

# Preserving Attorney-Client Privilege in Cross-Border Matters and Related Regulatory and Compliance Issues

**Association of Corporate Counsel – Dallas / Fort Worth**

2019 Annual In-House Symposium

Ethics CLE

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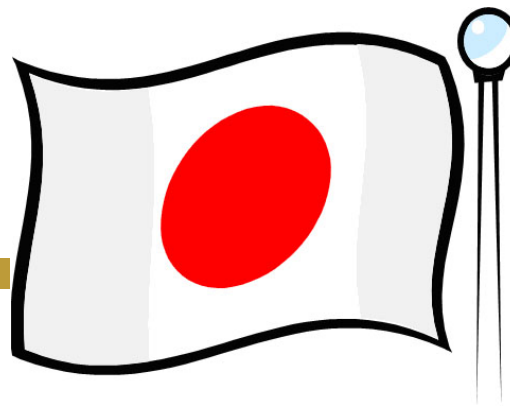
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# Why a Presentation on Cross-Border Privilege?

- Internal FCPA, AML and Antitrust investigations in 5 countries
- In-house counsel in US, Ireland, Japan, Singapore & Germany involved
- Highly sensitive communications
- Detailed (and convicting) self-critical analysis
- Privilege & data privacy strategies?
- ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.6 (more on this later)



# Japan



- **Bengoshi** (licensed member of the Bar ) v. Non-Bengoshi (not licensed)
- The concept of privilege exists more as an obligation than a privilege
- Bengoshi have the right and statutory obligation to hold in confidence secret information obtained during the course of their professional duties
- Confidential documents in lawyer's hands are privileged, but documents in corporation's hands are discoverable



# Hypothetical Antitrust & Anticorruption Issues

## Antitrust



Alleged collusion,  
concerted activity and  
conspiracy to fix prices  
and to raise prices



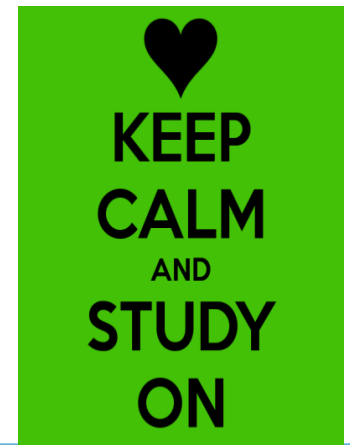
## Anticorruption

Contractor allegedly bribed  
government officials to obtain  
contracts and regulatory  
permits, rights and licenses to  
do business in Brazil and  
England



# Prepare like you've never prepared before!

- Assignment: investigate, interview & opine
- Observations re: governments' enforcement agenda
- Strategy, WEAKNESSES, diagrams, flow charts
- Witnesses names, admission statements, tons of privileged info
- You quantify liability...doesn't look good!
- Digitize lots of boxes of documents



# Let's Go To Brazil & England! (or your favorite country)



# Home Sweet Home!!!



# Bordering on Privilege Waiver!



- “What’s on your laptop, thumb drive and smart phone?”
- Like a locked suitcase
- *US v. Arnold*
- **Border Search Exception** to 4<sup>th</sup> Amendment

# What 4<sup>th</sup> Amendment Rights?

No Constitutional rights against unreasonable searches and seizures

## **ABA Gets Lawyers Heightened Protections for Device Searches at International Borders**

By Joseph J. Lazzarotti and Maya Atrakchi on January 31, 2018

U.S. Customs searches have become increasingly invasive over the years. Pursuant to Department of Homeland Security (DHS) policy, U.S. Customs and Border Protection (CBP) operates under the “broad search exception”, which allows searches and seizures at international borders or an equivalent (*e.g.* international airports) without probable cause or a warrant. CBP’s searches are deemed “reasonable” *per se*, and thus not a Fourth Amendment violation, which protects against “unreasonable searches and seizures”. The



