to inspect, sample, test, photograph and/or copy, any designated documents (including papers, books, accounts, writings, drawings, graphs, charts, photographs, any insurance agreement under which any person or entity carrying on an insurance business may be liable to satisfy part or all of a judgment which may be rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment), recordings and other data compilations from which information can be obtained, translated, if necessary, by the respondent through appropriate devices into reasonably usable form, and to inspect, sample, test, photograph, or copy any tangible things which constitute or contain matters which are in the possession, custody or control of the party upon whom the request is served;

(b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

4. NONPARTIES: The court may order a person, organizational entity, government agency or corporation not a party to the suit to produce in accordance with this rule. However, such order shall be made only after the filing of a motion setting forth with specific particularity the request, necessity therefor and after notice and hearing. All parties and the nonparty shall have the opportunity to assert objections at the hearing.

161 See ALA. R. CIV. P. 34(b)(2)(A); IND. R. TRIAL P. 34(C).

162 See ALA. R. CIV. P. 45(a) (clerk issues subpoena); IND. R. TRIAL P. 45(A) (same).

163 GA. CODE ANN. § 9-11-34(c) (1982).

164 N.Y. CIV. PRAC. R. 3120(b) (McKinney 1970); OKLA. STAT. ANN. tit. 12, § 3211(c) (West Supp. 1982); TEX. R. CIV. P. 167(4). This practice of allowing production only on motion and order is comparable to practice under Federal Rule 34 before it was revised in 1970 to operate on request. See generally C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2207 (1970).

165 Cf. J.B. LEVINE, *supra* note 146, at 106 (court order is preferable to subpoena for in-

be involved to resolve the dispute. But if no one objects to the production, it is unnecessary to require court involvement.¹⁶⁶

The state's discovery methods also vary in their resolution of the personal jurisdiction issue.¹⁶⁷ Generally, courts have no power over persons who are not subject to their jurisdiction.¹⁶⁸ The states have taken three distinct approaches to establishing personal jurisdiction over nonparties. In Alabama and Indiana, where production is accomplished by subpoena, the subpoena service requirements guarantee that personal jurisdiction exists.¹⁶⁹ In New York and Oklahoma, where court order authorizes production, the motion papers for the production must be served on the nonparty in the same manner as a summons.¹⁷⁰ Therefore, all the personal jurisdiction requirements associated with service of process are incorporated as limits on motions for production. In sharp contrast, the Georgia and Texas provisions include nothing which might serve to establish personal jurisdiction over the nonparty.¹⁷¹

spection of immobile property because "it has never been the function of a subpoena to order a non-party . . . to permit inspection of his real property.").

166 Saving court time was one of the benefits cited by the Advisory Committee when Federal Rule 34 was revised in 1970 to operate extrajudicially. *See* FED. R. CIV. P. 34(a) advisory committee note ("Although an extrajudicial procedure will not drastically alter existing practice under Rule 34 . . . it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.").

167 This question of jurisdiction was one of the stumbling blocks that dissuaded the Advisory Committee from the "ideal solution" of extending Federal Rule 34 to nonparties. *See* FED. R. CIV. P. 34(c), advisory committee note ("While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex.").

168 *See, e.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982) (due process clause requires that personal jurisdiction exist before court may enter valid order).

169 *See* ALA. R. CIV. P. 45(c) and (d); IND. R. TRIAL P. 45(C) and (D). Both rules include particular service requirements for subpoenas and territorial limits on their efficacy. For a discussion of subpoenas as establishing personal jurisdiction in the federal system, see *Ghandi v. Police Dep't of Detroit*, 74 F.R.D. 115, 119-21 (E.D. Mich. 1977); *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc.*, 45 F.R.D. 516 (S.D.N.Y. 1968).

170 N.Y. CIV. PRAC. R. § 3120(b) (McKinney 1970) ("[T]he nonparty shall be served with notice of motion [for disclosure] in the same manner as a summons."); OKLA. STAT. ANN. tit. 12, § 3211(c)(2) (West Supp. 1982) ("The person in possession or control of the property shall be served [with the motion for production and notice of hearing] as required for service of summons."). The Practice Commentary following New York Rule 3120 notes that since the nonparty witness "is not a party to the action, jurisdictional requirements are satisfied by the stipulation that the notice of motion be served on him 'in the same manner as a summons.'" N.Y. CIV. PRAC. R. § 3120 comment C3120:12.

