

“What keeps you up at night?”

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The Self-Evaluative Privilege: An alternative for protecting sensitive internal documents

By Daniel D. Santos

SUMMARY

The self-evaluative privilege has gained traction as a statutory privilege in some states and in certain contexts. As there are differences from state to state, care should be taken in determining whether this privilege exists in any jurisdiction prior to relying upon the privilege to protect internal audit documents.

A universal concern for in-house lawyers and their outside counsel is ensuring that sensitive documents, correspondence and information of a confidential nature are protected from disclosure to third parties. This concern is complicated for insurance companies that operate in a highly regulated environment subject to separate insurance department licensing and regulatory requirements in every state where they conduct business, and who must routinely respond to requests for information from regulators during market conduct examinations, financial examinations, data calls, investigations and other inquiries.

Historically, if an insurer provided information to a regulator, it waived any protection against subsequently being forced to disclose that information in litigation. See *Bank of America, N.A. v. Terra Nova Insurance Company*, 212 F.R.D. 166 (S.D.N.Y. 2002). This draconian result led to many disputes between insurers and regulators over production of documents and information to regulators because of concerns over the preservation of the confidentiality of those materials from disclosure to third parties, even if insurers did not otherwise object to sharing the information with its regulators. Over time, regulators began to endorse the concept of a self-evaluative privilege that would allow for communication between insurers and regulators, by eliminating the waiver issue.

The self-evaluative privilege has developed as a potential solution to some of these confidentiality concerns. It has its roots in the common law, and over time has also gained traction as a statutory privilege in some states and in certain contexts, such as medical peer

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reviews, equal employment practices, securities law, academic peer reviews, environmental audits and products liability cases. See National Association of Insurance Commissioners White Paper, *Regulatory Access to Insurer Information: The Issues of Confidentiality and Privilege*, March 2000. While the privilege is also known as the self-critical analysis privilege and the self-examination privilege, among others, the basic premise is the same. It is believed that the self-evaluative privilege was first recognized in 1970 in *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970). In *Bredice*, the plaintiff in a malpractice action sought copies of a hospital's peer review committee meeting reports. Because the purpose of the committee's work was to improve the quality of care, the court ruled that there was 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.” The court reasoned that confidentiality is essential to effective functioning of the committee. To subject those discussions to the discovery process without a showing of exceptional necessity, the court noted, would create an atmosphere of apprehension and would result in the termination of constructive professional criticism.

An increasing number of insurers have begun to use self-audits to monitor the effectiveness of their internal compliance programs. Because of the uncertainty in successfully establishing a self-evaluative privilege in court, the industry has pushed for a legislative solution to promote this alternative for protection of internal documents. Recognizing the benefits of a self-evaluative privilege, the National Conference of Insurance Legislators adopted the Insurance Compliance Self-Evaluative Privilege Model Act (the “Model Act”) in 1998. To date, approximately nine jurisdictions have enacted an insurance self-evaluative privilege statute that is based upon the Model Act.¹ Under the Model Act, an “insurance compliance self-evaluative audit document” is deemed privileged information and is not discoverable or admissible as evidence in

any legal action or administrative proceeding. See Model Act, at § 1(b)(1). An “insurance compliance self-evaluative audit document” is a document that has been prepared as a result of or in connection with an insurance compliance audit. *Id.* at § 1(g)(2). An “insurance compliance audit” means a voluntary, internal evaluation, review, assessment, audit, or investigation for the purpose of identifying or preventing non-compliance with applicable insurance laws or related authority. *Id.* at § 1(g)(1). The audit may be conducted by the regulated company, or by a third party on behalf of the company.

In connection with a regulator's examination, a company may voluntarily submit an insurance compliance self-evaluative audit document to the insurance department as a confidential document without waiving the self-evaluative privilege. See Model Act, § 1(b)(3). The Model Act also provides that the insurance department is not permitted to make a voluntarily submitted audit document available to the public absent court permission. Disclosure of an audit document to a regulator will not constitute a waiver of other applicable privileges, such as the attorney-client privilege, the work product doctrine, or the subsequent remedial measures exclusion. *Id.* at § 1(i). As a result, insurance companies are making increased use of the self-evaluative privilege to protect confidential information.

The Model Act provides a process for a court to compel disclosure of a document for which the privilege is asserted. *Id.* at § 1(c), (d). If a regulator provides a company with a written request for disclosure of an insurance compliance self-evaluative audit document, the company may file a petition with a court for an *in camera* hearing to determine whether the document is privileged or subject to disclosure. The court may require disclosure of the audit document if it finds that the privilege was asserted for a fraudulent purpose, or the material is not subject to the privilege. The court may only compel disclosure of those portions of the audit document that are relevant to issues in dispute in the underlying proceeding. In addition, any compelled disclosure will not be considered to be a public document, or be deemed a waiver of the privilege as to any other proceeding.

As indicated above, care should be taken in determining whether the self-evaluative privilege exists in any jurisdiction prior to relying upon the privilege to protect internal audit documents. While the

¹ They include the District of Columbia (D.C. Code §§ 31-851 to -857), Hawaii (H.R.S. § 431:2D-107), Illinois (215 Ill. Comp. Stat. § 5/155.35), Kansas (K.S.A. § 60-3351), Michigan (Mich. C.L.S. § 500.221), New Jersey (N.J. Stat. Ann. §§ 17:23C-1 to -14), North Dakota (N.D. Cent. Code §§ 26.1-51-01 to -09), Oregon (Or. Rev. Stat. §§ 731.760 to .770) and Texas (Tex. Ins. Code § 751.20).

self-evaluative privilege may exist in a particular jurisdiction, there are differences in the privilege from state to state, depending in particular upon whether the privilege is statutory or a creature of common law. Courts that recognize the common law self-evaluative privilege require that a party asserting the privilege typically satisfy the following elements: (i) the information must come from a self-evaluative analysis undertaken by the party seeking protection; (ii) the public must have a strong interest in preserving the free flow of the type of information sought; and (iii) the information must be of the type whose flow would be curtailed if discovery were allowed. Some courts have required an additional element, which is that the material must have been prepared with the expectation that it be kept confidential, and that it has in fact been kept confidential. See Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 Albany L. Rev. 171 (1996).

In the coming months, the Saul Ewing Insurance Practice Group will be offering a number of events that focus on this and other privilege issues of significance to our insurance clients and contacts. These offerings will provide the opportunity to earn CLE credit, and will include in-person breakfast meetings in certain of our offices, a webinar and an article on joint defense issues. Stay tuned for further details and the schedule for these events.

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