“Know thyself,” the ancients counseled. They may have been wise, but they did not have to consider who else might acquire that knowledge or whether it would be protected by privilege. They did not contend with litigation or discovery.

Times have changed. Today, a company’s self-knowledge often comes from internal investigations or self-audits. Businesses seek to “know themselves” in order to improve compliance with internal policies or comply with applicable laws, whether environmental, employment or criminal.

Here in the Second Circuit, however, it is far from certain whether the reports and findings of such internal investigations can be protected from disclosure in subsequent litigation. Some district courts within this circuit have unhesitatingly embraced a privilege – the so-called self-evaluative or self-critical analysis privilege – to protect such reports, while others have rejected the concept outright. Still other district courts, while acknowledging the judicial debate surrounding the issue, nonetheless have refused to recognize the privilege. The Second Circuit has yet to address the viability of the privilege. Until it does, or until there is a consensus among the district courts, the discoverability of internal investigative reports remains unsettled in this circuit.

The Privilege and Its Theoretical Bases

The common law self-evaluative or self-critical analysis privilege is meant to promote candid self-evaluation. It is based on the theory that disclosure of internal investigations or self-assessments will deter socially useful activity. While the protection first arose in the context of medical peer review, it has since extended to other areas, including employment discrimination investigations, accounting reviews, libel reviews by the news media, and environmental audits. The privilege “serves the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation.”

Some district courts in this circuit apply the privilege where (a) the information results from a critical self-analysis undertaken by the party seeking protection, (b) the public has a strong interest in preserving the free flow of the type of information sought, and (c) the information is of the type the flow of which would be curtailed if discovery were allowed. These courts also require that the analysis be prepared with the expectation that it remain confidential and that it actually has been kept confidential.

The privilege is not absolute, but qualified; it may be overcome by a showing of extraordinary circumstances or special need. Thus, even where the above factors exist, courts balance the competing harms and the parties’ relative need for the disclosure or non-disclosure of the self-evaluative materials. If the party resisting disclosure can establish harm, the party seeking disclosure must meet a higher standard of relevancy.

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courts have also limited the scope of the privilege, protecting only the evaluative portions of a report but permitting disclosure of the factual evidence upon which the evaluation is based.\textsuperscript{13}

As one set of commentators observed, the self-evaluative privilege “has led a badgered existence” in the Second Circuit.\textsuperscript{13} Only the district courts have discussed the privilege; the appellate court has yet to do so. To date, however, the trial courts within the circuit are split regarding the viability of the privilege.\textsuperscript{15}

The Cases Rejecting the Privilege

Several local federal district courts suggest that the 1990 U.S. Supreme Court decision in \textit{University of Pennsylvania} v. \textit{EEOC}\textsuperscript{16} conclusively rejects the very basis of the privilege. This case involved peer reviews of a professor who was denied tenure. The EEOC sought the reviews in connection with a claim of discrimination, and the university argued that if the material were discoverable, professors would be less inclined to offer honest assessments, and the integrity of the peer review process would be undermined. The trial and circuit court upheld the EEOC’s refusal to exclude peer review materials from a subpoena, and the Supreme Court affirmed. Justice Blackmun, speaking for the Court, observed that Federal Rule of Evidence 501 provides federal courts with flexibility to develop privileges, but expressed a disinclination to exercise such authority expansively, holding that courts should not “create and apply an evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for the probative evidence.’”\textsuperscript{17}

Relying on that rationale, several district courts have concluded that the privilege does not serve the public interest and therefore should be rejected. These courts opine that companies conduct self-evaluations to promote their business interests and that the companies would perform the self-audits without regard to whether the analyses would be discoverable in future litigation.\textsuperscript{18}

For example, in \textit{Roberts v. Hunt},\textsuperscript{19} the plaintiff sued the New York State Housing Finance Agency alleging age discrimination, upon being terminated after failing to pass a civil service examination. At depositions of employees of the defendant agency, the plaintiff sought information about a conversation concerning an investigation of the plaintiff for sexual harassment. While denying the request on the ground of relevancy, the court declared that the “so-called” self-evaluative privilege is not available under federal law. The court explained that in analyzing a proposed privilege, courts “should balance ‘the public’s need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege at issue.’”\textsuperscript{20} Rejecting the public policy argument advanced by courts recognizing the privilege, the court also noted that the rationale of the privilege was rejected by the Supreme Court in \textit{University of Pennsylvania}, and the privilege failed the “traditional common law test for establishment of a privilege.” More particularly, the court said:

\begin{displayquote}
[It] is not reasonable to believe that organizations will not comply with employment discrimination laws unless independent surveys revealing potential violations are deemed privileged. As noted, organizations have a self-interest in achieving compliance with the law and social expectations. Managers need only to scrutinize their workforce to determine if there are indications of potential discrimination. Governmental agencies have no less an incentive to promote equal opportunity in the workplace.\textsuperscript{21}
\end{displayquote}

