Chapter Four: Critically Challenged—The Recognition And Scope of The Self–Critical Analysis Privilege

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Critically Challenged—The Recognition And Scope of The Self–Critical Analysis Privilege

The self-critical analysis privilege (also called the self-evaluative or self-investigative privilege) operates to protect confidential, nonfactual deliberative material such as recommendations or opinions resulting from internal investigations, reviews, or audits. The privilege has been analogized to, and is based on the same public policy considerations as, Federal Rule of Evidence 407 regarding subsequent remedial measures. *See Capellupo v. FMC Corp.*, No. 4-85-1239, 1988 WL 41398 at *1 (D. Minn. Dec. 3, 1988) (holding that claims of a self-critical analysis privilege should be evaluated under Rule 407). Thus, the privilege has been described as protecting:

> [I]ndividuals and organizations from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidenced of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.

Reichhold Chem., *Inc. v Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994).

It is a very important privilege to corporate entities, particularly in this post Sarbanes-Oxley, Enron era, because the self-critical analysis privilege allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation.. Proponents of the privilege argue that without the privilege a "chilling effect" on self-analysis would result. *See, e.g.*, *In re Air Crash near Cali, Columbia on December 20, 1995*, 959 F. Supp. 1529, 1533, (S.D. Fla. 1997). Proponents also argue that it is unfair for a court to require a party to turn over to an opposing litigant, self-disparaging assessments that the government has required it to prepare. *See Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

I. The Origin and Evolution of The Privilege

The self-critical analysis privilege is a creation of common law. It first originated in *Bredice v. Doctors Hosp.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973), to protect from disclosure medical peer reviews. In *Bredice*, the administratrix of a decedent's estate filed a medical malpractice action against the hospital that treated the deceased. In discovery, the plaintiff sought information and reports generated by the hospital's staff, including (1) minutes and reports of any board or committee of the hospital or its staff concerning the death of the decedent, and (2) reports, statements, or memoranda, including reports to the malpractice carrier, reduced to writing, pertaining to the deceased or his treatment, no matter when or to whom or by whom made. *Id.* The court denied the plaintiff's access to such documents based on public policy grounds, finding that:

> Confidentiality is essential to effective functioning of the staff meetings; and these meetings are essential to continued improvement of the care and treatment of patients. Candid and conscious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive, professional criticism cannot occur in an atmosphere of tension that one doctor's suggestion would be used as a denunciation of a colleague's conduct in a malpractice suit.

Bredice v. Doctors Hosp., 50 F.R.D. 249, 250 (D.D.C. 1970). Although *Bredice* was decided over thirty years ago, the evolution of the privilege has been plagued with uncertainty and inconsistency.

The evolution of the privilege has been impeded by two competing societal interests—a general policy favoring the free flow of information versus the litigant's right to liberal discovery. Thus, the growing trend by the courts is to construe the self-critical analysis privilege narrowly either by severely limiting its application or by questioning its existence and refusing to apply the privilege to any degree. *See, e.g.*, *In re Burlington Northern*, *Inc.*, 679 F.2d 762, 765 n.4 (8th Cir. 1982) ("[C]ourts have appeared reluctant to enforce even a qualified 'self-evaluation' privilege. They typically concede its possible application in some situations, but then proceed to find a reason why the documents in question do not fall within its scope."); *MacNamara v. City of New York*, No 04-CIV-9612, 2007 WL 755401 at **3–5 (S.D.N.Y. March 14, 2007) (recognizing that while the self-critical privilege is an "open question" in the Second Circuit, even if it exists it cannot protect police department reviews).

Such judicial disfavor has resulted in an inconsistent case-by-case approach, leading to unpredictable outcomes for corporations relying on the privilege to maintain the confidentiality of their self-analytical documents. When the privilege has been recognized, however, the rationale for protecting self-analytical materials from disclosure is the same in every case—the public's interest in encouraging candid institutional self-analysis outweighs the public's concern of insuring complete disclosure of all irrelevant information to a litigant. *See, e.g.*, *New York Stock Exch. v. Sloan*, No. 71CV2912, 1976 WL 169086 at *3 (S.D.N.Y. Oct 21, 1976) ("[T]he common theme linking all these cases is that, in each, the policies in favor of confidentiality—protecting individuals' expectations of privacy and/or promoting free communication of candid evaluations and criticisms within an organization—have been deemed strong enough to justify restrictions on liberal pre-trial discovery.").

