

May 2019

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### Recommended Citation

Amir Shachmurove, *A Quixotic Quest Over Befogged Terrain? How to Choose and Contest a Deposition's Location Under Federal Procedural Law*, 87 U. Cin. L. Rev. 945 (2019)  
Available at: <https://scholarship.law.uc.edu/uclr/vol87/iss4/2>

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A QUIXOTIC QUEST OVER BEFOGGED TERRAIN?  
HOW TO CHOOSE AND CONTEST A DEPOSITION'S LOCATION  
UNDER FEDERAL PROCEDURAL LAW

*Amir Shachmurove\**

ABSTRACT

*Rather than something extraordinary, this article strives to provide something ordinary—a rough map, an assured but imperfect sketch—sorely needed by practitioners yet strangely missing from modern commentary, scholarly and otherwise. In less than 10,000 words, it summarizes the presumptions, precedents, and provisions applicable to a court's decision regarding the proper location of a deposition under federal law, whether embodied in explicit text or conveyed in often qualified prose. As it shows, in making these fact-specific determinations over the last fifty years, this nation's federal courts have mined a default presumption from Rule 30, focused their energies on Rule 26, and crafted two more tenets and at least two substantially identical, and increasingly narrowed, tests. Indubitably, these ad hoc analyses have engendered a perplexing and contradictory body of law. Yet, in the midst of this jarring cacophony, directions for the busy can be imparted, and checklists adumbrated. In an era of transnational defendants and cross-border cases, even such tentative directions can aid the pressured and puzzled.*

## I. INTRODUCTION

Crafted by men focused on the loosening of the common law's stultifying formalism,<sup>1</sup> the Federal Rules of Civil Procedure ("Rules" collectively, and "Rule" individually) say little about the proper location for a deposition of a person, whether a citizen or non-citizen and whether living in or out of the United States. Rule 30 plainly allows a party to "by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2),"<sup>2</sup> but nothing as to any such querying's setting appears in this provision, the Rules' fifth title, or the Rules as a whole. Like purest nature, though, few federal courts<sup>3</sup> can tolerate a vacuum and stomach taciturnity's perpetration; even if so inclined, not even the most artful can always evade a case and controversy merely by a confession of bemusement or befuddlement. Due to the inevitable byproduct of this process—too much imperfect precedent and too many inconsistent holdings—those searching for guidance concerning this fraught issue face the near certainty of cumbersome exegeses of haphazard dogmas and false doctrinal leads, ones likely to yield, with only a few exceptions, mostly questionable conclusions.

Nonetheless, some definite instructions can be mined from this muddled jurisprudence, as this brief article—and its appendix—dare to delineate. If only tentatively, a relatively stable atlas, a virtue so crucial for the preservation of hoary equity,<sup>4</sup> can be sketched, a protean reality familiar to the seafarers of yesteryear. At minimum, it is more than what has formerly existed, providing a bit of the predictability and certainty so crucial to the reasoned exercise of even the most generous bequest of procedural discretion.

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1. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 924–25 (1987).

2. FED. R. CIV. P. 30(a)(1).

3. Unless otherwise noted, any reference to "court" or "courts" is to one or more United States district courts or courts of appeals. If capitalized, however, the term "Court" refers to the United States Supreme Court in accordance with *The Bluebook: A Uniform System of Citation*.

4. See Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES J. 4, 5 (2007) (characterizing openness and stability as the essential predicates for the rule of law).

## II. LEGAL SURVEY: IDENTIFYING RELEVANT PROVISIONS AND PRECEDENTS

As originally written and as subsequently amended, the Rules evince a maddening silence with regard to the choice of a deposition's location, particularly as to depositions governed by Rule 30(a)(1) and Rule 30(b)(6).<sup>5</sup> Unsurprisingly, “a confusing, and sometimes inconsistent, line of caselaw” has festered due to this willful reticence.<sup>6</sup> This mostly accurate declamation, however, neglects the lighthouses—not strikingly luminous yet incontestably real—dotting this anarchic landscape. Over the last five decades, with only occasional inconsistencies, sundry courts have extracted a default presumption from Rule 30, made much of Rule 26, and formulated two more tenets and at least two substantially identical tests, tapering their analytical focus to two factors: (1) whether the deponent is an individual party or a representative of an organization, and (2) whether the party is a plaintiff or defendant. In that tense period in which lawyers debate a deposition's location, it is these seemingly settled, but variable, patterns and prevalent, yet contested, notions with which every lawyer must be conversant.

### A. Extrinsic Sources: Universal Precepts

Apart from the texts, two verities influence the judiciary's application of these nebulous touchstones. Relevant to even the most specific provision's explication, courts tend to view the Rules as “an integrated whole.”<sup>7</sup> Consequently, in courts' reckoning, the discovery rules amount to “an integrated mechanism to be read *in pari materia*.”<sup>8</sup> One rule's construction, in other words, must be consistent not just with its explicit text but the Rules *in toto*.<sup>9</sup> Furthermore, the Rules' “deposition-discovery regime” has always been seen as “an extremely permissive one,” overwhelmingly tilted in favor of minimally reasonable

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5. See, e.g., *SEC v. Banc de Binary*, No. 2:13-CV-993-RCJ-VCF, 2014 U.S. Dist. LEXIS 34373, at \*8, 2014 WL 1030862, at \*3 (D. Nev. Mar. 14, 2014); *Arabi Gin Co. v. Plexus Cotton, Ltd.* (*In re Joseph Walker & Co.*), 472 B.R. 696, 699–700 (Bankr. D.S.C. 2012); *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 470–71 (E.D. Va. 2010).

6. Jeffrey S. Kinsler, *Location of Party-Depositions under Federal Rules of Civil Procedure*, 37 RES GESTAE 358 (Feb. 1994).

7. *Garza v. Webb Cty.*, 296 F.R.D. 511, 512 (S.D. Tex. 2014); see also, e.g., *Cipollone v. Liggett Grp., Inc.*, 822 F.2d 335, 342 (3d Cir. 1987) (quoting with approval *Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 92–93 (D.N.J. (1986))).

8. *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 258 (M.D.N.C. 2001); see also *Mortg. Info. Servs. v. Kitchens*, 210 F.R.D. 562, 566–67 (W.D.N.C. 2002) (noting that “the traditional canons of interpretation regarding the interaction between the various Federal Rules of Civil Procedure . . . require that the rules be construed in a manner that is internally consistent”).

9. Amir Shachmurove, *Purchasing Claims and Changing Votes: Establishing “Cause” under Rule 3018(a)*, 89 AM. BANKR. L.J. 511, 532 (2015).

discovery.<sup>10</sup> As one court aptly observed, the Rules' design and spirit compel "a broad and liberal treatment" so as to allow parties to "refine the case and . . . prepare it for trial based on a full understanding of the relevant facts."<sup>11</sup> In spite of recent precedent and amendments in tension with this forgiving penchant, this longstanding ideal endures.<sup>12</sup> Acting concurrently, this vision of the Rules in general and Title V in particular as an integrated series of commands to be construed, by default, so as to enhance the uncovering and winnowing of facts influence the federal courts' approach to the determination of a deposition's appropriate locale whenever a deponent challenges another's initially unfettered choice.

### B. Written Laws

#### 1. Depositions Generally: Rule 30's Implicit and Explicit Restrictions

Since Title V's limited rearrangement in 1970, Rule 30 has controlled the conduct of all depositions by oral examination,<sup>13</sup> recognizing no distinction between *de bene esse* (or trial) and discovery depositions like some of the Rules' state analogues.<sup>14</sup> Per Rule 30(a)(1), a party may depose "any person, including a party, without leave of court, except as provided in Rule 30(a)(2)," and attendance of a deponent, whether a party or not, "may be compelled by subpoena under Rule 45."<sup>15</sup> Typically, a notice issued by a plaintiff suffices to compel the attendance of a party at a deposition.<sup>16</sup> Rule 30(a)(2) requires judicial permission in only four separate instances: (1) whenever the parties have

10. Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Delaware, Inc. v. Friedman (*In re* Subpoena Issued to Dennis Friedman), 350 F.3d 65, 69 (2d Cir. 2003) (quoting Schlagenhauf v. Holder, 379 U.S. 104, 114–15, 85 S. Ct. 234, 241, 13 L. Ed. 2d 152 (1964) (quoting Hickman v. Taylor, 329 U.S. 495, 501, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947) (internal quotation marks omitted)); see also Sonnino v. Univ. of Kan. Hosp. Auth., 221 F.R.D. 661, 670–71 (D. Kan. 2004) (emphasizing "the broad and liberal construction afforded by the federal discovery rules").

11. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d at 69; Arthur R. Miller, *Reflections on the Deformation of Federal Procedure*, 88 N.Y.U.L. REV. 286, 353–56 (2013).

12. Amir Shachmurove, *Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—yet Problematic—Construction*, 37 N. Ill. U.L. REV. 203, 212 n.38 (2017).

13. FED. R. CIV. P. 30; Lefkoe v. Jos. A. Bank Clothiers, Inc., 577 F.3d 240, 246 (4th Cir. 2009).

14. Chrysler Int'l Corp. v. Chemaly, 280 F.3d 1358, 1362 n.8 (11th Cir. 2002).

15. FED. R. CIV. P. 30(a)(1); see, e.g., Luckey v. Visalia Unified Sch. Dist., No. 1:13-cv-00332-AWI-SAB, 2014 U.S. Dist. LEXIS 179446, at \*3, 2014 WL 7409034, at \*2 (E.D. Cal. Dec. 30, 2014); Peitzman v. City of Illmo, 141 F.2d 956, 960 (8th Cir. 1944).

16. E.g., Bailey v. Connolly (*In re* Van Vleet), Nos. 08-cv-00506-WYD, 08-cv-01645-WYD, 08-cv-01870-WYD, 08-cv-02109-WYD, 09-cv-00433-WYD, 2009 U.S. Dist. LEXIS 953, at \*12–13, 2009 WL 3162212, at \*4 (D. Colo. Sept. 30, 2009); *In re* Honda, 106 B.R. 209, 211 (Bankr. D. Haw. 1989); Farquhar v. Sheldon, 116 F.R.D. 70, 71 (E.D. Mich. 1987); Cont'l Fed. Sav. & Loan Ass'n v. Delta Corp. of Am., 71 F.R.D. 697, 699 (W.D. Okla. 1976).

not stipulated to a deposition and (a) “the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants”; (b) “the deponent has already been deposed in the case;” or (c) “the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or (2) whenever the deponent is imprisoned.”<sup>17</sup> As Rule 30 implies, in this authorized exercise of discretion, a court is expected to employ the proportionality test now set forth in Rule 26(b)(1) and (2)(C) and once encoded in Rule 26(b)(2)(C).<sup>18</sup> In essence, via Rule 26, a party can overcome Rule 30’s presumptive limit by demonstrating any additional depositions’ reasonableness and necessity.<sup>19</sup>

Rule 30(b) sets forth numerous formal procedural requirements.<sup>20</sup> Its first paragraph specifies what the requisite notice must generally include.<sup>21</sup> Rule 30(b)(6) modifies those prerequisites when either “notice or subpoena” is directed at “a public or private corporation, a partnership, an association, a governmental agency, or other entity.”<sup>22</sup> Upon receipt of a notice sent pursuant to Rule 30(b)(6), “the named organization must then designate one or more officers, directors, or managing agents, or . . . other persons who consent to testify on its behalf;” it may even “set out the matters on which each person designated will testify,” though “a subpoena,” but not a notice, “must advise a nonparty organization of its duty to make this designation.”<sup>23</sup> The person so selected must “testify about information known or reasonably available to the organization.”<sup>24</sup> Despite this sentence’s seemingly plain meaning, a split of authority has arisen as to when and

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17. FED. R. CIV. P. 30(a)(2); *Smith v. Royal Caribbean Cruises, Ltd.*, 302 F.R.D. 688, 690 (S.D. Fla. 2014).

