THE IDC MONOGRAPH:

ENCOURAGING CORPORATE RESPONSIBILITY: The Privilege of Self-Critical Analysis

By Andrew Kopon, Jr., Robert W. Hickey and Scott A. Kearns[1]

I. Introduction

For a corporation today, the reality of being sued is a legitimate concern in many decisions. The fear of litigation must be balanced with the corporate desire to protect its employees and the public. A corporation will often try to learn from its actions by conducting internal reviews of its procedures to determine what, if anything, it could improve upon. These reviews may be summarized in a report that contains self-critical statements. The reports may be prepared before or after an accident or injury has occurred.

Because these reports contain self-critical statements, plaintiffs routinely request them as part of discovery. This article discusses the strong public policy reasons against such disclosure and its embodiment in the privilege of self-critical analysis.[2] This article discusses why the privilege is a necessity and the criteria for the application of the privilege. Also, this article will discuss how Illinois courts and the Seventh Circuit have dealt with the privilege and how other jurisdictions have applied the privilege. Lastly, this article will discuss practice tips in asserting and preserving the privilege.

II. The Privilege of Self-Critical Analysis

A. Why Is the Privilege Needed

The first question an attorney invoking the privilege will be asked is "Why do we need the privilege?" The answer is simple — the privilege protects the public by encouraging corporations to undertake self-critical safety reviews. It protects consumers from defective products, employees from accidents, minorities from discrimination and the environment from pollution. As noted by the court in *Reichhold Chemicals v. Textron, Inc.*,[3] the privilege

> "allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them .... 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 violation of 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."

The *Reichhold* decision echoed the rationale behind the first case to recognize the privilege, *Bredice v. Doctor's Hospital, Inc.*[4] In *Bredice*, the plaintiff sought to discover the minutes and reports of the medical staff meetings which were convened to discuss the death of the plaintiff's decedent.

The hospital objected to such discovery on the grounds that those medical staff meetings were confidential. A breach of that confidentiality, the hospital argued, would negatively affect the candor of the meetings and, thereby, decrease their productiveness.[5]

The court agreed with the hospital and refused to compel discovery. The court stated "[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."[6]

These cases show that the privilege is needed to, and does in fact, protect the public by allowing companies and individuals to candidly assess their deficiencies without having to worry about creating the rope by which to hang themselves. As Section V will fully discuss, an argument in favor of the privilege must begin with, and repeatedly refer back to, the public policy interest being served by the privilege of self-critical analysis.

(Continued on next page)

Monograph *(Continued)*

B. The Test

One of the most recent applications of the privilege of self-critical analysis was in *Reichhold Chemicals*.[7] In *Reichhold*, the plaintiff sought contribution from prior landowners for the cost of responding to the contamination of the ground water.[8] As part of the discovery process, the plaintiff asked for a protective order to prevent disclosure of a retrospective analysis of the plaintiff's conduct.[9] The District Court for the Northern District of Florida recognized the following test as the one to be used to determine whether the privilege should be applied:

> (1) the information sought to be protected 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 within the company;
> (3) the information must be of a type whose flow would be curtailed if discovery were allowed; and,
> (4) the document must have been created with the expectation that it would be kept confidential and must have remained so.[10]

Interestingly, the *Reichhold* court did not set out this test until the discussion of the privilege was nearly complete. Before ever reaching the test, the court set out why the privilege is needed[11] and the reasoning behind it.[12] This demonstrates the importance of stressing the public policy safety reasons behind the privilege.

III. Application of the Privilege

The privilege of self-critical analysis has been asserted in numerous contexts including securities law,[13] personal injury,[14] products liability,[15] environmental remediation,[16] employment law and discrimination,[17] wrongful death,[18] anti-trust[19] and medical malpractice.[20]

These cases can be divided into three groups: (1) those that have accepted the privilege (with and without qualifications); (2) those that have noted the privilege's existence but failed to apply the privilege because it was not needed, had been waived, or one of the elements of the test was missing; and (3) those that question the soundness or utility of the privilege. While the application of the privilege will be discussed by jurisdiction, it is important to remember into which category the case being discussed falls.

A. The Privilege in Illinois and the Seventh Circuit

Outside the medical peer review area, the privilege of self-critical analysis has never been examined by an Illinois court of review.[21] However, the Seventh Circuit and its underlying Illinois district courts have been presented with the issue of the privilege of self-critical analysis several times.[22] However, each time, the courts decided not to apply the privilege, instead holding that an element of the test was missing or the privilege had been waived.