171 GA. CODE ANN. § 9-11-34(c) (1982); TEX. R. CIV. P. 167(4). The absence of any provision on personal jurisdiction is particularly striking in view of the legislative history from New York on this issue. The Eleventh Annual Report of the Judicial Conference of the State of New York, issued in 1966, included a study on the disclosure provisions of the Civil Prac-

Among the three approaches to personal jurisdiction, the first two procedures—service of a subpoena and service of motion papers in the same manner as a summons—are equally effective in establishing personal jurisdiction and entail comparable expenditures of time and money.¹⁷² Neither procedure is markedly superior. However, either of these procedures is better than the Georgia/Texas approach which makes no provision for establishing personal jurisdiction. Clearly, if a party served a nonparty with a request or motion for production which did not include a subpoena and was not served as a summons, the nonparty could refuse to produce and the court would be powerless to sanction the nonparty.¹⁷³

Another interesting issue in the states which have extended Rule 34 is whether the regular discovery standards govern, or whether some extraordinary showing must be made for production from nonparties. The states with production by subpoena require no additional showing; the party seeking production must merely meet the threshold standards required for all discovery, namely that the information sought is relevant to the subject matter of the pending action and is not privileged.¹⁷⁴ On the other hand, four states mandate some special showing before a party can compel production from a nonparty. In Texas, the motion for production must demonstrate

tice Law and Rules by Professor David D. Siegel. In his study, Professor Siegel recommended that CPLR 3120, which at the time provided for production only from parties, be amended to allow production from nonparty witnesses. Siegel, *Disclosure Under the CPLR: Taking Stock After Two Years* in Eleventh Annual Report of the Judicial Conference of the State of New York 148, 190. Siegel's proposed amendment provided:

A person not a party may be directed to do whatever a party may be directed to do under subdivision (a). Such direction shall be by order containing, in addition to such specifications as the notice is required to contain under subdivision (a), provision for its service on the nonparty and the defraying of his expenses.

Id. at 208 (Appendix C). The New York legislature took Professor Siegel's suggestion and amended CPLR 3120 to operate against nonparties but felt it necessary to insert a provision requiring that the motion be served on the nonparty as a summons. *See* note 170 *supra*. As Professor Siegel explains in the Practice Commentary following the adopted version of CPLR 3120, this provision on service functions to satisfy personal jurisdiction requirements. *See* N.Y. CIV. PRAC. R. § 3120 comment C3120:12, at 523. In view of this legislative history from New York, and in view of Oklahoma's similar decision to require that the motion for production be served as a summons, *see* note 170 *supra*, the Georgia and Texas provisions' silence on personal jurisdiction is very curious. Perhaps the drafters contemplated that the courts would impose personal jurisdiction requirements.

172 *See* note 28 *supra*.

173 *See* J.B. LEVINE, *supra* note 146, at 104 (recommending that Rule 45(d) be used for production because "disregard of a Rule 34 request by a non-party would expose him to no sanctions").

174 ALA. R. C. P. 26(b)(1); IND. R. TRIAL P. 26(B)(1). This is the same general standard used in the federal system. *See* FED. R. CIV. P. 26(b)(1).

the "necessity" for the production.¹⁷⁵ In New York, the party seeking discovery must show that "special circumstances" exist for the production.¹⁷⁶ But the New York courts have construed this phrase to require only a minimal showing.¹⁷⁷ In practice a demonstration that the nonparty possesses something relevant to the case and will not permit inspection voluntarily will qualify as a "special circumstance."¹⁷⁸ In Oklahoma, the motion for production must establish that the movant has a substantial need for the materials and cannot without undue hardship obtain the substantial equivalent of the materials elsewhere.¹⁷⁹ This familiar two-prong showing is identical to that which Federal Rule 26(b)(3) requires for a party to obtain things prepared in anticipation of litigation.¹⁸⁰ Finally, the Georgia statute takes a middle course and requires a showing of "good cause" before production will be compelled.¹⁸¹ Unlike the other states, this

175 TEX. R. CIV. P. 167(4).

176 N.Y. CIV. PRAC. R. § 3101(a) provides: "There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . by . . . any person where the court on motion determines that there are adequate special circumstances." Amended N.Y. CIV. PRAC. R. § 3120 "does not dispense with the requirement of CPLR 3101 that a special circumstance be shown to justify discovery and inspection . . . against a nonparty." N.Y. CIV. PRAC. R. § 3120 comment C3120:12, at 525.