# Bordering on Malpractice and Ethics Violations

## Customs officers searching more travelers' devices

By COLLEEN LONG December 10, 2018

## Travelers' Laptops May Be Detained At Border

No Suspicion Required Under DHS Policies  
By Ellen Nakashima  
Washington Post Staff Writer

- Suspicionless “virtual strip search”
- Now in public domain
- **Looper**, other cases - Customs current policy is that if a claim of privilege is made, must consult with CBP counsel
- ***"officials may share copies of the laptop's contents with other agencies and private entities for language translation, data decryption or other reasons."***
- Some limits—LAX—***U.S. v. Kim*** (USDC WDC 2015)
- ABA President Hilarie Bass Weighs In







# Can Border Patrol agents demand you unlock your phone? Tech worker's SFO experience raises question



Bob Egelko

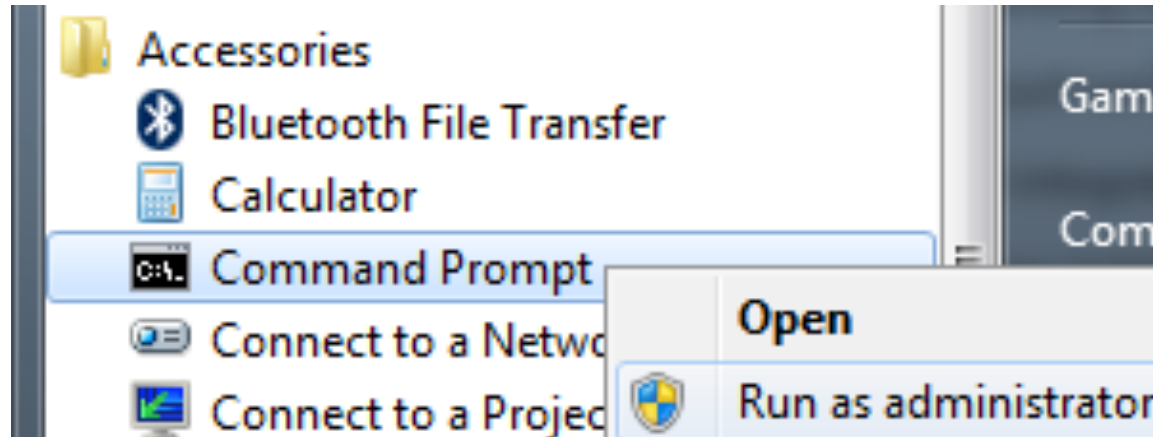
| April 16, 2019

| Updated: April 16, 2019 4 a.m.

Such electronic searches are “on the rise,” said ACLU attorney William Freeman. “We believe there are tens of thousands of them every year.”

# 2018 ABA Mid-Winter Conference in Canada

## Don't Be An Information Hoarder at the Border!



Any lawyer that travels outside the U.S. should be aware of the DHS policy on electronic device search and seizure at international borders, and take precautions accordingly.

# What's A Traveling Lawyer To Do?



In addition, the ABA Standing Committee on Ethics and Professional Responsibility issued advice to travelling lawyers, in an electronic device advisory. The ABA recommends the following:

- Determining which device contains attorney-client privileged documents, and consider leaving at home.
- Consider a temporary, inexpensive device or storage device with minimum necessary information.
- Familiarizing yourself with the type and location of privileged and confidential information.
- Placing device on airplane mode, or powering off entirely.
- Identification available to demonstrate that you are a legal professional.
- Familiarizing yourself with the requirements in your jurisdiction's professional code of conduct.

