The Privilege of Self-Critical Analysis
by
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Introduction

In recent years, there has been an unprecedented onslaught of multi-million dollar damage awards levied against corporations resulting from product liability lawsuits. In light of this recent trend in tort law, it is incumbent upon potential corporate defendants to take every possible precaution to avoid being subject to these potentially calamitous pecuniary losses.

One method by which corporations have attempted to prevent these results has been to institute self-evaluative or self-policing programs by conducting periodic internal investigations, in an effort to maximize safety and/or to comply with all local, state and federal laws. Additionally, corporations frequently conduct their own investigations into accidents that may have occurred as a result of a product that they manufacture. Consequently, the reports and other documents that are generated as a result of these internal investigations oftentimes become the topic of hot debate during the discovery phase of an ensuing lawsuit.

Generally speaking, plaintiffs on the one hand, seek to have these internal investigations or self-critical analysis reports produced during discovery, to aid them in proving their case of liability against the corporate defendant. The corporate defendant, however, believes that these internally generated self-critiques should be privileged, because to hold otherwise would discourage employees within the corporation from conducting a true and candid analysis, for fear that their findings might have costly future ramifications.¹

In an attempt to address this quandary, courts have developed what is becoming widely known as the privilege of self-critical analysis. As the court stated in Reichhold Chemicals, Inc. v. Textron, Inc.²,

¹ See The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1091 (1983) stating that "the chilling effect of disclosure of self-critical analyses has a two-fold nature. First, if a plaintiff obtains discovery, there may be a direct chilling effect on the institutional or individual self-analyst; this effect operates to discourage the analyst from investigating thoroughly and frankly or even from investigating at all... Second, courts should be concerned about the ability of the self-analyst to gather the information it needs to make its evaluation. Knowledge that a final report may be disclosed will often discourage individuals from coming forward with relevant information. Therefore, courts must be aware of the chilling effect not only on the self-analyst, but also on persons asked to supply the data that make internal analyses possible."

² 157 F.R.D. 522 (N.D. Fla. 1994).
The privilege protects an organization or individual 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 evidence 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.\(^3\)

**The Self-Critical Analysis Privilege**

The emerging privilege of self-critical analysis attempts to protect from disclosure an organization's internal investigations and analytical reports concerning its policies, procedures and practices.\(^4\) The first case to address this privilege was *Bredice v. Doctor's Hospital, Inc.*,\(^5\) a medical malpractice suit wherein the plaintiff sought production of minutes and reports generated by the hospital "peer review" committee investigating the death of the patient, the sole purpose of which was "the improvement of medical procedures and techniques...."\(^6\) The court, in denying plaintiff's request for the production of this material, stated that the value of these discussions would be destroyed if the meetings were to be opened to the discovery process, and, that there is an overwhelming interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.\(^7\) The court held that these documents were entitled to a qualified privilege because of "this overwhelming public interest."\(^8\)

The *Bredice* court further held that this qualified privilege could be overcome if the party seeking disclosure made a showing of "extraordinary circumstance" as to why the information should be produced. However, most courts since *Bredice* that have recognized the self-critical analysis privilege have not followed the "extraordinary circumstance" test, but instead have applied a balancing test to determine whether the information sought should be produced.\(^9\) The public policy benefits that justify the privilege are weighed against societal interests in arriving at

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\(^3\) Id. at 524.


\(^6\) Id. at 250.

\(^7\) Id. at 250, 251.

\(^8\) Id.

the truth.¹⁰

Not all courts have acknowledged this relatively new and emerging privilege; however, the courts that have recognized it, have applied it to cases beyond medical peer reviews to include: equal employment opportunity compliance,¹¹ securities law,¹² product safety assessment¹³ and product liability suits,¹⁴ among others.

**Apparent Elements of The Self-Critical Analysis Privilege**

Most courts that have considered the issue of whether the privilege of self-critical analysis should be applied in a given case have relied on three or four critical elements:

1. the information must result from a critical self-analysis undertaken by the party seeking protection;
2. the public must have a strong interest in preserving the free flow of the type of information sought; and
3. the information must be of the type whose flow would be curtailed if discovery were allowed.¹⁵

Some courts have required that one additional element be met in order for the privilege to apply:

4. the document to be produced must be prepared with the expectation that it will be kept confidential and has in fact been

¹⁰ See Brief, *The Self-Analysis Privilege: Obscuring the Truth But Safeguarding Improvement*, Michael J. Holland, 25-Fall Brief 52 (Fall 1995).


