



# SwissHoldings

**Ein Berufsgeheimnis für Unternehmensjuristen in der Schweiz**

**Die Regelung in den USA und weiteren Jurisdiktionen - welche Schlüsse sind zu ziehen?**

SwissHoldings Tagung vom 5. März 2007 - SWX Swiss Exchange, Zürich

Peter Honegger



# Vorbemerkung

*„Sound legal advice or advocacy ... depends upon the lawyer being fully informed by the client.“*

*Upjohn Co. v. United States,  
449 U.S. 383 (1981)*



# Überblick

- *Rechtslage USA*
- *Abstecher EU / RoW*
- *„vor fremden Richtern“*

# US-style Disclosure

## Behörden

SEC

Subpoena



Zeugen/Dokumente

## Strafprozess

Grand Jury

Subpoena



Zeugen/Dokumente

## Zivilprozess

Attorney

Discovery

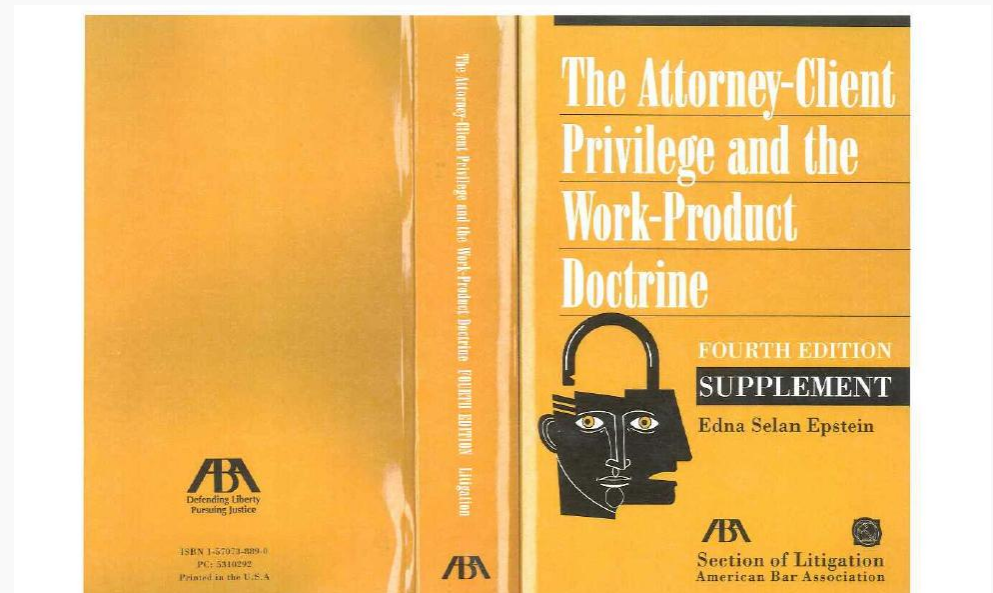


Zeugen/Dokumente

# Attorney-Client Privilege

*“Conversations between a corporation’s employees and in-house counsel are protected by the privilege ...”*

*Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 4<sup>th</sup> ed., Section of Litigation, American Bar Association, p. 143*  
[www.ababooks.org](http://www.ababooks.org)





# In-house Counsel Privilege

*“The type of service performed by house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients.”*

*U.S. vs. United Shoe Machinery Corp.,  
89 F.Supp. 357, 360 (1950)*



# In-house Counsel Privilege

*“American businesses believe, with good reasons, that no law enforcement agent is as effective at achieving **compliance with the law** as a corporation’s in-house company lawyer.”*



STATEMENT  
of the  
UNITED STATES COUNCIL  
FOR INTERNATIONAL BUSINESS



# Privilege für Legal Advice

*“... conversations in which in-house counsel is a participant, as well as documents addressed to or from in-house counsel, are readily susceptible to challenge on ground that it is **business advice** that is being given and not **legal advice**.”*

*Edna Selan Epstein, The Attorney-Client Privilege, p. 144*





# Vergleich mit der Schweiz

*“Überwiegt in diesen Fällen das kaufmännische Element derart, dass die Tätigkeit des Anwalts nicht mehr als eine anwaltliche Tätigkeit betrachtet werden kann ... [kein Berufsgeheimnis gemäss Art. 321 StGB].*

