Self-Evaluation Privilege: An Overview

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For the past two years, the world has seen businesses overwhelmed with an increase in media attention regarding their failing ethical standards and noncompliance. This increase in media attention correlates with the increase in non-compliance reports (e.g., sexual harassment). NAVEX Global's annual benchmark report analyzed over 1,200 ethics and compliance programs in 2017. Based on the NAVEX study, changing regulations and internal investigation reports are the top information sources companies with highly sophisticated compliance programs consult when making ethics and compliance training decisions.

Increased reliance on internal investigation reports to make key business decisions raises a question of whether these reports are discoverable. While plaintiffs are searching for ways to compel disclosing the reports, companies are looking to protect their reports while continuing to develop their compliance training programs. As a result, companies look to federal and state laws, which have expanded the number of privileges available over the years.

Common law principles govern federal privileges unless the Constitution, a federal statute, or Supreme Court-prescribed rule provides otherwise. Consequently, federal courts have flexibility to expand existing privileges and to identify new privileges on a case-by-case basis. The so-called self-evaluation privilege is one such privilege.

While federal appellate courts have not yet recognized the self-evaluation privilege, some district courts have. *See, e.g.*, *Melhorn v. New Jersey Transit Rail Opers., Inc.*, 203 F.R.D. 176, 178-179 (E.D. Pa. 2001). Under this privilege, information is privileged if: (1) it results from a critical self-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 the type whose flow would be curtailed if discovery were allowed; and (4) the information was prepared with the expectation of confidentiality and has in fact been kept confidential. *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 425-26 (9thCir. 1992).

The Northern District of Texas referenced the self-evaluation privilege in the early 1980s when attempting to balance the value of making documents and communications discoverable with the corporation's interest in self-investigation and preparation for litigation. *In re LTV Securities Litigation*, 89 F.R.D. 595, 613, 621 n.22 (N.D. Tex. 1981). However, the Fifth Circuit later refused to recognize the self-evaluation privilege when the documents in question were sought by a government agency. *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000). Nonetheless, the Fifth Circuit declined to rule whether the self-evaluation privilege may be recognized under different circumstances. *Id.*

Although the Fifth Circuit has not adopted the self-evaluation privilege, there are other means to accomplish the same goal: that is, protecting the material created from companies' self-evaluations. The "current corporate employee" privilege, recognized in federal common law, flows from the broader attorney-client privilege. Evaluated by the *Upjohn* test (*see* Upjohn Co. v. United States, 449 U.S. 383 (1981); *and see* Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647-48 (Tex. 1995), this privilege protects communications by a corporate employee—regardless of the position of the employee—when the communications concern matters within the scope of the employee's corporate duties and the employee is aware the information is being furnished to enable the attorney to provide legal advice to the corporation.

While there are certain communications with former corporate employees that are protected by the attorney-client privilege, the full extent of that protection is unclear. Nevertheless, the implication is that the *Upjohn* test would also apply to the communications of former employees. However, these employee privileges may not cover all the information exposed by a company's self-evaluation.

Texas law recognizes a variety of privileges, but Texas lacks a single source of authority outlining every recognized Texas state law privilege. Instead, these privileges are scattered across different levels of legislative and judicial authority. Further, the Texas Legislature gave the Texas Supreme Court the power to make rules regarding civil practice and procedure, including privileges.

Texas state law has not explicitly adopted the self-evaluation privilege. Instead, the discoverability of investigative reports has been decided on a case-by-case basis. For example, the San Antonio Court of Appeals held a company's investigative report created after the opposing party hired an attorney was not discoverable. *In re Weeks Mar., Inc.*, 31 S.W.3d 389, 391 (Tex. App.—San Antonio 2000, *orig. proceeding*). The Texas Supreme Court held an investigation report unrelated to the matter that gave rise to the current litigation was discoverable. *Axelson, Inc., v. McIlhany*, 798 S.W.2d 550, 552-53 (Tex. 1990). The deciding factor in both of those cases was the threshold question of whether the report was made in anticipation of litigation. Texas therefore continues to focus on the motivation behind the company's reasons for a self-evaluation, rather than the self-evaluation itself.

The self-evaluation privilege is a mechanism companies use in some jurisdictions, but neither the Fifth Circuit nor Texas has explicitly adopted such privilege. However, the purpose behind the self-evaluation privilege is rooted in currently recognized and adopted privileges in Fifth Circuit and Texas state courts. Thus, the self-evaluation privilege may offer a means to fill possible gaps between the other privileges.

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