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Cross Border Transfers

NYC Bar Tackles Thorny Cross-Border Discovery Issues

BY MICHAEL GREENE

Complying with U.S. discovery obligations that conflict with foreign data privacy laws can be unenviable task for corporations and their attorneys.

On the one hand, a company can be required to hand over data that is stored overseas during U.S. litigation. And on the other hand, it may break foreign rules—such as the European Union's General Protection Data Regulation— by transferring the data to the U.S. and handing it to an adversary.

Currently there are few resources that specifically address how to navigate cross-border e-discovery issues. A new report from the New York City Bar Association's E-Discovery Working Group may help fill that void.

The report—Cross-Border E-Discovery: Navigating Foreign Data Privacy Laws and Blocking Statutes in U.S. Litigation—provides best practices and guidelines for when a discoverable document resides within a foreign jurisdiction.

The report is the first by a state or local bar to give formal guidance on cross-border data transfers where there is a conflict between U.S. and foreign law.

''In modern litigation, one of the greatest obstacles to an efficient and streamlined discovery process is the conflict of laws that arises when documents that are subject to domestic discovery obligations are simultaneously subject to foreign laws that prohibit their transfer to the United States,'' Daniel Meyers, the chair of New York City Bar's E-Discovery Working Group, told Bloomberg Law in an email.

''Many litigants (and their lawyers) have faced severe consequences at home and abroad by running afoul of this conflict,'' Meyers, who is also President of TransPerfect Legal Solutions' information governance division, said. TransPerfect provides services related to e-discovery and data management.

The objective of the report ''was to raise awareness of this issue and offer practical guidelines to help practitioners identify and navigate this conflict in their own matters,'' he said.

An E-Discovery Nightmare? The bar association's guidance comes at time when litigation often isn't limited to events in a single country.

''In an increasingly global economy, it has become commonplace for data subject to discovery to reside outside of the U.S.,'' Vincent M. Catanzaro, a Philadelphia-based senior attorney at Morgan, Lewis & Bockius LLP, told Bloomberg Law. Catanzaro advises clients on issues related to information governance, data preservation, litigation management, and international and cross-border collection.

''Data can reside in 3rd party cloud providers in any part of the world under any jurisdiction,'' he said. ''Practitioners in this area should always ask, 'where is the data located?' and 'where are the custodians located?' in order to assess the conflicts that may arise.''

More than 80 nations have have enacted privacy laws, according to bar's report. The most significant law may be the EU's GDPR, which went into effect in May. Under GDPR, data protection authorities have the powers to fine companies up to the higher of €20 million or 4 percent of their global revenues, for the most serious data breaches.

One of most cited publications on cross-border discovery is the Sedona Conference's Practical In-House Approaches for Cross-Border Discovery & Data Protection. However, that publication was released in June 2016.

''Unfortunately, as advancements in technology and client resources move at a brisk pace, the law and legal guidance lags behind. However, as is shown here in the NYC Bar Opinion, there is movement,'' Catanzaro said.

Best Practices The New York City Bar report is helpful because it finds the limited amount of case law that deals with cross-border discovery issues, Debbie Reynolds, Data Privacy Officer and Director of eDiscovery at Eimer Stahl LLP, told Bloomberg Law.

Though written for New York attorneys, the report is something that attorneys in other states can use, she said.

Among the best practices suggested in the report include:

- inquiring early on with clients about whether any data resides on foreign servers;
- addressing cross-border discovery issues in meet-and-confers, and in the resulting confidentiality orders;
- choosing a service provider with foreign infrastructure and services; and
- using emerging technology.

''Attorneys must be familiar with foreign disclosure restrictions and work with counsel in the foreign jurisdictions so that they can strictly comply with those restrictions,'' J. Alexander Lawrence, a New York-based partner at Morrison & Foerster LLP and co-chair of its eDiscovery Task Force, told Bloomberg Law.

''Best practice is to bring these issues to the court's attention early on. Waiting to flag the issues is not in your client's best interest,'' he said.

''[W]hen you do identify this issue, keep calm and don't panic, Meyers said. ''There are many ways to navigate the conflict.''

''Retain a discovery vendor with foreign infrastructure and expertise,'' he said. Proactively raise cross-border discovery issues during pre-trial discovery conferences, and add necessary provisions to agreed-upon orders that govern the exchange of information, he said.

''With warning and proactive planning, you can efficiently escape the Catch-22,'' he said.

Theory, Meet Practice ''The NYC Bar opinion does a good job of outlining the issues, identifying the various elements of why it is so difficult to resolve, and listing the methods courts have used to evaluate individual situations,'' Catanzaro said.

''One of the most practical pieces of the report is the suggestion that parties be transparent regarding difficult data sources and the means for collecting that data within the context of litigation,'' Catanzaro said.

''Unfortunately, and in the theoretical context of a legal analysis, these 'best practices' are often ignored within the context of everyday litigation,'' he said. ''Parties can be as transparent as they want, but if a requesting party needs the unique data located outside of the U.S. and successfully convinces the court of that necessity, the likelihood is that the party will have to make a decision on whose authority to ignore, that of the US Court or that of its local jurisdiction. It then becomes a risk evaluation that informed parties will need to make on a case-by-case basis with the advice of counsel.''

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