*BGE 112 Ib 606-609 (1986).*



# Schutzobjekt Communication

*“Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications ... are ... permanently protected from disclosure **by himself** or by the legal adviser, except the protection be waived.”*

*Professor Henry Wigmore (1900)*



# Internal Discussion of Advice

*“Management should be able to discuss amongst themselves the legal advice given to them as agents of the corporation with an expectation of privilege.”*

*McCook Metals L.L.C. v. Alcoa Inc., 192 F.R.D. 242, 254 (N.D.Ill. 2000)*



# Vergleich mit der Schweiz

*“Soweit sich [die Korrespondenz] bei der [Klientin] befindet, handelt es sich um Geschäftsunterlagen und nicht um ... Anwaltskorrespondenz.“*

*BGE 114 III 108 (1988).*

# Attorney-Client Privilege

## Legal Advice

External lawyer  
In-house counsel  
Internal discussion of advice  
Documents held by the Company

## Business Advice

To be disclosed

Tätigkeit als  
(selbständiger)  
Anwalt

Kaufmännische  
Tätigkeit

Rechtsberatung  
Akten bei der  
Gesellschaft

Offenlegung



# Work-Product Doctrine

*Schriftstücke, die ein Anwalt „in anticipation of litigation“ anfertigt.*

*„interviews, statements, memoranda, correspondence, briefs, mental impressions“*

*Hickman vs. Taylor, 329 U.S. 495, 511 (1947)*



# Document Index

- *document description*
- *date of document, date prepared*
- *author, addressee*
- *purpose of preparing document*
- *number of pages of document*
- *basis for withholding discovery*
- *any other pertinent information*



# Foreign Privilege Law

*Communication did not “touch base” with the United States*

*Stryker Corp. v. Intermedics, 145 F.R.D. 298 (E.D.N.Y. 1992)*

*Law of the place where the privileged relationship was entered into*

*Golden Trade v. Lee Apparel, 143 F.R.D. 514 (S.D.N.Y. 1992)*





# Proving Foreign Privilege

*“For communications relating to patent activities in other countries, no privilege will be granted as the defendants have failed to indicate what the applicable privilege is, if indeed it exists.”*

*In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 391 (D.C. 1978)*



# Proving Foreign Privilege

*“misperception that ... attorney’s obligation to hold secret the materials and documents pertaining to clients is the same as his obligation pursuant to the attorney-client privilege to withhold certain material from court proceedings.”*

*Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.,  
1998 U.S. Dist. LEXIS 4213 (S.D.N.Y. 1998); 1999 U.S.  
Dist. LEXIS 5950 (S.D.N.Y. 1999)*



# Affidavits

*“Increasingly, affidavits are expected to support assertions of privilege and provide foundational support for privilege logs. Courts expect ...*

*Thus clients and their attorneys are being asked to give testimonial support ...”*

