



## Second Circuit Precludes Foreign Proceedings Discovery From U.S. Counsel

***This is a significant decision, given how often non-U.S. clients entrust U.S. law firms with their documents.***

On July 10, 2018, the U.S. Court of Appeals for the Second Circuit ruled that law firm Cravath need not divulge client documents for use in overseas litigation. The court emphasized that a contrary holding would pose risk to frank attorney–client communications and undermine protective orders that parties frequently execute to maintain discovery confidentiality.

In *Kiobel v. Cravath, Swain & Moore, LLP*, the plaintiff filed a petition to subpoena documents from Cravath under 28 U.S.C. § 1782, authorizing U.S. discovery in aid of foreign proceedings. Her goal was to assist her lawsuit against Royal Dutch Shell in the Netherlands, where the discovery the plaintiff sought was prohibited. The district court granted Kiobel's petition to obtain Shell documents provided to Cravath, Shell's counsel, for prior U.S. litigation.

The Second Circuit agreed the district court had jurisdiction, but held the district court abused its discretion in granting the plaintiff's petition upon application of the Section 1782 test that the Supreme Court articulated in *Intel Corp.* and related guidance in the Second Circuit's *Sarrio* decision. The Second Circuit reasoned that permitting discovery of client documents unreachable in a foreign tribunal simply because the client gave those documents to its U.S. counsel would harm the U.S. system of litigation by impeding open attorney–client communications.

The court also determined that allowing such discovery would undermine confidence in protective orders, which encourage disclosure by safeguarding the confidentiality of documents. Although the Second Circuit did not specifically address it, its reasoning should apply with even greater force to attempted Section 1782 discovery of communications protected by attorney–client privilege or the work-product doctrine.

The Second Circuit's *Kiobel* decision is important given the increasing frequency with which foreign clients entrust U.S. law firms with their documents. As the Second Circuit noted, a contrary ruling might inhibit foreign entities from engaging U.S. counsel if client documents unreachable in a foreign court could be obtained merely by subpoenaing U.S. counsel. In *Kiobel*, the Second Circuit did not directly address whether Section 1782 can be used to obtain documents located abroad, but that significant issue is now subject to a Second Circuit appeal in *In re Application of Accent Delight International Ltd.*



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