the deposition videotape is advisable with a primary camera focused on taking the inspection/testing videotape.[94]

To alleviate burdensomeness and disruption and create mutually agreeable circumstances,[95] parties commonly collaborate in specifying the location, time and manner of the inspection.[96] However, courts do intervene. For example, when production sought under Rule 34(a) is so voluminous that it would impose oppressive copying and transportation costs on the producing party, courts may order inspection of the records at the producing party's convenience and place of business, rather than hard-copy-production.[97]

3. *Custody, Possession, Control*

Rule 34 authorizes inspection of things and premises if they are within *either* the "possession, custody, *or* control"[98] of a party or proper nonparty.[99] Accordingly, courts do not require the *preparation* of nonexistent writings producible for inspection.[100] Still, the concept of "custody, possession or control" is far-reaching, because only one of the three need apply and "control" is broadly construed under Rule 34;[101] it may include having a legal right to obtain a document, even if no copy is presently possessed.[102] At least one commentator argues and several courts have held that the concept of control should extend to circumstances when a "*practical ability* to obtain materials in possession of another" exists, even absent a legally enforceable right to obtain the documents.[103]

In patent infringement actions, issues of control surface when nonparty agents, such as attorneys, corporate officers and corporate parents and their subsidiaries possess,

94 Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, *in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79, 105 (footnotes omitted).

95 *See* Harris v. Sunset Oil Co., 2 F.R.D. 93, 93 (W.D. Wash. 1941) (ordering production's location and time or, alternatively, allowing parties to agree on a *mutually agreeable* time and place).

96 *See* 7 MOORE ET AL., *supra* note 89, at §34.14[3].

97 *See id.*; *e.g.* Baine v. General Motors Corp., 141 F.R.D. 328, 331 – 32 (M.D. Ala. 1991) (inspection of accident reports at their usual storage location to reduce time and expense).

98 FED. R. CIV. P. 45(a) (emphasis added). The disjunctive listing implies that only a single requirement must apply.

99 Nonparties must be subject to jurisdiction under Federal Rule 45.

100 7 MOORE ET AL., *supra* note 89, at §34.14[2][a]. Nevertheless, creation of a computer tape which did not previously exist was proper under Rule 34. In re Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 641, 646 (E.D. Mich. 1989).

101 7 MOORE ET AL., *supra* note 89, at §34.14[1]. *See also* Societe Internationale v. Rogers, 357 U.S. at 204 – 206, *supra* notes 61 – 63 (holding that *Roger's* factual and legal background mandated Rule 34 to be construed in accordance with the Trading with the Enemy Act's policies and that so read a ruling that the documents were in the plaintiff's "control" sufficient to require Rule 34 production was justified).

102 Scott v. Arex, Inc., 124 F.R.D. 39, 41 (D. Conn. 1989) (control means the right, authority or ability to obtain document on demand); *contra* Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426 – 1427 (7th Cir. 1993) (fact that party could theoretically and only with great efforts obtain a document does not mean it has control).

103 *See* 7 MOORE ET AL., *supra* note 89, at §34.14[2][b]; *e.g.* Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 558 – 559 (S.D.N.Y. 1994) (emphasis added) (ordering corporation to produce tapes made by its officer and in possession of his attorney, because control exists if the party has the practical ability to obtain the tapes).

control or have custody of discoverable evidence. Documents in the possession of such legal persons are, generally, deemed within their corporation's control and, thus, discoverable if non-privileged.[104] This extended and inferred concept of control also covers parent-subsidiary relationships, even if the companies operate in different countries.[105] While the specific corporate form of the companies' relationship does not dispose of the control issue, courts tend to rely on multi-factor tests in assessing whether, overall, the entities have a sufficiently close nexus to justify a finding of control.[106]

4. *Obligation to Preserve and Spoliation*

Until service of process, no general obligation exists to preserve information for potential discovery production.[107] Nevertheless, spoliation, a discovery violation, is defined as the "intentional destruction, mutilation, alteration, or concealment of evidence"[108] in "pending or reasonable foreseeable litigation."[109] Exactly *when* litigation may be deemed "reasonably foreseeable" remains unclear.[110] Thus, while receipt of a warning letter or other notice regarding the possibility of subsequent litigation does not necessarily effect an obligation to preserve likely evidence, courts may construe such acts as sufficient to impose preservation obligations or to permit an adverse inference instruction based on destruction of evidence.[111] Subjective apprehension seems to play an important role in whether document destruction contravenes Rule 26.

B. *Context of Rule 34 amid Other Discovery Rules*

As mentioned above, Rule 26 constitutes an umbrella rule detailing the general parameters of discovery.[112] It allows the parties to discover any nonprivileged matter relevant to a party's claim or defense, "including the existence, description, nature, custody, condition and location of any books, documents or other tangible things."[113] Thus, discoverability extends not only to admissible evidence but also to matter that

104 *See* American Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 233 F.R.D. 209, 212 (D.D.C. 2006) (documents gathered and possessed by attorney are within client's control, but nondiscoverable as work product); *see* General Envtl. Sci. Corp. v. Horsfall, 136 F.R.D. 130, 134 (N.D. Ohio 1991) (individual defendants who are corporate officers, directors and shareholders must produce documents possessed by corporation).
105 Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627 – 29 (N.D. Ind. 1993).
106 Uniden America Corp. v. Ericsson, Inc., 181 F.R.D. 302, 306 (M.D.N.C. 1998) (applying five-factor test to determine control).
107 *E.g.* Hansen v. Dean Witter Reynolds Inc., 887 F. Supp. 669, 675 – 76 (S.D.N.Y. 1995).
108 BLACK'S LAW DICTIONARY POCKET EDITION 659 (2d ed. 2004)
109 *See* West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d. Cir. 1999).
110 *See* Kenneth R. Adamo et al., *Document Discovery in Patent Litigation, in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79, 96 – 7.
111 *See* Rush v. Artuz, 00 Civ. 3436, 2003 U.S. Dist. LEXIS 7158, at *6 (SD.N.Y. Apr. 3, 2003).
112 *See supra* Part II.
113 FED. R. CIV. P. 26(b)(1).