18. FED. R. CIV. P. 30(a)(2); *Wertz v. GEA Heat Exchangers Inc.*, No. 1:14-CV-1991, 2015 U.S. Dist. LEXIS 167947, at \*5–6, 2015 WL 8959408, at \*2–3 (M.D. Pa. Dec. 16, 2015).

19. *See, e.g., Alaska Elec. Pension Fund v. Pharmacia Corp.*, No. Civ. A. 03-1519 (AET), 2006 U.S. Dist. LEXIS 59095, at \*8, 2006 WL 6487632, at \*3 (D.N.J. Aug. 22, 2006).

20. FED. R. CIV. P. 30(b); *Healthier Choice Flooring, LLC v. CCA Global Partners, Inc.*, No. 1:11-CV-2504-CAP, 2013 U.S. Dist. LEXIS 193345, at \*5–6, 2013 WL 12101905, at \*2 (N.D. Ga. Jan. 4, 2013).

21. FED. R. CIV. P. 30(b)(1); *Mealing v. Ga. Dep’t of Juvenile Justice*, 564 F. App’x 421, 429 (11th Cir. 2014).

22. FED. R. CIV. P. 30(b)(6); *In re Boehringer Ingelheim Pharm., Inc.*, 745 F.3d 216, 218 (7th Cir. 2014).

23. FED. R. CIV. P. 30(b)(6); *Sahu v. Union Carbide Corp.*, 528 F. App’x 96, 103 n.7 (2d Cir. 2013).

24. FED. R. CIV. P. 30(b)(6); *Gonzalez Prod. Sys. v. Martinrea Int’l Inc.*, 310 F.R.D. 341, 342–43 (E.D. Mich. 2015).

how a party can use a Rule 30(b)(6) designee at trial.<sup>25</sup> Despite this debate and its intricacy, Rule 30(b)(6) “does not preclude a deposition by any other procedure allowed by the [R]ules,”<sup>26</sup> and “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means.”<sup>27</sup> Unsurprisingly, however, the text itself does not codify a standard for adjudicating the merits of such accommodations.<sup>28</sup>

Customarily, and certainly in its early decades, Rule 30(b) has been and was read to allow the examining party to “unilaterally” choose the location of the deposition of party and non-party alike.<sup>29</sup>

## 2. Deposition by Subpoena: The Problems Presented by Rule 45 and 28 U.S.C. § 1783

If the proposed deponent is not a party and does not consent to attend, a subpoena is the only alternative under the Rules. In such cases, Rule 45 governs that writ’s service and the deposition’s location.<sup>30</sup> True, “nothing in the Federal Rules of Civil Procedure explicitly precludes the use of Rule 45 subpoenas against parties,” including a governmental entity.<sup>31</sup> And when the location of the depositions for a subpoenaed party engenders dispute, courts only inconsistently invoke its geographic limitation.<sup>32</sup> Regardless of debates over its coverage, whether the target

25. See *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 291 F.R.D. 297, 303–06 (N.D. Iowa 2013) (canvassing divide).

26. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 92 n.6 (2d Cir. 2012).

27. FED. R. CIV. P. 30(b)(4); see *Marlboro Prod. Corp. v. N. Am. Philips Corp.*, 55 F.R.D. 487, 489 (S.D.N.Y. 1972) (concluding that “experimentation with the newly authorized procedure should be encouraged rather than blocked”), quoted in *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 522 (D.C. Cir. 1975).

28. *Estate of Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385 (S.D.N.Y. 2011).

29. *SEC v. Banc de Binary*, No. 2:13-CV-993-RCJ-VCF, 2014 U.S. Dist. LEXIS 34373, at \*8, 2014 WL 1030862, at \*3 (D. Nev. Mar. 14, 2014) (citing 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2112 (2010)); accord, e.g., *Cassidy v. Teaching Co., LLC*, No. 2:13-CV-884, 2014 U.S. Dist. LEXIS 123413, at \*3, 2014 WL 4377843, at \*1 (S.D. Ohio Sept. 4, 2014); *Lord v. Flanagan*, No. CV 13-26-BU-DLC-JCL, 2014 U.S. Dist. LEXIS 1687, at \*3–4, 2014 WL 51655, at \*2 (D. Mont. Jan. 7, 2014); *DeGeer v. Gillis*, No. 09 C 6974, 2010 U.S. Dist. LEXIS 97457, at \*4, 2010 WL 3732132, at \*1 (N.D. Ill. Sept. 17, 2010).

30. *Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 100 (D. Mass. 1996); accord, e.g., *Renewable Res. Coalition, Inc. v. Kaplan (In re Robert Leonard Kaplan)*, No. 2:11-bk-60249-RK, 2013 Bankr. LEXIS 2390, at \*5, 2013 WL 2897766, at \*1 (Bankr. C.D. Cal. June 12, 2013). By definition, a “subpoena” is “a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.” *Subpoena*, BLACK’S LAW DICTIONARY (10th ed. 2014).

31. *Yousuf v. Samantar*, 451 F.3d 248, 256–57 (D.C. Cir. 2006); *First City, Tex.-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 254 n.5 (S.D.N.Y. 2000).

32. See *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 10 (1st Cir. 1985) (deeming the geographic limitations of Rule 45(e) to be equally applicable to parties and non-parties); *Racher v. Lusk*, No. CIV-13-665-M, 2016 U.S. Dist. LEXIS 1160, at \*5, 2016 WL 67799, at \*2 (W.D.

is a party or a non-party, “[a] subpoena may be served at any place within the United States” under Rule 45(b)(2).<sup>33</sup> Once served, a failure to comply may render that recalcitrant person liable for contempt of court.<sup>34</sup> Still, as a practical matter, a subpoena issued upon express order of a judge and one by a clerk tend to elicit different juridical treatment.<sup>35</sup> In short, “[f]acilitating service of process on managing agents of foreign corporations [or any foreign person] is not a legitimate reason to compel deponents to appear in . . . [a specific U.S. jurisdiction], as this is not the function of Rules 30(a)(1) or (b)(6)”; for such situations, “the carefully crafted procedures of Rule 45” control.<sup>36</sup>

In contrast, Section 1783 of the twenty-eighth title of the United States Code (“Code”), also known as the Walsh Act,<sup>37</sup> “governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country,”<sup>38</sup> classes explicitly broader than the term “United States citizen.”<sup>39</sup> Seemingly, Congress did not intend this provision to apply in connection with any foreign proceedings.<sup>40</sup> Rather, this statute “was enacted in 1926 in order to compel Americans living abroad to return to the United States to testify at a trial in a criminal case [and, after 1964, a civil case], if the testimony was deemed by the court

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Okla. Jan. 5, 2016) (noting that the geographic limitation of Rule 45 does not apply to the depositions of parties).

33. FED. R. CIV. P. 45(b)(2); *Osgood v. Disc. Auto Parts, LLC*, 981 F. Supp. 2d 1259, 1265 (S.D. Fla. 2013).

34. FED. R. CIV. P. 45(f)–(g); *see also, e.g.*, *Sheet Metal Workers’ Nat’l Pension Fund v. Rhb Installations, Inc.*, No. CV 12-2981 (JS)(ARL), 2016 U.S. Dist. LEXIS 4266, at \*4, 2016 WL 128153, at \*2 (E.D.N.Y. Jan. 12, 2016) (“If a commanded party ‘fails without adequate excuse to obey the subpoena,’ the court may hold that party in contempt.” (quoting FED. R. CIV. P. 45(g))); *Calabro v. Stone*, 224 F.R.D. 532, 533 (E.D.N.Y. 2004) (“Absent an improperly issued subpoena or an ‘adequate excuse’ by the non-party, failure to comply with a subpoena made under Rule 45 may be deemed a contempt of the court from which the subpoena issued.”); *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1364 (2d Cir. 1991) (“[A] valid subpoena is a legal instrument, non-compliance with which can constitute contempt of court.”).

35. *See Recording Indus. of Am. v. Verizon Internet Servs., Inc. (In re Verizon Internet Servs., Inc.)*, 257 F. Supp. 2d 244, 251 (D.D.C. 2003) (“[I]n the Rule 45 context, courts recognize that a subpoena issued upon express order of a judge and a subpoena issued by the clerk of the court are not equivalent.”).

36. *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 474 (E.D. Va. 2010).

37. Act of July 3, 1926, 44 Stat. 83 (codified as amended in 28 U.S.C. § 1783); *see Blackmer v. United States*, 284 U.S. 421, 433–35 n.1, 52 S. Ct. 252, 76 L. Ed. 2d 375 (1932) (discussing this original version).

38. FED. R. CIV. P. 45(b)(3); 28 U.S.C. § 1783. A separate section within the same chapter of the Code controls discovery from United States residents or those individuals found in the United States for use in *foreign* tribunals. 28 U.S.C. § 1782(a). In this article, any references to “Section 1782” or “§ 1782,” and to “Section 1783” or “§ 1783,” are to the sections cited in this footnote, as codified within the Code’s twenty-eighth title, unless otherwise noted.

39. 8 U.S.C. § 1101(a)(22) (2014).

