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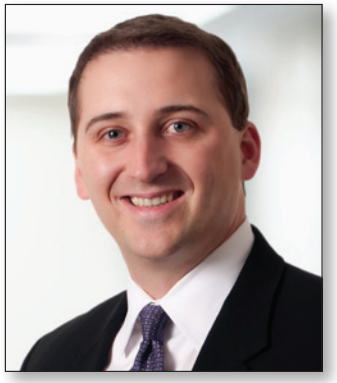
# Preserving Foreign Privacy Law Objections

Parties must timely and adequately raise issues of foreign privacy law.



James Sullivan

*BY JAMES M. SULLIVAN*

When a party asks a U.S. district court to preclude discovery based on foreign privacy or blocking statutes, it can put the court in the undesirable position of choosing between denying the requesting party access to potentially important discovery or compelling the resisting party to produce the information in violation of foreign law. For example, compare two decisions from the Eastern District of New York, *Linde v. Arab Bank* (balancing competing interests and precluding discovery based on Israeli privacy law) and *In re Air Cargo Shipping Servs. Antitrust Litig.* (balancing competing interests and compelling production of information that would cause resisting party to violate South African blocking statute). It should not be surprising that if a court is given procedural opportunities to avoid having to choose between giving effect to U.S. or foreign law, the court will usually choose to avoid the conflict.

To reduce the chance of getting caught on the losing end of this issue, when litigation presents the possibility that the opposing party will serve discovery requests for information located abroad, start thinking about Rule 44.1 of the Federal Rules of Civil Procedure. Rule 44.1 requires that "a party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing." Courts have found this provision is not limited to parties seeking to rely upon foreign law for the substantive issues in a case, and it also applies to discovery. For example,

where defendants recently sought to oppose discovery based on French privacy law in *McAllister-Lewis v. Goodyear Dunlop Tires N. Am., Ltd.,* the U.S. District Court for the District of South Dakota held based on Rule 44.1 that the defendants waived the issue because they "did not explain in their responses to [the] plaintiff's discovery requests the French privacy law upon which they relied."

**Addressing Foreign Privacy Law Early**

Rule 44.1 does not define what constitutes timely notice. However, the Advisory Committee's note to Rule 44.1 provides that the notice must be "reasonable" and suggests that courts consider the circumstances, including the timing of the notice, why the notice was not given earlier, and the importance of the foreign law issue to the case, i.e., whether the party expected the issue to arise. At least where a party is located abroad, that party will usually want to raise issues of foreign privacy law early, including in connection with the Rule 26(f) planning conference.

For example, Rule 26(f) requires consideration of "any issues about disclosure, discovery, or preservation of electronically stored information." Certain actions to preserve and collect data for litigation may violate foreign privacy laws even if that data is never ultimately disclosed to the opposing party. Foreign privacy law also may require discussion regarding special protective orders, redactions, or anonymizing of personal data.

Another required topic of the Rule 26(f) planning conference is "whether discovery should be conducted in phases." When foreign privacy or blocking statutes may apply, courts have recognized the benefit of phasing discovery with U.S.-based discovery preceding foreign discovery.

For example, the court may conclude following U.S.-based discovery that foreign discovery would not be proportional to the needs of the case. In *In re Aredia & Zometa Prods. Liab. Litig.*, the Middle District of Tennessee held that the U.S.-based defendant's production of "adverse event reports to the FDA regardless of where they occur or who discovered them" as well as any non-privileged "correspondence related to those reports" the defendant had was "sufficient" despite the plaintiffs' arguments that "sister or parent companies" located abroad might have additional documents.

If neither party is located abroad, or stores its data abroad, then the first time foreign privacy law may become an issue is if a party seeks discovery from a nonparty. Even if raised earlier in the litigation, when responding to document requests seeking information located abroad, the response should provide notice of any foreign privacy law objections.

**The Notice Of Invoking Foreign Privacy Law**

Although the party relying on foreign privacy law "must provide the opposing party with reasonable notice that an argument will be raised, . . . the litigant need not flesh out its full argument at the Rule 44.1 stage," said the U.S. Court of Appeals for the Second Circuit in *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.* Notice does not require legal argument. Courts have found adequate notice under Rule 44.1 where parties have responded to discovery requests by identifying which foreign privacy laws apply, such as two cases from the Eastern District of New York in 2007: *Strauss v. Credit Lyonnais, S.A.* and *Weiss v. Nat'l Westminster Bank, PLC.* When choice-of-law analysis may be required to determine which country's privacy laws govern, the responding party can identify more than one country's privacy laws in its Rule 44.1 notice where the "relevant events occurred in multiple foreign locations and legitimately point to several different applicable bodies of law."

Parties can avoid waiving foreign privacy law objections and other pitfalls through early planning for the complexities of cross-border discovery.

*James M. Sullivan is a partner with Hollingsworth LLP.*