For example, in *Coates v. Johnson & Johnson*, the plaintiff had instituted an individual and class action suit against Johnson & Johnson under Title VII of the Civil Rights Act.[23] During the discovery stage of the case, the district court refused to order Johnson & Johnson to turn over self-critical portions of the company's affirmative action plans.[24] On appeal, the plaintiff claimed that this refusal was reversible error.[25] The Seventh Circuit began its analysis by noting the prevailing view that the privilege existed for self-critical portions of affirmative action plans. However, the court noted that since Johnson & Johnson had used these plans as affirmative evidence at trial, it had waived the privilege. The court held, therefore, the district court's refusal was error.[26] In other words, the court declined to apply the privilege not because it was an unsound privilege, but because Johnson & Johnson had waived it.

In *Memorial Hospital v. Shadur*, the hospital sought a writ of mandamus compelling the district court judge to vacate a discovery order.[27] This order required the hospital to turn over records of peer review meetings. The order was part of a civil anti-trust action brought by Dr. Tambone, who had been repeatedly denied staff privileges at the hospital. The court refused to issue the writ.[28] The court based its decision on two considerations. First, the court noted that *Bredice* was inapplicable as it was a medical malpractice case. The rationale behind *Bredice* was based on the protection of the public from negligent care. That rationale was not important in the case at bar because Dr. Tambone sought the records to prove his anti-trust case, not to prove medical malpractice. Second, the court noted that "[t]o deny Dr. Tambone's access to this information may very well prevent him from bringing his action altogether."[29]

In *Culinary Foods, Inc. v. Raychem Corp.*, a products liability action, the defendant sought a protective order.[30] One area which it sought protection from disclosure was its evaluations of its products. The defendant claimed that such evaluations were protected by the privilege of self-critical analysis while the plaintiff claimed that the privilege did not exist in Illinois.[31] The court reviewed all previous case law and came to the conclusion that it was

(Continued on next page)

Monograph *(Continued)*

unclear as to whether the privilege had been adopted by the federal courts applying Illinois law.[32] However, the court specifically refused to decide whether the privilege applied to the issues involving a protective order. The court indicated that the assertion of the privilege should be document specific, not asserted broadly in a protective order. The court stated, "What is clear to the court is that this issue [the existence of the privilege] should not be decided in the abstract, but should be dealt with at the appropriate time when the privilege is claimed regarding a specific document. At that time, we will determine whether the privilege exists with respect to that document."[33]

The district courts within the Seventh Circuit have examined the privilege of self-critical analysis. However, the courts have not been presented with a case where they have applied the privilege because the facts of the case at bar did not warrant it. However, as *Culinary Foods* seems to indicate, the court recognizes the privilege, and if given the appropriate case would apply the privilege to documents that fall within the scope of the privilege.

B. The Privilege in State Courts

The privilege of self-critical analysis has been examined in six states and the District of Columbia.[34] Of these states, New Jersey has been in the lead, by far, in applying the privilege. As of this writing, there have been eight New Jersey cases discussing the privilege.[35] They all turn on whether the "public need for disclosure is outweighed by the public need for confidentiality of information."[36]

For example, in *Wylie v. Mills*, the first case discussing the privilege outside of the context of medical malpractice, the plaintiff sought an investigative report as part of discovery.[37] The report was based on an employee's automobile accident. It contained self-critical statements as a result of the defendant's investigation.[38] The defendant argued that the report was privileged as self-critical analysis.

The court agreed that the prevention of automobile accidents was an important public interest and that the confidentiality of self-critical reports was necessary to achieve that public interest. The court stated:

> [C]onfidentiality and the "public need for confidentiality" are the *sine qua non* of effective internal self-critical analysis . . . Such criticism is essential in recognizing the cause of past problems and the elimination of future problems. If the public policy of safety improvements . . . is to be encouraged, the "public need for disclosure" for the individual must give way. This is especially so if such improvements are to continue and develop.[39]

Based on the public interest being served and the public need for confidentiality, the court held that the self-evaluative portion of the report was privileged from discovery.[40]

Another important New Jersey case is *Korostynski v. State of New Jersey, Division of Gaming Enforcement.*[41] In *Korostynski*, the plaintiff, a state trooper, brought a wrongful termination action against the Division of Gaming Enforcement. During discovery, the plaintiff requested the personnel and internal investigation records of the Division. These records were based on investigations of employee misconduct. The Division asserted the privilege of self-critical analysis. The trial court ordered disclosure and the Division appealed. The appellate court, in reversing, stated:

> It cannot be seriously disputed that candor and assurance of confidentiality are of paramount concern when seeking to uncover the truth in such an investigation, and thereby improve the operations of the Division....it is clear that the public interest in confidentiality significantly outweighs plaintiff's need for full discovery of the requested material.[42]

These New Jersey cases show several things. First, that courts recognize that the need for confidentiality of self-critical communication is crucial to a company's improvement. Second, that a corporation's improvement, whether it be a decrease in car accidents or an increase in employee responsibility, is a benefit to the public. Third, and possibly most important, these cases show how the privilege of self-critical analysis can be balanced against a plaintiff's claim that the document are otherwise discoverable.