The *Bredice* court applied the privilege to a medical peer review context and, indeed, the self-investigative privilege has been most frequently employed to protect hospital internal review procedures and employer affirmative action reports. *See, e.g.*, *Gillman v. U.S.*, 53 F.R.D. 316, 318 (S.D.N.Y. 1971) (hospital review committee notes). The privilege has been extended to numerous other areas, however, from a contractor's confidential assessment of its equal employment opportunity practices to product safety assessments. *See, e.g.*, *Keyes v. Lenoir Rhyne College*, 552 F.2d 57 (4th Cir.), *cert denied*, 434 U.S. 904 (1977) (applied to academic peer reviews); *Bracco v. Diagnostics, Inc. v. Amersham Health Inc.*, No. A.03-6025(FLW), 2006 WL 2946469 at *8 (D.N.J. Oct. 16, 2007) (applied to a pharmaceutical company's legal compliance review); *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992) (applied to products liability case); *Granger v. Nat'l R.R. Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987) (applied to railroad accident investigations); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (applied to product safety assessments); *New York Stock Exch. v. Sloan*, No. 71CV2912, 1976 WL 169086 at *1 (S.D.N.Y. Oct 21, 1976) (applied to accounting records); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (applied to a defense contractor's confidential assessment of its equal employment opportunity practices).

In 1992, the Ninth Circuit in *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992), developed a four-prong test for determining whether to apply the privilege (although the court ultimately held that the privilege did not apply to the facts before it). This test asks whether (1) the information resulted from a self-critical analysis undertaken by the party seeking protection; (2) the public has a strong interest in preserving the free flow of the type of information sought; (3) the information is of they type whose flow would be curtailed if discovery were allowed and (4) the information was prepared with the expectation that it be kept confidential. Several courts have adopted one or more of the factors of the four-prong test to determine whether the privilege applies.

Because of the inconsistent application of the self-critical analysis privilege, the privilege remains widely amorphous. *See, e.g.*, *Guardian Life Ins. Co. v. Serv. Corp. Int'l.*, No. 88–0395, 1989 WL 3496 at *3 (E.D. Pa. Jan. 17, 1989) (stating the privilege was "largely undefined and has not generally been recognized by many authorities"). Indeed the privilege has been applied by some courts and rejected by many others; "it is neither widely recognized nor firmly established in federal common law." *Abdallah v. Coca-Cola Co.*, No. A1:98CV3679RWS, 2000 WL 33249254 at *5 (N.D. Ga. Jan. 25, 2000). While the number of federal circuits with courts that have recognized the privilege and courts that have refused to recognize the privilege are almost equal, the decisions from district to district and even within the same district are so inconsistent that there is little true guidance as to under what circumstances, if any, the privilege will be recognized. A trendy surge regarding the privilege has blossomed at the state level, with several states statutorily enacting laws shielding internal self-critical analysis from discovery. *See, e.g.*, Mich. Comp. L. §§324.14801–324.14810 (2008) (setting forth evidentiary privilege for civil or administrative, but not criminal, proceedings, and immunity for voluntary disclosures and remediation for environmental violations discovered in an environmental audit); La. Rev. Stat. Ann. §6:336 (2008) (enacting statutory privilege for banks and other financial institutions that protects self-evaluations conducted with respect to compliance with state or federal banking laws and regulations). Knowledge of these state regulations is important in diversity cases since the federal courts will look to the state's laws to determine whether the privilege applies. *See* Fed. R. Evid. 501.

Against that framework, the following section will discuss the various applications of the privilege by district courts in each of the federal circuits. It will also provide some practice pointers to in-house and outside counsel who want to take advantage of the privilege.

II. What The Circuits Think of The Privilege

The development of the privilege has taken place almost entirely at the district court level, with very little guidance from the federal appellate courts. The United States Supreme Court, for example, in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), held that an analogous peer review privilege did not apply to a Title VII suit, but left unanswered the ultimate question of whether it would recognize the privilege in a different context. Like the Court in *University of Pennsylvania*, many courts faced with addressing whether to recognize the privilege avoid the ultimate question, finding instead that the privilege is inapplicable to the facts before them. *See*, *e.g.*, *Lacloair v. City of St. Paul*, 187 F.3d 824, 828–29 (8th Cir. 1999). Several courts interpret the *University of Pennsylvania* decision as holding that the determination of whether to recognize the privilege must be conducted on a case-by-case basis.

This case-by-cases analysis, however, has led to divergent and inconsistent applications of the privilege from one district to another as well as within the same district. It has also led to the creation of a host of varying court-made exceptions and limitations. *See Spencer v. Sav. Bank SLA v. Excell Mortgage Corp.*, 960 F.Supp. 835 (D.N.J. 1997) (discussing the emergence of the privilege and its diverse application, lack of uniformity and limited application). For example, several courts require the compilation of the material to be mandated by the government (*e.g.*, E.E.O.C. reports) in order to be privileged. *See*, *e.g.*, *Zoom Imaging*, *L.P. v. St. Luke's Hosp. and Health Network.*, 513 F. Supp.2d 411, 416 (E.D. Pa 2007) (noting that "most of the federal cases that have recognized the privilege have done so in areas where the self-critical analysis is either compulsory or part of an effort to comply with legal or regulatory requirements"). Other courts have held that the privilege does not apply to routine internal reviews that pre-date the situation giving rise to litigation. For example, in *Dowling*, the court held that the privilege did not protect routine corporate reviews and, rather, should be applied to "after action" reports. *Dowling*, 971 F.2d at 426; *see also Reichhold*, 157 F.R.D. at 527 (holding that the self-critical analysis privilege only applies to reports which were prepared after the fact for the purpose of self-evaluation and analysis and stating that the "fact that an actor had actual prior knowledge of the harm that would or could result from a course of action, and, nevertheless, deliberately chose to act is highly relevant. . . and should ordinarily be discoverable. However, retrospective analysis is generally not relevant").

