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ESSAY

DISPELLING SUSPICIONS AS TO THE EXISTENCE OF THE SELF-EVALUATIVE PRIVILEGE*

Hon. Arlene R. Lindsay[†] & Lisa C. Solbakken^{††}

INTRODUCTION

The “self-evaluative privilege,” or the “privilege of self-critical analysis” as it has also been called,¹ has led a badgered existence in this circuit. Indeed, even those courts that ultimately embrace the privilege’s application tend to riddle their analyses with disclaimers with respect to its viability.² To this end, it has been duly observed that courts in this circuit “continue to grapple with whether and under what circumstances to recognize” the self-evaluative privilege.³

One component of the analytical disarray surrounding the privilege is the result of the belief held by some that the Su-

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¹ The self-evaluative privilege will be referred to throughout this Essay as the “privilege.”

² See, e.g., *Hardy v. New York News Inc.*, 114 F.R.D. 633, 640-41 (S.D.N.Y. 1987) (applying the privilege to certain communications only after noting that “several courts have raised serious questions about [its viability]”). This point is aptly summarized by the Court of Appeals for the District of Columbia: “A number of courts have relied upon a self-evaluative privilege in diverse factual settings More recently, however, courts have appeared reluctant to enforce even a qualified ‘self-evaluative’ privilege. They typically concede its possible application in some situations, but then proceed to find a reason why the documents in question do not fall within its scope.” *Federal Trade Comm’n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (citations omitted); see also James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 561 (1983) (“[S]elf critical or self-evaluative studies have never been adequately defined by the courts.”).

³ See Michael C. Silberberg, *Predatory Intent in Denying Access to Attorney*, N.Y. L.J., Oct. 15, 1999, at 6.

preme Court has already addressed, and rejected, the privilege's theoretical foundation. To establish whether this interpretation of Supreme Court "privilege precedent" is accurate, this Essay first reviews the decisions that provide the basis for this position. It then considers the nature and extent of the instruction that the Court's determinations provide with respect to the viability of the self-evaluative privilege. Upon completion of this examination, this Essay concludes that to so rely on "privilege precedent" to preclude recognition of the privilege is error, and that contrary to the opinions of several lower courts, the privilege remains a viable mechanism by which self-critical documents may be protected from disclosure.

It should be noted that this Essay does not undertake to comment upon the definition of the self-evaluative privilege, which has been discussed at length elsewhere.⁴ Nor does it provide any significant discussion of the permutations of fact that give rise to the privilege's application. Instead, this Essay endeavors to dispel some of the suspicion typically held by lower courts upon consideration of the privilege by rejecting the aforementioned contention that Supreme Court precedent precludes recognition of the privilege. The intention is to remove this unnecessary analytical hurdle with respect to the privilege's application, with the hope that doing so will assist district and magistrate courts confronted with the question of the privilege's existence.

⁴ See, e.g., Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 335 (1987); Robert J. Bush, *Stimulating Corporate Self Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597 (1993); Marla Clark, *The Privilege For Self-Critical Analysis*, 42-JAN RES GESTAE 7, 9-14 (1999); Ellen Deason, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405, 407-11 (1984); Flanagan, *supra* note 2, at 551-54; Michael J. Holland, *The Self-Analysis Privilege: Obscuring the Truth but Safeguarding Improvement?*, 25-FALL BRIEF 52, 52 (1995); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 113-41 (1988); Stephen C. Simpson, *The Self-Critical Analysis Privilege in Employment Law*, 21 J. CORP. L. 577 (1996); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1083-1100 (1983) [hereinafter *Privilege of Self-Critical Analysis*].

I. BACKGROUND

The self-evaluative privilege has its foundation in public policy concerns that "certain types of information, vital to the internal operations and improvement of certain industries, ought to be protected from disclosure,"⁵ so not to "impede the open and candid discussion of ideas."⁶ In so doing, the privilege is said to preserve the free flow of information and dialogue generated pursuant to critical self-analyses undertaken to redress errors or inequities that exist within a given operation or organization.⁷ The privilege has been asserted, with varying degrees of success, to prevent disclosure of internal investigatory reports,⁸ equal employment opportunity stud-

⁵ *Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, No. 93-5375, 1996 WL 675772, at *2 (S.D.N.Y. Nov. 21, 1996).

⁶ See Holland, *supra* note 4, at 52.

⁷ See, e.g., Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 80-82 (1995).