177 *See, e.g.*, Kelly v. Shafiroff, 436 N.Y.S.2d 44 (1981) (mere showing by attorney that he needs witness' pretrial deposition in order to prepare fully for trial suffices as a special circumstance under CPLR 21201); *accord* Villano v. Conde Nast Publications, 361 N.Y.S.2d 351 (1974); Kenford Co. v. Erie County, 340 N.Y.S.2d 300 (1973).

178 The Practice Commentary following New York Rule 3120 states, "[T]he mere fact that the nonparty has in his possession something relevant to the case, and will not permit inspection of it voluntarily, would usually *per se* qualify as the needed 'special circumstance'." N.Y. CIV. PRAC. R. § 3120 comment C3120:12, at 525.

179 OKLA. STAT. ANN. tit. 12, § 3211(c)(1) (West Supp. 1982).

180 FED. R. CIV. P. 26(b)(3) (party may discover materials prepared in anticipation of litigation "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.").

Federal case law interpreting this standard in the work product context will be relied on by the Oklahoma courts to construe the same standard in the context of discovery from nonparties. *See* Minnis, *Civil Discovery in Oklahoma Revisited Under the New Code*, 18 TULSA L.J. 173, 174 (1982) (footnotes omitted):

The drafters of the New Code relied heavily on the Federal Rules of Civil Procedure for much of the precise language used. The Oklahoma courts have consistently recognized that when the Oklahoma legislature enacts statutes adopted from another jurisdiction, the constructions placed on those statutes by courts of the other jurisdiction became persuasive authority when interpreting the Oklahoma statute. Accordingly, federal cases prior to adoption of the New Code interpreting the federal rules will undoubtedly be quite persuasive authority for the meaning of the New Code, particularly when the words in the New Code match exactly those in the federal rules.

181 GA. CODE ANN. § 9-11-34(c) (1982).

special showing need not be made in the initial request for production. Instead, a nonparty seeking discovery must make a showing of good cause in the motion to compel.¹⁸²

The best system is to make production available based on the same standards applicable to other discovery procedures. No justification for these special showings has been articulated by the states which mandate them,¹⁸³ and such provisions lead to incongruous results. For example, requiring a special showing to compel production from a nonparty when no extra showing must be made to depose the nonparty is inconsistent,¹⁸⁴ especially since complying with a deposition often imposes a greater burden on the nonparty than producing things or permitting inspection. Furthermore, if multiple methods for production exist,¹⁸⁵ imposing additional standards for some meth-

182 *Id.*

183 One rationale for these special showings is that nonparties have a right to privacy, a right not to be involved in other people's litigation unless it is absolutely necessary. The "mere witness" rule, discussed in notes 124-34 *supra* and accompanying text, may have been another manifestation of this policy. *See generally* Hughes & Anderson, *supra* note 100.

A second rationale for imposing an extra burden before compelling production by nonparties is that this is a fairly new and untested practice and should be approached cautiously. This is one reason why a good cause requirement was first included in Federal Rule 34 in regard to production from parties. *See* FED. R. CIV. P. 34 advisory committee notes ("The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder.").

New York Rule 3101(a)(4) requires that a special circumstance be shown before production is available from nonparties, but the Practice Commentary following that rule not only offers no justification for the requirement but actually urges trial judges to ignore it:

It is submitted that disclosure against a nonparty witness should be just as broad in the state practice as it is in the federal. The only barrier is CPLR 3101(a)(4), and that is truly a nominal one. Even hostility of such a witness should not be a necessary showing. A mere showing by the lawyer that he needs such witness's pretrial deposition in order to prepare fully for the trial should suffice as a "special circumstance." If the trial judges hold that it suffices, they will have met the language of paragraph (4), implemented the Court of Appeals' aims in the Allen case, and removed from all competition a factor which has often influenced a plaintiff's lawyer with a choice of forums to select the federal one on the simple ground that the state practice includes a serious obstacle to pretrial preparation.

If a witness holds the key, or merely a key, to any substantial fact involved in the case, how can any lawyer in this day and age be compelled to go to trial without knowing intimately what that witness is going to say?

