



Cincinnati Law Library News

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Courts' treatment of the Self-Critical Analysis Privilege

By Christopher Glade Johnson and Gerron McKnight, FBT Summer Associate, 2007

In response to the proliferation of multi-million dollar product-liability suits in recent decades, manufacturers increasingly conduct internal investigations designed to enhance product safety and to prevent costly litigation. But problems may arise when a company conducts self-critical analysis, implements a safety program, and then is slapped with a high-stakes lawsuit. Aggressive plaintiff's attorneys frequently request that manufacturers produce all documents related to any pre-accident self-examinations. Those lawyers then use the internally-generated, self-critical documents to argue that a company knew about a product's potential safety hazards. In an attempt to avoid production of documents created during an internal safety review, a company may attempt to argue that those documents are protected by the self-critical analysis privilege.

Although some courts have recognized the self-critical analysis privilege, even more have rejected the privilege. Even those courts applying the privilege define it narrowly. Moreover, the requirements for invoking the privilege vary widely from one court to another. In sum, manufacturers cannot rely on different jurisdictions' inconsistent application of the self-critical analysis privilege to shield them from disclosure of pre-accident, self-critical documents.

A Narrow Self-Critical Analysis Privilege Has Been Recognized by Some Courts

The self-critical analysis privilege was first recognized in 1970 by the District of Columbia. *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249 (D.D.C. 1970). This privilege shields production of certain documents in an attempt to encourage socially beneficial, but self critical, safety evaluations. The basic requirements for the privilege are:

First, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed. *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992), quoting Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1086 (1983).

Some courts also require that, in order for the privilege to apply, documents be prepared with the expectation that they will be kept confidential, and that they in fact be kept confidential.

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Dowling, supra, (adopting additional criteria of confidentiality); *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fl. 1994) (adopting confidentiality requirement); *Morgan v. Union Pacific Railroad Co.*, 182 F.R.D. 261 (N.D. Ill. 1998) ("Like every other privilege, confidentiality is an essential element of the self-critical analysis privilege"). Additionally, some courts only protect subjective, evaluative portions of the documents and not information related to objective facts. *Morgan*, supra, citing *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987); *Fisher v. Borden, Inc.*, 1994 U.S. Dist. LEXIS 21274, (D.C.N.J. 1994) ("The self-critical analysis privilege applies only to evaluative or deliberative material").

Most Courts Have Not Embraced the Self-Critical Analysis Privilege

Voluntary pre-accident safety reviews are often not protected by the self-critical analysis privilege. Many courts have rejected the privilege. Other courts that have substantively analyzed the privilege define it narrowly. Still others have left the question open. Neither the Supreme Court of the United States nor any Circuit Court has directly adopted the self-critical analysis privilege. When conducting self-critical analysis privilege, federal courts generally begin by asserting that the privilege does not exist in their Circuit and then go on to state that even if the privilege was recognized it would be inapplicable to the case before them.¹

For example, the availability of the self-critical analysis privilege is an open question in the **Second Circuit**. *In re Currency Conversion Fee Antitrust Litigation*, No. 1409, M 21-95, 2003 U.S. Dist. LEXIS 18636, at *12-13 (S.D.N.Y. Oct. 21, 2003). In the *In re Currency Conversion Fee Antitrust Litigation*, the court declined to decide whether the privilege is valid. 2003 U.S. Dist. LEXIS 18636 (S.D.N.Y. Oct. 21, 2003). Instead, the US District Court

for the Southern District of New York ruled that even if the privilege were held to be valid, "management control studies and internal audit reports are not the type of studies or reports whose flow would be curtailed if discovery is allowed." *Id.* at *12-13.

Courts within the **Third Circuit** have refused to recognize a self critical analysis privilege. *Zoom Imaging, L.P. v. St. Luke's Hosp. and Health Network*, No. 06-4401, 2007 U.S. Dist. LEXIS 45354, at *15-16 (E.D. Pa. June 22, 2007).

The state of **Pennsylvania** also has not recognized the privilege. *Drayton v. Pilgrim's Pride Corp.*, No. 03-2334, 2005 U.S. Dist. LEXIS 18571, *4-5 (E.D. Pa. August 30, 2005). The court noted "Pennsylvania has not recognized the self-critical analysis privilege. Although a few lower Pennsylvania state courts have applied the privilege in limited situations, no Pennsylvania appellate court has adopted it. In fact, the Pennsylvania Commonwealth Court has specifically noted that the privilege has not been recognized in this state." *Id.* citing *VanHime v. Dep't of State*, 856 A.2d 204 (Pa. Comw. Ct. 2004).

Likewise, the United States District Court of New Jersey refused to apply the privilege to quality control audit observations, relying on the *Dowling* court's analysis discussed above. *Fisher v. Borden, Inc.*, 1994 U.S. Dist. LEXIS 21274 (D.C.N.J. 1994).

