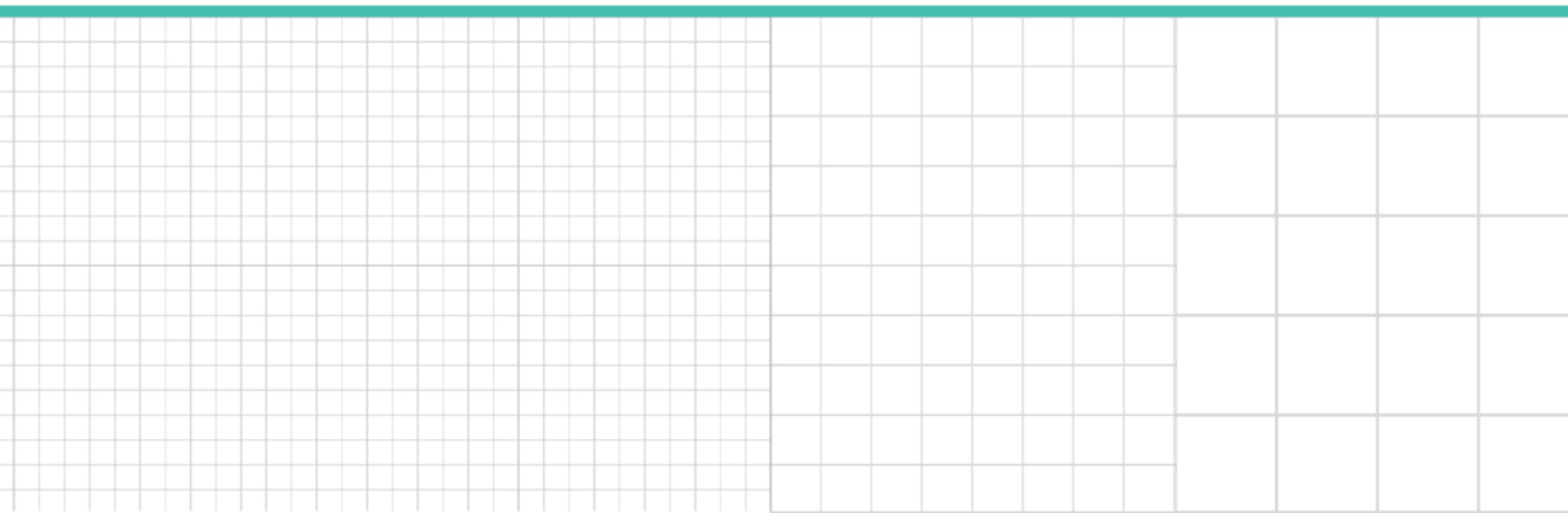


**Professional Perspective**

# **Section 1782 Litigation: Scope and Use in Discovery Outside the U.S.**

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# Section 1782 Litigation: Scope and Use in Discovery Outside the U.S.

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When initiating a Section 1782 action, litigants need to know what documents they can obtain through such an action, including if they can obtain documents that are located outside the U.S. Additionally, they need to know whether all or only some of the discovery protections generally applicable to U.S. discovery apply to Section 1782 actions as well, for example, notice to opposing party and protective orders.

This installment of a three-part series on Section 1782 litigation focuses on three questions:

- Can Section 1782 be used to obtain documents that are located outside the U.S.?
- Must an applicant, who is also a party in the foreign proceeding, provide notice to the opposing party when seeking Section 1782 discovery from a third party in the U.S. ex parte?
- What is the scope of protective orders for discovery granted under Section 1782?

## Documents Outside the U.S.

There is no clear rule as to whether Section 1782 may be used to obtain documents that are located outside the U.S. The following factors indicate that Congress intended Section 1782 to have extraterritorial effect:

- Section 1782 requires that, unless ordered otherwise, discovery shall be taken in accordance with the FRCP. Under the FRCP, a person must produce all documents within his or her possession, custody or control, wherever situated.
- Section 1782 requires that the respondent, not the documents, be found in the district of the court.
- The language of Section 1782 does not limit discovery to evidence located in the U.S.