N.Y. CIV. PRAC. R. § 3101(a)(4) comment C3101:22.

184 *Compare* OKLA. STAT. ANN. tit. 12, § 3211 (West Supp. 1982) (party must show substantial need for the materials and inability without undue hardship to obtain the substantial equivalent elsewhere before production from nonparty will be ordered) *with* OKLA. STAT. ANN. tit. 12, § 3207 (no showing of need required for deposition of nonparty); and *compare* TEX. R. CIV. P. 176(4) (necessity must be shown for production from nonparty) *with* TEX. R. CIV. P. 186(a) (no showing of necessity required for deposition of nonparty).

185 *See* notes 201-03 *infra* and accompanying text.

ods but not others may cause confusion.¹⁸⁶ Finally, some of the particular standards adopted by the states contain specific flaws. As previously mentioned, the New York courts have interpreted the term "special circumstances" to amount to such a minimal requirement that the concept is meaningless.¹⁸⁷ "Good cause" and "necessity" are difficult to define consistently;¹⁸⁸ this difficulty is one reason why the "good cause" requirement was dropped from Federal Rule 34 in 1970.¹⁸⁹ Of the higher standards which the states have imposed, the Oklahoma work product standard is the most susceptible to meaningful and consistent judicial application. Even so, the requirement remains a target for the general criticisms noted above. Thus, the best approach is to impose no higher standard.

The states extending Rule 34 to nonparties differ as to the amount of information which the party must include in the papers served on the nonparty. This variation is especially pronounced in states where production is primarily extrajudicial. Alabama requires only that the subpoena advise the recipient of his right to object at

186 For example, in Oklahoma, to compel production alone, the discovering party must demonstrate need and hardship, *see* note 159 *supra*. However no comparable special showing is required to compel production by subpoena duces tecum. *See* OKLA. STAT. ANN. tit. 12, § 3207. The risk of not meeting the greater showing required for production alone encourages discovering parties to use the subpoena duces tecum procedure, even if a deposition is unnecessary or inconvenient. As a result, all the benefits which would accrue from allowing production alone are undermined. To avoid such a result, the Oklahoma courts might superimpose the need and hardship prerequisites on the subpoena duces tecum method of production.

A comparable situation existed under the Federal Rules with regard to production from parties before 1970, when a motion for production included a good cause requirement but a subpoena duces tecum did not. The federal courts resolved the incongruity by imposing a good cause requirement for production by subpoena duces tecum. *See, e.g.*, *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *LaChance v. Service Trucking Co.*, 215 F. Supp. 159 (D. Md. 1963); *Alexander's Dep't Stores, Inc. v. E.J. Korvette, Inc.*, 198 F. Supp. 28 (S.D.N.Y. 1961). *See generally* C. WRIGHT & MILLER, *supra* note 164, § 2457 (1971 & Supp. 1983).

187 *See* note 177 *supra*.

188 *See, e.g.*, FED. R. CIV. P. 26(b)(3) advisory committee notes ("The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether 'good cause' is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity. . . .").

189 *Id.* The Advisory Committee stated:

The rules are amended by eliminating the general requirement of 'good cause' from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of 'good cause' whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made; substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

any time before the compliance date.¹⁹⁰ Indiana goes further, requiring extensive advice to the nonparty; the request for production must not only inform the nonparty that he is entitled to security against any damages which the production causes but also it must advise the nonparty of all the responses that may be made to the request.¹⁹¹ Thus, the nonparty is informed that possible responses include submitting to the terms of the request, proposing different terms, objecting specifically or generally with a written response, and moving to quash the request.¹⁹² Finally, at the other extreme of the extrajudicial states is Georgia. The Georgia rule does not require that the party furnish the nonparty with any information.¹⁹³

The three states which allow production from nonparties on motion and order do not require that the motion papers provide the nonparty with any information regarding his rights.¹⁹⁴ Presumably this omission reflects the conclusion that requiring a court order for production sufficiently protects the nonparty, obviating the need to advise the nonparty of his rights.