40. *In re Oxus Gold PLC*, No. 06-82–GEB, 2007 U.S. Dist. LEXIS 24061, at \*25, 2007 WL 1037387, at \*9 (D.N.J. Apr. 2, 2007).

issuing the subpoena to be of sufficient importance.”<sup>41</sup> Whatever its precise purpose, before a court may order the appearance of United States citizens residing in foreign countries as witnesses in a deposition, Section 1783 requires that it find (1) “that particular testimony or the production of the document or other thing by him is necessary in the interest of justice” and (2) “that it is not possible to obtain his [or her] testimony in admissible form without his [or her] personal appearance or to obtain the production of the document or other thing in any other manner.”<sup>42</sup> For all their apparent clarity, much ambiguity enshrouds these operative criteria as to this “extraordinary subpoena power.”<sup>43</sup>

The subject of a “surprising shortage of pertinent case law,” the “interest of justice” prong is normally “considered in light of the circumstances of the particular case and, more importantly, the posture of the case when the issue arises.”<sup>44</sup> In the eyes of most courts, this bar is met only upon proof of one or more “compelling reason[s].”<sup>45</sup> By no means binding, and oddly never included within its body, this statute’s legislative history offers up “a multiple of factors,”<sup>46</sup> including “the nature of the proceedings, the nature of the testimony or evidence sought, the convenience of the witness or the producer of the evidence, the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness.”<sup>47</sup> In fact, some courts have often classified “the predicate theory of federal pre-trial discovery,” i.e. “the production of relevant material essential for the full and fair litigation of a cause of action,” as one such pertinent justification.<sup>48</sup> Effectively concocting a quasi-standard, a handful of courts have held testimony to be “necessary in the interest of justice” under Section 1783 by virtue of its satisfaction of the liberal relevancy standard implanted within Rule 26(b).<sup>49</sup>

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41. SEC v. Sabhlok, No. 08 Civ. 4238, 2009 U.S. Dist. LEXIS 105194, at \*13, 2009 WL 3561523, at \*4 (N.D. Cal. Oct. 30, 2009).

42. 28 U.S.C. § 1783(a); Air Turbine Tech., Inc. v. Atlas Copco AB, 217 F.R.D. 545, 546 (S.D. Fla. 2003).

43. S. REP. NO. 88-1580, at 10 (1964).

44. Estate of Ungar v. Palestinian Auth., 412 F. Supp. 2d 328, 333 (S.D.N.Y. 2006) (quoting Klesch & Co. v. Liberty Media Corp., 217 F.R.D. 517, 523 (D. Colo. 2003)); see also, e.g., *In re Petrobras Secs. Litig.*, No. 14-cv-9662 (JSR), 2016 U.S. Dist. LEXIS 30469, at \*6–8, 2016 WL 908644, at \*1–2 (S.D.N.Y. Mar. 4, 2016) (applying this totality of circumstances test).

45. *Ungar*, 412 F. Supp. 2d at 333–34 (quoting *Klesch & Co.*, 217 F.R.D. at 523); see also *Balk v. N.Y. Inst. of Tech.*, 974 F. Supp. 2d 147, 155 (E.D.N.Y. 2013) (applying Walsh Act).

46. *Ungar*, 412 F. Supp. 2d at 334.

47. S. REP. NO. 88-1580, at 10.

48. *Klesch & Co.*, 217 F.R.D. at 524; see also, e.g., *Costello v. Poisella*, 291 F.R.D. 224, 230 (N.D. Ill. 2013) (observing that the court’s authority to manage and oversee the discovery process extends beyond information acquired through formal discovery and allows it to restrict a party’s use of the Rules’ subpoena provision).

49. See, e.g., SEC v. Sabhlok, No. 08 Civ. 4238, 2009 U.S. Dist. LEXIS 105194, at \*8, 2009 WL

The second prong, in turn, has been even less frequently explicated. The few courts forced to assess this second requirement look to whether the information sought from the relevant witness can be practically obtained.<sup>50</sup> Thus, “[s]ubpoenas may be issued when it is ‘impractical’ to obtain the information.”<sup>51</sup> To some, it can be met by showing that the deponent offers “a unique source of evidence . . . not previously provided,”<sup>52</sup> or “where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines.”<sup>53</sup> As another court opined, “[i]mpracticality occurs . . . where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines.”<sup>54</sup> Whatever the standard’s functional denotation, sheer impossibility is not necessary,<sup>55</sup> and “generalized and speculative concern[s]” about possible “hardship” will never suffice.<sup>56</sup>

Several limits attach to any subpoena issued pursuant to Rule 45(b)(2) or (b)(3). Most importantly, such a directive may command a person to attend a deposition in only two places: (1) “within 100 miles of where the person resides, is employed, or regularly transacts business in person,” or (2) “within the state where the person resides, is employed, or regularly transacts business in person” if that person is either “a party or a party’s officer” or “is command to attend a trial and would not incur substantial expense.”<sup>57</sup> In practice, Rule 45 compels a court to “quash any subpoena that calls for a deposition beyond the 100 mile limit for non-party witness.”<sup>58</sup> This atextual construction draws its justification from Rule 45’s reputed ends: “to protect such witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest.”<sup>59</sup> In addition, the resulting subpoena must be served

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3561523, at \*3 (N.D. Cal. Oct. 30, 2009) (citing *SEC v. Sandifur*, No. C05-1631C, 2006 U.S. Dist. LEXIS 89428, at \*11, 2006 WL 3692611, at \*4 (W.D. Wash. Dec. 11, 2006)); cf. *Klesch*, 217 F.R.D. at 523 (so concluding, partly on the basis of the belief “that the discovery procedures in the Federal Rules of Civil Procedures seek to further the interests of justice by minimizing surprise at trial and ensuring wide-ranging discovery of information”).

50. *Balk*, 974 F. Supp. 2d at 156.

51. *Sandifur*, 2006 U.S. Dist. LEXIS 89428, at \*13, 2006 WL 3692611, at \*4.

52. *Sabhlok*, 2009 U.S. Dist. LEXIS 105194, at \*11, 2009 WL 3561523, at \*4.

53. *Sandifur*, 2006 U.S. Dist. LEXIS 89428, at \*13, 2006 WL 3692611, at \*4.

54. *Id.*

55. *Safar v. Costco Wholesale Corp.*, No. 1:15cv469, 2016 U.S. Dist. LEXIS 52404, at \*5, 2016 WL 1589600, at \*2 (E.D. Va. Apr. 19, 2016) (citing *Balk*, 974 F. Supp. 2d at 156).

56. *U.S. Equal Emp’t Opp. Comm’n v. Global Horizons, Inc.*, No. 11-00257 DAE-RLP, 2012 U.S. Dist. LEXIS 33346, at \*15–16, 2012 WL 874868, at \*5 (D. Haw. Mar. 13, 2012).

57. FED. R. CIV. P. 45(c)(1)(A)–(B).

58. *State Nat’l Ins. Co. v. Cty. of Camden*, Civ. No. 08-5128 (NLH) (AMD), 2010 U.S. Dist. LEXIS 65142, at \*7–8, 2010 WL 2719810, at \*2 (D.N.J. June 30, 2010).

59. *Edelman v. Taittinger* (*In re Edelman*), 295 F.3d 171, 178 (2d Cir. 2002); see also, e.g., *M’Baye v. N.J. Sports Prod., Inc.*, 246 F.R.D. 205, 207 (S.D.N.Y. 2007) (quoting case and emphasizing

in accordance with the Rules, and the serving party must always pay any witness' travel costs, as calculated by the relevant tribunal.<sup>60</sup> Lastly, as courts have overwhelmingly ruled, “[t]he only people who cannot be served under . . . [this statute] are foreign nationals residing in a foreign country.”<sup>61</sup>

### 3. Limits on Distant Depositions: Rule 28

If a deposition is to be held abroad, whether physically or via teleconference, Rule 28(b) must be consulted.<sup>62</sup> In accordance with its language, a deposition in a foreign court will only be permitted (1) “under a treaty or convention,” (2) “under a letter of request, whether or not captioned a ‘letter of rogatory,’” (3) “on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination,” or finally (4) “before a person commissioned by the court to administer any necessary oath and take testimony.”<sup>63</sup> The burden for getting such an order lies upon the party opposing the location selected by another or preferred by a court.<sup>64</sup> For this very reason, one court admonished a party for “mak[ing] no attempt to analyze which, if any, of the circumstances [enumerated in Rule 28(b)] is applicable” and thereupon denied without prejudice a motion to depose by videoconference under Rule 30, a denial to be reconsidered if the requesting party would “supplement its request with proposed procedures that would ensure that the requirements of Rule 28(b) . . . [can be] satisfied.”<sup>65</sup> Before allowing or ordering a deposition to be hosted abroad to occur pursuant to Rule 28, courts focus on a variety of “logistical” factors, regularly compelling the party whose witness is to be deposed to (1) provide documentation that the foreign nation’s government permits such depositions to proceed on its own soil or does not expressly foreclose their conduct; (2) identify and secure one or more officials who are authorized to administer an oath at the prospective location; (3) set forth dates, times, and locations of any

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the plain language of Rule 45).

60. 28 U.S.C. § 1783(b).

61. *NML Capital Ltd. v. Rep. of Arg.*, No. 2:14-cv-492-RFB-VCF, 2014 U.S. Dist. LEXIS 110625, at \*29, 2014 WL 3898021, at \*9 (D. Nev. Aug. 11, 2014) (citing, among others, *Relational, LLC v. Hodges*, 627 F.3d 668, 673 (7th Cir. 2010), and *United States v. Drogoul*, 1 F.3d 1546, 1553 (11th Cir. 1993)).

62. FED. R. CIV. P. 28(b); *Zassenhaus v. Evening Star Newspaper Co.*, 404 F.2d 1361, 1362 n.1 (D.C. Cir. 1968).

63. FED. R. CIV. P. 28(b)(1)(A)–(D); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1151 (C.D. Cal. 2005).

64. *See Fausto v. Credigy Servs. Corp.*, 251 F.R.D. 427, 430–31 (N.D. Cal. 2008).

65. *Menovcik v. BASF Corp.*, No. 09-12096, 2010 U.S. Dist. LEXIS 123858, at \*12, \*15–16, 2010 WL 4867408, at \*4, \*5 (E.D. Mich. Nov. 23, 2010).

foreign deposition promptly; (4) arrange high-resolution cameras/videos offering a full view of both the deponent and his or her immediate surroundings if the deposition is to be taken via live video; and/or (5) identify any and all interpreters, stenographers, and, if necessary, videographers to be involved.<sup>66</sup>

#### 4. Discovery's Purpose: Rules 1 and 26

The Rules' first paragraph delineates their scope and purpose, thus influencing the interpretation of every other rule—and much of the judiciary's treatment of any procedural ambiguity.

Pursuant to its first sentence, “the [R]ules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”<sup>67</sup> Rule 1's second independent clause sets out the three principles intended to guide every rule's construction: “[The Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>68</sup> In 1993, the advisory committee added “and administered” so as to “to recognize the affirmative duty of the court to exercise the authority conferred by the [R]ules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”<sup>69</sup> Attorneys “share this responsibility with the judge to whom the case is assigned,” and even the most partisan lawyer must not forget that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”<sup>70</sup> The addition of “employed” on December 1, 2015, extended this obligation to one final group—the parties themselves.<sup>71</sup> As such, every rule, including Rules 28 and 30, must be construed in a manner most likely to ensure realization of the three virtues—justice, speed, and efficiency—consecrated in Rule 1.<sup>72</sup>

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66. *United States v. Cordoba*, No. 12-20157-CR-ROSENBAUM, 2013 U.S. Dist. LEXIS 46804, at \*11–12, 2013 WL 1325302, at \*4 (S.D. Fla. Apr. 1, 2013) (listing these conditions).