C. The Privilege in Federal Courts Outside of Illinois

Since federal courts hear cases based on diversity jurisdiction and federal question jurisdiction, federal courts have discussed the privilege of self-critical analysis as it applies to both federal and state common law. In light of this, each type of jurisdictional basis will be discussed separately.

1. Federal courts applying state law

Under Federal Rule of Evidence 501, where a federal case is based on diversity jurisdiction, the privileges of the state in which the court sits will be applied.[43] Where there is no discussion or decision on the existence of a privilege, the federal courts are required to decide the question of privilege as the state court would do if presented with the issue.[44] However, underlying the federal courts' analysis is the

(Continued on next page)

Monograph *(Continued)*

maxim that privileges are not lightly to be created nor expansively construed.[45] Given this maxim, the federal courts have been reluctant to apply the privilege of self-critical analysis in a state where the privilege has not been applied.[46]

However, in *Shipes v. BIC Corp.*, a recent case from the Middle District of Georgia, the court decided that the privilege did exist in Georgia.[47] In *Shipes*, the plaintiff was injured by one of the defendant's products.[48] As part of discovery, the plaintiff sought self-critical reports which had been prepared by BIC for submission to the Consumer Products Safety Commission. These documents were required to be created under federal law.[49]

The court based its decision on two prior cases. One was a federal case from the Northern District of Georgia which held that the privilege existed in Georgia in an employment discrimination context.[50] The other was a Georgia Supreme Court case upholding the statutory privilege protecting medical peer review committee reports from discovery.[51] The *Shipes* court found that the privilege of self-critical analysis could be analogized to the privilege protecting medical peer review committee reports. In creating the privilege, the federal court stated, "the reasoning behind the common law privilege [of self-critical analysis] mirrors that behind Georgia's statutory Medical Peer Review privilege. The public interest is furthered when organizations or corporations analyze their safety records."[52]

Shipes demonstrates that reasoning by analogy can be persuasive. Prior to *Shipes*, there was no common law privilege to protect documents in a products liability case. However, when the court viewed the policy reasons behind the privilege, it found that the those reasons had just as much force in a new area of law as they had in the old.

2. Federal courts applying federal law

Where a federal court's jurisdiction is based on a federal question, the court must then apply federal common law.[53] The leading self-critical privilege case in this area is *Dowling v. American Hawaii Cruises, Inc.*[54]

In *Dowling*, the plaintiff sued his employer, American Hawaii Cruises (AHC), under the Jones Act[55] and general maritime law for a back injury he suffered while working aboard AHC's ship.[56] During discovery, the plaintiff requested the minutes of safety committee meetings. These meetings were conducted before the accident in AHC's regular course of business. AHC objected to their disclosure, asserting that the minutes were protected by the privilege of self-critical analysis. The trial court agreed with AHC and refused to order disclosure.

However, the Ninth Circuit reversed the trial court on this issue.[57] Central to the Ninth Circuit's decision was the fact that the minutes were the result of "voluntary routine safety reviews" conducted *before* the accident. However, the *Dowling* court specifically excluded *post*-accident reports from its decision. The court noted, "we believe the difference between pre-accident safety reviews and post-accident investigations is an important one. The candid analysis of the causes of accidents is more likely to be stifled by a disclosure requirement than would the routine review of safety concerns."[58]

This case highlights one of the major limitations placed on the privilege of self-critical analysis -- the analysis must have taken place after an occurrence. However, as section V(*B*) will show, that limitation runs contrary to the purpose of the privilege.

V. Creation and Use of the Privilege of Self-Critical Analysis in Illinois

The United States Supreme Court noted that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[59] Defense attorneys need to clearly articulate the privilege of self-critical analysis, and thereby make it certain.

This section will discuss considerations which need to be addressed when asking the Illinois courts to apply the privilege.

A. Applying the Privilege in Illinois

To apply the privilege of self-critical analysis, it is necessary to show the court two elements underlying the privilege. First, that both the Illinois legislature and courts have recognized the need to protect certain confidential relationships. Second, that the relationships needed to make a viable self-critical analysis are sufficiently similar to those already protected relationships to warrant similar treatment.