*Edna Selan Epstein, Supplement, p. 182*



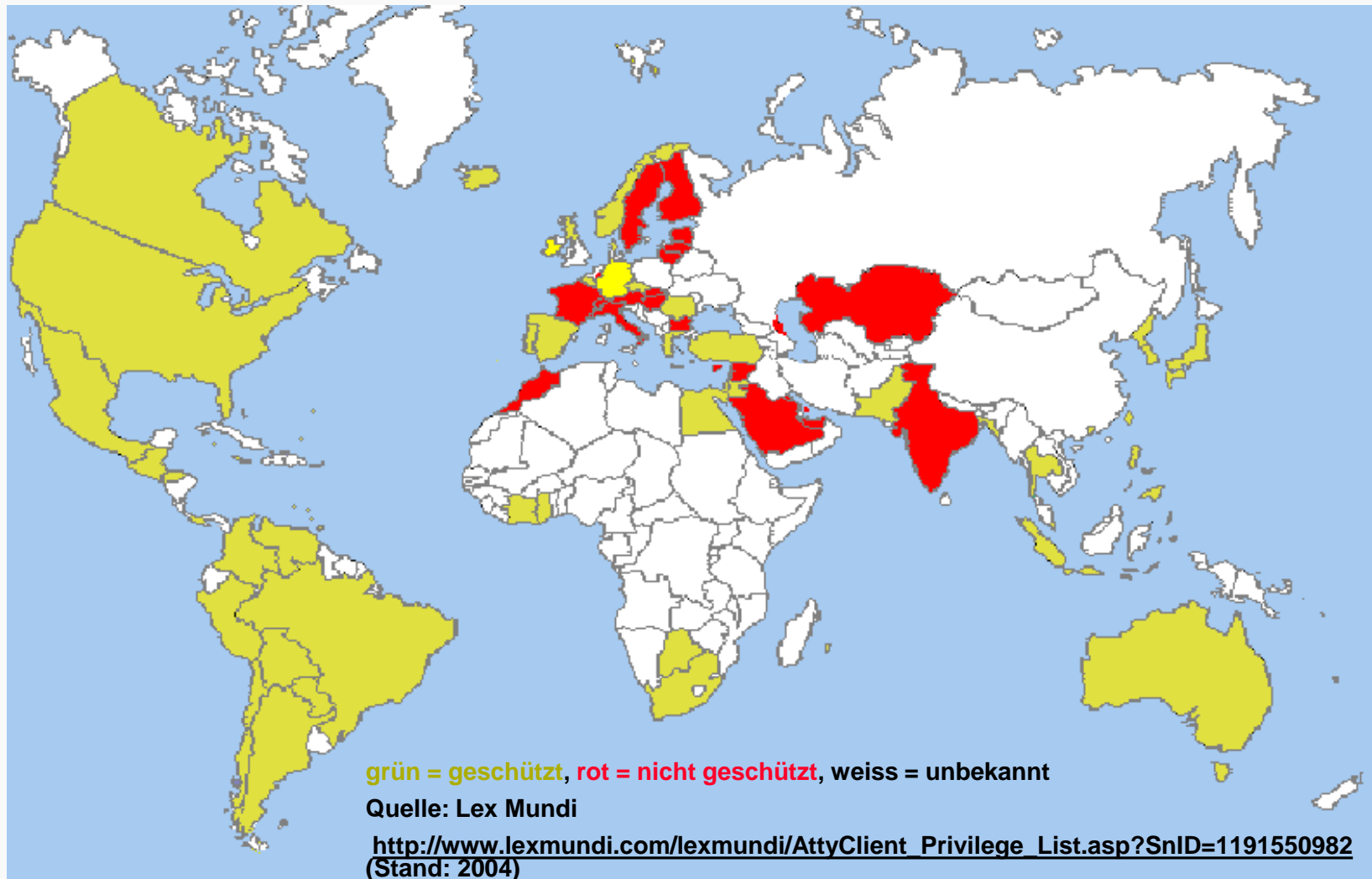
# EU: Akzo Nobel

*Arbeitsunterlagen, die ein Unternehmen im Hinblick auf die Ausübung der Verteidigungsrechte durch seinen **Unternehmensjuristen** [zugelassener Syndikusanwalt] angefertigt hat, ... können dem Berufsgeheimnis unterliegen.“*

*EuG 30.10.2003*



# Andere Länder weltweit



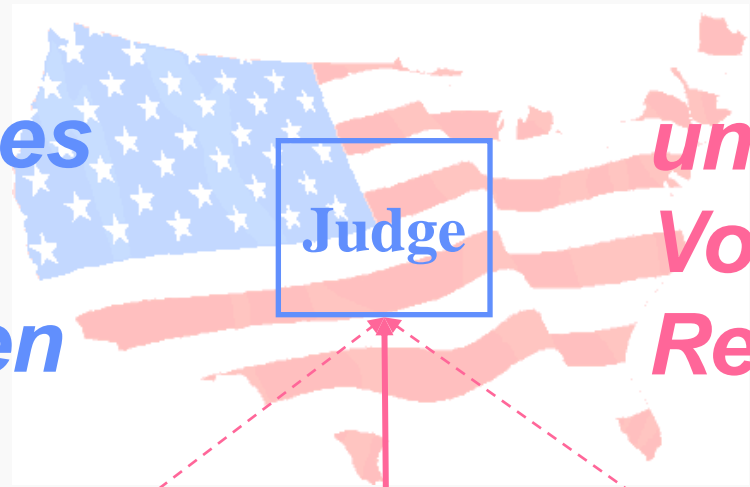


# Vor fremden Richtern

*Gibt Art. 168b BStPO auch Schutz bei ausländischen Strafuntersuchungen?*

# Extraterritoriale Discovery

*ausländisches  
Straf- oder  
Zivilverfahren*



*unilaterales  
Vorgehen, ohne  
Rechtshilfe*

BSStPO

Zeuge

StGB



BZPO



# Extraterritoriale Discovery

*“International comity does **not** require in all instances that American litigants **first resort to Convention** procedures before initiating discovery under the Federal Rules.”*