The decision not to supply any information to the nonparty is reasonable when a motion and order procedure is used, because the court will undoubtedly protect the nonparty. But in states authorizing extrajudicial productions, the nonparty should be supplied with the maximum information in the request for production or accompanying subpoena for two reasons. First, receipt of this information reduces the likelihood that the nonparty would blindly comply with an objectionable request or subpoena. For example, in Georgia, where the rule does not require that any information be given the

190 ALA. R. CIV. P. 34(b)(2)(B) ("The subpoena shall advise the recipient of the right to object at any time prior to the date set forth in the subpoena for compliance therewith."). This advice is no doubt helpful, but it does not inform the recipient of how to assert his or her objection. The method of objection is important, because the very next sentence of the rule states, "Such objection shall be communicated in writing to the party serving the subpoena." It would be a simple matter to require the subpoena to advise the recipient of his right to object by writing to the party serving the subpoena. Cf. IND. R. TRIAL P. 34(C), *see* note 192 *infra*.

191 IND. R. TRIAL P. 34(C).

192 *Id.* (the request must state "that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by submitting to its terms, by proposing different terms, by objecting specifically or generally to the request by serving a written response to the party making the request within thirty [30] days, or by moving to quash as permitted by Rule 45(B)."). This rule, unlike the comparable Alabama rule discussed in note 190, *supra*, specifically informs the nonparty how to assert his objections.

193 GA. CODE ANN. 9-11-34(c) (1982).

194 N.Y. CIV. PRAC. R. § 3120(b) (McKinney 1970); OKLA. STAT. ANN. tit. 12, § 3211(c) (West Supp. 1982); TEX. R. CIV. P. 167(4).

nonparty,¹⁹⁵ the recipient of a production request might think he had no choice but to supply the material. Second, supplying extensive information minimizes the chance of burdening the nonparty with retaining an attorney for advice on how to respond to the subpoena.¹⁹⁶ So in Indiana, for example, where the request for production must inform the nonparty recipient of all the responses that may be made and how to make them, it is much less likely that the nonparty would be compelled to hire a lawyer.¹⁹⁷ Moreover, providing extensive information to the nonparty results in no burden or cost; only a few more paragraphs are necessary in the printed subpoena or the production request form.

Of the three states using the extrajudicial approach, Indiana requires not only the most extensive but also the most useful advice. For example, while under the Alabama rule the party must advise the nonparty of his right to object,¹⁹⁸ the nonparty does not have to be advised of how to assert this right. In contrast, the Indiana rule provides that the nonparty be informed that he may object specifically or generally by serving a written response to the party making the request within thirty days.¹⁹⁹ Clearly, the Indiana system would be more useful to a lay person desiring to contest the production.

All of these state variations of Federal Rule 34 authorize access to both mobile and immobile property.²⁰⁰ Thus the question arises whether the other methods for discovery of a nonparty's property—subpoenas duces tecum and independent actions—remain available in these states. All six states still have provisions authorizing subpoenas duces tecum.²⁰¹ The litigants in these states have a choice when seeking production of mobile things: they can use a request/motion for production or a subpoena duces tecum.²⁰² As to independent actions for production, most of the states have no provision in the dis-

195 GA. CODE ANN. § 9-11-34(c) (1982).

196 See note 33 *supra*.

197 IND. R. TRIAL P. 34(C); see note 157 *supra*.

198 ALA. R. CIV. P. 34(b)(2)(B).

199 See IND. R. TRIAL P. 34(C).

200 All the rules provide for production of documents and things and for entry upon land. ALA. R. CIV. P. 34(a); GA. CODE ANN. § 9-11-34(9) (1982); IND. R. TRIAL P. 34(C); N.Y. CIV. PRAC. R. § 3120(a) (McKinney 1976); OKLA. STAT. ANN. tit. 12, § 3211(A) (West Supp. 1982); TEX. R. CIV. P. 167(1).

201 ALA. R. CIV. P. 45(d)(1); GA. CODE ANN. § 9-11-45(a)(1) (1982); IND. R. TRIAL P. 45; N.Y. CIV. PRAC. 3111 (McKinney 1970); OKLA. STAT. ANN. tit. 12, § 3207(c)(5) (West Supp. 1982); TEX. R. CIV. P. 201(2).