Legislatively created privileges based on confidential relationships have long been established in Illinois.These privileges include the attorney/client,[60] husband/wife,[61] doctor/patient,[62] and clergy/penitent.[63] Each of these privileges are based on the belief that the relationships which underlie the privileges need confidentiality to function properly.[64]

In addition to these privileges, the Illinois legislature has also recognized two self-critical analysis areas where it is in the public interest to have confidential communication. Oldest is the privilege accorded medical peer review boards.[65] This statute protects from discovery the notes and minutes of these review boards. The purpose of the statute is to encourage candid and voluntary critical self-analysis.[66] The legislature recognized that physicians would

(Continued on next page)

Monograph *(Continued)*

be reluctant to sit on peer review boards and frankly criticize their colleagues without the privilege.[67]

The Illinois legislature has also recognized that it is in the public interest to protect confidential communication for corporate environmental audits. This law, which took effect on January 24, 1995, is designed to encourage landowners to conduct voluntary internal environmental audits to determine their own compliance with environmental laws and regulations.[68] The law makes such audits inadmissible as evidence in any civil, criminal or administrative action and further protects them from disclosure during discovery.[69]

In addition to legislative recognition, there are two First District Appellate Court cases which can be analogized to the privilege of self-critical analysis.[70] In each, the court created a common law privilege based on the need for confidentiality where none had previously existed.

The first was *In re Petition of Illinois Judicial Inquiry Board.*[71] In that case, the Illinois Judicial Inquiry board sought to enforce a subpoena issued to the Chicago Bar Association (CBA). The subpoena demanded the production of all documents which directly or indirectly reflected actual or potential violations of the Standards of Judicial Conduct.[72] These documents were gathered from CBA members in response to the CBA's judicial evaluation survey. The CBA objected to the subpoena on the grounds that the disclosure of the documents would destroy the confidentiality of the survey, impair the effectiveness of the evaluation process, and lead to the abandonment of the survey.[73]

The court, in refusing to enforce the subpoena, cited Professor Wigmore's evidence treatise in support.[74] The treatise states the following four-part test to determine if there should be a privilege against disclosure:

> (1) The communication must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[75]

Comparison of Professor Wigmore's test with the test utilized by most courts when analyzing the privilege of self-critical analysis shows them to be quite similar.[76] Each requires that the confidentiality of the communication be necessary for the communication to continue. Each requires that it be in best interest of the public that the information remain confidential. Thus, *In re Petition of Illinois Judicial Inquiry Board*, while not expressly adopting the privilege of self-critical analysis, did at least hold that a general privilege to protect confidential communication exists.

The second case was *In re Marriage of Daniels.*[77] In *Daniels*, Ruth Davis (Davis) sought to re-acquire custody of the couple's children. Custody had been transferred to Mark Daniels (Daniels) after Davis had been shot by an unknown assailant. Daniels had alleged in his petition to obtain custody that the shooting was related to Davis' drug use. Davis responded that it was Daniels who had shot her. As part of the custody transfer hearing, Sergeant Thomas, the officer in charge of the shooting investigation, testified *in camera* about the investigation. The trial court placed a "gag" order on that testimony in that it contained information about a pending investigation.[78]

About 8 months later, Daniels, who was a suspect in the shooting, sought to remove the gag order and also sought leave to depose Sergeant Thomas. The court agreed and issued a subpoena to Sergeant Thomas. Sergeant Thomas then filed an emergency motion to quash the subpoena.[79] The motion was based on the "law enforcement privilege." This privilege protects ongoing criminal investigations from discovery.

The appellate court noted ten criteria to be used to determine whether the privilege applied:

> (1) the extent disclosure will discourage citizens from giving police information;
> (2) the impact upon persons who have given information;
> (3) the degree government self-evaluation will be chilled by disclosure;
> (4) whether the information sought is factual data or evaluative summary;
> (5) whether the party seeking discovery is an actual or potential defendant in criminal proceedings;
> (6) whether the police investigation has been completed;
> (7) whether disciplinary proceedings have arisen or may arise from investigation;
> (8) whether the plaintiff's suit is nonfrivolous and brought in good faith;
> (9) whether the information sought is available from other sources; and,
> (10) the importance of the information sought to plaintiff's case.

(Continued on next page)

Monograph *(Continued)*

Discussion of these factors shows that a parallel can be drawn to the privilege of self-critical analysis. For example, as to the first criteria, the court stated, "It is widely recognized that witnesses to a crime will not speak candidly if they believe that disclosure to [litigants] is possible. A more likely result of disclosure of identities of citizens who relayed significant information to the police is that candor will be chilled."[80] As to the second factor, the court stated, "The purpose of the government's privilege to withhold the identity of informants is to protect the public interest in effective law enforcement by encouraging citizens to communicate their knowledge of the commission of crimes to law enforcement personnel."[81]

The reasoning behind both these criteria is based on the belief that a person is less willing to give information if that person might suffer repercussions. This reasoning applies to both the employer and employee in the self-critical analysis area. The employer will be reluctant to place the causes of a problem in a report if that report can be used as ammunition against the employer. The employee will be less willing to give information that she has if that information will then embroil her in a lawsuit against her and/or her employer.