Generally, the courts which recognize the privilege (as well as many of those which analyze the privilege without deciding whether to recognize it), apply some version of the four-prong test articulated by the Ninth Circuit in *Dowling.* Even when recognized, however, the privilege will protect only subjective opinions, impressions, and recommendations, and not objective facts. *See*, *e.g.*, *Todd v. South Jersey Hosp. Sys.*, 152 F.R.D. 676, 682 (D.N.J. 1993); *Culinary Foods*, *Inc. v. Raychem Corp.*, 153 F.R.D. 614 (N.D. Ill. 1993). Additionally, in order for the self-evaluation privilege to apply, the materials at issue must have been prepared with the expectation that they would be kept confidential and must have in fact been kept confidential. *See*, *e.g.*, *Burden-Meeks v. Welch*, 319 F.3d 897 (7th Cir. 2003) (refusing to reach the question of self-critical analysis privilege on the grounds that the disputed report's author, an intergovernmental cooperative agency of which the defendant city was a member, had not disclosed the report to the city's mayor). Further, most courts hold that the privilege is a qualified privilege which may be overcome by a showing of "sufficient need." *Bracco v. Diagnostics, Inc. v. Amersham Health Inc.*, No. A.03-6025(FLW), 2006 WL

2946469 at *4 (D.N.J. Oct. 16, 2007). Thus, courts considering claims of self-evaluation privilege will engage in a balancing process, weighing the interests of the party seeking disclosure against the public interest in maintaining confidentiality. *See Morgan v. Union Pac. R.R. Co.*, 182 F.R.D. 261, 264 (N.D. Ill. 1998).

As previously stated, a number of courts have rejected the self-critical analysis privilege. *See*, *e.g.*, *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) (rejecting privilege on waiver grounds, but noting that the self-critical analysis privilege is "a privilege never recognized in this circuit"); *E.B. v. New York City Bd. of Educ.*, 233 F.R.D. 289, 295 (E.D.N.Y. 2005) (declining to recognize the self-critical analysis privilege and noting that the privilege has led a "checkered existence" in the federal courts); *Spencer v. Sav. Bank SLA v. Excell Mortgage Corp.*, 960 F.Supp. 835, 840 (D.N.J. 1997) (holding that self-critical analysis privilege does not exist at federal common law).

One of the major concerns is that a privilege must promote sufficiently important interests to outweigh the need for probative evidence. *See*, *e.g.*, *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990). Many believe that the self-critical analysis privilege simply fails to meet that requirement. The Supreme Court has stated that it is "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." *Id.* at 189. The Court noted that 501 of the Federal Rules of Evidence provides the federal courts with the flexibility to develop privileges, yet held that such non-statutory privileges should be recognized infrequently and narrowly. Following this reasoning, a number of state courts have rejected the privilege simply because the state legislature has yet to adopt the privilege. Indeed, in many states, courts are forbidden from adopting new privileges by judicial decision. *See*, *e.g.*, *Southern Bell Tel. & Tel. Co. v. Beard*, 597 So. 2d 873, 876 (Fla. Dist. Ct. App. 1992). Thus, while under the Federal Rules new privileges can be recognized by judicial decision, this may not be the case in the state court where a plaintiff brings suit. *Id.*

A typical analysis of the four-pronged *Dowling* standard turns on the third element and whether the information would be subject to a chilling effect. Courts often determine that the information in a report would continue to be collected even if discoverable because other incentives would be sufficient to overcome any chilling effect. *See In re Salomon Inc. Sec. Litig.*, No. 91 Civ. 5442 (RPP), 1992 WL 350762 at *1 (S.D.N.Y. 1992). In *In re Salomon*, Salomon Brothers was sued for misrepresentation of facts and concealment of treasury violations in a securities auction. Salomon had conducted internal audits of its controls and procedures for trading, and had commissioned an audit by an outside party. *Id.* at *5. When a suit was brought, Salomon claimed a self-critical privilege for these audits. The court recognized the public's interest, but concluded that management control studies and internal audits would not be curtailed because economic efficiencies, accuracy in financial reporting, and improvement of business standards are integral to the success of a business. *Id.* Thus, the court found no self-investigative privilege applied. *Id.*

