



Discovery insights

5 questions about cross-border discovery

An interview with Jeff Griffiths, Principal, Deloitte Discovery, Deloitte Transactions and Business Analytics LLP

Business globalization is expanding the need for cross-border discovery in litigation and compliance matters. Companies accustomed to operating under US data privacy and security laws and regulations can find many of the requirements and customs of other regimes to be confounding and frustrating. Recognizing several key questions regarding processes, data and technology use, and ethics can help companies and their counsel navigate cross-border intricacies and nuance.



How does the global web of laws, regulations, and standards affect cross-border discovery?

Varying data privacy requirements in different countries can complicate and slow discovery. Under US laws, business data, documents, and communications are the property of the corporation. In other countries, the individual employee often has considerably more say regarding what information can be requested and searched. This can cause delays as the company tries to meet discovery demands while respecting a person's desire not to release certain information. Country regulations can also restrict the ability to patriate data to the United States or other locations to conduct discovery. This limitation can have cost implications, as parties may need to establish data processing services in-country, or rely on more expensive in-country talent, rather than use an already existing, scalable e-Discovery solution located elsewhere.

What impact does handling personal data have on cross-border discovery?

Determining how to deal with personal data can create issues starting with data identification and collection, through preservation, processing and analysis, to production and presentation. At the outset, a company's global information management practices can conflict with personal data rules and policies. As global organizations strive to address discovery requirements, their employees' patterns of information use can make it difficult to find and pursue the needed data. In some jurisdictions, data preservation is considered a form of processing, requiring the establishment of specific legal instruments that assign a data steward or controller before work can start. Based on local privacy provisions, data from multiple jurisdictions may need to be cross-referenced, sent to a handful of different locations for processing and hosting, and analyzed across the hosting platforms. Extra effort may be required to sort out redaction, privilege, and confidentiality of content. In some jurisdictions, local courts may review what needs to be produced.

What other challenges can the discovery process create?

Several issues can arise that may test the judgment of the parties to discovery. A party may choose to cite regional data privacy and data security laws as an excuse to delay or block production of information. Immersing in regulatory minutia, citing the complexity of the resolution process, or claiming the need for regional experts to verify data protection rules are among actions that may be pursued to slow the process. Difficulties can also arise in assembling the discovery team. Is it in the client's best interest to staff the process with in-country people who know the language but are short on necessary technical skills, or should outside expertise be brought in with the attendant cost? Also, what are the consequences of collecting less information, and thus lowering costs, by limiting the discovery scope or targeting data collection by applying search terms at the point of data gathering? Finally, the tendency for US companies to take a US-centric view of the process, fueled by the sophistication of US processes and technology, can lead to cultural clashes or insensitivity to local considerations.

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How can technology and workflow techniques be used in cross-border discovery?

The application of appropriate technology can both speed and enhance the work of counsel during cross-border discovery. Ideally, one can leverage existing in region data centers and services which can allow for consistency of service. However, in some regions of the world these services are just not as readily available. If such services and tools are unavailable locally in certain regions, discovery consultants may deploy "field kits" containing technology for forensic analysis, early case assessment, and data analytics. Workflow tools and techniques can be applied to discovery in whole or in part based on factors including need, cost, and complexity of discovery. Typically, the first workflow step is to analyze metadata to build a broader understanding of the data set and identify key attributes that can inform the larger strategy. For example, of particular concern with respect to cross-border discovery is the identification and handling of personally identifiable information (PII). PII filters can be developed that take into consideration:

- Document properties and storage locations: analysis of user controlled features like file path and naming conventions and facial identification in conjunction with file types
- Domain analysis: unique inclusive and exclusive domains and frequency analysis
- Standard queries: based on personal data indicators/edit masks ("CC#", "D/O/B"), and regular expressions

- Clause libraries: typically built from the ground up for the relevant matter or jurisdiction that map to EU data directives classifications for racial/ethnic origin, political opinions, religious/philosophical beliefs, health/sexual life, etc.

What are some leading practices to consider in addressing the challenges of cross-border discovery?

Efficient, productive discovery requires visibility for all stakeholders into execution tactics. A key to achieving transparency is designation of one outside counsel to be responsible for managing discovery communication, preferably a firm with local offices in the regions where project work is undertaken. Such an approach can help in establishing consistency in the discovery approach and messaging across regions and different parts of the organization. Enforcement of consistency helps mitigate potential spoliation and other sanctions as information is produced to authorities around the world. For example, a law firm may want access to data that another firm wants withheld for privacy or other reasons. Having one firm arbitrate the issue, reach a decision, and communicate the resolution can help reduce misinterpretation and confusion. A critical aspect of this approach is to conduct conferences calls to discuss production with representatives from all of the law firms involved in the matter. Such calls can help inculcate consistency in facts, approach, and reasoning, while reducing the need to individually train and update local counsel regarding issue mitigation.

My take: Global discovery compels global thinking

As more companies expand internationally, the risk of disputes with other companies and regulatory authorities grows. In this environment, the legal discovery process becomes more global, too, so waiting until a dispute or investigation arises to address the challenges discussed above can be a costly mistake. By understanding the distinct discovery requirements of different regions, instilling transparency and consistency throughout the discovery team and process, and taking advantage of powerful technology and workflow tools, companies can be better equipped to meet the discovery demands of litigation and regulatory investigations.



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