67. FED. R. CIV. P. 1; *United States v. Perez*, 752 F.3d 398, 404 (4th Cir. 2014).

68. FED. R. CIV. P. 1.

69. FED. R. CIV. P. 1 advisory committee's note to 1993 amendment; *see also, e.g., In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 (10th Cir. 2009).

70. FED. R. CIV. P. 1 advisory committee's note to 1993 amendment; *Paul v. State Farm Mut. Auto. Ins. Co.*, No. 2:14-cv-1382, 2015 U.S. Dist. LEXIS 143935, at \*11–12, 2015 WL 6134104, at \*4 (W.D. Pa. Oct. 16, 2015); *Navico, Inc. v. Garmin Int'l, Inc.*, No. 14-cv-303-CVE-TLW, 2015 U.S. Dist. LEXIS 160036, at \*15, 2015 WL 7721218, at \*5 (N.D. Okla. Nov. 30, 2015).

71. FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

72. *See, e.g., Scotch Whisky Ass'n v. U.S. Distilled Prods. Co.*, 952 F.2d 1317, 1319 (Fed. Cir. 1991) (“Rule 1 sets the policy for construing all of these rules.”); *United States v. Hoffa*, 497 F.2d 294, 296 (7th Cir. 1974) (“All of the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 54(d) relating to costs, must be interpreted in light of Fed. R. Civ. P. 1.”); *Nasser v. Isthmian Lines*, 331 F.2d

Establishing the Rules' "pre-trial deposition-discovery mechanism,"<sup>73</sup> two subsections relevant to Rule 30's explication appear in Rule 26. Above all, Rule 26(b)(1) promulgates discovery's uniquely minimalistic relevance standard: "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," with a court empowered to order "discovery of any matter relevant to the subject matter involved in the action" upon a showing of "good cause."<sup>74</sup> At the same time, Rule 26(b)(1) obviates any link between relevance for purposes of discovery and admissibility and thus impliedly bars the derivation of any such conflated standard: "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."<sup>75</sup> As drafted and construed, Rule 26(b)(1)'s discoverability criteria do (and should) influence the location of all depositions.<sup>76</sup> In its current form, moreover, Rule 26(b)(1) does one thing more. Simply put, it subjects "[a]ll discovery" to limitations imposed by Rule 26(b)(2)(C).<sup>77</sup> Any evidentiary material's discoverability therefore depends upon its "proportional[ity] to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."<sup>78</sup> Due to this reconfiguration, several constraints—(1) "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (2) "the

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124, 127 (2d Cir. 1964) ("[T]he Rules were intended to embody a unitary concept of efficient and meaningful judicial procedure, and that no single Rule can consequently be considered in a vacuum."); cf. Amir Shachmurove, *Sovereign Speech in Troubled Times: Prosecutorial Statements as Extrajudicial Admissions*, 86 TENN. L. REV. 401, 427–31 (2019) (discussing these values' roles beyond just the Rules' purview).

73. Hickman v. Taylor, 329 U.S. 495, 500, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947).

74. FED. R. CIV. P. 26(b)(1); see also, e.g., U.S. Commodity Futures Trading Comm'n v. Parmon Energy, Inc., 593 F. App'x 32, 36 (2d Cir. 2014) ("Relevance to the subject matter under Rule 26 is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." (internal quotation marks omitted) (quoting *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 2389, 57 L. Ed. 2d 253 (1978))).

75. FED. R. CIV. P. 26(b)(1); *Anderson v. Marsh*, No. 1:14-cv-01599-TLN-SAB, 2015 U.S. Dist. LEXIS 169071, at \*3, 2015 WL 9179361, at \*1 (E.D. Cal. Dec. 17, 2015) (citing new rule).

76. *Bell v. Bd. of Educ.*, 225 F.R.D. 186, 193 (S.D. W. Va. 2004); cf., e.g., *Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998) ("The rules for depositions and discovery are to be accorded a broad and liberal treatment"); *Pucket v. Hot Springs Sch. Dist.* No. 23-2, 239 F.R.D. 572, 579–80 (D.S.D. 2006) (invoking Rule in analysis of Federal Rule of Evidence 501).

77. FED. R. CIV. P. 26(b)(1); see also, e.g., *Progressive Cas. Ins. Co. v. F.D.I.C.*, 49 F. Supp. 3d 545, 562 (N.D. Iowa 2014); *Colaco v. ASIC Advantage Simplified Pension Plan*, 301 F.R.D. 431, 434 n.21 (N.D. Cal. 2014).

78. FED. R. CIV. P. 26(b)(1); *Booth v. City of Dallas*, No. 3:15-cv-2435-P, 2015 U.S. Dist. LEXIS 169225, at \*4, 2015 WL 9259060, at \*2 (N.D. Tex. Dec. 18, 2015) (quoting new rule).

party seeking discovery has had ample opportunity to obtain the information by discovery in the action”; or (3) “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”<sup>79</sup>—merit careful consideration if a potential deponent chooses to contest a deposition notice or subpoena.<sup>80</sup> Even absent such evidenced opposition, courts may invoke Rule 26(b)(2)(C) *sua sponte*,<sup>81</sup> an analysis necessarily incorporating Rule 26(b)(1)’s two standards.<sup>82</sup>

One more paragraph enjoys a starring role in the judicial struggles over the pegging of a prospective deposition’s appropriate location. Specifically, Rule 26(c) vests a court with the prerogative to issue an order, “for good cause,” protecting a “party or person” from “annoyance, embarrassment, oppression, or undue burden or expense.”<sup>83</sup> Relying upon this subparagraph, multiple jurists have maintained that “[a] district court has wide discretion to establish the time and place of depositions.”<sup>84</sup> After all, this rule provides for protective orders precisely so as to circumscribe “the extensive intrusion into the affairs of both litigants and third parties’ that is both permissible and common in modern discovery.”<sup>85</sup> Recent amendments to the Rules, all animated by a desire to place some definite limits on sprawling discovery, only underscore the judiciary’s obligation to diligently, albeit reasonably, exercise the discretion already afforded by Rule 26(b) and (c).

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79. FED. R. CIV. P. 26(b)(2)(C); *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007).

80. FED. R. CIV. P. 26(b)(1), 30(d)(3)(B); *see also, e.g.*, *Kiln Underwriting, Ltd. v. Jesuit High Sch. of New Orleans*, Nos. 05-04350, 06-05060, 06-05057, 2008 U.S. Dist. LEXIS 83535, at \*4–6, 2008 WL 4286491, at \*2 (E.D. La. Sept. 18, 2008).

81. Fed. R. Civ. P. 26(b)(2)(C) (requiring a court to “limit the frequency or extent of discovery” whether on “motion or on its own”); *Rich v. Shrader*, No. 09-CV-0652-AJB (BGS), 2013 U.S. Dist. LEXIS 98184, at \*15, 2013 WL 3710806, at \*5 (S.D. Cal. July 11, 2013).

82. *See Charvat v. Travel Servs.*, No. 12-cv-05746, 2015 U.S. Dist. LEXIS 81770, at \*7, 2015 WL 3917046, at \*2 (N.D. Ill. June 24, 2015) (contending that, in part due to Rule 26(b)(2)(C), “a court is not merely permitted to limit discovery of information it finds to be irrelevant, [as defined in Rule 26(b)(1)], it is required to do so”).

83. FED. R. CIV. P. 26(c)(1) (emphasis added); *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009).

84. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994); *see also, e.g.*, *SEC v. Banc de Binary*, No. 2:13-CV-993-RCJ-VCF, 2014 U.S. Dist. LEXIS 34373, at \*8, 2014 WL 1030862, at \*3 (D. Nev. Mar. 14, 2014); *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988); *Leist v. Union Oil Co.*, 82 F.R.D. 203, 204 (E.D. Wis. 1979).

85. *Bond*, 585 F.3d at 1067 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30, 104 S. Ct. 2199, 2206, 81 L. Ed. 2d 17 (1984)).

## 5. Summary: Deriving Guidance from the Rules' Written Commands

Having wandered through a textual thicket, two conclusions can be distilled. First, the prohibition in Rule 26(c) and the limitation set forth in Rule 45(c)(1)(A) and (c)(1)(B) serve to delimitate any federal court's authority to compel depositions of out-of-state witnesses in practice, if not by rule.<sup>86</sup> Indeed, though it does not appear in the written text of Rule 30, the requirements embedded in Rule 45(c)(1) have tellingly been extended to noticed depositions, with courts utilizing Rules 1 and 26(c) as the gateways. Conversely, some tribunals have dispensed with it when the particular request appears meritorious, a sufficient nexus exists, the judicial process has already been disrupted, and a stipulation to mitigate costs has been entered.<sup>87</sup> Second, while notice that complies with Rule 30(a)(1) will suffice per Rule 28(b)(1)(C), before a court orders the holding of a foreign deposition pursuant to the latter, it will need to ascertain whether one of the four conditions in Rule 28(b)(1) can be satisfied and whether another nation-state's law even permits the holding of a deposition authorized by a United States tribunal on its own soil, a question that may (or may not) depend upon the citizenship of the potential deponent.

*C. Mutually Hostile Presumptions*

In addition to the foregoing restrictions, a rebuttable presumption has gained a foothold, its imprint now contracting, over the last twenty-five years. As one court précised it, "a corporation's deposition should be taken at the corporation's [principal] place of business."<sup>88</sup> Formally, though this principle extends to officers, directors, and managing agents of that corporation,<sup>89</sup> much case law hints at a broader application. To wit, for countless courts, any defendant, natural or artificial, must be examined at his residence or place of business or employment unless this presumption has been decidedly rebutted.<sup>90</sup> As logic foretells, "[w]hen a foreign defendant is involved, this presumption may be even

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86. FED. R. CIV. P. 26(c), 45(c)(1)(A)–(B); *In re Guthrie*, 733 F.2d 634, 638 (4th Cir. 1984).

87. *NML Capital Ltd. v. Rep. of Arg.*, No. 2:14-cv-492-RFB-VCF, 2014 U.S. Dist. LEXIS 110625, at \*37, 2014 WL 3898021, at \*12 (D. Nev. Aug. 11, 2014).

88. *Banc de Binary*, 2014 U.S. Dist. LEXIS 34373, at \*8–9, 2014 WL 1030862, at \*3; *accord*, e.g., *St. Hillaire & Assocs. v. F.D.I.C.*, Civ. No. 92-511-SD, 1994 U.S. Dist. LEXIS 14839, at \*3–4, 1994 WL 575773, at \*2 (D.N.H. Oct. 13, 1994); *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989).