Furthermore, many courts are also unlikely to apply the privilege to documents sought by a government agency. *See*, *e.g.*, *United States v. Noall*, 587 F.2d 123 (2d Cir. 1978) (self-evaluation privilege does not apply to documents sought by the IRS when Congress has established policy requiring disclosure). This limitation is based on recognition that the self-evaluation privilege is rooted in the public's interest and, thus, may be outweighed by "the strong public interest in having administrative investigations proceed expeditiously and without impediment." *F.T.C. v. TRW*, *Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980). Whatever the status of the self-evaluative privilege in the context of private litigation, courts often refuse its application where the documents in question have been sought by a governmental agency. *Id.*

III. A Sampling of the Diverse Decisions in the Federal Circuits

D.C. Circuit. The D.C. circuit is widely acknowledged as the first circuit to apply the privilege because of the *Bredice* decision. *Bredice v. Doctors Hosp.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). In a subsequent case, however, the circuit refused to apply the privilege to documents sought by a government agency. *F.T.C. v. TRW, Inc.,* 628 F.2d 207, 210–11 (D.C. Cir. 1980). In addition, courts require a party to raise the privilege in a timely manner. *See* First E. Corp. v. Mainwaring, 21 F.3d 465, 467 (D.C. Cir. 1994) (refusing to entertain defendant's privilege claim against disclosure of requested documents after defendant failed to raise the claim in the court below).

First Circuit. The First Circuit has not yet weighed in on the issue. However, in *O'Connor v. Chrysler*, 86 F.R.D. 211, 217 (D. Mass. 1980), the District Court of Massachusetts examined the availability of the self-critical analysis privilege for government-mandated materials and found that it would be unfair if the rule allowed the government to require companies to engage in self-critical analysis and then hand that analysis over to plaintiff litigants as ammunition. *Id.* (expressing concern for assuring "fairness to persons who have been required by law to engage in self-evaluation to promote the public interest in fair employment practices and to make the self-evaluation process more effective by creating an effective incentive structure for candid and unconstrained self-evaluation"). Significantly, the Court issued an Order allowing the privilege but with detailed instructions for separating factual from privileged evaluative materials.

Second Circuit. Although some commentators include the Second Circuit among the lists of circuits that have refused to recognize the privilege, that refusal has not been consistent. In *United States v. Noall*, 587 F.2d 123 (2d Cir. 1978), the court refused to apply the privilege to documents sought by a government agency. Likewise, in *Donato v. Fitzgibbons,* 172 F.R.D. 69, 71 (S.D.N.Y. 1996) and *Robert v. Hunt*, 187 F.R.D. 71, 74–76 (W.D.N.Y. 1999), the courts refused to recognize the privilege.

There are several district courts in the Second Circuit, however, that have recognized the existence of the privilege, but have applied it narrowly. *See, e.g.*, *UBS Asset Mgt., Inc. v. Wood Gundy Corp.*, No. 95 CIV 5157(LLS), 1999 WL 294843 at *1 (S.D.N.Y. May 11, 1999). In *In re Crazy Eddie Securities Litigation*, the United States District Court for the Eastern District of New York relied on the privilege to protect an accounting firm from producing documents that pertained to internal quality control. *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992). The documents sought by the plaintiffs included information obtained in an audit of Crazy Eddie, a peer review report, and a letter of comments on the internal quality controls.

Conversely, in *In re Salomon Inc. Sec. Litig.*, No. 91 Civ. 5442 (RPP), 1992 WL 350762 at *1 (S.D.N.Y. 1992), the United States District Court for the Southern District of New York expressly declined to follow the *In re Crazy Eddie* decision, holding instead that the defendants were required to produce several documents that were in the nature of self-critical analysis. In *In re Salomon*, which came only six months after *In re Crazy Eddie*, the requested documents related to internal audit reports and management control studies. Although in both cases the desired documents were comparable in nature and were to be used to prove elements of fraud under analogous allegations, the *In re Salomon* court took the view that "overwhelming business interests would take priority over the possibility of future disclosures and businesses would, therefore, continue with the crucial process of self-critical analysis, even knowing that they might at some future time be required to share such analysis with an adversary in litigation." *See In re Salomon*, 1992 WL 350762 at *9.

Third Circuit. The Third Circuit has not recognized the self-critical analysis privilege and, as one district court stated, "[it] is unlikely to do so." *Davis v. Kraft Foods North America*, No. 03-6060, 2006 WL 3486461 at *1 (E.D. Pa. Dec. 1, 2006); *see also Spencer Sav. Bank, SLA v. Excell Mortgage Corp.*, 960 F.Supp. 835 (D.N.J. 1997) (no self-critical analysis privilege under federal common law). Significantly, in *Armstrong v. Dwyer*, the court referred to "the so-called self-critical analysis privilege," 155 F.3d 211, 214 (3d Cir. 1998), indicating the Third Circuit's reluctance to accept the existence of the privilege at all.