⁸ See *In re Health Management, Inc.*, No. 96-0889 (E.D.N.Y. Sept. 25, 1999) (unpublished) (applied); *Abbott v. Harris Publications*, No. 97-7648, 1999 WL 549002 (S.D.N.Y. July 28, 1999) (recognized, not applied); *UBS Asset Mgmt. v. Wood Gundy Corp.*, No. 95-5157, 1999 WL 294843 (S.D.N.Y. May 11, 1999) (applied); *Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, No. 93-5375, 1996 WL 675772 (S.D.N.Y. Nov. 21, 1996) (recognized, not applied); *Chemical Bank v. Affiliated FM Ins. Co.*, 1994 WL 89292 (S.D.N.Y. Mar. 16, 1994) (recognized, not applied); *In re Salomon Inc. Sec. Litig.*, No. 91-5442, 1992 WL 350762 (S.D.N.Y. Nov. 13, 1992) (recognized, not applied); *In re Crazy Eddie Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992) (applied); *Lizotte v. New York City Health & Hosps. Corp.*, No. 85-7548, 1989 WL 260217 (S.D.N.Y. Nov. 28, 1989) (recognized, not applied); *Ross v. Bolton*, 106 F.R.D. 22 (S.D.N.Y. 1985) (applied); *Westmoreland v. CBS*, 97 F.R.D. 703 (S.D.N.Y. 1983) (recognized, not applied); *New York Stock Exchange v. Sloan*, 22 Fed. R. Serv. 2d 500 (S.D.N.Y. 1976) (applied).

ies,⁹ hospital committee reports,¹⁰ and accident investigatory reports within the context of personal injury suits.¹¹

In order for the privilege to apply:

the information must [first] result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; [and] finally, the information must be of the type whose flow would be curtailed if discovery were allowed.¹²

Refinements of the privilege have included the requirements that documents were prepared confidentially and that they were, in fact, kept confidential.¹³ Finally, "the self-critical analysis privilege is not absolute; it protects only the self-

⁹ See *Trezza v. The Hartford, Inc.*, No. 98-2205, 1999 WL 511673 (S.D.N.Y. July 20, 1999) (applied); *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546 (S.D.N.Y. 1996) (applied); *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6 (E.D.N.Y. 1995) (applied); *Reilly v. Metro-North Commuter R.R.*, No. 93-7317, 1995 WL 105286 (S.D.N.Y. Mar. 13, 1995) (recognized, not applied); *Abel v. Merrill Lynch & Co.*, No. 91-6261, 1993 WL 33348 (S.D.N.Y. Feb. 4, 1993) (does not recognize); *Flynn v. Goldman, Sachs & Co.*, No. 91-0035, 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993) (applied); *Cobb v. Rockefeller Univ.*, No. 90-6516, 1991 WL 222125 (S.D.N.Y. Oct. 24, 1991) (applied); *Hardy v. New York News Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987) (recognized, not applied); *Boyd v. City of New York*, No. 86-4501-CSH, 1987 WL 6915 (S.D.N.Y. Feb. 11, 1987) (not applied); *Mazzella v. RCA Global Communications, Inc.*, No. 83 Civ. 3716, 1984 WL 55541 (S.D.N.Y. Mar. 28, 1984) (applied); *Zahorik v. Cornell Univ.*, 98 F.R.D. 27 (N.D.N.Y. 1983) (recognized, not applied).

¹⁰ See *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971) (applied).

¹¹ See *Spencer v. Sea-Land Serv. Inc.*, No. 98-2817, 1999 WL 619637 (S.D.N.Y. Aug. 16, 1999) (recognized, not applied); *Wimer v. Sealand Serv., Inc.*, No. 96-8730, 1997 WL 375661 (S.D.N.Y. July 3, 1997) (recognized, not applied).

¹² *Privilege of Self-Critical Analysis*, *supra* note 4, at 1086. The aforementioned article is the alpha point for many of the analyses conducted by district courts when considering the privilege. See, e.g., *Spencer*, 1999 WL 619637, at *2; *Wimer*, 1997 WL 375661, at *1; *Chemical Bank*, 1994 WL 89292, at *1; *In re Salomon Inc.*, 1992 WL 350762, at *1; *Hardy*, 114 F.R.D. at 640. However, the privilege's genesis may be traced back to *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). In *Bredice*, the district court found that a plaintiff in a malpractice suit was not entitled to the minutes or reports generated during medical staff meetings. See *id.* at 251. The court found that the documents were entitled to a qualified privilege, as the "purpose of these staff meetings is the improvement, through self analysis, of the efficiency of medical procedures and techniques" and because "[t]here is an overwhelming public interest in having those [meetings] on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id.* at 250-51.

¹³ See *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

evaluative material, not the underlying facts which form the foundation of the evaluation or analysis."¹⁴

Since its birth in 1970,¹⁵ the privilege has been faced with a legal environment generally hostile to the recognition of its kind. Indeed, it has been said that over the last few decades, both the Supreme Court and the Second Circuit have consistently demonstrated a desire to narrow the scope of existing privileges, as well as a noticeable hesitancy to embrace the existence of new ones.¹⁶ For the most part, however, the privilege of self-critical analysis has survived the slings and arrows that have slain its brethren.