202 The Practice Commentaries following New York Rule 3111, the subpoena duces tecum provision, explain when production by subpoena duces tecum should be used and when production by motion under Rule 3120 should be used. The Commentaries state in part:

covery rules comparable to Federal Rule 34(c), but Oklahoma does have an independent action provision identical to Federal Rule 34(c).²⁰³

Although other distinctions in the methods of production from nonparties exist among these states,²⁰⁴ the variations are not signifi-

If the party seeking the disclosure is not interested in taking a deposition but merely wants a party or witness to produce for discovery and inspection a paper or other tangible item in his possession, his remedy is an outright discovery notice or order under CPLR 3120. . . .

CPLR 3111 is an analogous but more limited device. It is used to require the deponent to produce the paper or thing in conjunction with a deposition and for use upon it.

The New York cases echo this distinction and hold that production pursuant to subpoena duces tecum is generally more limited and may be sought only insofar as the production is incidental to a deposition. *See* *Grow Const. Co. v. State*, 54 Misc. 2d 108, 281 N.Y.S.2d 454 (1967); *Revyuk v. Dunbar*, 12 Misc. 2d 713, 179 N.Y.S.2d 606 (1957).

203 OKLA. STAT. ANN. tit. 12, § 3211(D) (West Supp. 1982) ("This section does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."). Theoretically, then, in Oklahoma, the litigant may choose whether to pursue production from a nonparty through a motion for production under § 3211(C) or an independent action under § 3211(D). However, the Oklahoma courts will likely follow the lead of *Home Insurance Co.* and hold independent actions available only when production can be achieved no other way. *See* text accompanying notes 15-17 *supra*.

204 For example, the states have different systems for objections to production. The states which allow extrajudicial production have generally similar schemes. In Georgia, either the nonparty or any party may object to the request by filing a written objection with its bases; the party seeking discovery must then file a motion to compel. GA. CODE ANN. § 9-11-34(c) (1982).

In Alabama, the rule provides for objections at two stages. First, when the party seeking discovery files a notice of intent to serve a subpoena, "any person or party" may serve an objection within ten days. ALA. R. CIV. P. 34(b)(2)(A). (Construing this rule literally to allow "any person" to object to the production could lead to some absurd results, if, for example, a person totally uninvolved in the litigation asserted a right to object under the rule. Probably the drafters merely intended the word "person" to refer to the nonparty from whom production is sought. Later in the rule, the nonparty is referred to as the "recipient" of the subpoena, but that term was not available for the provision under discussion because this provision deals with a stage in the process when no subpoena has yet been issued so there is not yet any "recipient." The rule as currently drafted is obviously overbroad and the Alabama courts should interpret the word "person" to include only the nonparty from whom production is sought.). If an objection is served, the subpoena is not issued, and the party seeking discovery must file a Rule 37(a) motion to compel. If no objection is served, the subpoena is issued, and at this second stage, the recipient has the right to object at any time before the date set for compliance. ALA. R. CIV. P. 34(b)(2)(B). This two-stage process was modeled on Florida Rule 1.351 which authorizes subpoenas for production without depositions. The Committee Comments following Alabama Rule 34 state: "At about the time the committee was involved in its study of Rule 34, the supreme court of Florida promulgated some new rules governing production of documents and things without deposition (citation omitted). Borrowing some aspects of that Florida rule, the committee came forward with the proposed revision of Rule 34(b)." *See* text accompanying notes 66-85, *supra*. If the recipient objects, the party seeking discovery is again left to a motion to compel.

In Indiana, all the parties as well as the nonparty may object. IND. R. TRIAL P. 34(C).

cant. Of the six diverse systems, the Indiana approach is the soundest for several reasons. Indiana uses the subpoena method, a superior approach to the motion and order procedure since it conserves judicial resources.²⁰⁵ The Indiana rule clearly provides for personal jurisdiction through the subpoena requirement.²⁰⁶ It imposes no prerequisite of an extraordinary showing and so avoids the uncertainty and incongruities associated with those requirements.²⁰⁷ Finally, the Indiana rule mandates that the request for production provide the nonparty with extensive and useful information.²⁰⁸

IV. Alternatives for the Federal System

The federal rules on production of nonparties' things contain two major weaknesses. First, mobile things are only discoverable with subpoenas *duces tecum*, which entail unnecessary depositions.²⁰⁹ Second, immobile things are only discoverable through uncertain and wasteful independent actions.²¹⁰ Either of two possible changes could remedy these weaknesses: amendment of Rule 45 or amendment of Rule 34.