In *Paladino v. Woodloch Pines, Inc.,* 188 F.R.D. 224 (M.D. Pa. 1999), however, the Middle District of Pennsylvania, without discussing the Supreme Court's *University of Pennsylvania* decision, seemed to accept that a self-critical analysis privilege was cognizable, but held that the document at issue, a "guest claim investigation and prevention report" compiled by the defendant resort's safety office, did not fall within the scope of the privilege. The report had been compiled after the plaintiff suffered a slip-and fall on the resort's property, and contained analysis of the accident and the steps which could have been taken to prevent it. The court followed earlier opinions of the Eastern District of Pennsylvania, which concluded that the privilege does not apply to self-studies which that are not mandated by a governmental agency. *Id.* at 225. *Paladino* further rejected the defendant's argument that to permit discovery would have the effect of chilling voluntary, honest self-evaluation in order to prevent future accidents. The court followed the *Dowling* rationale that, because companies have an external market incentive to improve safety and because safety reviews are generally not confidential in nature, no chilling effect would result from disclosure. *Id*; *see also Hogan v. City of Easton*, No. CIV A 04-759, 2006 WL 3702637 at *8 n.8 (E.D. Pa. Dec. 12, 2006) (holding that both FRE 407 and self-critical awareness privilege protected police safety reviews from discovery).

Fourth Circuit. In *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977), the court refused to apply the privilege to protect disclosures to the E.E.O.C. In *Deel v. Bank of America, N.A.*, 227 F.R.D. 456 (W.D. Va. 2005), the Western District of Virginia refused to apply the privilege to documents compiled by an employer in connection with an audit of its job classifications in a Fair Labor Standards Act (FLSA) case. *Id*; *see also Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984), *aff'd*, 785 F.2d 306 (4th Cir. 1986).

In *Witten*, the Fourth Circuit Court of Appeals advanced other reasons for rejecting the privilege in equal employment cases. The court affirmed the district court's order compelling production of the defendant's self-evaluative affirmative action plans and EEO-1 reports. *Id.* at 453. The district court was swayed in favor of discovery not only by the potential relevancy of the documents, but also by the fact that the evaluations were not entirely voluntary. *Id.* In other words, since the government requires its contractors to adopt affirmative action plans and draft evaluative reports, the claim that the spectra of discovery would chill companies' ardor for such candid self-assessments is attenuated. If companies want federal contracts, they will make their federal reports and worry about discovery later. *Id.*

The *Witten* court also debunked the argument that the threat of discovery is a major disincentive to candid equal employment assessments. *Id.* The court pointed out that there are disincentives to self-critical analyses other than the discovery threat, including the fear among those employees charged with making candid and potentially damaging critiques of possible employer retribution. *Id.* Since other disincentives exist, the court concluded that blindly applying the privilege will not guarantee that candid self-examinations will be made or that the goals of the privilege will be satisfied. *Id.*

Fifth Circuit. In *Southern Ry. Co. v. Lanham*, the court refused to permit discovery of subjective impressions contained in a defendant railroad's accident reports stating that "absent complete and honest reports, effective accident evaluation may be impaired and the prevention of future accidents hampered." 403 F.2d 119, 131 (5th Cir. 1968). After extensively analyzing competing policy considerations, the Fifth Circuit held that retrospective investigations of railroad accidents were immune from discovery on public policy grounds. *Id*. at 130–33. Based on that decision, there is authority in the Fifth Circuit for recognition of the privilege.

Moreover, the Eastern District of Louisiana affirmed the holding of a magistrate judge which rejected application of the self-critical analysis privilege, without deciding whether the privilege would be applied on other facts. In *In re: July 5, 1999 Explosion at Kaiser Alum. & Chem. Co.*, 1999 WL 717513 at *1 (Sept. 13, 1999), *aff'd*, 1999 WL 743503 (E.D. La. Sept. 17, 1999), the magistrate judge noted that the Fifth Circuit had not yet approved the privilege, and that it remains "largely undefined." *Id.* at *2. After an in camera review of the requested documents, the magistrate judge declined to apply the privilege. While stopping just short of outright rejecting the existence of the privilege, the magistrate judge determined that, even if it were to apply the *Dowling* test, it would reach the conclusion that the documents were not protected. Stating that the documents were "comparable in nature" to the pre-accident safety reviews which had been found not privileged in *Dowling*, the magistrate judge held that the "compelling interest" of the citizens living near the defendant's manufacturing plant in having access to the defendant's safety evaluations outweighed the possibility that the defendant would be deterred from conducting such self-evaluation in the future. Moreover, the documents did not specifically indicate that they were to be kept confidential. *Id.* at *3.

Sixth Circuit. While in *Siskonen v. Stanadyne, Inc.*, 124 F.R.D. 610 (W.D. Mich 1989), the court stated that there was no self-critical analysis privilege under federal common law, it noted that the privilege has been extended to such contexts as workplace safety and products liability. *See Harper v. Griggs*, No. CIV.