89. *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 571 (W.D. Va. 1998).

90. E.g., *Fausto v. Credigy Servs. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2008); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987).

stronger.”<sup>91</sup> Accordingly, subject to only extraordinary circumstances, not just corporate designees but any defendant can only be deposed at either his or her employer’s principal place of business or established residence,<sup>92</sup> this rule trumpeting plaintiff’s normally unfettered right to pick a deposition’s location.

Whatever the setting, this axiom is based on “the concept that it is the plaintiffs who bring the lawsuit and who exercise the first choice as to the forum” and “[t]he defendants, on the other hand, are not before the court by choice.”<sup>93</sup> As the Court itself has warned, “American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position,” with judges expected to pay “the most careful consideration” of “objections to ‘abusive’ discovery” and to acknowledge “the special demands of comity” when dealing with “a foreign litigant on account of its nationality or the location of its operations.”<sup>94</sup> Notably, much ink has been spilled over the extent of this “general proposition.”<sup>95</sup>

Complicating matters, a countervailing tendency can be glimpsed within a hodgepodge of cases, as corporate defendants are, in fact, commonly deposed in places other than the location of the principal place of business, especially in the forum where the action is pending.<sup>96</sup> Mostly, courts give two justifications for this increasingly common approach: (1) “the convenience of all parties” and (2) “the general interests of judicial economy.”<sup>97</sup> Another concern— “[i]f a federal court

91. *Banc de Binary*, 2014 U.S. Dist. LEXIS 34373, at \*9, 2014 WL 1030862, at \*3 (relying on *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987)).

92. *Fausto*, 251 F.R.D. at 429; *see also, e.g., Fernandez v. Penske Truck Leasing Co., L.P.*, No. 2:12-cv-00295-JCM-GWF, 2013 U.S. Dist. LEXIS 14786, at \*4, 2013 WL 438669, at \*2 (D. Nev. Feb. 1, 2013) (citing *Fausto*, 251 F.R.D. at 429).

93. *Doe v. Karadzic*, Nos. 93 Civ. 878, 93 Civ. 1163, 1997 U.S. Dist. LEXIS 1073, at \*9, 1997 WL 45515, at \*3 (S.D.N.Y. Feb. 4, 1997) (internal quotation marks omitted) (quoting *Farquhar*, 116 F.R.D. at 72).

94. *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 546.

95. *Doe*, 1997 U.S. Dist. LEXIS 1073, at \*8, 1997 WL 45515, at \*3; *see also, e.g., Fed. Deposit Ins. Co. v. La Antillana, S.A.*, No. 88 Civ. 2670, 1990 U.S. Dist. LEXIS 13246, at \*2–4, 1990 WL 155727, at \*1 (S.D.N.Y. Oct. 5, 1990); *Deep S. Oil Co. of Tex. v. Metro. Life Ins. Co.*, 21 F.R.D. 340, 342 (S.D.N.Y. 1958).

96. *United States v. One Gulfstream G-V Jet Displaying Tail No. VPCES*, 304 F.R.D. 10, 14 (D.D.C. 2014); *Trs. of the Local 813 Ins. Tr. Fund v. Indus. Recycling Sys., Inc.*, No. 12-CV-1522, 2013 U.S. Dist. LEXIS 167566, at \*5, 2013 WL 6178579, at \*1 (E.D.N.Y. Nov. 25, 2013); *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784(WHP), 2012 U.S. Dist. LEXIS 80905, at \*10–11, 2012 WL 2108220, at \*4 (S.D.N.Y. June 11, 2012); *see also, e.g., Toyota Motor Corp. v. Super. Ct. of L.A. Cty.*, 130 Cal. Rptr. 3d 131, 146–47 (Cal. Ct. App. 2011) (noting that “foreign corporation[s]’ agents are frequently compelled for deposition on American soil” under federal law and that “[v]arious state courts likewise have ordered foreign nationals to attend depositions in this country”).

97. *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 171 (S.D.N.Y. 1985), *cited*

compels discovery on foreign soil, foreign judicial sovereignty may be infringed, but when depositions of foreign nationals are taken on American or neutral soil . . . comity concerns are not implicated”—has also been cited as a defense.<sup>98</sup> For these very reasons, a foreign corporation subject to a United States court’s *in personam* jurisdiction can be—and have been—ordered under Rule 30(b)(6) to produce its officers, directors, or managing agents in the United States to give deposition testimony.<sup>99</sup> In such situations, federal courts almost invariably select an American city, *i.e.* Washington or New York for European deponents.<sup>100</sup>

In short, in the case of a corporation’s deposition under Rule 30(b)(6), two presumptions, subject to endless adjustments, persist. Often cited, of course, is the “presumption” that the deposition of a corporation’s agents and officers should ordinarily be taken at the company’s principal place of business.<sup>101</sup> When the corporation is a defendant, this postulate’s cogency only grows.<sup>102</sup> In line with this understanding, as much case law declares, good cause for a protective order cannot be established simply by arguing that it would be burdensome to travel to a foreign country and/or because the deponent is a busy executive.<sup>103</sup> In truth, however, federal courts actually accord “varying degrees of deference” to this so-called “presumption.”<sup>104</sup> As one explained, it can be readily overcome by showing that “peculiar” circumstances favor depositions at a different location or factors of cost, convenience, and litigation efficiency favor holding the deposition outside of the witness’ district.<sup>105</sup> The presumption loses further force in cases where a plaintiff

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*in Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 338 (N.D. Ind. 2000).

98. *In re Honda Am. Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D. 535, 538 (D. Md. 1996) (citing numerous cases, including *In re Anschuetz & Co.*, 754 F.2d 602, 608 n.13 (5th Cir. 1985)).

99. *Custom Form Mfg., Inc.*, 196 F.R.D. at 336 (collecting cases, including *In re Honda Am. Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D. at 541–42; *M & C Corp. v. Erwin Behr GmbH & Co.*, 165 F.R.D. 65, 68 (E.D. Mich. 1996); and *Roberts v. Heim*, 130 F.R.D. 430, 439–40 (N.D. Cal. 1990)); *Work v. Bier*, 106 F.R.D. 45, 52 (D.D.C. 1985) (emphasis added).

100. *See SEC v. Banc de Binary*, No. 2:13-CV-993-RCJ-VCF, 2014 U.S. Dist. LEXIS 34373, at \*13–30, 2014 WL 1030862, at \*4–8 (D. Nev. Mar. 14, 2014); *New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 469 (N.D. Ill. 2007).

101. *Magnus Elecs., Inc. v. Masco Corp. of Ind.*, 871 F.2d 626, 630 (7th Cir. 1989); *Chris-Craft Indus. Prods., Inc. v. Kuraray Co., Ltd.*, 184 F.R.D. 605, 607 (N.D. Ill. 1999).

102. *Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 162 (N.D. Ill. 1982).

103. *E.g.*, *Motion Games, LLC v. Nintendo Co., Ltd.*, No. 6:12-cv-878-JDL, 2014 U.S. Dist. LEXIS 147853, at \*13, 2014 WL 5306961, at \*3 (E.D. Tex. Oct. 16, 2014); *Invensas Corp. v. Renesas Elecs. Corp.*, No. CA 11-448-GMS-CJB, 2012 U.S. Dist. LEXIS 92455, at \*10, 2012 WL 2501106, at \*3–4 (D. Del. June 27, 2012).

104. *New Medium Techs., LLC*, 242 F.R.D. at 466.

105. *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 107 (S.D.N.Y. 2001); *see also, e.g., Doe*, 1997 U.S. Dist. LEXIS 1073, at \*10–11, 1997 WL 45515, at \*3–4.

chose the relevant forum as a result of unavoidable and strict constraints.<sup>106</sup> And “[w]here the factual premise is attenuated, the presumption is weakest.”<sup>107</sup> Riddled with such exceptions, the “presumption” that a defendant or non-party witness will be deposed in the district where the deponent resides or has a principal place of business has been described as “the antithesis of [one].”<sup>108</sup>

#### *D. Regnant Tests*

If “no place . . . appears convenient for the parties,” the deposition’s location must be decided.<sup>109</sup> Axiomatically, courts have wide discretion in determining the appropriate place and may attach any number of conditions, including payment of expenses.<sup>110</sup> When making the foregoing determinations, courts attempt to ascertain whether “circumstances exist distinguishing the [present] case from the ordinary run of civil cases.”<sup>111</sup> Typically, these tribunals employ the five-factor test famously limned in *Cadent Ltd. v. 3M Unitek Corp.*: “(1) the location of counsel for the parties in the forum district; (2) the number of corporate representatives a party is seeking to depose; (3) the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court; (4) whether the persons sought to be deposed often engage in travel for business purposes; and (5) the equities with regard to the nature of the claim and the parties’ relationship.”<sup>112</sup> Separately from and additionally to this quintet, courts tend to weigh (6) its own “ability to supervise depositions and resolve discovery dispute[s],”<sup>113</sup> and (7) “whether the [proposed] deposition would be impeded by the foreign nation’s laws or would affront the nation’s judicial sovereignty,”<sup>114</sup> an analysis substantively identical to

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106. *Devlin v. Transp. Commc’ns Int’l Union*, Nos. 95 Civ. 0742 (JFK) (JCF), 95 Civ. 10838 (JFK) (JCF), 2000 U.S. Dist. LEXIS 264, at \*8–9, 2000 WL 28173, at \*3 (S.D.N.Y. Jan. 14, 2000).

107. *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989).

108. *New Medium Techs., LLC*, 242 F.R.D. at 466.

109. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987).

110. *Sacramento E.D.M., Inc. v. Hynes Aviation Indus., Inc.*, No. 2:13-cv-0288 MCE KJN, 2014 U.S. Dist. LEXIS 126922, at \*2–3, 2014 WL 4471419, at \*1 (E.D. Cal. Sept. 10, 2014) (collecting cases).

111. *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 472 (E.D. Va. 2010).

112. 232 F.R.D. 625, 629 (C.D. Cal. 2005); *accord, e.g., Banc de Binary*, 2014 U.S. Dist. LEXIS 34373, at \*10 & n.8, 2014 WL 1030862, at \*3 & n.8 (describing the *Cadent* factors as the default rule in the Ninth Circuit and noting that other circuits use similar tests); *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 571 (W.D. Va. 1998) (citing the same five factors, occasionally branded the “*Armsey* factors”).

113. *Afram Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1365 (7th Cir. 1985).

114. *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000).

that impliedly mandated by Rule 28(b).