The **Fifth Circuit** Court of Appeals has not definitively ruled on the critical self analysis privilege, but courts within the Circuit have failed to recognize the privilege; "All of the courts of this Circuit confronting the issue have declined to find that the self critical analysis privilege exists." *Ganious v. Apache Clearwater Operations, Inc.*, No. 03-2634, 2004 U.S. Dist. LEXIS 2043, at *4 (E.D.L.A. Feb. 12, 2004) (ruling that the privilege doesn't exist for a post-accident

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investigation). See also, *Louisiana Environmental Action Network, Inc. v. Evans Indus.*, 1996 U.S. Dist. LEXIS 8117 (E.D. La. 1996) ("This Court is unable to find a Fifth Circuit case addressing whether there actually exists a so-called privilege of self-critical analysis"); *Maxey v. General Motors Corp.*, 1996 U.S. Dist. LEXIS 21136 (N.D. Miss. 1996) citing *Louisiana Env. Action Network*, supra ("As to the asserted 'self-critical analysis' privilege, this court is not certain that such a privilege even exists in this circuit"); *Bordelon v. Winn-Dixie Louisiana, Inc.*, 1998 U.S. Dist. LEXIS 13826 (E.D. La. 1998) citing *Louisiana Env. Action Network*, supra ("Self-critical analysis privilege, however, has not been found to exist in the Fifth Circuit").

Yet each of these courts, with the exception of the Eastern District of Louisiana, went on to engage in at least a superficial evaluation of the privilege. In *Louisiana Env. Action Network*, the court determined that the privilege did not apply to voluntary environmental self-analysis reasoning that disclosure would not deter such evaluations, they are not performed with the expectation of confidentiality, and "the fairness rationale offered to justify application of the privilege to documents that a party has been legally required to prepare is inapplicable to documents voluntarily prepared." *Louisiana Env. Action Network*, supra, at *7-8. Further, in *Maxie*, the court stated that the self-analysis privilege was qualified, and that the defendant waived the privilege because it did not present its objections in a timely manner. *Maxie*, supra, at *4.

Thus, not only are the district courts in the Fifth Circuit reluctant to even acknowledge the existence of the self-critical analysis privilege, the courts have consistently found that the privilege would be inapplicable to the facts before them. Therefore, the trend in the Fifth Circuit is most definitely not favorable

for an assertion of the self-critical analysis privilege.

Courts within the **Sixth Circuit** have allowed use of the self critical analysis privilege in limited circumstances. *Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 363-364 (N.D. Ohio 1999). In *Hickman*, the court noted that "although the Sixth Circuit has not passed on the question, the Circuit would adopt the 'self-critical analysis' privilege when faced squarely with the issue." *Id.* The documents at issue contained "candid and open discussions concerning plant safety issues." The Court found that requiring production of the documents would "do great damage to this Defendant's efforts to improve safety and the efforts of business and industry in general." *Id.* But see, *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 196 F.R.D. 310, 313-314 (S.D. Ohio 2000) (citing *Dowling*, 971 F.2d 423) (stating that the privilege wasn't meant to apply to routine and voluntary internal corporate reviews, but declining use of the privilege on the grounds that it didn't meet the Ninth Circuit *Dowling* test allowing assertion of the privilege).

In explaining its allowance of the privilege, the court stated that "the privilege encourages companies to continually monitor their safety measures and operations, with a view to correcting mistakes and improving safety." *Id.* at 363. The court also explained that "public policy certainly favors protection of such items because such candid dialog and collection of data functions to reduce injuries and improve productivity. Therefore, this Court believes that the Sixth Circuit would adopt the privilege of 'self-critical analysis' when faced with the facts before this Court." *Id.* at 364.

The state of **Michigan** does not allow the privilege except for limited instances in the hospital context. *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F.Supp.2d 743, 746

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(E.D. Mich. 2001). The **Eighth Circuit** has not directly addressed the question of whether a self-critical analysis privilege exists, but voluntary self-audits likely are not protected by the self-critical analysis privilege. *LeClere v. Mut. Trust Life Ins. Co.*, No. C99-0061, 2000 U.S. Dist. LEXIS 22098, at *6 (N.D. Iowa June 14, 2000). The court in *LeClere* explained:

[T]his court does not believe that the Eighth Circuit Court of Appeals will ultimately recognize such a privilege.

Even if it does, this court does not believe such recognition is appropriate here for this voluntary internal investigation. This report is in the nature of a voluntary audit. Its nature is very different from the peer review done in the medical profession.

Id. at *7-8.