Also, one should note the general rule which makes post-accident remedial measures inadmissible at trial.[82] Several courts have noted that post-accident self-critical analyses are merely part of the post-accident remedial process.[83] Thus, one might argue that even if the privilege is not applied, a post-occurrence report is inadmissible as a remedial measure.

Analogy from these reference points is the next step in the application of the privilege of self-critical analysis.[84] While the privilege has been applied in a plethora of areas, the following three principles apply to all areas. First, the prevention of some ill (be it a car accident, defective product, employment discrimination or environmental pollution) is an important public interest. Second, that important public interest can best be achieved by allowing confidential self-critical analysis. Third, the self-critical analysis will be negatively affected if it becomes discoverable.[85]

B. Arguing Against Limitations on the Privilege

Judicially imposed limitations on the application of the privilege threaten to eviscerate it. As the following will show, such limitations are counterproductive and run contrary to the purpose of the privilege.

There are three limitations which courts have used to restrict the scope of the privilege. One is the requirement that the privileged information must have resulted from a post-occurrence investigation.[86] Another is that the privileged information can only be self-critical, *i.e.*, the privilege does not protect facts.[87] A third is that the privilege only applies to analyses mandated by the government.[8]

1. Post-occurrence limitation

In *Dowling v. American Hawaii Cruises*, discussed in section IV(*C*)(2) above, the court held that the justifications for the privilege of self-critical analysis "do not support its application to voluntary routine [pre-occurrence] safety reviews."[89] The court based this holding on three conclusions: First, that routine safety reviews "will rarely, if ever, be curtailed simply because they may be subject to discovery"; second, that routine safety reviews are usually not kept confidential; and third, that while it would be unfair to require a party to turn over governmentally mandated self-criticisms, it would *not* be unfair to require the disclosure of voluntary self-criticisms.[90]

These conclusions run contrary to the purpose of the privilege. The privilege exists, as noted by the *Dowling* court, to prevent harm to the public. However, under the *Dowling* court's reasoning, it is only good policy to prevent an accident from happening a second time, not from preventing the accident in the first place. While routine safety reviews may not cease if they are discoverable, it would be naive to think that they would not be negatively affected by, for example, less than complete candor or less than needed specificity. After all, should not a corporation be encouraged to undertake pre-accident safety reviews?[91]

Furthermore, the *Dowling* court's reliance on safety reviews not being kept confidential as a reason to deny application of the privilege is misguided. If the reason to have the privilege is to protect the public, why should a company be penalized for sharing its review with the appropriate group of people to assure that safety is achieved?

In addition, there is no defensible reason to differentiate between governmentally mandated and voluntary safety reviews. As discussed more fully below, this distinction is too restrictive.

Finally, in those areas where the legislature has created a self-critical analysis privilege (medical peer review and environmental audit), no such temporal limitation has been employed. Review of each statute indicates that the privilege extends to pre-accident reviews.[92]

2. Factual limitation

Several courts have adopted the privilege of self-critical analysis, but then only applied it to self-critical portions of documents.[93] For example, in *Shipes v. BIC Corp.*, the court refused to compel the wholesale disclosure of self-critical documents, but did require those documents which

(Continued on next page)

Monograph *(Continued)*

contained both factual and self-critical portions to be redacted, removing the self-critical portions, and then disclosed.[94]

The *Shipes* court recognized that discovery of some corporate communication will chill that communication.[95] There is no reason to believe that discovery will only chill self-critical statements.[96] If an employee is reluctant to draw a conclusion as to how an accident happened, why would he not be reluctant to say what "facts" led up to the accident? Furthermore, since self-critical conclusions must be drawn from facts, what incentive would a limited privilege give to a company to compile the facts?

Finally, if the goal is protection of the public, it is unwise to force a factual limitation on the privilege. Factual information is *the* prerequisite to effective self-evaluation. If neither the company nor the employee have the incentive to communicate facts, then any conclusion that can be drawn is suspect. This truism has best been described by: "an uninformed decision is no decision" or "garbage in, garbage out."[97]

3. Governmental mandate limitation

Finally, some courts have required that the documents at issue must have been created to satisfy a governmental mandate in order to qualify for the privilege.[98] Again, this limitation can be refuted by going back to the reason for the privilege — to protect the public. The governmental mandate privilege is based on the belief that if the government requires information to be compiled, then the compilation serves a public interest.[99] This belief presupposes two things. First, that when the government acts, it does so in the public interest. Second, that only the government can serve the public interest. Both of these are called into question by everyday experience and common sense. Thus, the governmental mandate limitation excludes from protection all private analysis even though it serves the public interest.