Relevant to the *Cadent* test and its iterations is Rule 30: “[t]he parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means,”<sup>115</sup> with the Rule read to mean that a deposition is “taken” where the deponent is physically located regardless of the means by which he or she is being queried—as well as a federal court’s power to authorize use of alternate discovery methods, “such as the use of written questions,” so as to minimize any number of difficulties.<sup>116</sup> Thus, courts have repeatedly ordered individuals located abroad to be deposed by video conference under Rule 30,<sup>117</sup> partly impelled by the *Cadent* tests’ stress on circumstantial equities and driven by the desire to encourage parties to make use of technology to limit costs whenever feasible.<sup>118</sup> With just as much unflagging faithfulness, they have made clear that the constrictions applicable under Rule 28(b) must still be adhered if the deponent is located outside the specific forum.<sup>119</sup>

### *E. Distillation*

As noted above, Rule 30, particularly paragraph (a)(1), sets forth the governing standard for fixing a deposition’s site. Notably, “[t]he deponent’s attendance may be compelled by subpoena under Rule 45,” whether or not the deponent is a party.<sup>120</sup> However, “[a] deposition notice is all that is needed to require the attendance of parties at their depositions.”<sup>121</sup> In contrast, a subpoena must only be “served on a *non-party* to compel attendance at the taking of a deposition.”<sup>122</sup> Admittedly,

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115. FED. R. CIV. P. 30(b)(4).

116. *Wis. Real Estate Inv. Tr. v. Weinstein*, 530 F. Supp. 1249, 1254 (E.D. Wis. 1982).

117. *See, e.g.*, *Yowie N. Am., Inc.*, No. 13-CV-1906 BEN (JMA), 2013 U.S. Dist. LEXIS 163127, at \*6, 2013 WL 6061945, at \*2 (S.D. Cal. Nov. 14, 2013) (citing cases so ordering); *United States v. Philip Morris USA, Inc.*, No. 99-2496, 2004 U.S. Dist. LEXIS 24551, 2004 WL 3253681 (D.D.C. Aug. 30, 2004); *UniSuper Ltd. v. News Corp.*, No. 1699-N, 2006 Del. Ch. LEXIS 31, 2006 WL 375433 (Del. Chanc. Feb. 9, 2006).

118. *See Guillen v. Bank of Am. Corp.*, No. 10-05825, 2011 U.S. Dist. LEXIS 97966, at \*2, 2011 WL 3939690, at \*1 (N.D. Cal. Aug. 31, 2011).

119. *See, e.g.*, *Angamarca v. Da Ciro, Inc.*, 303 F.R.D. 445, 446 (S.D.N.Y. 2012); *Am. Nat’l Fire Ins. Co. v. Mirasco, Inc.*, 265 F. Supp. 2d 240, 250 (S.D.N.Y. 2003).

120. FED. R. CIV. P. 30(a)(1).

121. *United States v. \$ 160,066.98 from Bank of Am.*, 202 F.R.D. 624, 627 (S.D. Cal. 2001); *see also, e.g.*, *Calderon v. Experian Info. Solutions, Inc.*, 287 F.R.D. 629, 631 (D. Idaho 2012) (“It is, of course, black letter law that only a party to a lawsuit may be deposed pursuant to notice as opposed to subpoena.”).

122. FED. R. CIV. P. 30 advisory committee’s note to 1971 amendment (emphasis added); *see also, e.g.*, *Lehman v. Kornblau*, 206 F.R.D. 345, (E.D.N.Y. 2001) (“Discovery of non-parties must be conducted by subpoena pursuant to Fed. R. Civ. P. 45, not the rules governing discovery of parties.”); *cf. Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D. Cal. 2005) (concluding that once a non-party is

Rule 45, expressly applicable only if subpoenas must be or are actually used, contains the 100-mile limitation.<sup>123</sup> Despite this fact, however, courts have used the 100-mile limitation in evaluating where a deposition of a non-party should be located, frequently construing anything more than 100 miles to be a “substantial burden” that reinforces the classic presumptions précised below. More significantly, Rule 26(c)(2) and the *Cadent* factors, numbering anywhere from four to seven<sup>124</sup> or even eight,<sup>125</sup> can be, and have been, invoked to modify these same presumption(s).<sup>126</sup> Perhaps unsurprisingly, “[c]ost considerations related to the location of depositions” should be “viewed through at least two lenses: the relative ability of the parties to bear the expense of depositions in a given location, and the effect that the choice of location will have upon the total costs of litigation.”<sup>127</sup> In the end, a court<sup>128</sup> “must consider each case on its own facts and the equities of the particular situation,”<sup>129</sup> and always retains “wide discretion to establish the time and place of depositions”<sup>130</sup> in the interest of justice and procedural equity.<sup>131</sup> Regardless, court and party would be well-served by beginning with the checklists included in this article’s appendix, matched to both the relevant rules and the regnant precedent.

### III. CONCLUSION

In legal and colloquial discourse, words like “reasonable” and

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served in accordance with Rule 45, it is under the same obligation that would be conferred on a party to whom request is addressed pursuant to Rule 30).

123. FED. R. CIV. P. 45(C)(1)(A).

124. *Sacramento E.D.M., Inc. v. Hynes Aviation Indus.*, No. 2:13-cv-0288 MCE KJN, 2014 U.S. Dist. LEXIS 126922, at \*4, 2014 WL 4471419, at \*1–2 (E.D. Cal. Sept. 10, 2014); *see also, e.g.*, *Clean Air Council v. Dragon Int’l Grp.*, No. 1:CV-06-0430, 2007 U.S. Dist. LEXIS 89565, at \*3–4, 2007 WL 4276532, at \*1 (M.D. Pa. Dec. 5, 2007) (identifying many factors, though emphasizing the significance of “hardship to the parties”).

125. *In re Honda Am. Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D. 535, 538 (D. Md. 1996).

126. *E.g.*, *Nat’l Cmty. Reinvestment Coal. v. NovaStar Fin., Inc.*, 604 F. Supp. 2d 26, 31–32 (D. D.C. 2009); *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988).

127. *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 5682 (CBM), 2003 U.S. Dist. LEXIS 13859, at \*8, 2003 WL 21910861, at \*3 (S.D.N.Y. Aug. 11, 2003).

128. Logically, this case law draws no distinction between magistrate and district court judges. *S. Seas Catamaran, Inc. v. The Motor Vessel “Leeway”*, 120 F.R.D. 17, 21 (D.N.J. 1988).

129. *Turner*, 119 F.R.D. at 383.

130. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994).

131. *See Arizona v. California*, 292 U.S. 341, 347, 54 S. Ct. 735, 737, 78 L. Ed. 1298 (1934) (observing that the traditional powers of the courts at equity, as codified in Rule 27(a), date from even before the adoption of the Constitution); *cf. In re Standard Metals Corp.*, 817 F.2d 625, 628 (10th Cir. 1987) (“The trial court has great discretion in establishing the time and place of a deposition.”); *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000) (quoting *In re Standard Metals Corp.*, 817 F.2d at 628).

“cause” imply an award of discretion. Where little definitive direction jumps from the pertinent texts, and courts must instead rely on contextual extrapolation, that freedom increases exponentially. Within the world of federal procedure, the complicated calculus involved in determining the situs of any deposition is but one more demonstration of this old truth. Of course, where a deponent opts not to contest another’s choice, a party’s pick poses no problems, but where objection is lodged, parties and courts alike must wander into a wild terrain. There, the Rules give some aid; there, presumptions duel; there, such fluid phrases as “cost, convenience, and litigation efficiency” get tossed around, jumping from motion to motion and from decision to decision, like demented ions. That some coherence can be artificially concocted by diligent readers does not change the threats to clarity and certainty posed by ill-defined rules and sloppy ratiocination. Perhaps, then, the time has come to finally input a definite standard for this unmathematical assay into Rule 30(b)’s sphinxlike decree, one akin to that now encoded in Rule 26(b)(1). Otherwise, bitter controversy will continue, and discretion, for good and ill, will litter this peculiarly vacant procedural field with almost surely incompatible curiosities.<sup>132</sup> While Congress may have “given the responsibilities for filling in the details of common law statutes” to the courts,<sup>133</sup> such vacuums can sometimes undermine the law’s very quiddity.<sup>134</sup>

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132. Indeed, even if globalization’s allure has waned, to allow this emptiness to continue is to invite far more risks to international comity and procedural coherence than a definite touchstone would foster. Cf. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 294 (1993) (describing the dangers of certain discretionary terms to the predictability of bankruptcy jurisprudence).

133. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377–78 (1988).

134. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (“Stability and predictability are essential factors in the proper operation of the rule of law.”); cf. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547, 115 S. Ct. 1043, 1055, 130 L. Ed. 2d 1024 (1995) (rejecting a complex test that would “jettison[] relative predictability for the open-ended rough-and-tumble of factors that assures complex argument[s] in [the] trial court and . . . virtually inevitable appeal” (internal quotation marks omitted)).

## V. APPENDIX

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
1	_____	(a) Party . . . who . . .	Different presumptions apply depending on whether the deponent party is a plaintiff or a defendant. Generally, a natural <i>plaintiff</i> must make himself/herself available for examination in the forum in which the suit was brought. <sup>135</sup> Conversely, an initial presumption exists that a natural <i>defendant</i> should be deposed in the district of his residence or principal place of business. <sup>136</sup> Eminent good sense underlies these dueling presumptions: “[b]ecause the plaintiff often chooses the forum, he will more likely be required to attend his deposition when set in the forum district,” but “[a] defendant . . . does not choose the forum.” <sup>137</sup>
	_____	(b) lives <i>less</i> 100 miles from forum court . . .	
	_____	(c) over which personal jurisdiction <i>does</i> exist; and	
	_____	(d) who is a <i>natural person</i> .	However, where the forum court has jurisdiction and the potential deponent is a party to the action and resides in the forum, the examining party is often free to “unilaterally choose a deposition’s location,”

135. *Lexington Ins. Co. v. Commonwealth Ins. Co.*, No. C98-3477-CRB (JCS), 1999 U.S. Dist. LEXIS 23428, at \*27, 1999 WL 33292943, at \*9 (N.D. Cal. Sept 17, 1999); *accord* *Masterobjects, Inc. v. eBay, Inc.*, No. 3:12-cv-680 JSC, 2013 U.S. Dist. LEXIS 118943, at \*2 (N.D. Cal. Aug 21, 2013); *see also, e.g.*, *Yaskawa Elec. Corp. v. Kollmorgen Corp.*, 201 F.R.D. 443, 444 (N.D. Ill. 2001) (observing that “in the absence of compelling circumstances or extreme hardship, a plaintiff should appear for a deposition in the forum of his choice—even if he is a nonresident.” (internal quotation marks omitted) (citing *Orrison v. The Balcor Co.*, 132 F.R.D. 202, 203 (N.D. Ill. 1990)); *S. Seas Catamaran, Inc. v. The Motor Vessel “Leeway”*, 120 F.R.D. 17, 21 (D.N.J. 1988) (noting this “general rule”).