# What Should I Do? Put Up A Fight.

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- “*I am an attorney*” – Bar/Business Card
- “*The electronic device contains privileged info*”
- “Is this a **request** or a **demand**?”
- Do applicable ethics rules allow you to consent to **request**?
- Data Breach – client notification

# One Reason Why: AML / Anti-Trust / Anti-Corruption Investigations Have Globalized

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- Detection of international and cross-border corruption and anti-competition
- New cooperation between governments – 180-degree change
- “Follow the Sun” 18-hour simultaneous dawn raids





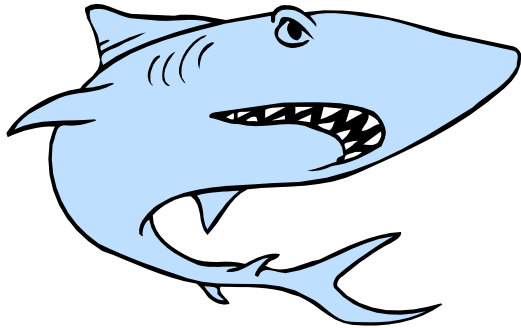
# Who Wants Your Client's Secrets and Privileged Information?





# Is Our Legal Team in Compliance?

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Who is supposed to protect  
your client's secrets and  
privileged information?

# ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.6(a)

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**A lawyer  
shall not reveal information  
protected by the attorney-client privilege  
under **applicable** law ....**

# Uhhh...What Law Applies?

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Note to self:

Ask this question **BEFORE**  
you inadvertently waive  
privilege

# Spoken or Written Communication

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- Pick up the telephone!
- Do you really need to write it down?
- Don't write it if you don't have to!
- Tip



# Defining Attorney-Client Privilege

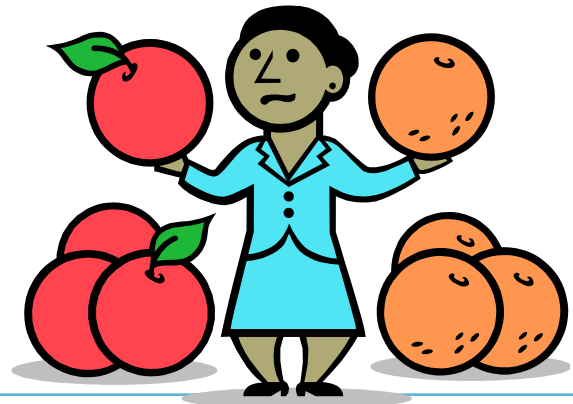
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- Know U.S. privilege law...much litigation is in the U.S.
- Generally...
  - **confidentiality** of all forms of communication,
  - between a **lawyer** and the **client**,
  - for the purpose of the attorney **rendering legal advice**.

# “Lawyers are Lawyers”

- Often no equivalent of U.S. states’ bar membership in other jurisdictions
- In-house counsel oftentimes are not eligible for bar membership
- Remember Japan?





# “Lawyers” in Sweden

- There is no monopoly of legal services in Sweden
- Any person may practice law, offering services to the public ... no need for a law license
- Any person may use the title “lawyer”
- In-house counsel may not be bar members
- Privilege only attaches to communications between clients members of the bar



# Are You Rendering Legal Advice?



## Press Release from Siemens

“The new worldwide general counsels will not just give legal advice.

They will have a formative role and decision-making function in business operations.

Their responsibilities in this key position will go considerably beyond merely identifying risks.”

**Are you rendering  
business advice or legal advice?**



# Business or Legal Advice?

**BUSINESS**

- Communications with in-house counsel that seek business advice or that appear to be for informational purposes are not privileged
- A corporation cannot insulate information from discovery simply by copying in-house counsel
- What is your title?
- Having in-house counsel sit in on a meeting does not render privileged everything said at that meeting





**“We request legal  
advice on the  
following....”**





**“In response to your  
request for legal  
advice....”**





# Who is the Client? Under Which Law?



- Parent
- Subsidiary
- Affiliate
- Board of Directors
- Shareholders
- Directors
- Officers
- Board Committee
- Control Group Test
- Subject Matter Test

E a s y?