A.04-260-C, 2006 WL 2604663 at *1 (W.D. Ky. Sept. 11, 2006). The court in *Harper*, in applying the privilege, concluded that an accident review board's report was of a conclusory nature and was inadmissible as evidence because such evidence includes the accident review board's "thoughts, analyses, inferences, or deductions, based on the factual circumstances of [the] accident and their recommendations, changes in policy, or employment decision in light of the accident." *Id.* at *2. The court further held, however, that evidence related to the empirical facts of the accident was admissible. *Id.* Such evidence encompassed any factual findings of the accident review board, including evidence relating to causes, circumstances or damages caused by the accident. *Id.*

Yet another district court in the same Circuit, in *Williams v. Vulcan-Hart Corp.*, 136 F.R.D. 457, 459–460 (W.D. Ky. 1991), applying Kentucky law, noted that Kentucky courts have not recognized the self-critical analysis privilege and expressed doubt that they would.

Seventh Circuit. In *Burden v. Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003), the Seventh Circuit declined to recognize the self-critical analysis privilege. In *Morgan v. Union Pac. R.R. Co*., 182 F.R.D. 261, 264 (N.D. Ill. 1998), the court stated that, "[g]iven the vast array of inconsistent decisions on this issue, it would be an understatement to say that it is unclear whether a federal self-critical analysis privilege exists."

In addressing the self-critical analysis privilege, courts often avoid adopting or rejecting the privilege by prefacing their analysis with the statement, "assuming the privilege does exist" or words to that affect, but then denying the claim based on the facts of particular cases. The court in *Morgan*, for example, stated that "[t]he Seventh Circuit has yet to squarely address the issue of whether the privilege of self-critical analysis exists and, if so, to define the contours of the privilege. In this absence of binding authority, and recognizing that most courts afford some level of recognition to the privilege, this court presumes for the purposes of this case, that federal common law does recognize the privilege of self-critical analysis." *Id.* The court went on to find, however, the case inapplicable to the case before it. *Id.*

Eighth Circuit. The Eighth Circuit has not addressed the issue of whether it will recognize the privilege. Several districts courts in this district, however, while refusing to apply the privilege in employment cases, have refused to reject the privilege outright. *See Holland v. Muscatone Gen. Hosp.*, 971 F. Supp. 35 (S.D. Iowa 1997) (refusing to recognize the privilege as to peer review documents in Title VII action); *Tharp v. Sivyer Steel Corp*., 194 F.R.D. 177 (S.D. Iowa 1993) (holding that the privilege did not apply in the employment discrimination context). In *Gatewood v. Stone Container Corp.*, 170 F.R.D. 455 (S.D. Iowa 1996), however, the court refused to hold that under no circumstances would the privilege apply in an employment case, but rather, held that it did not apply based on the facts before the court. Going beyond the employment context to a products case, but still leaving the ultimate question unanswered, the court in *Carlson v. Freightliner, LLC*, 226 F.R.D. 343 (D. Neb 2004) held that the privilege does not apply to reports which were routine internal corporate reviews of matters related to the defendant's business operations, recalls, and safety concerns.

Ninth Circuit. The Ninth Circuit has declined to recognize the self-critical analysis privilege. *See Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (holding that no federal privilege of peer review protected mortality review conducted by county correctional health services); *Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069 (9th Cir. 2000) (holding that the circuit has not recognized the privilege). The *Agster* decision, however, appears to conflict with the Circuit's decision in *Dowling*, *supra*, in which the court held that the privilege could apply under certain circumstances. Although the court in *Dowling* did not apply the privilege to a routine safety inspection because the inspection was not expected to be kept confidential, the court did enunciate a four part test under which the privilege might apply.

Thus, not surprisingly, several district courts in the Circuit have held that the privilege might be applicable, although refusing to apply it to the facts before them. *See Granberry v. Jet Blue Airways*, 228 F.R.D. 647 (N.D. Cal. 2005) (holding that privilege did not apply to employment discrimination case); *Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005) (holding that privilege would apply if certain conditions were met); *Price v. County of San Diego*, 165 F.R.D. 614 (S.D. Cal. 1996) (holding that the privilege did not apply to §1983 action because the report did not meet the elements for protection); *Soto v. City of Concord*, 162 F.R.D. 603 (N.D. Cal. 1995) (holding that the privilege did not apply to civil suit against police department); *United States ex rel Burns v. Family Practice Assoc. of San Diego*, 162 F.R.D. 624 (S.D. Cal 1995) (holding that the disputed report in a *qui tam* action did not meet the elements necessary for the privilege to apply since the reports were prepared to promote the company's own self interest).

Tenth Circuit. There are no published decisions from the Tenth Circuit addressing the privilege. Two district courts, however, while refusing to apply the privilege to the facts before them, left the ultimate question of whether the privilege would apply to other circumstances unanswered. In *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995), the court refused to apply the privilege in an affirmative action Title VII case, but left the question as to whether the privilege might apply under different circumstances unanswered. Similarly, in *Mason v. Stock*, 869 F.Supp. 828 (D. Kan. 1994), the court held that the privilege did not apply in a §1983 action against a police officer, but left the question of whether the privilege would apply in general unanswered. One district court has recognized the privilege in the medical review context. *Weekoty v. United States*, 30 F.Supp.2d 1343 (D.N.M. 1998).