The following factors indicate that Congress did not intend Section 1782 to have extraterritorial effect:

- Considerations of international comity
- Parts of the legislative history for the 1964 amendment to Section 1782 suggest that the purpose of the statute was obtaining “documentary evidence in the United States.” See S. Rep. No. 88-1580 (19624), reprinted in 1964 USCCAN 3782, 3788.
- Professor Smit, one of the draftsmen of the 1964 amendments, has argued powerfully against the extraterritorial application of Section 1782, because, among other things “[s]ection 1782 should not be used to interfere with the regular court processes in another country” and “if Section 1782 could be used for this purpose, American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world” Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1 (1998), at 11.

While there is a dearth of circuit court precedent, the majority of courts that have considered this issue have held that Congress likely intended Section 1782 to apply only to discovery of evidence located within the U.S. See *In re Kaczor*, 2014 U.S. Dist. [2014 BL 408808](#), 4 (S.D. Ohio Aug. 21, 2014) (“courts have read into § 1782 a threshold requirement that the

material sought be located in the United States"); *In re Kreke Immobilien KG*, [2013 WL 5966916](#), at \*4, [2013 BL 311484](#), 4 (S.D.N.Y. Nov. 8, 2013) (the bulk of authority finds that a respondent cannot be compelled to produce documents located abroad), *In re Godfrey*, [526 F.Supp.2d 417](#), 423–24 (S.D.N.Y. 2007) (Section 1782 is limited to discovery within the United States), and *In re Microsoft Corp.*, [428 F.Supp.2d 188](#), 194 n. 5 (S.D.N.Y. 2006) (“[Section] 1782 does not authorize discovery of documents held abroad.”); contra *In re Gemeinschaftspraxis*, [2006 WL 3844464](#), at \*5, [2006 BL 127366](#), 5 (S.D.N.Y. Dec. 29, 2006) (“[A]bsent any express statutory language, the location of the documents at issue should at most be a discretionary consideration.”).

However, the Eleventh Circuit, which is the only circuit court to have squarely decided this issue, reached the opposite conclusion, holding that “the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a per se bar to discovery under § 1782. To hold otherwise would categorically restrict the discretion Congress afforded federal courts to allow discovery under § 1782 in accordance with the Federal Rules of Civil Procedure.” *Sergeeva v. Tripleton Int’l Ltd.*, [834 F.3d 1194](#), 1200 (11th Cir. 2016); see also *Fuhr v. Credit Suisse AG*, [687 F. App’x 810](#), 816, n. 8 (11th Cir. 2017) (following *Sergeeva*), but compare *In re Sarrio, S.A.*, [119 F.3d 143](#), 147 (2d Cir. 1997) (“On its face, § 1782 does not limit its discovery power to documents located in the United States ..., [but] there is reason to think that Congress intended to reach only evidence located within the United States.”)

## Notice to Opposing Party

The target of Section 1782 discovery is often a third party, not the opposing party in the underlying foreign proceeding. The applicant typically makes the Section 1782 application on an *ex parte* basis. If the applicant prevails on the *ex parte* application and is authorized to issue a subpoena, the respondent may move to quash the subpoena. Must notice also be provided to the opposing party? The answer, in most circumstances, is “yes.”

Section 1782(a) specifies that “to the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing shall be produced, in accordance with the Federal Rules of Civil Procedure.” [Rule 30\(b\)\(1\) of the FRCP](#) requires that a party who wants to take a deposition of another person provide “reasonable written notice to every other party.” [Rule 45\(a\)\(4\) of the FRCP](#) requires a notice and copy of a subpoena to be served on each party before it is served on the person to whom it is directed. In the case of contemplated proceedings, Rule 27(a)(2) requires service on “each expected adverse party.”