## Attorney-Client Privilege Across Borders

Works here,  
works there



## ***Key Point #1***

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Protection of attorney-client  
privileged communications  
***primarily***  
is a matter of each individual  
country's law

## ***Key Point #2***

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**Identical information receives  
different privilege status  
in different jurisdictions**

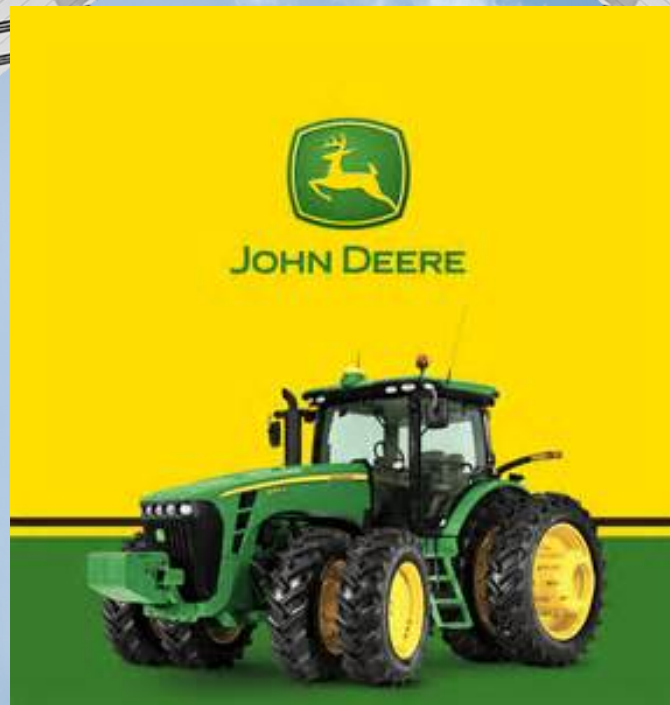




...and three key cases on point –

*John Deere, Akzo & RBS*





*John Deere*

1984 - Germany

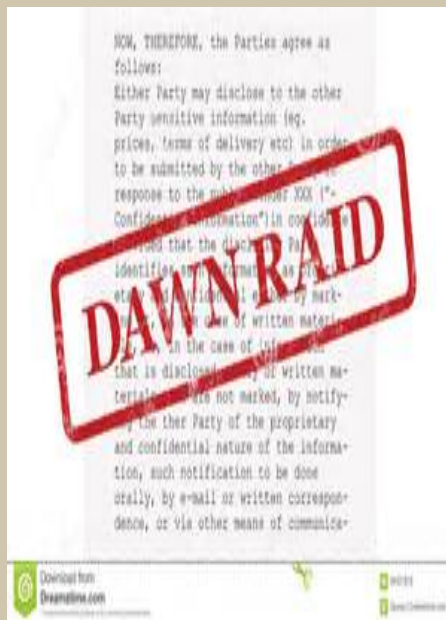
# TOUGH LEGAL TIMES

no.203.078

Trapping the Unwary In-House Counsel

- Since 1802

## John Deere Dawn Raided in Germany



- GC transferred from Illinois
- Internal investigations & self-critical analysis
- EC investigation of anti-competitive behavior
- Documents seized



# Lawyer's Writings Seized

- “Privileged” documents used at trial
- “...knowingly violated our law...”
- “Their own lawyer wrote ...”



# ***Akzo Nobel Chemicals***

***2010 - UK***



# Akzo learns from John Deere

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Move servers, etc. to England, where they have great privilege rules



# Akzo Nobel Chemicals Ltd

- EC investigating Akzo (Industry) for anti-competitive behaviors
- General Counsel's Office - great source of evidence

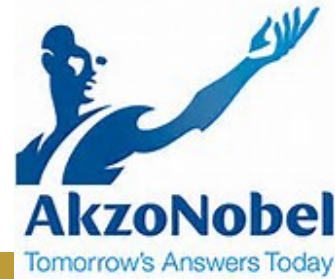






# **EC Competition Authority Dawn Raid**

# Akzo Nobel Chemicals



- Documents seized from GC's office
- Two emails at issue
- Licensed in-house competition lawyer's opinions on competition compliance program seized





**WSJ 29 April 2010:**

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## ***“Bad Day For In-House Lawyers”***