Eleventh Circuit. The Eleventh Circuit has not explicitly answered the question of whether it would recognize the privilege. *See Adkins v. Christie*, 488 F.3d 1324, 1331 (11th Cir. 2007) ("While all fifty states and the District of Columbia recognize such a privilege, the Eleventh Circuit has not yet definitively ruled on whether it applies in federal court . . . [W]e conclude that the medical peer review process does not warrant the extraordinary protection of an evidentiary privilege in federal civil rights cases."). Several district courts in the Eleventh Circuit, however, have recognized the privilege. For example, in *Reid v. Lockheed Martin Aeronautics Co.,* 199 F.R.D. 379 (N.D. Ga. 2001), the district court held that a report created for the employer's diversity council relating to the employer's corporate culture was protected under the privilege and distinguished the facts before it from the *University of Pennsylvania* case. Similarly, in *In re Air Crash Near Cali, Columbia on December 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997), the court recognized the privilege for materials prepared as part of an airline safety program. *See also Joiner v. Hercules, Inc.*, 169 F.R.D. 695 (S.D. Ga. 1996) (applying the privilege to documents and files prepared or created by a company in order to evaluate the company's compliance with environmental regulations and laws).

Additionally, there are a few district courts in the Eleventh Circuit which, while recognizing the privilege, refused to apply it to the facts before it. For example, in *Freiermuth v. PPG Ind. Inc.*, 218 F.R.D. 694 (N.D. Ala. 2003) (recognizing the privilege, but refusing to apply it to an employment discrimination case and stating further that even if the privilege applied to the employment context it would not apply to documents prepared in connection with the company's reduction in force, which contained only factual information). *See also Johnson v. United Parcel Serv., Inc.*, 206 F.R.D. 686 (M.D. Fla. 2002) (holding that until the Eleventh Circuit or United States Supreme Court recognizes the privilege, the district court was not inclined to apply the privilege at least in the employment context and further stating that it could find no overwhelming public policy supporting recognition of such a judicially created evidentiary privilege in the facts before it).

IV. Practice Tips

Because of the varying and inconsistent application of the privilege, the most important practice tip for dealing with this privilege is to keep in mind that it cannot be guaranteed under any set of circumstances. Accordingly, the second most important practice tip is for in-house and outside counsel to protect such documents under another privilege, such as the work product doctrine or attorney-client privilege. Notwithstanding the various courts' inconsistent treatment of the self-critical analysis privilege, in-house and outside counsel should still develop standard operating procedures and drafting techniques to protect such critical documents. Below is a list of pointers to utilize when dealing with the privilege, as well as a discussion of alternatives to the privilege.

A. Helpful Tips

- Raise the privilege in a timely fashion.
- The burden is on the claimant to establish that the privilege applies.

- The privilege cannot be used as both a sword and a shield. *See Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985) (finding employer waived privilege by introducing part of the report); *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703 (S.D.N.Y. 1983) (holding that CBS waived privilege by using report to justify broadcast).
- Make sure that the document sought to be protected is intended to be kept confidential and is in fact kept confidential. *See Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005) (the privilege will not apply unless the document at issue was prepared with expectation that it be kept confidential and was in fact kept confidential; thus, privilege did not apply to report that was relied upon by the defendant in support of its affirmative defense). For example, counsel should make sure to conspicuously mark all self-critical documents as confidential and limit their distribution both internally and externally.
- The privilege does not protect underlying facts. *See*, *e.g.*, Price v. County of San Diego, 165 F.R.D. 614 (S.D. Cal. 1996); *Sheppard v. Consol. Edison Co. of New York*, 893 F. Supp. 6 (E.D.N.Y. 1995); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431 (E.D. Pa. 1988). It protects only those portions of documents that contain subjective opinions, impressions or recommendations. *See O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218–220 (D. Mass. 1980) (issuing order with detailed instructions for separating factual from privileged evaluative materials). Thus, when drafting critical documents, counsel should advise clients to separate objective facts from opinions. While opposing counsel, and inevitably a judge, may disagree with a company's characterization of a document as self-critical, that characterization may be made more persuasive if the document is both aptly titled and composed of sections clearly delineated as subjective analysis or opinion. While titles and section headings will not transform objective facts into subjective self-criticism, such labels may at least lay the foundation for a privilege argument.
- Keep in mind the privilege will yield if the party seeking the information can demonstrate extraordinary circumstances or "special need" which outweighs the interests protected by the privilege. *See Mem'l Hosp. for Meltonry City v. Shadler*, 664 F.2d 1058 (7th Cir. 1981). Thus, in preparing a privilege strategy, a company should develop counterarguments to an exceptional need claim. For instance, an argument may be made that the facts underlying the analysis (which are always discoverable) provide sufficient information for the opposing party to litigate his or her case without having to probe the company's subjective conclusions about itself.
- In diversity cases, federal courts look to state law, and several states, such as Florida, Georgia, and Arizona have enacted regulations codifying the privilege in certain circumstances. Thus, in-house and outside counsel should be cognizant of a particular state's self-critical analysis statute, if applicable.
- Be aware of the consequences of possibly having to disclose self-critical materials prior to preparing such materials and keep those consequences in mind during the drafting process.