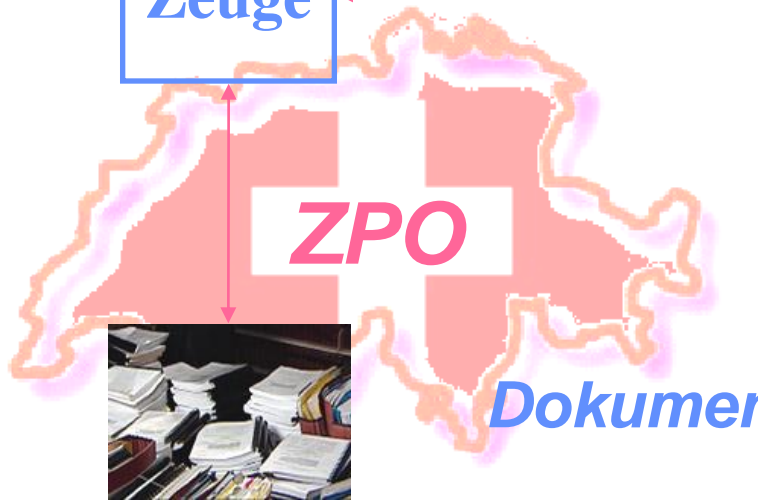
*Société Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987)*



# Rechtshilfe in Zivilsachen



*Rechtshilfe in  
Zivilsachen*



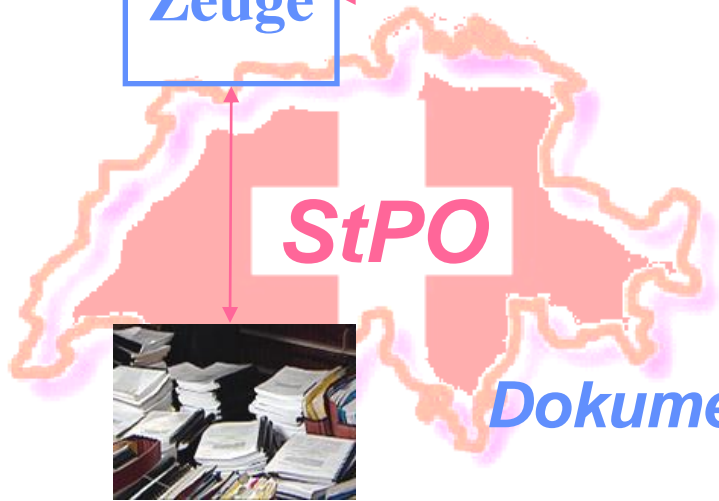
# Rechtshilfe in Strafsachen



*Rechtshilfe in  
Strafsachen*



**Zeuge**





# Welche Schlüsse sind zu ziehen?

## *Konsequenzen (de lege lata)*

- 1. Markierung Anwaltskorrespondenz als “privileged & confidential”*
- 2. Getrennte Dossiers führen: “Legal Advice” und “Business Advice”*
- 3. Affidavit zum Nachweis von schweizerischem Anwaltsgeheimnis bzw. Zeugnisverweigerungsrecht (caveat: Unternehmensjuristen)*



# Welche Schlüsse sind zu ziehen?

## *Forderungen (de lege ferenda)*

- 1. Explizites Zeugnisverweigerungsrecht für Unternehmensjuristen.*
- 2. Schutz von Akten bei der Gesellschaft (nicht nur beim Anwalt).*
- 3. Explizites Zeugnisverweigerungsrecht bezüglich Dokumenten, die in Antizipierung eines Rechtsstreits erstellt worden sind.*