136. *Fausto v. Credify Servs. Corp.*, 251 F.R.D. 427, 429 (N.D. Cal. 2008) (relying on *Doe v. Karadzic*, Nos. 93 Civ. 878 (PKL) (HBP), 93 Civ. 1163 (PKL) (HBP), 1997 U.S. Dist. LEXIS 1073, at \*8–9, 1997 WL 45515, at \*3 (S.D.N.Y. Feb. 4, 1997)); *accord, e.g.*, *Thykkuttathil v. Keese*, No. C12-1749RSM, 2013 U.S. Dist. LEXIS 120426, at \*3–4 (W.D. Wash. Aug. 23, 2013); *Willis v. Mullins*, No. CV-F-04-6542 AWI LJO, 2006 U.S. Dist. LEXIS 35627, at \*16, 2006 WL 302343, \* 5-6 (E.D. Cal. Feb. 8, 2006) (citing to *Grey v. Cont’l Mktg. Assocs.*, 315 F. Supp. 826, 832 (N.D. Ga. 1970)); *Mothersbaugh v. GTX, Inc.*, No. 89-1202-FR, 1990 U.S. Dist. LEXIS 4022, at \*2, 1990 WL 47389, at \*1 (D. Or. Mar. 29, 1990); *Fed. Deposit Ins. Co. v. La Antillana, S.A.*, No. 88 Civ. 2670 (JFK), 1990 U.S. Dist. LEXIS 13246, 1990 WL 155727 at \*2 (S.D.N.Y. Oct. 5, 1990).

137. *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
			subject only to the constraints imposed by Rule 26. <sup>138</sup>  In sum, then, if conditions (a) through (d) hold, neither of the two presumptions summed here come into play, for the examining party's right to choose the deposition's location can never be too inconvenient (etc.) for a party that is a natural person who lives less than 100 miles from the forum court.
2	_____	(a) Party . . . which	The same presumptions discussed in Row #1 as to the officers, directors, or managing agents <sup>139</sup> to be deposed pursuant to Rule 30(b)(1) and (b)(6) of a corporation. In other words, "[t]he deposition of a corporation by its

138. *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 628 (C.D. Cal. 2005); *accord, e.g.*, *Reishus v. Almaraz*, No. CV-10-0760-PHX-LOA, 2011 U.S. Dist. LEXIS 21113, at \*8–9, 2011 WL 676920, at \*3 (D. Ariz. Feb. 23, 2011); *United States v. \$160,066.98 from Bank of Am.*, 202 F.R.D. 624, 627 (S.D. Cal. 2001).

139. Per the relevant rule's text, this presumption extends only to directors, officers, and managing agents. FED. R. CIV. P. 30(b)(6). However, because a corporation served under Rule 30(b)(6) can itself designate an agent to be deposed if the other party's request is not specific as to person and title, non-managing but expressly designated agents are occasionally treated like officers, directors, and their managing brethren, as this article has already adduced. *See supra* Part IIC; *Couch v. Harmony Sci. Acad. – El Paso*, No. EP08-CA-201-FM, 2009 U.S. Dist. LEXIS 51085, at \*14, 2009 WL 10669392, at \*4–5 (W.D. Tex. Feb. 10, 2009) (denying defendants' request to dictate the location of the individual they had designated to respond to the Rule 30(b)(6) deposition as defendants' because "the organization noticed for the Rule 30(b)(6) deposition is a *party* and not a *non-party*" (emphasis in original)); FED. R. CIV. P. 30(b)(6) ("The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf . . ."). With the caveat that the term "managing agent" is itself nebulous and elastic, the narrow interpretation appears the more appropriate. *See, e.g.*, *Richmond v. Mission Bank*, No. 1:14-cv-0184-JLT, 2015 U.S. Dist. LEXIS 48452, at \*27, 2015 WL 1637835, at \*11–12 (E.D. Cal. Apr. 13, 2015).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
	_____	(b) lives <i>less</i> 100 miles from forum court . . .	agents and officers should ordinarily be taken at its principal place of business.” <sup>140</sup> Equally true, the deposing party has great freedom to choose the deposition’s location if conditions (a) through (d) hold true. If the deponent is not a director, officer, managing agent, however, the deponent is treated as a non-party. <sup>141</sup> For the presumption applicable to such witnesses, see Row 7 through 10.
	_____	(c) over which personal jurisdiction <i>does</i> exist; and	
	_____	(d) which is a <i>corporation</i> .	
*** Only difference between (1) and (2) is (d). ***			

140. *Cadent*, 232 F.R.D. at 628 (citing 8A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2112 (2d ed. rev. 1994)); *accord, e.g.*, *Calderon v. Experian Info. Solutions, Inc.*, 287 F.R.D. 629, 636 (D. Idaho 2012) (citing *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 473 (E.D. Va. 2010), and *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, 268 F.R.D. 45, 54–55 (E.D. Va. 2010)); *Hardin v. Wal-Mart Stores, Inc.*, No. 08-CV-0617 AWI BAM, 2011 U.S. Dist. LEXIS 138892, at \*13–14, 2011 WL 11563217, at \*5 (E.D. Cal. Dec. 2, 2011); *Strategic Intent, LLC v. Strangofrd Lough Brewing Co. Ltd.*, No. CV-09-309-RHW, 2010 U.S. Dist. LEXIS 69131, at \*6, 2010 WL 2486365, at \*2 (E.D. Wash. June 16, 2010); *Dean Foods Co. v. Eastman Chem. Co.*, Nos. C 00-4379 WHO, C 00-4402 WHO (JL), 2001 U.S. Dist. LEXIS 25447, at \*14–16 (N.D. Cal. Aug. 13, 2001).

141. *Calderon*, 287 F.R.D. at 631.

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
3	_____	(a) Party . . . who . . .	Interestingly, personal jurisdiction does not directly affect the previously discussed presumptions. Indeed, in and of itself it will not defeat operation of the aforementioned rules of thumb. <sup>142</sup> Instead, in the few cases even discussing this relationship, the fact that personal jurisdiction has been established is cited as one of the more compelling reasons to modify these presumptions. <sup>143</sup> To wit, the presumptions detailed in Rows 1 and 2 operate regardless of personal jurisdiction. <sup>144</sup> Its presence or absence, of course, may factor into the balancing test required by <i>Cadent</i> and its progeny.
	_____	(b) lives <i>less</i> 100 miles from forum court . . .	
	_____	(c) over which personal jurisdiction <i>does not</i> exist; and	
	_____	(d) who is a <i>natural person.</i>	

142. *Sloniger v. Deja*, No. 09CV858S, 2010 U.S. Dist. LEXIS 134414, at \*26–28, 2010 WL 5343184, at \*9 (W.D.N.Y. Dec. 20, 2010) (citing two non-California cases which applied variants of the *Cadent* test and concluding that the existence of personal jurisdiction could not “overcome the presumption under federal law that a non-resident defendant should be deposed in his place of residence” absent “extraordinary circumstances”); *Wallace v. Hounshel*, No. 1:06-cv-1560-RLY-TAB, 2008 U.S. Dist. LEXIS 6607, at \*2–4, 2008 WL 282069, at \*1–2 (S.D. Ind. Jan. 29, 2008) (alluding to its own lack of personal jurisdiction over the deponent, but not considering it as decisive, and ultimately applying the presumption).

143. *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000) (“When a foreign corporation is doing business in the United States, *is subject to the court’s jurisdiction*, and has freely taken advantage of our federal rules of discovery, exceptions to the general rule on the location of depositions are often made.” (emphasis added) (collecting cases)); *see also Metcalf v. Bay Ferries Ltd.*, No. 12-40075-TSH, 2014 U.S. Dist. LEXIS 98538, at \*3–4, 2014 WL 3670786, at \*1–2 (D. Mass. July 21, 2014) (ordering a foreign company to present its agent for deposition in Massachusetts, as plaintiffs’ counsel requested in the relevant notice); *New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 466 (N.D. Ill. 2007) (quoting *Custom Form Mfg., Inc.*, 196 F.R.D. at 336); *I Create Int’l, Inc. v. Mattel, Inc.*, No. 03 Civ. 3993 (JFK), 2004 U.S. Dist. LEXIS 15477, at \*14, 2004 WL 1774250, at \*5 (S.D.N.Y. Aug. 9, 2004) (noting that the disparity in means which may justify transfer to a venue where personal jurisdiction exists may impact how a court exercises its discretionary power over depositions’ location).

144. *See Custom Form Mfg., Inc.*, 196 F.R.D. at 336.

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
4	_____	(a) Party . . . which . . .	The same analysis regarding the location of natural parties over whom personal jurisdiction does not exist extends to corporations with one change. If an officer, director, or managing agent is to be deposed, the presumption is different than if merely an employee is involved. The latter are treated as non-party witnesses, for whom different presumptions, detailed in Rows 7 through 10, apply.
	_____	(b) lives <i>less</i> 100 miles from forum court . . .	
	_____	(c) over which personal jurisdiction <i>does not</i> exist; and	
	_____	(d) which is a <i>corporation</i> .	
** Only difference between (3) and (4) is (d). ***			

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
5	_____	(a) Party . . . who . . .	Within most circuits, the presumption summarized in Row 1 is regularly invoked here so long as a subpoena under Rule 45(c)(1) is not employed. Thus, “the rule that the place of depositions is presumptively where the deponent resides applies.” <sup>145</sup>
	_____	(b) lives <i>more than</i> 100 miles from forum court . . .	A matter purely of degree, one difference can be discerned: this same presumption is even stronger when a party is so far removed from the forum court. So animated, as court after court within this circuit has repeated, “[w]hen a deponent resides at a <i>substantial distance</i> from the deposing party’s residence, the deposing party should be required to take the deposition at a location in the vicinity in which the deponent resides, <i>even if the deponent is a party.</i> ” <sup>146</sup>
	_____	(c) over which personal jurisdiction <i>does</i> exist; and	Notably, whether or not “substantial distance” is identical to “more than 100

145. *Berry v. Baca*, No. CV 01-02069 DDP (SHx), 2002 U.S. Dist. LEXIS 15698, at \*10, 2002 WL 1777412, at \*3 (C.D. Cal. July 30, 2002); *accord* \$160,066.98, 202 F.R.D. at 627.