A. The Information Must Result From a Critical Self-Analysis Undertaken by the Party Seeking Protection

This element requires that the individual or corporation seeking protection must have actually initiated the evaluation. A party would not be successful in asserting the privilege if, for example, an outside agency came in and performed the investigation or analysis. Furthermore, if the investigation was performed by an outside agency, one would not meet the fourth requirement, because the resulting information would not be considered confidential. Additionally, the information to be protected must be a true self-critique. Mere facts and statistics will not be protected.

The types of analyses that have the potential of being shielded from discovery include:

* technical reviews of product design;
* post accident investigations;
* aircraft accident investigative reports;
* internal analysis of company's affirmative action or equal employment programs;
* reporting instances of non-compliance to appropriate regulatory agency; and,
* safety committee minutes

Routine internal safety reviews, however, have not satisfied the first element of the privilege.

B. The Public Must Have a Strong Interest in Preserving the Free Flow of the Type of Information Sought

Certainly, there are strong public policy concerns for preserving the free-flow of information with respect to, e.g., post-accident investigations or perhaps required governmental filings regarding a defective product. For example, in *Ashley v. Uniden Corporation of America*.
America, a product liability action, plaintiff sought disclosure of government filings relating to a defective product. The federal district court, in upholding the privilege, stated that: "[T]he need to encourage full and frank disclosure of information to the government regarding defective products is of crucial importance to the consuming public. The success of the reporting scheme would be severely undercut if manufacturers feared that their frank disclosures may be used against them in lawsuits."21

Similarly, in Peterson, the court, in deciding whether to apply the privilege to a post chemical spill accident investigation, stated that:

[T]he public's strong interest in preserving the free flow of socially useful information undergirds [sic] the entire self-critical analysis privilege...
For reasons of public health and safety alone, it would seem imperative that those entities responsible for formulating the appropriate responses must be free to review their procedures, including past mistakes, without fear that their candor will return to haunt them in some future civil proceeding.23

It should be noted, however, that the Peterson court concluded that the privilege did not apply in this case because the investigative report was not prepared with the expectation that it would remain confidential.

C. The Information Must be of the Type Whose Flow Would be Curtailed if Discovery Were Allowed

Many courts have displayed valid concerns that individuals within an organization would be reluctant to perform candid and forthright investigations concerning an accident for fear that they would be creating a damaging "paper trail" to be used against them in future litigation. For example, in Bradley, another products liability action, plaintiff Bradley sought disclosure of seven additional accident reports involving injuries caused by a similar mechanism that caused plaintiff's injuries. The court, in concluding that the mental impressions, opinions and recommendations were privileged, stated that: "manufacturers study reports of accidents involving their products for the purpose of ascertaining if preventative measures can be taken to avoid future accidents. In such cases, courts have recognized a privilege of self-critical analysis precluding the discovery of impressions, opinions and evaluations but allowing the discovery of factual data. The reasoning behind this approach is that the ultimate benefit to others from this

20 Civil No. SA-84-CA-2383 (W.D.Tex. 1986).
21 Id.
23 Id. at 364.
critical analysis of the product or event far outweighs any benefits from disclosure. Valuable criticism could not be obtained under the threat of potential or possible public exposure for it is not realistic to expect candid expressions of opinion or suggested changes in policies, procedures or processes knowing that such statements or suggestions may very well be used against colleagues and employees in subsequent litigation. If discovery of critical self-analyses were allowed, constructive criticism would be suppressed for fear of the consequences.

D. The Document to be Produced Must be Prepared With the Expectation That it Will be Kept Confidential and has in Fact Been Kept Confidential

This additional element, first enunciated by the Ninth Circuit in Dowling v. American Hawaii Cruises, Inc. has not been widely expounded upon by the courts. It would seem there can be no doubt, however, that if an organization voluntarily discloses all or a significant portion of a self-critical analysis, they will have waived whatever privilege they may have once had. For example, in Westmoreland v. CBS, Inc., the court held that it was unnecessary to even address the privilege of self-critical analysis because CBS waived any privilege they may have had by releasing public statements regarding their report.

Conclusion

Corporations should be aware of the privilege of self-critical analysis and the elements required to assert it. Although the law regarding this privilege is still evolving and has been narrowly drawn with respect to product liability suits, corporations will stand a much better chance of successfully asserting it (at least as to the opinions and recommendations) if they take certain precautions: (1) ensure that the document the company will want to be protected is a true self-critique - facts and statistics will not be afforded any protection; (2) clearly title the report as a Critical Self-Analysis or Self-Critique and stamp it CONFIDENTIAL; (3) separate all factual data from subjective analysis or opinion and label them appropriately; and (4) in fact keep all self-analysis reports confidential.

25 Id. note 14, citing 84 A.L.R. 4th 15.


27 971 F.2d 423 (9th Cir. 1992).