While not flatly rejecting the viability of the privilege, Judge Martin reached a similar conclusion in \textit{Abbott v. Harris Publications},\textsuperscript{22} in which the plaintiff sought documents prepared as part of the defendant’s internal investigation of the processing of the plaintiff’s application to serve as a dog show judge. The defendant raised the privilege to object to the production of the internal investigation. In directing disclosure of the materials, the court observed that, after \textit{University of Pennsylvania}, the party asserting the self-critical analysis privilege “bears a heavy burden of establishing that public policy strongly favors the type of review at issue and that disclosure in the course of discovery will have a substantial chilling effect on the willingness of parties to engage in such reviews.”\textsuperscript{23} The court rejected the argument that disclosure of the document would have a “chilling effect” on organizations’ willingness to engage in self-assessment, stating that “[r]eviews such as these are conducted by organizations because they are concerned with the integrity of their own operations and, while they no doubt would prefer that the information not be made public, the fact that the results might be discoverable in civil litigation will not deter them from doing what their business interest requires.”\textsuperscript{24}

The Contrasting View:
Cases Embracing the Privilege

The line of cases rejecting the privilege on the basis of University of Pennsylvania is not universally embraced within the circuit. Many of the local cases recognizing the privilege have arisen in the context of employment litigation and a company’s efforts to identify and rectify discriminatory employment practices. Unlike the decisions discussed above, in each of these cases the court upheld the privilege based upon the view that it furthers important public policies, encouraging businesses to take affirmative steps to ensure compliance with the law.
Urging adoption of the privilege, one pair of commentators emphasized that in University of Pennsylvania the EEOC had sought employee reviews that had been routinely generated in the ordinary course of the university’s business. The case did not involve an internal analysis that had been voluntarily undertaken as a good-faith effort to use self-evaluation to comply with applicable standards of conduct mandated by law.25

In Flynn v. Goldman, Sachs & Co.,26 for example, the plaintiff sued Goldman Sachs for gender discrimination and requested the production of documents pertaining to Goldman’s study of barriers to the equal and fair employment of women in the company. Goldman had retained a company, Catalyst, to study the issue, and Catalyst moved to quash a subpoena that the plaintiff had served on it. Catalyst sought protection from disclosure of its report, which included notes from interviews of Goldman employees and analysis of the results of the research. The communications between Catalyst and the defendant’s employees had been made with the understanding that the statements would remain confidential and anonymous. Catalyst argued that disclosing the documents would reduce the likelihood that employers would voluntarily seek critical analysis from firms such as Catalyst.

Judge Wood refused to order disclosure of the report because the confidentiality of such communications is critically important in eliciting candid responses from employees about their concerns. Finding that the privilege protected the Catalyst materials from disclosure, Judge Wood – adopting a view rejected by courts hesitant to recognize the privilege – emphasized that the “[d]issemination of Catalyst’s interview notes, even in redacted form, would have a chilling effect on the future willingness of employees at defendant and other firms to speak candidly about sensitive topics.”27 The court further emphasized that “voluntary studies such as the one commissioned by defendant are to be encouraged as a matter of public policy” and “[p]laintiff’s need for the interview notes and the reports does not outweigh the serious harm that disclosure would cause to the future of self-critical analysis.”28

In Sheppard v. Consolidated Edison Co.,29 Magistrate Judge Azrack adopted a similar view. In that case the plaintiff in an employment discrimination action sought disclosure of the defendant’s study of internal employment and affirmative action practices. The plaintiff argued that the study would demonstrate that the company had notice of its discriminatory practices. Magistrate Judge Azrack determined that the privilege insulated the material from discovery, holding that “there is a strong public policy in favor of the flow of self-critical analysis of employment discrimination” and that

companies will surely be chilled from memorializing their self-critical analysis knowing that it would be disclosed to an aggrieved employee. Such a practice would not only curtail the flow of such information, but may also diminish the value of the information if companies are too skeptical of memorializing their analysis and thus fail to circulate the information to the persons responsible for employment decisions.30

The court also noted that the potential harm of disclosure outweighed the plaintiff’s need for the information.31