146. *Gen. Leasing Co. v. Lawrence Photo-Graphic Supply, Inc.*, 84 F.R.D. 130, 131 (W.D. Mo. 1979) (emphasis added); *see also* *Mothersbaugh v. GTX, Inc.*, No 89-1202-FR, 1990 U.S. Dist. LEXIS 4022, at \*2, 1990 WL 47389, at \*1 (D. Or. Mar. 29, 1990) (quoting *Gen. Leasing Co.*, 84 F.R.D. at 131); *accord, e.g.*, *Clairmont v. Genuity, Inc.*, No. C02-1876L, 2004 U.S. Dist. LEXIS 20784, at \*2–3, 2004 WL 2287781, at \*1 (W.D. Wash. Mar. 26, 2004) (quoting *Metrex Res. Corp. v. United States*, 151 F.R.D. 122, 125 (D. Colo. 1993)).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
	_____	(d) who is a <i>natural person</i> .	miles” is unclear. Nonetheless, as Rule 32(a)(4)(B) defines an unavailable witness as one who “is more than 100 miles from the place of hearing or trial or is outside the United States,” <sup>147</sup> and per the embedded mandate of Rule 1, <sup>148</sup> it would be logical and reasonable to so consider it.
6	_____	(a) Party . . . which . . .	The same analysis in Row 5 extends to corporations with one change. If an officer, director, or managing agent is to be deposed, the presumption is different than if merely an employee is involved. The former are subject to the same stronger-than-usual presumption summarized in Row 5; the latter (i.e. non- managing agents) are treated as non-party witnesses, to whom a different presumption applies. For the applicable rules, see Rows 7 through 10.
	_____	(b) lives <i>more than</i> 100 miles from forum court . . .	
	_____	(c) over which. personal jurisdiction <i>does</i> exist; and	
	_____	(d) which is a <i>corporation</i> .	
*** Only difference between (5) and (6) is (d). ***			

147. FED. R. CIV. P. 32(a)(4)(B); Delgado v. Pawtucket Police Dep’t, 668 F.3d 42, 49 (1st Cir. 2012).

148. FED. R. CIV. P. 1; Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964) (contending that “the Rules were intended to embody a unitary concept of efficient and meaningful judicial procedure, and that no single Rule can consequently be considered in a vacuum”).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
7	_____	(a) Non-party . . . who . . .	Whether or not a deponent is a party or a non-party, the general presumption remains the same: they ought to be deposed where the deponent resides or has its/his/her principal place of business. <sup>149</sup> However, unlike the other precepts previously delineated, because “an ordinary non-party witness” can only be deposed via “a subpoena” under Rule 45, this presumption is essentially statutory <sup>150</sup> and delimited by mileage. <sup>151</sup> Per Rule 45(c)(1)(A), a subpoena can command a person to attend a deposition only “within 100 miles of where the person resides, is employed, or regularly

149. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784(WHP), 2012 U.S. Dist. LEXIS 80905, at \*11, 2012 WL 2108220, at \*4 (S.D.N.Y. June 11, 2012) (collecting cases). A few federal courts in California have implicitly endorsed this approach. *Berry*, 2002 U.S. Dist. LEXIS 15698, at \*11, 2002 WL 1777412, at \*3 (endorsing the general rule, which applies to parties and non-parties alike, that “the place of depositions is presumptively where the deponent resides,” applicable “*even if* the deponent is a party”) (emphasis added).

150. Since the Rules have the force and effect of law, their commands can be described as “statutory.” *Morel v. Daimler-Chrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009) (citation omitted) (internal quotation marks omitted); see also, e.g., *Police & Fire Ret. Sys. of City of Detroit v. Indymac MBS, Inc.*, 721 F.3d 95, 108 n.14 (2d Cir. 2013) (“The Federal Rules of Civil Procedure . . . have the force and effect of a federal statute.” (internal quotation marks omitted)); *SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin)*, 530 F.3d 230, 235 (3d Cir. 2008) (“The Rules are binding and courts must abide by them unless there is an irreconcilable conflict with the Bankruptcy Code.”), *abrogated on other grounds*, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 158 (2010); *Shachmurove*, *supra* note 9, at 511 n.2 (citing these and other cases).

151. *Calderon v. Experian Info. Solutions, Inc.*, 287 F.R.D. 629, 631 (D. Idaho 2012); *cf.* *Symantec Corp. v. Acronis, Inc.*, No. 11-cv-5310 EMC (JSC), 2013 U.S. Dist. LEXIS 17505, at \*4–5, 2013 WL 503612, at \*1 (N.D. Cal. Feb. 8, 2013) (opining that if a person is a non-party “[their] deposition must be sought by third-party subpoena”).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
	_____	(b) works/lives less 100 miles from forum court.	transacts business.” <sup>152</sup> In this scenario, with the forum court being within 100 miles of non-party’s residence, no possible deposition location within that area can violate the rule. <sup>153</sup>
	_____	(a) Non-party . . . who . . .	Element (b) is key here, effectively propagating one more presumption. Quite simply, a non-party cannot be deposed more than “100 miles . . . [from] where the person resides, is employed, or regularly transacts business.” <sup>154</sup> This strict reading of Rule 45 widely prevails. <sup>155</sup> Numerous courts within the jurisdiction of the Ninth Circuit have followed it as well. <sup>156</sup>  Arguably, the Ninth Circuit did so as well

152. FED. R. CIV. P. 45(c)(1)(A); *In re Apple, Inc.*, 581 F. App’x 886, 889 (Fed. Cir. 2014). Rule 45(c)(1)(B) dispenses with the 100-mile limitation, allowing for depositions to be held “within the state where the person resides, is employed, or regularly transacts business in person,” but only so long as that person is “a party or a party’s officer” *or* is being commanded “to attend a trial,” not a deposition, “and would not [thereby] incur substantial expense.” FED. R. CIV. P. 45(c)(1)(B).

153. The 100-mile limitation has been criticized as archaic, particularly inappropriate in the context of complex and multidistrict litigation. *See Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213, 221–22 (E.D. La. 2008) (collecting cases).

154. FED. R. CIV. P. 45(c)(1)(A).

155. *State Nat’l Ins. Co. v. Cty. of Camden*, No. 08-5128(NLH)(AMD), 2010 U.S. Dist. LEXIS 65142, at \*7, 2010 WL 2719810, at \*3 (D.N.J. June 30, 2010) (“[N]umerous cases throughout the country . . . make it clear that a court must quash any subpoena that calls for a deposition beyond the 100 mile limit for non-party witness.”); *Edelman v. Taittinger (In re Edelman)*, 295 F.3d 171, 178 (2d Cir. 2002). Consequently, the discretion which courts normally have about locating depositions does not exist when Rule 45 applies, as it does regarding non-party deponents. *State Nat’l Ins. Co.*, 2010 U.S. Dist. LEXIS 65142, at \*7, 2010 WL 2719810, at \*3.

156. *See, e.g., Dolezal v. Fritch*, No. CV-08-1362-PHX-DGC, 2009 U.S. Dist. LEXIS 26238, at \*3–4, 2009 WL 764542, at \*2 (D. Ariz. Mar. 23, 2009); *Mothersbaugh v. GTX, Inc.*, No. 89-1202-FR, 1990 U.S. Dist. LEXIS 4022, at \*2, 1990 WL 47389, at \*1 (D. Or. Mar. 29, 1990).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
	—	(b) works/lives <i>more than</i> 100 miles from forum court.	when it found it was not an abuse of discretion for a district court, under Rule 45(d)(1), “to protect this witness from the burden of traveling overseas for examination” by ordering that the deposition of a non-party witness take place in that deponent’s domicile (Sweden). <sup>157</sup>
*** Only difference between (7) and (8) is (b). ***			

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157. Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
9	_____	(a) Non-party . . . who . . .	The presumptions summarized in Rows 8 and 9 control. For non-parties, the 100-mile limitation is the key factor, not the fact that the person lives abroad, though a person's foreign residence will affect how service of a subpoena can be made and whether a deposition can even be held. <sup>158</sup>
	_____	(b) works/lives <i>abroad</i> ; and . . .	
	_____	(c) who is <i>not</i> a United States citizen.	
10	_____	(a) Non-party . . . who . . .	As to Row 10, the same presumptions summarized in Rows 8 and 9 govern here, though they are undeniably weaker due to a suddenly applicable statute. To summarize, if the non-party is a United States citizen, § 1783(a) governs.  Under that statute, “[a] court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country.” <sup>159</sup> Two

158. *See, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 300 (3d Cir. 2004) (“[T]he Federal Rules are ‘the normal methods’ for federal litigation involving foreign national parties unless the ‘optional’ or ‘supplemental’ [Hague] Convention procedures prove to be conducive to discovery under some circumstances.”); *United States v. Afram Lines, Ltd.*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994) (“[Non-party] witness[es] must be subpoenaed pursuant to Rule 45 of the Federal Rules of Civil Procedure, or, if the witness is overseas, the procedures of the Hague Convention or other applicable treaty must be utilized.”). Briefly, while the presumption as to location does not change, a more onerous service process, lodged in Rule 4(f), must be followed. FED. R. CIV. P. 4(f); *Estate of Ungar v. Palestinian Auth.*, 412 F. Supp. 2d 328, 335 (S.D.N.Y. 2006).

159. 28 U.S.C. § 1783(a) (2014).

	<u>Yes/No</u>	<b>Characteristics of Potential Deponent</b>	<b>Presumptive Location of Deposition</b>
	_____	(b) works/lives <i>abroad</i> ; and . . .	conditions must be met before a court may authorize a subpoena's issuance pursuant to this section: (a) "that particular testimony or the production of the document or other thing by him is necessary in the interest of justice," and (b) "in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance . . . in any other manner." <sup>160</sup> The subpoena must still be served "in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country," <sup>161</sup> which are encoded in Rule 4(f). <sup>162</sup> While this statute technically creates no more than personal jurisdiction over the proposed deponent, <sup>163</sup> three facts—(a) it allows a court to order a US citizen to appear for a deposition; (b) international procedures may be uncertain or unavailable; and (c) a United States' court's jurisdiction to enforce compulsion with any subpoena evaporates outside of the United States— <i>weaken</i> the normal (and here especially) "strong presumption that foreign defendants should be deposed at their principal place of business or near their residence." <sup>164</sup>
	_____	(c) who <i>is</i> a United States citizen.	
*** Only difference between (9) and (10) is (c). ***			

160. *Id.*

161. *Id.* § 1783(b).

162. However, in contrast with the service of subpoenas on non-U.S. citizens, "[t]he person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses." *Id.*

163. *Blackmer v. United States*, 284 U.S. 421, 438, 52 S. Ct. 252, 255, 76 L. Ed. 375 (1929).

164. *SEC v. Banc de Binary*, No. 2:13-CV-993-RJ-VCF, 2014 U.S. Dist. LEXIS 34373, at \*28, 2014 WL 1030862, at \*9 (D. Nev. Mar. 14, 2014); *SEC v. Sabhlok*, No. C 08-4238 CRB (JL), 2009 U.S. Dist. LEXIS 105194, at \*15-24, 2009 WL 3561523, at \*6-8 (N.D. Cal. Oct. 30, 2009) (discussing facts (a) through (b) and balancing the hardships in such a way as to justify ordering a foreign national covered by § 1783 to be deposed in the United States).