C. Practice Tips

The privilege should be applied in Illinois. Before attempting to assert the privilege of self-critical analysis, the following points need to be considered.

First, the privilege is a *qualified* one.[100] Like attorney work-product, it can be overcome by a claim of necessity.

Second, application of the privilege is at the court's discretion.[101] As a discretionary matter, it is not easily reversed on appeal.[102]

Third, keep in mind that the self-critical analysis must be created confidentially and kept confidential.[103] Failure to do so will make the privilege's assertion moot.

Finally, remember that subjecting a document to the privilege during discovery will bar its affirmative use at trial.[104] Do not assert the privilege if will be needed the document in your case.

VI. Conclusion

Courts and legislatures have recognized that the privilege of self-critical analysis serves an important interest — protection of the public from the harm of defective products, unsafe work areas, car accidents, employment discrimination and environmental pollution, among others. It does so by allowing candid self-evaluation, evaluation that would be encouraged by preventing its use against the maker.

Endnotes

[1] **Andrew Kopon, Jr.** is a partner in the Chicago office of *Cremer, Kopon, Shaughnessy & Spina* and the co-chair of the ***IDC*** Products Liability Committee. **Robert Hickey** is Assistant General Counsel of *Acme Metals, Inc.* **Scott Kearns** is an associate at the Chicago office of *Cremer, Kopon, Shaughnessy & Spina* and a member of the ***IDC***.

[2] The privilege has also been called the "self-evaluative privilege" and the "privilege of self-examination." However, the "privilege of self-critical analysis" is the predominant designation, and as such, will be used exclusively in this article.

[3] *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994)

[4] *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973)

[5] *Bredice*, 50 F.R.D. at 251.

[6] *Id.*

[7] *Reichhold Chemicals*, 157 F.R.D. at 522.

[8] *Reichhold*, 157 F.R.D. at 524.

[9] Compare *Reichhold, supra,* with *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 303 (N.D.Ill. 1993) (where court refused to apply privilege to a protective order, holding that the privilege can only be asserted *after* a document has been requested during discovery).

[10] *Reichhold,* 157 F.R.D. at 526. This test was also applied in *Shipes v. BIC Corp.*, 154 F.R.D. 301, 307 (M.D. Ga. 1994). and *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992). *See also,* Note, The Privilege of Self-Critical Analysis, 96 Harv.L.Rev. 1083, 1086 (1983)

[11] *Reichhold*, 157 F.R.D. at 525.

[12] *Id.*

[13] *In re Crazy Eddie Securities Litigation*, 792 F. Supp. 197 (E.D.N.Y. 1992) (upholding privilege in securities law).

[14] *Wylie v. Mills*, 478 A.2d 1273 (Law Div. 1984) (accepting the privilege in auto accident case).

[15] *Shipes v. BIC Corp.*, 154 F.R.D. 301, 307 (M.D.Ga. 1994) (accepting privilege in products liability case).

[16] *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D.Fla., 1994) (accepting privilege in environmental remediation).

[17] *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D.Ga. 1971) (accepting privilege in employment discrimination case); *Korostynski v. State, Div. of Gaming Enforcement,* 630 A.2d 342 (N.J.Sup.Ct. 1993).

[18] *Peterson v. Chesapeake & Ohio Ry. Co.*, 112 F.R.D. 360 (W.D. Mich 1986)

[19] *Memorial Hospital for McHenry County v. Shadur,* 664 F.2d 1058 (7th Cir. 1981); *Wei v. Bodner*, 127 F.R.D. 91 (D. N.J. 1989)

[20] *Bredice v. Doctors Hospit., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973)

[21] However, one Illinois court was presented with an assertion of the privilege. *In re K.S.*, 264 Ill.App.3d 923, 637 N.E.2d 1163, 1165 (1994). In *In re K.S.*, the trial court ordered the disclosure of a report by the Department of Child and Family Services (DCFS) relating to the death of a child in foster care. DCFS objected citing executive and self-critical analysis privilege and appealed the discovery order. However, the appellate court never reached the issue, instead holding that the trial court lacked jurisdiction. *Id.*

(Continued on next page)

Monograph *(Continued)*

[22] *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297 (N.D. Ill. 1993); *Vanek v. Nutrasweet Co.*, 1992 WL 281355, 1992 U.S. Dist. LEXIS 15196 (N.D. Ill. October 7, 1992) (Vanek II); *Vanek v. Nutrasweet Co.*, 1992 WL 133162, 1992 U.S. Dist. LEXIS 8191 (N.D. Ill. June 9, 1992) (Vanek I); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 374 (N.D.Ill. 1982); and, *Equal Opportunity Comm'n v. Burlington-Northern, Inc. et al.*, No. 78 C 269, sl. op., (N.D. Ill. December 10, 1982)

[23] *Coates*, 756 F.2d at 528.

