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# Courts Continue Trend In Third Circuit Rejecting The Self-Critical Analysis Privilege

**Another court has joined the recent trend of decisions by district courts in the Third Circuit rejecting the application of the self-critical analysis privilege.** In *Slaughter v. National Railroad Passenger Corporation a/k/a Amtrak*, 2011 U.S. Dist. LEXIS 21838 (E.D. Pa. Mar. 4, 2011), the Honorable Lynne A. Sitarski, U.S.M.J. granted the plaintiff's motion to compel defendant to produce an un-redacted copy of an accident investigation report that it had prepared in connection with the accident in which plaintiff was allegedly injured. *Slaughter*, 2011 U.S. Dist. LEXIS 21838 at **1-3. The court ordered defendant to produce a complete copy of the report even though the redacted information consisted of "subjective evaluation which provide recommended actions which should be taken by [Amtrak] in order to prevent similar accidents in the future" (*Id.*), the type of information that the self-critical analysis privilege was intended to protect.

In declining to recognize the self-critical analysis privilege, Judge Sitarski acknowledged that Congress did not intend to "freeze the law of privileges...." when it enacted Rule 501 of the Federal Rules of Evidence, noting that the rule's "purpose was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis....'" *Id.* at *5 (*quoting Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906 (1980)). The court cautioned, however, that the Supreme Court "urges restraint when developing or recognizing new privileges because they impede the discovery of relevant information" and that "the general rule 'disfavor[s] testimonial privileges.'" *Slaughter*, 2011 U.S. Dist. LEXIS 21838 at **5-6 (*quoting Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S. Ct. 1923 (1996)). Insofar as the self-critical analysis privilege is concerned, Judge Sitarski observed that since it was first recognized in *Bredice v. Doctors Hosp. Inc.*, 50 F. R. D. 249 (D.D.C. 1970), the privilege "has not been uniformly accepted, nor uniformly applied." *Slaughter* , 2011 U.S. Dist. LEXIS 21838 at *9. Moreover, "a majority of the Circuits have refused to recognize or apply . . . ." the privilege, including the Third Circuit. *Id.* at *9 (*quoting Davis v. Kraft Foods North America*, 2006 U.S. Dist. LEXIS 87140 (E.D. Pa. Dec. 1, 2006)). In *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F. 3d 342 (3d Cir. 2009), the Third Circuit was "unpersuaded" by the district court's reliance on the "so-called" self-critical analysis privilege as a basis for sealing the record in that matter, stating that the privilege "has never been recognized by this Court and we see no reason to recognize it now." *Alaska Elec. Pension Fund*, 554 F. 3d at 351, n. 12. Following *Alaska Elec. Pension Fund*, "courts within the Third Circuit have consistently declined to apply the self-critical analysis privilege." *Slaughter*, 2011 U.S. Dist. LEXIS 21838 at *10 (citing Sabric v. Lockheed Martin, 2011 U.S. Dist. LEXIS 17630 (M.D. Pa. Feb. 23, 2011); *Craig v. Rite Aid Corp.*, 2010 U.S. Dist. LEXIS 137773 (M.D. Pa. Dec. 29, 2010); *Smith v. Life Investors Ins. Co. of America*, 2009 U.S. Dist. LEXIS 96310 (W.D. Pa. Oct. 16, 2009)). Judge Sitarski found the Third Circuit's statement in *Alaska Elec. Pension Fund* and the subsequent district court decisions to be dispositive, concluding that she "cannot recognize and employ the self-critical analysis privilege

in this case." *Id*. at *11. While acknowledging that district courts within the Eastern District of Pennsylvania have in certain instances applied the self-critical analysis privilege, Judge Sitarski found that the "persuasiveness of these cases has been undercut" because they "predate *Alaska Elec. Pension Fund* and the Third Circuit's statement therein that it has never recognized a self-critical analysis privilege." *Id*. at *13. The court also rejected defendant's public policy argument that "protecting the redacted material is necessary to promote candor in accident investigation reports, which in turn promotes employee and railroad safety," holding that these goals, while laudable, did not warrant application of the privilege "in light of the liberal discovery afforded litigants under [Fed. R. Civ. P.] 26 and the view that evidentiary privileges are disfavored as inconsistent with that broad scope of discovery." *Id*. at ** 13-14.

Cases such as *Slaughter* are thus making it increasingly clear that the self-critical analysis privilege will not be recognized by courts in the Third Circuit. Thus, a defendant in an action pending in the Third Circuit will in all likelihood be unable to invoke this privilege to shield from discovery the portions of any internal investigation report that it prepares (or which is prepared on its behalf) containing "subjective evaluation which provide recommended actions ...." (*Id*. at *4) to be taken by the defendant to avoid the recurrence of the conduct in question. ■

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