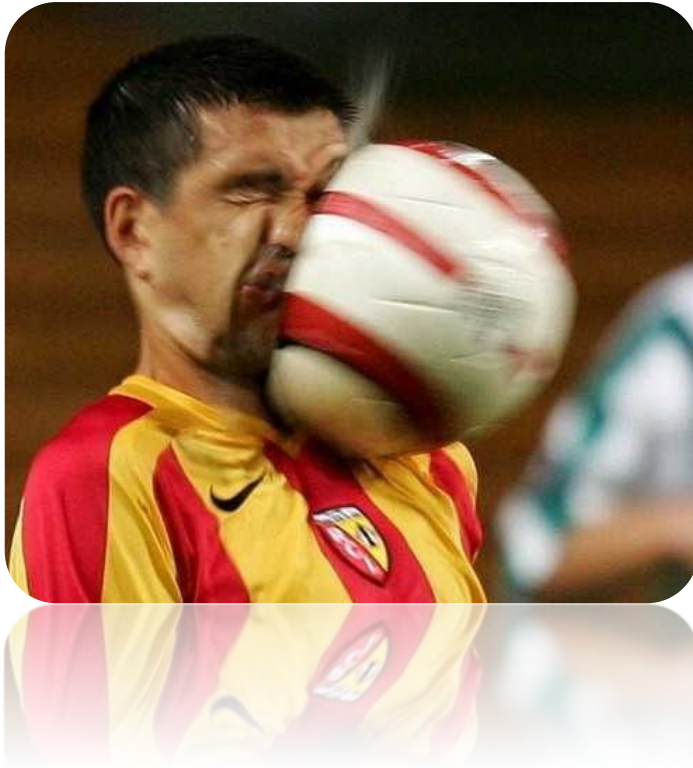
ECJ advisory opinion:

**NO PRIVILEGE  
for executive’s  
communications with  
in-house counsel -**

WSJ 14 September 2010

AkzoNobel

## *“Bad Day For In-House Lawyers Part Deux”*



The ECJ Rejects Akzo's arguments that its employees' communications with internal lawyers should be covered by LPP

# 28 member states (Brexit)

European Union member countries are split on whether to recognize legal professional privilege for in-house counsel

Ireland,  
England,  
Greece, Poland,  
Netherlands



EU Law

# High Impact

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“The ruling has the perverse effect of undermining ... corporate compliance in multinational companies....”



**December 2016**  
**UK**



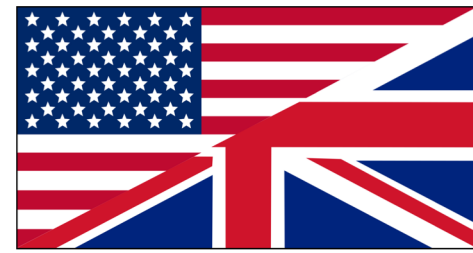
The image features the words "wait..." in green 3D block letters and "WHAT?" in blue 3D block letters, both slanted upwards. A horizontal bar with a gold-to-black gradient runs behind the text.

wait...  
WHAT?

A document created in one jurisdiction may not be where an arbitrator or court will decide whether that document is privileged...or discoverable



# ***RBS Rights Issue Litigation - UK***



- RBS investors who suffered losses sue in UK
- RBS receives request for RBS' U.S. & UK **outside counsel** notes
- Seeking attorney notes from interviews with RBS employees and former employees in the US from two investigations **conducted by outside counsel**
- One internal investigation was done in response to U.S. SEC subpoena

# RBS -- OBJECTION!



- Notes protected by Legal Advice Privilege/LPP/ACP
- Lawyers' working papers / work product
- English courts should apply the law of the jurisdiction (U.S.) where the engagement / instructions were made which gave rise to the notes
- U.S. law - privilege attaches - ***Upjohn*** (Subject Matter)

# ***RBS Rights Issue Litigation – Lex Fori***

- Privilege decided under ***Lex Fori*** (England)
- Privilege does not extend to information provided by employees / former employees (Control Group)
- Privilege covers genuine analysis and legal advice
- Privilege **does not** cover notes, train of inquiry...
- **Facts** are never privileged!