In *LeClere*, the defendants hired a financial company to conduct an investigation and write a report to help manage risk within the client insurance company, and to "find weaknesses in the company's internal workings which could contribute to fraudulent activities." *Id.* at *6-7. The court declined to allow the reports to be privileged. *Id.*

The **Ninth Circuit** has not considered or recognized the privilege of critical self-analysis. *Adams v. Teck Cominco Alaska Inc.*, 232 F.R.D. 341, 346 (D. Alaska 2005). Referring to *Dowling*, the court noted that the Ninth Circuit "has not yet considered whether there exists a so-called privilege of self-critical analysis." In a more recent case where a party invoked the critical self-analysis privilege, the court explicitly stated that the Ninth Circuit "has not recognized this novel privilege." *Id.*

Furthermore, within the Ninth Circuit, "voluntary, routine, pre-accident safety reviews are not protected by a privilege of self-critical analysis." *Dowling*, supra, at 427. Specifically, the *Dowling* court found that such reviews are not likely to be curtailed since a reputation for safety renders a product more marketable. *Id.*, p. 426. The states of **California** and **Oregon** also do not recognize the privilege. *Union Pacific R.R. Co. v. Mower*, 219 F.3d 1069, 1076 (9th Cir. 2000).

The **Eleventh Circuit** "has not explicitly recognized the self-critical analysis privilege, joining other federal Courts of Appeal in failing to do so." *Adeduntan v. Hosp. Authority of Clarke County*, 2005 U.S. Dist. LEXIS 18281, at *37-38 (M.D. Ga. Aug. 25, 2005) (ruling that the privilege cannot be applied to the discovery of limited peer review materials). In *Lara v. Tri-State Drilling*, the U.S. District Court for the Northern District of Georgia (applying Georgia law) held that Georgia does not recognize the privilege:

The narrow approach taken by the Georgia legislature, and the complete absence of the Georgia courts having recognized a self-critical analysis privilege, leads this court to conclude that Georgia law does not allow for such a privilege. In a case such as this, where state law provides the rule of decision, a privilege exists only when created by state law. The fact that the legislature might create the privilege in the future, or that the state courts might recognize such a privilege, does not give this court the authority to apply the privilege in this case. *Lara v. Tri-State Drilling, Inc.*, No. 4:06-CV-0183-RLV, 2007 U.S. Dist. LEXIS 43893, at *16-17 (N.D. Ga. June 18, 2007).

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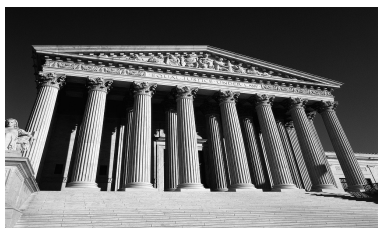
Further, Alabama has not definitively ruled on the privilege, but has stated that even though some of its state courts have allowed the privilege of certain corporate records as self-evaluative reports, the Supreme Court of Alabama believes "that the best procedure for consideration of a rule of evidence that appears to be controversial should be by that Committee (on Evidence) or by the Legislature" in declining the privilege for certain records for health care providers. *Ex parte Cryer*, 814 So. 2d 239, 249 (Ala. 2001).

In sum, although some courts recognize the self-critical analysis privilege, most refuse to invoke it to limit document production when given the opportunity. Rather, courts often either reject the privilege outright, or distinguish the facts of the cases they are considering and hold that the privilege does not apply.

Conclusion

Courts refuse to apply the self-critical analysis privilege far more often than they apply it. Even those courts that recognize the privilege have developed different criteria for deciding when it protects self-evaluative documents. However, at a minimum, a qualified self-critical analysis privilege may exist only if: 1) the party asserting the privilege can show the information is a result of 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; and 3) the information is of a type whose flow would be curtailed if discovery were allowed. Courts often appear to be less inclined to protect internal studies than those performed by outside experts that clearly are beyond the course of management's usual self-assessment. Given the inconsistency with which the privilege is recognized and applied, manufacturers generally should not expect the privilege to protect them against disclosure of documents resulting from pre-accident self evaluations.

¹ The following discussion is not intended to be a circuit-by-circuit or state-by-state analysis of the privilege, but rather highlights certain key cases in select jurisdictions.



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Chris recently assisted in getting four clients dismissed from two separate wrongful death cases. Defending insured clients, Chris has negotiated several "nuisance value" settlements early in the litigation process, saving both time and legal expense. Chris has also written numerous successful motions, pleadings and briefs in a wide range of insurance and commercial matters. Representing both corporations and individuals, Chris has obtained and collected several judgments. Before attending law school, Chris worked as an Analyst for Citigroup.

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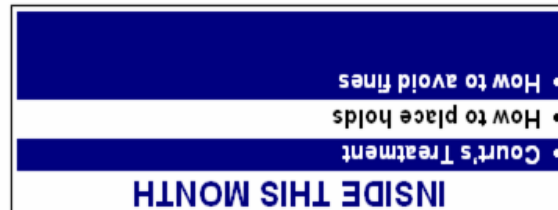
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