In the context of 1782 proceedings, courts have held that the applicant must serve the opposing parties in the foreign proceeding with a copy of the subpoena. See, for example, *In re Hornbeam Corp.*, 2015 U.S. Dist. [2015 BL 344360](#), 6 and 7 (S.D.N.Y. Sept. 17, 2015) (“a party engaged in foreign litigation who serves a 1782 subpoena duces tecum to obtain documents for use in the foreign litigation must first serve notice on all parties to the foreign proceeding”) and (“Hornbeam was obligated to provide notice to its expected adversaries before issuing subpoenas to third parties to obtain documents for use in anticipated BVI litigation.”); *In re Rivada Networks*, [230 F. Supp.3d 467](#) (E.D. Va. 2017) (“once Rivada’s 1782 application was granted, Altan Redes [the opposing party in the foreign litigation] was entitled to notice of the subpoenas and deposition, as required by the Federal Rules of Civil Procedure.”); *In re Hully Enterprises*, 2017 U.S. Dist. [2017 BL 354820](#) (C.D. Cal. Sept. 28, 2017) (court orders Applicant to show cause why the 1782 order should not be vacated “because the subpoenas were improvidently authorized without notice to the opposing party as required by [Federal Rules of Civil Procedure 30\(b\)\(1\)](#) and 45(a)(4).”).

An applicant wishing to avoid disclosing the subpoena to the adverse party must apply for an order sealing the Section 1782 application and must demonstrate why such an order is necessary. Courts have granted such a request where disclosure would subvert the purpose of the subpoena, for example, to prevent the adverse party from dissipating funds held in an account with the bank that is the target of the subpoena. See, e.g., *In re Application of Bank of Montreal*, Case No. 11-mc-00179, at \*2 (S.D.N.Y. July 12, 2011).

## What is the scope of protective orders for discovery granted under Section 1782?

The basic rule in domestic U.S. litigation is that, absent a protective order restricting the use of the discovery materials, to help prosecute or defend litigation, parties may use any information that they lawfully possess, including using in one case information lawfully obtained by discovery in another case. *Glock v. Glock, Inc.*, [797 F.3d 1002](#), 1007 (11th Cir. 2015).

The two circuit courts that have decided the issue—the Second and the Eleventh—have held that the same principle applies to evidence obtained through discovery under Section 1782. (party could use Section 1782 evidence in U.S. domestic litigation where protective order did not expressly prohibit such use); *In re Accent Delight Int'l Ltd.*, [869 F.3d 121](#), 135 (2d Cir. 2017) (“In sum, we hold that Section 1782 does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise.”).

If a respondent is “concerned in a particular case that a § 1782 applicant is attempting to use foreign litigation as a ruse for obtaining discovery in the U.S. without complying with the usual procedures of the Federal Rules of Civil Procedure, [the respondent] can and should bring evidence of such chicanery to the § 1782 court’s attention.” *Glock*, 797 F.3d at 1009 (11th Cir. 2015)). Indeed, if a party is attempting such chicanery to “circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.,” this is a discretionary *Intel* factor that supports denying the Section 1782 application altogether. *Accent Delight*, 869 F.3d at 135 (citing *Intel*, 542 U.S. at 265). See also *Glock*, 797 F.3d at 1009).

### Practice Pointers

#### When seeking documents located outside the U.S., if possible, file in the Eleventh Circuit

The Eleventh Circuit appears to be the most favorable circuit for Section 1782 applicants seeking extraterritorial discovery, because the Eleventh Circuit is the only circuit court explicitly to have held that Section 1782 permits the district court to order discovery of documents located outside the U.S. While district courts sitting in the Eleventh Circuit must still consider the discretionary *Intel* factors (e.g., whether the application is designed to evade foreign discovery rules) in determining whether to grant the application, applicants will not be stymied by the threshold question of whether such discovery is available at all.

#### Seek a protective order to limit the use of discovery obtained under Section 1782

As in domestic litigation, documents lawfully obtained through discovery under Section 1782 are presumptively available for use in any proceedings. Therefore, a respondent providing discovery in response to a Section 1782 application should seek a protective order that explicitly limits the applicant’s use of the documents obtained under Section 1782 to the specific foreign proceeding in support of which discovery is sought. In *Glock*, the protective order allowed the applicant wife to use the documents “in a proceeding to which Applicant is a party,” so long as she obtained prior leave of the court to use the documents in proceedings other than the ongoing Austrian divorce proceedings. *Glock*, 797 F.3d at 1010-11. Given the protective order’s broad definition of “proceeding,” the Eleventh Circuit held that Mrs. Glock, having successfully obtained leave of the presiding magistrate judge, could use the Section 1782 evidence in [RICO](#) proceedings in the U.S.