# Take-Aways from RBS

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- ***U.S. v. UK law*** - identical information receives different privilege status in different jurisdictions (remember Key Point #2?)
- ***Lex Fori***, privilege law of the forum
- Are you creating discoverable documents?
- Discoverable in other jurisdictions?
- THINK AHEAD!
- Develop powers of clairvoyance

**TAKE  
AWAY!**



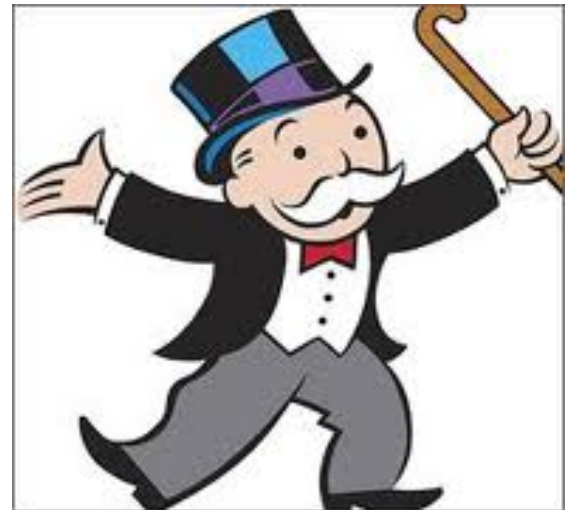
A hand is holding a white rectangular sign in the center of the frame. The sign contains the text "Privilege: Not just for litigation!". The background is a low-angle shot of several tall skyscrapers reaching towards a bright blue sky with scattered white clouds. The perspective creates a sense of height and grandeur.

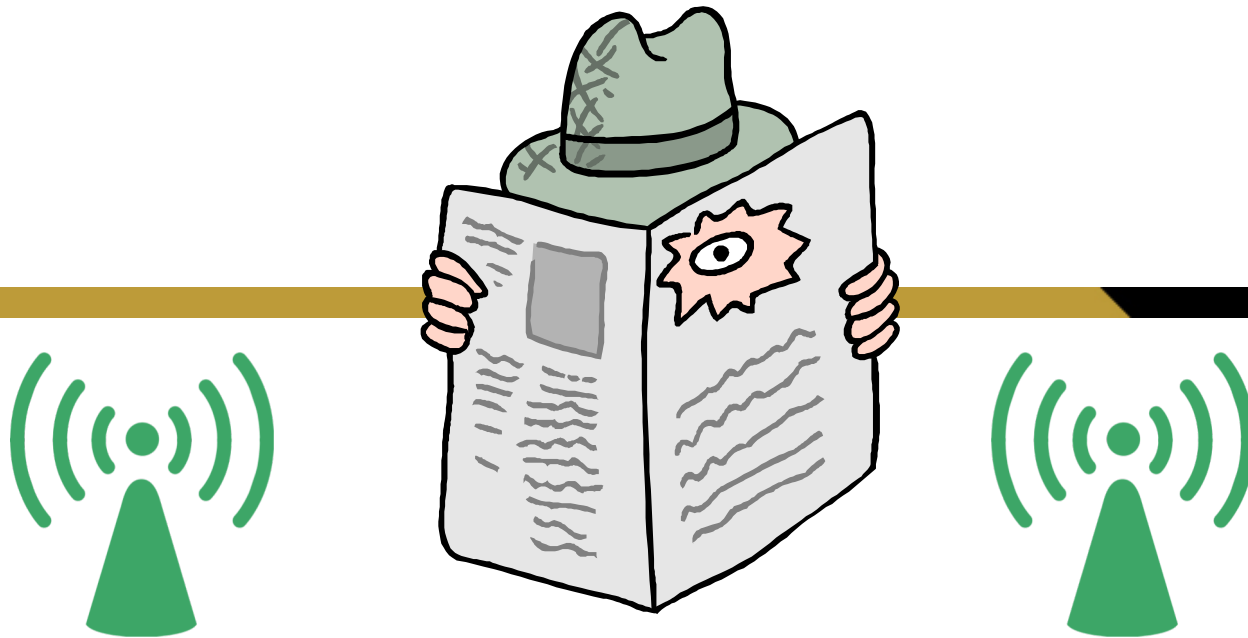
**Privilege:  
Not just for  
litigation!**