Several courts, while recognizing the privilege, have applied it in a limited fashion to protect only the evaluative portions of a company’s self-audits. Several courts, while recognizing the privilege, have applied it in a limited fashion to protect only the evaluative portions of a company’s self-audits. One such case is Troupin v. Metropolitan Life Insurance Co.,33 in which the plaintiff alleged age and gender discrimination, and sought disclosure of an internal company report addressing the defendant’s shortcomings relating to advancement opportunities for female employees. Defendants argued that the self-evaluative privilege protected the requested materials from disclosure. More particularly, Met Life claimed that disclosure of the report would dissuade businesses from conducting such studies and effectively punish attempts to advance the inter-

Several courts, while recognizing the privilege, have applied it in a limited fashion to protect only the evaluative portions of a company’s self-audits.
ests of women and minorities. Although Judge Sweet concluded that the plaintiff had met her burden of demonstrating the need for evidence of defendant’s discriminatory intent, the court refused to direct production of the entire report. Instead, Judge Sweet invoked the privilege to protect the narrative and the evaluative and analytical portions of the report, but not the factual information that would be otherwise discoverable “pursuant to the normal discovery process.”34 Other courts within this circuit have reached similar conclusions.35

**Proceed With Caution**

As these cases teach, until the Second Circuit or the U.S. Supreme Court addresses the issue, the only certainty is uncertainty. Whether the privilege will apply may turn on such uncontrollable factors as the other party’s ability to demonstrate need or the spin of the clerk’s office wheel. With this in mind, companies and counsel inclined to conduct an internal investigation must assume that the findings may be discoverable.

In-house counsel and attorneys representing companies considering self-assessment should advise clients that the “internal” reviews being conducted to ensure compliance with the law may well be transformed into discoverable materials that could prove damaging in a later litigation. To distinguish an internal investigation from the University of Pennsylvania tenure review, a company may need to establish that its self-assessment was not conducted in the ordinary course of business.36

The investigation and results should be kept confidential, a requirement of the privilege emphasized by many of the courts.37 But even if an assessment is kept confidential, the protection of the privilege may be limited to only the “evaluative” portions of the analysis, not its “factual” parts. One might justifiably be dubious of whether such a distinction can be made. And while the use of “evaluative” terminology in a report, where appropriate, might increase protection, self-serving inclusion of such language may blur an already unclear line and cause additional portions of a report to lose protection.

On the other side, counsel seeking access to self-audits should aggressively challenge attempts to invoke the privilege. Clearly, in this circuit the very viability of the privilege has come under critical scrutiny and its application may hinge upon the particular judge assigned to the matter as well as the particular set of facts addressed. Counsel should be ready to demonstrate that the business carried out the investigation routinely and that it was in its self interest to do so. Moreover, full consideration must be given to all aspects of the confidentiality issues surrounding such self-auditing procedures, from the confidentiality expectations of individuals who contributed to the investigation to the manner in which the report was maintained, including the extent to which it was disseminated. And, even where confronted by a court receptive to a plaintiff’s claims of privilege, counsel should vigorously seek production of the non-evaluative, factual portions of any such report.

Simply stated, until the Second Circuit addresses the issue, whether the self-evaluative privilege will protect a business from disclosing internal investigation materials depends largely on the judge assigned to the matter. Because the issue remains subject to the random spin of the wheel, there is no assurance of confidentiality upon which any business may comfortably rely.

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18. *In re Crazy Eddie Sec. Litig.,* 792 F. Supp. at 205.
recognized by the New York State courts, which defer to the legislature for the creation of privileges).


17. *Id.* at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

18. *See*, e.g., *Cruz v. Coach Stores, Inc.*, 196 F.R.D. 228 (S.D.N.Y. 2000), in which, while not expressly relying on *University of Pennsylvania*, Judge Rakoff warned against expansive application of the authority provided under FRE 501. Judge Rakoff also rejected the public policy argument articulated by other courts: “A company has an obvious economic interest in engaging in self-evaluation of employee misconduct: it hardly needs . . . a shield of privilege to investigate its own employee’s alleged derelictions. . . .” *Id.* at 232.


20. *Id.* at 75 (quoting Weinstein’s Evidence par. 501[03], at 39–41).

21. *Id.* at 76.


23. *Id.* at *2.


27. *Id.* at *4.

28. *Id.* at *6.


30. *Id.* at 7–8.


34. *Id.* at 550.


36. Of course, if documents are prepared in anticipation of litigation, the work-product doctrine may protect the materials.