Rule 45 could be revised to delete the deposition prerequisite so that a pure subpoena for production of things was available.²¹¹ The new Florida rule essentially adopted this change.²¹² Such an amendment would cure the unwanted deposition weakness, but to solve the independent action problem, Rule 45 would need further amendment to allow subpoenas for inspection of immobile things. Amending Rule 45 to provide subpoenas for inspection of immobile things

If an objection is made, the party seeking production must file a motion to compel under Rule 34(a). *Id.*

In contrast with these specific objection provisions, two of the states which provide for production by motion and order have enacted no objection provisions directed specifically to this discovery device. The New York and Oklahoma provisions are silent as to objections, and the issue is left to the general discovery provisions. N.Y. CIV. PRAC. R. § 3120(b) (McKinney 1976); OKLA. STAT. ANN tit. 12, § 3211(c) (West Supp. 1982).

205 See text accompanying notes 156-66 *supra*.

206 See text accompanying notes 167-73 *supra*.

207 See text accompanying notes 174-89 *supra*.

208 See text accompanying notes 190-99 *supra*.

209 See notes 7-61 *supra* and accompanying text.

210 See notes 86-152 *supra* and accompanying text.

211 Such an amendment was suggested in J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 100, at 665 ("Why shouldn't Rule 45 be amended to provide for production of items for pretrial inspection without the artificial deposition requirement?"), and in J.B. LEVINE, *supra* note 146, at 104 ("Rule 45(d)(1) should be amended so that a subpoena *duces tecum* may command a non-party to produce documents or movable property for inspection at a reasonable place and time.").

212 See notes 66-85 *supra* and accompanying text.

was the solution suggested by one commentator critical of independent actions.²¹³ However, no jurisdiction has adopted such an amendment. The courts should not make these changes in Rule 45 through different judicial interpretations of the current language, however;²¹⁴ instead, the text of Rule 45(d) should be amended²¹⁵ or a new rule

213 See Note, *supra* note 91, at 120-22; *cf.* note 165 *supra*.

214 Arguably, the current language of Rule 45(d) could merely be reinterpreted by the courts to allow pure subpoenas for production and subpoenas for inspection of immobile things. Rule 45(d) states in relevant part:

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rule 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. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the person served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

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

The sentence which states, "The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things . . ." does not by its terms require a deposition and could be interpreted to authorize a subpoena for production without a deposition. Further, that sentence could be interpreted to allow subpoenas for entry upon land as it authorizes subpoenas for the inspection of tangible things. While the desired changes in Rule 45(d) might be achieved solely through court reinterpretation, this is a poor way to make the changes for several reasons. First, such reinterpretation would render part of the title of the rule, "Subpoena for Taking Depositions," misleading. Second, the rule authorizes the clerk to issue a subpoena only after a notice of deposition has been served, and since there would be no deposition in connection with the new subpoenas for production only or for inspection of immobile things, the clerk would be without authority to issue subpoenas. Third, it is ill advised to make such a relatively drastic change in practice without revising the text of the rule because the fact that the text of the rule went unchanged might be confusing and make the change in procedure unnecessarily complex.

215 The title of Rule 45(d) would be changed to "Subpoena for Taking Depositions, Production or Inspection; Place of Examination." A provision similar to Rule 30(d)(1) would be added requiring that a party seeking production or entry upon land give notice to the other parties, and the first sentence of Rule 45(d)(1) would be amended to make proof of service of such notice sufficient authorization for the clerk to issue the subpoena. The second and third sentences would be amended as follows (new matter in *italics*):

Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken *or the production or inspection is to occur* a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed *to give his deposition*, to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of

added.²¹⁶

If these changes were effected, the current production methods would need adjustment. The subpoena duces tecum procedure could either be deleted or retained. If it were deleted, parties could use the pure production subpoena first and then, if necessary, schedule a deposition to examine the nonparty on the things produced, much like the current practice with regard to parties.²¹⁷ If the subpoena duces tecum remained available, the discovering party could use either it or the pure production subpoena. The discovering party would have a choice of procedures and would not be compelled to schedule a deposition to get production, so presumably discovering parties would only use the subpoena duces tecum procedure when a deposition was warranted and convenient.²¹⁸ New York has had such an option in its discovery rules for several years,²¹⁹ and although

the examination permitted by Rule 25(b), and to permit entry upon designated land or other property for the purpose of inspection within the scope permitted by Rule 34(a)(2), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The last insertion, regarding entry upon land, was suggested in Note, *supra* note 89, at 121 n.59. As that commentator notes, there would also have to be minor changes in the second paragraph of Rule 45(d)(1) and Rule 27.