[24] *Id.* at 551.

[25] *Id.*

[26] However, it was not reversible error. *Id.* at 552.

[27] *Memorial Hospital*, 664 F.2d at 1059.

[28] *Id.*

[29] *Id.* at 1063.

[30] *Culinary Foods*, 151 F.R.D. at 303.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 304.

[34] The privilege has been presented in New Jersey, Colorado, Indiana, New York, Florida, Ohio and the District of Columbia. New Jersey and the District of Columbia have adopted the privilege. *Plough Inc. v. National Academy of Sciences*, 530 A.2d 1152 (D.D.C. 1987); see Note 26, *infra*. The remaining states have all noted that, as a general rule, the creation of a privilege should be done by the legislature, not the courts. *Combined Communications Corp., Inc. v. Public Service Co. of Colorado*, 865 P.2d 893 (Colo. App. 1993); *Southern Bell Telephone & Telegraph Co. v. Beard*, 597 So.2d 873, n.4 (Fla. 1st DCA 1992); *Lamitie v. Emerson Electric Co.*, 535 N.Y.S.2d 650 (A.D. 3 Dept. 1988); *Scroggins v. Uniden Corp. of America*, 506 N.E.2d 83 (Ind. Appl 1 Dist. 1987). However, in *Reichhold*, the federal court stated that "Florida courts have consistently held that ... the self-critical analysis privilege has been adopted in the common law of Florida, not as a rule of privilege, but as a discretionary right of a court on grounds of public policy." 157 F.R.D. at 527 (and cites therein) Thus, at least in Florida, the privilege may exist.. In addition, one Ohio court noted that the privilege had not yet been recognized in Ohio, but even if it had been, it would not have been applicable to the case then at bar. *State ex rel. Celebrezze v. CECOS Inter., Inc.*, 583 N.E.2d 1118, n. 3 (Ohio App. 12 Dist. 1990). Thus, no state court has rejected the privilege as unsound. Instead, these state courts simply followed the long-standing traditions in their respective states not to judicially create privileges.

[35] *Dixon v. Rutgers, The State University of N.J.*, 541 A.2d 1046 (N.J. 1988); *Loigman v. Kimmelman*, 505 A.2d 958, 963 (N.J. 1986); *McClain v. College Hospital*, 492 A.2d 991, 998 (N.J. 1985); *Korostynski v. State, Division of Gaming Enforcement*, 630 A.2d 342 (N.J. Sup. Ct. 1993); *Estate of Hussain v. Gardner*, 264 N.J. Super. 208 (Law Div. 1993); *CPC Intern. v. Hartford Acc.*, 620 A.2d 462 (Law Div. 1992); *Bundy v. Sinopoli*, 580 A.2d 1101 (Law Div. 1990); *Wylie v. Mills*, 478 A.2d 1273 (Law Div. 1984)

[36] *Wylie v. Mills*, 478 A.2d 1273.

[37] *Id.* at 1275.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Korostynski v. State, Division of Gaming Enforcement*, 630 A.2d 342.

[42] *Id.* at 347.

[43] *Roberts v. Carrier Corp.*, 107 F.R.D. at 685..

[44] *Peterson v. Chesapeake & Ohio Ry. Co.*, 112 F.R.D. 360 (W.D. Mich 1986)

[45] *United States v. Nixon*, 418 U.S. 683, 710 (1974)

[46] *Williams Vulcan Hart Corp.*, 136 F.R.D. 457, 460 (W.D. Ky. 1991)

[47] *Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994) (holding that self-critical statements contained in reports to the Consumer Products Safety Commission were not discoverable).

[48] *Id.*

[49] 15 U.S.C. §2065(b) requires manufacturers of consumer goods to maintain records and provide information to the CPSC about the safety of its products.

[50] *Banks v. Lockheed*, 53 F.R.D. 283 (N.D. Ga. 1971)

[51] *Hallowell v. Jove*, 279 S.E.2d 430 (Ga. 1981)

[52] *Shipes*, 154 F.R.D. at 306.

[53] Fed.R.Evid. 501.

[54] *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992)

[55] Jones Act, 46 U.S.C. §688 (1990)

[56] *Dowling*, 971 F.2d at 424.