# Think Ahead!

- Business Combinations / Mergers and Acquisitions
- Antitrust and other due diligence & opinions
- Recent example – Two US in-house lawyers caught in Dawn Raid in London





Government authorities have dawn raided  
business operations outside the U.S. and  
requested documents employees there can  
access from servers in U.S.,  
***including U.S. legal departments***

# Lessons Learned

## IT Infrastructure and Location

- Moved IT Servers to location in US
- Follow the Sun Dawn Raid in UK, Spain, Singapore, Mexico, LATAM, US - remote access to privileged information
- Does remote access destroy privilege?
- Big study for client



# Play the Privilege Card



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## International Compliance Card – Privilege 2019

Country	Broad or Limited Privilege	Privilege for Licensed In-House Counsel	Privilege for Foreign Licensed Attorneys	Privilege Extends to Information in Client's Possession	Separate Litigation Privilege
UNITED STATES	B	✓	✓	✓	✓
EUROPEAN UNION	B	✗	EU Licensed	✓	✗
ARGENTINA	B	✓	✗	✓	✗
AUSTRALIA	B	Yes, subject to independence	✓	✓	✓
AUSTRIA	B	✗	EU or Swiss Licensed	✗	✗
BELGIUM	B	✓	EU, EEA or Swiss Licensed	✓	✗
BRAZIL	B	✓	Portuguese Licensed	✗	✗
BULGARIA	B	✗	EU, EEA or Swiss Licensed	✗	✗
CANADA*	B	✓	✓	✓	✓
CHILE	L	✓	✗	✗	✗
CHINA	✗	✗	✗	✗	✗
CZECH REPUBLIC	B	✗	✓	✗	✗
DENMARK	B	✓	EU, EEA or Swiss Licensed	✗	✗
FINLAND	B	✗	EEA Licensed	✓	✗
FRANCE	B	✗	EU, EEA or Swiss Licensed	✗	✗
GERMANY	B	✗	EU, EEA or Swiss Licensed	✗	✗
GREECE	B	Yes, except in EU issues	EU or EEA Licensed	✗	✗
HONG KONG	B	✓	✓	✓	✓
HUNGARY	L	✗	EU or EEA Licensed	✓	✗
ICELAND	B	✓	EEA Licensed	✗	✗
INDIA	B	✗	✗	✓	✗