216 Such a rule might read as follows:

45(g) For Production Without Deposition; for Inspection of Land or Other Property

A party desiring production of books, papers, documents, or tangible things from any person or inspection of land or other property of any person shall give reasonable notice in writing to every other party to the action. Proof of service of a notice of production or inspection constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the production or inspection is to occur of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court in which the production or inspection is to occur a copy of the notice together with a statement of the date and manner of service and the names of the persons served, certified by the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), and to permit inspection of designated land or other property within the scope permitted by Rule 34(a)(2). The subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

217 Under the federal rules relating to discovery from parties, a litigant who wants to examine a party on documents or things generally files a request for production under Federal Rule 34, reviews the documents or things, and then arranges a deposition of the relevant party under Federal Rule 30.

218 Thus, a discovering party would use a subpoena duces tecum only when he or she definitely anticipated some questions about the things produced and further knew the things would not be so voluminous or complex as to require extensive preparation to ask effective questions. *See* text accompanying notes 54-61 *supra*.

219 *See* note 201 *supra*.

the actual distinction between a subpoena for production and a subpoena duces tecum is difficult to articulate,²²⁰ the existence of multiple production methods has presented no problems.

While the subpoena duces tecum provisions could be retained or deleted with no harmful impact, Rule 34(c), the independent action provision, should definitely be deleted. Since subpoenas would be available for discovery of immobile things, independent actions would be unnecessary and undesirable; the courts should deem that the new provisions preempt independent actions.²²¹

An extension of Rule 34 to nonparties is the second way to eliminate the weaknesses in the federal rules. This revision would provide for discovery of both mobile and immobile property²²² and thereby remedy both the problems of the unwanted deposition and the independent action. The Advisory Committee described such an extension of Rule 34 as "ideal,"²²³ and several states have adopted this approach.²²⁴ The Indiana discovery system provides the best model of this approach.²²⁵ The impact of such a revision on subpoenas duces tecum and independent actions would be similar to the impact of revising Rule 45;²²⁶ the subpoena duces tecum procedure could be deleted or retained with no harmful consequences, but Rule 34(c) should be deleted and independent actions deemed preempted.

V. Conclusion

Ultimately, the proper amendment of either Rule 45 or Rule 34 achieves the same result: a party may subpoena a nonparty to produce things or allow entry upon land for inspection of immobile things.²²⁷ Both approaches have the benefit of eliminating the procedural distinctions in discovery of mobile and immobile property. Be-

220 See note 202 *supra*.

221 Under the holding of *Home Insurance*, see text accompanying notes 15-16 *supra*, independent actions are only available if the production cannot be compelled by any other method. Once subpoenas for inspection of immobile things are available, therefore, independent actions could not be used for discovery, and arguably Rule 34(c) would not need to be deleted. Even so, it seems wiser to delete Rule 34(c), making it that much clearer that the comprehensive production rules preempt independent actions for production.

222 Rule 34 provides for production of mobile things and inspection of immobile things. FED. R. CIV. P. 34(a).

223 FED. R. CIV. P. 34(c), advisory committee notes. See note 96 *supra*.

224 See notes 154-208 *supra* and accompanying text.

225 See text accompanying notes 205-08 *supra*.

226 See text accompanying notes 217-21 *supra*.

227 Of course, the result is the same only if the extension of Rule 34 to nonparties is accomplished with the subpoena model rather than the less desirable motion and order model. See text accompanying notes 161-66 *supra*.

tween these approaches, amendment of Rule 34 seems marginally preferable. First, amending Rule 34, the rule on production, is a more direct method of compelling production from nonparties than amending Rule 45, the rule on subpoenas. Second, the Advisory Committee appears inclined to make the change through amendment of Rule 34 rather than through amendment of Rule 45.²²⁸ Third, several states have chosen to compel production from nonparties via extension of Rule 34,²²⁹ and their experience can be monitored for guidance.

228 See note 96 *supra*.

229 See notes 154-208 *supra* and accompanying text.