B. Alternatives

Most importantly, even if a party is unable to block discovery challenges, there are a number of other options that both in-house and outside counsel can explore to protect the corporate client. There are a host of other federal and state-specific privileges that apply in only certain situations. For example, many states have a statutory compliance privilege for insurance companies and environmental audit privileges, and the accountant-client or auditor-client privilege may be invoked in certain circumstances (though not in SEC investigations or other federal matters).

There are several other potential grounds for protecting the product of a compliance program if the documents are generated in litigation or in anticipation of litigation. One of the most important is the attorney work product doctrine, which is one of the strongest grounds on which a company may protect the products of its compliance programs. Moreover, the attorney-client privilege protects from trial and pre-trial disclosure communications between a client and his or her attorney which are legal in nature and confidential. If a self-critical evaluation is either contained in or comprises a confidential communication from a client to attorney on a legally related matter, the privilege may attach. If the communication is made to in-house counsel, the privilege may attach depending upon the nature of the communication and the employee-client making the communication.

Rule 26(c) of the Federal Rules of Civil Procedure permits a party to move for an order to protect it from discovery which may cause "annoyance, embarrassment, oppression, or undue burden or expense." An order may direct that discovery not occur, that it be limited to certain matters, or that a "trade secret or other confidential research, development, or commercial information not be revealed." A protective order may be sought in conjunction with or as an alternative to the privilege. *IPALCO Enter. v. PSI Res., Inc.*, 148 F.R.D. 604, 606 (S.D. Ind. 1993) (stating that the protection of "business strategies" from discovery is generally handled through protective orders). While these orders may only shield certain aspects of a self-critical document, some protection is undoubtedly preferable to complete disclosure of sensitive materials.

In addition, settlement offers or plea negotiations, including Wells submissions in SEC matters, may be deemed inadmissible in court pursuant to Rules 408 and 410 of the Federal Rules of Evidence, but those rules do not protect such information from disclosure to an adversary in litigation. *See*, *e.g.*, *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2004 WL 60290 at *1 (S.D.N.Y. Jan. 12, 2004). Communications with a non-testifying expert may also be protected in the litigation context. There may also be an opportunity to protect communications with other parties if subject to viable joint defense agreements.

In general, the strongest grounds for protecting the products of a compliance program are those that depend upon the involvement of a lawyer giving legal advice or generating work product in anticipation of litigation. Most routine compliance documents will therefore not be protected from disclosure; however, unlike the self-critical analysis privilege, the attorney-client privilege may not be defeated by a showing of exceptional need—the privilege is absolute. Companies should strongly consider attempting to invoke the legal grounds described above to protect sensitive and potentially damaging compliance documents, such as reports of internal investigations and recommendations for remediation.

V. Conclusion

Over the past twenty years, American businesses have witnessed a shocking surge in the number of multi-million dollar damage awards against corporate defendants ranging from products liability to insurance bad faith to employment discrimination. Whether citing examples varying from innumerable insider trading scandals to Exxon Valdez's tragic impact on Alaska's natural environment, the federal government and consumer advocates have relentlessly demanded heightened corporate responsibility and accountability. Coincident to this rise in punitive jury verdicts and demand for enhanced corporate self-policing has been the proliferation of federal, state, and local laws regulating various aspects of corporate conduct. These developments urge aggressive managerial action, both to honor contemporary social mores to which an organization may subscribe, and to avert adverse publicity and potential legal liability.

Unlike individuals, however, corporations do not enjoy a constitutionally implicated right to privacy, which might otherwise shield the results of such internal investigations from coerced public disclosure. Thus, despite the prophylactic benefit of corporate self-critical analysis, corporations fear that the written reports and candid critiques of a company's operations and practices may later be used in a civil suit or other proceeding against the corporate defendant. Furthermore, neither state nor federal courts have consistently applied the self-critical analysis privilege and even where the privilege is accepted, the circumstances required in order to invoke the privilege vary from one jurisdiction to another. Therefore, rather than rely on the inconsistent application of this privilege for protection, corporations should structure internal investigations around a more settled privilege, such as the work-product privilege. In practice, this may mean hiring outside legal counsel to conduct and structure internal investigations, as they may be in a better position to independently assess the situation and structure the investigation accordingly. Most importantly, in-house counsel must work alongside outside counsel to protect self-critical documents in advance of litigation in order to keep the attorney-client privilege and to keep the principles underlying the privilege in view when drafting and disseminating self-critical documents.

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