[57] *Id.*

[58] *Id.* at 427.

[59] *Upjohn v. United States*, 449 U.S. 383, 389 (1981)

[60] *People v. Williams*, 97 Ill.2d 252, 454 N.E.2d 220 (Ill. 1983) *cert. denied* 466 U.S. 981 (1984)

[61] *People v. Fosky*, 136 Ill.2d 66, 554 N.E.2d 192 (Ill. 1990)

[62] *People v. Florendo*, 95 Ill.2d 155, 498 N.E.2d 1105 (Ill. 1983)

[63] *Snyder v. Poplett*, 98 Ill.App.3d 359, 424 N.E.2d 396 (1981)

[64] *United States v. Byrd*, 750 F.2d 585 (7th Cir. 1984)

[65] 736 ILCS 5/8-2101 (1992)

[66] *Niven v. Siqueria*, 109 Ill.2d 357, 487 N.E.2d 937 (Ill. 1985)

[67] *Jenkins v. Wu*, 102 Ill.2d 468, 468 N.E.2d 1162 (Ill. 1984)

[68] 415 ILCS 5/52.2 (1995). See also, Dorigan, Therese M., "New Illinois Environmental Audit Privilege" in ***IDC Quarterly***, Vol. 5 No.2, at 40 (1995)

[69] 415 ILCS 5/52.2 (1995)

[70] See notes 71 and 77.

[71] *In re Petition of Illinois Judicial Inquiry Board*, 128 Ill, App. 3d 798, 471 N.E.2d 601 (1st Dist. 1984)

[72] *Id.* at 602.

[73] *Id.*

[74] *Id.*

[75] 8 Wigmore, Evidence (McNaughton rev. 1961) §2285.

[76] See Section II, *supra*.

[77] *In re Marriage of Daniels*, 240 Ill.App.3d 314, 607 N.E.2d 1255 (1st Dist. 1992)

[78] *Id.* at 1257.

[79] *Id.* at 1258.

[80] *Id.* at 1267.

[81] *Id.*

[82] *Schaffner v. Chicago Northwestern Transportation Co.*, 129 Ill.2d 1, 14, 541 N.E.2d 643, 647 (Ill. 1982)

[83] *See e.g. Reichhold*, 157 F.R.D. at 526.

[84] However, any attorney attempting to reason by analogy must be aware that such reasoning can cut both ways. *Peterson v. Chesapeake & Ohio Ry. Co.*, 112 F.R.D. 360 (W.D. Mich 1986). For example, in *Peterson*, the District Court noted that though arguing by analogy can be persuasive, it also can demonstrate that the legislature knew of the privilege and deliberately chose *not* to extend it any further. *Id.*

[85] Some courts have expressed concern that this is an untested assumption. *Scroggins v. Uniden Corp*, 506 N.E.2d at 86. However, in a recent survey of corporate executives and corporate attorneys, it was shown that effective analysis would be chilled. *See* Robert J. Bush, *Stimulating Corporate Self-Regulation — The Corporate Self-Evaluative Privilege*, 87 Nw. U. L. Rev. 597, 636 (Winter 1993)

[86] *Dowling*, 971 F.2d 423.

[87] *Reichhold*, 157 F.R.D. 522.

[88] *Resnick*, 91 F.R.D. 372.

[89] *Dowling*, 971 F.2d at 425.

[90] *Id.*

[91] For example, in the now famous "Pinto Fire Case", *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 165 Cal. Rptr. 39 (1981), Ford's cost-benefit analysis (balancing cost of safety improvements against harm to passengers) was proven in large part by a self-critical report. This report significantly helped the plaintiff receive a $125 million dollar punitive damage award from the jury (later reduced by the court to $3.5 million). As noted by several commentators, the threats of such awards decrease the incentive to perform self-critical analyses.James A. Henderson, *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. Rev. 765, 772 (October 1983)

[92] See notes 65 and 68, *supra*.

[93] *Shipes v. BIC Corp.*, 154 F.R.D. 301.

[94] *Id.* at 307.

[95] *Id.*

[96] Robert J. Bush, *Stimulating Corporate Self-Regulation — The Corporate Self-Evaluative Privilege*, 87 Nw. U. L. Rev. 597, 636 (Winter 1993)

[97] *Id.*

[98] *Resnick*, 95 F.R.D. 372.

[99] *Roberts v. Carrier Corp*, 107 F.R.D. at 681.

[100] *Reichhold*, 157 F.R.D. at 525.

[101] *E.g. Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d at 425. *Id.*

[102] *Id.*

[103] *Reichhold*, 157 F.R.D. at 526.

[104] *Coates v. Johnson & Johnson, Inc.*, 757 F.2d at 552.