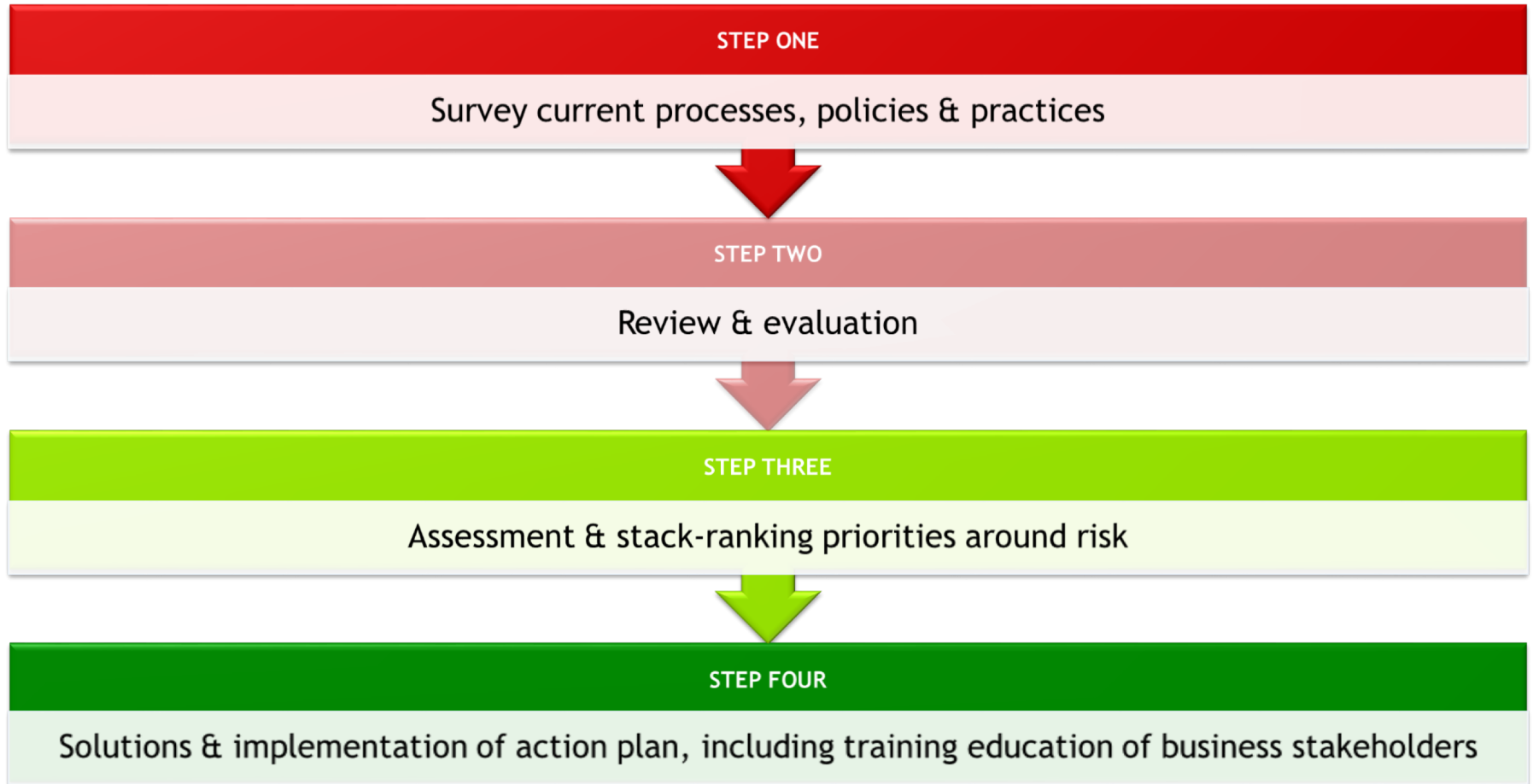
Does Not Cover In-House Counsel Covers In-House Counsel Exceptions

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# Your To Do List

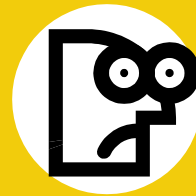
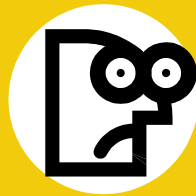


# Your To Do List

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- Evaluate one important country, region OR hub
- Think through the issues
- Prepare processes & communications protocol
- Customize for other countries, regions as time and budget allow





**It's QUESTION TIME!!**

# I M P O R T A N T   N O T E



This document, and any accompanying exhibits and/or oral presentation, provides general information as to selected issues.

***IT IS NOT LEGAL ADVICE AND SHOULD NOT BE USED AS A SUBSTITUTE FOR REVIEW OF YOUR SPECIFIC SITUATION WITH LEGAL COUNSEL.***

Efforts have been made to provide accurate information; however, we advise you to seek counsel and advice from a qualified lawyer regarding legal matters. Legal obligations may vary according to the facts and circumstances as well as the jurisdiction.



# Avoiding Cross-Border Attorney-Client Privilege Waiver Disasters

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