One could argue that the equivocation with which the privilege is met may only exist because neither the Supreme Court, nor any circuit court,¹⁷ has squarely considered its propriety.¹⁸ Indeed, this is the position taken by many lower courts, who, left to postulate as to the privilege's existence in a climate inhospitable to its kind, decline to recognize the privilege.¹⁹ Many of these courts have also extrapolated from in-

¹⁴ *Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp.*, No. 93-5375, 1996 WL 675772, at *2 (S.D.N.Y. Nov. 21, 1996). The distinction between what is factual and what is evaluative is not always one that is easily made. For a discussion of this point, see Note, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405, 417-18 (1984).

¹⁵ See *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970).

¹⁶ See *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 168 n.3 (E.D.N.Y. 1988) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984); *Trammel v. United States*, 445 U.S. 40 (1980); *United States v. Gillock*, 445 U.S. 360 (1980); *Herbert v. Lando*, 441 U.S. 153 (1979); *United States v. Nixon*, 418 U.S. 683 (1974); *Branzburg v. Hayes*, 408 U.S. 665, (1972); *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223 (2d Cir. 1984); *In re Grand Jury Subpoena (Marc Rich)*, 731 F.2d 1032 (2d Cir. 1984); *In re Grand Jury Subpoena (Lawrence Matthews)*, 714 F.2d 223 (2d Cir. 1983); *In re Doe*, 711 F.2d 1187 (2d Cir. 1983); *In re Cueto*, 554 F.2d 14 (2d Cir. 1977); *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976)). *But see Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing the existence of the psychotherapist-patient privilege).

¹⁷ The Court of Appeals for the Ninth Circuit addressed a district court's application of the privilege in the following manner: "[W]e hold that no privilege of 'self-critical analysis' protects routine internal corporate reviews of matters related to safety concerns. *Even if such a privilege exists*, the justifications for it do not support its application to voluntary routine safety reviews." *Dowling*, 971 F.2d at 426 (emphasis added).

¹⁸ See *id.* at 425 n.1; *Abel v. Merrill Lynch & Co.*, No. 91-6261, 1993 WL 33348, at *2 (S.D.N.Y. Feb. 4, 1993).

¹⁹ See, e.g., *Abbott v. Harris Publications*, No. 97-7648, 1999 WL 549002 (S.D.N.Y. July 28, 1999) ("In light of the Supreme Court opinion in *[EEOC]*, it is clear that to the extent a self-critical analysis privilege has any continued validity,

structions provided by cases in which analogous judicially-crafted privileges are recognized based on the principle of maintaining a free flow of candid information.²⁰

II. THE TRIALS OF THEORY

As articulated above, several courts have stated that the rationale behind the self-evaluative privilege has indeed been addressed, and rejected, by the Supreme Court.²¹ These suppositions have, of course, acted as a hurdle to the privilege's application. Indeed, the question of whether the Court has addressed the theoretical basis supporting the recognition of the privilege has provided the impetus (and necessity) for tal-mudic analyses concerning the viability of the privilege whenever it is asserted.

Yet a review of the Court's decisions which are cited to in this respect illustrates that they may not be as fatal to the cause as some have thought. That is, neither *United States v. Arthur Young & Co.* nor *University of Pennsylvania v. EEOC*, the two cases that are most often cited to in support of the proposition that the privilege would not withstand the Court's

the party seeking to invoke it 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."); *Wimer v. Sealand Serv., Inc.*, No. 96-8730, 1997 WL 375661, at *1 (S.D.N.Y. July 3, 1997) ("[The privilege's] viability has been called into question by the analysis of the Supreme Court in [*EEOC*]."); *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 549 (S.D.N.Y. 1996) (the "Supreme Court [in *EEOC*] cast some doubt on the vitality of the Privilege by declining to recognize a qualified common-law privilege against the disclosure of confidential peer review materials, a privilege based largely on the same policy considerations as the self-critical analysis privilege"); *Cobb v. Rockefeller Univ.*, No. 90 Civ. 6515, 1991 WL 222125, *1 (S.D.N.Y. Oct. 24, 1991) (noting the Supreme Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), upon consideration of the applicability of the self-evaluative privilege); *Lamitie v. Emerson Elec. Co.*, 142 A.D.2d 293, 298, 535 N.Y.S.2d 650, 653 (3d Dep't 1988) ("The United States Supreme Court, in *United States v. Arthur Young & Co.*, rejected policy arguments similar to those underlying the critical self-analysis privilege in holding that no privilege applied to work papers of independent auditors used in preparation of financial reports of publicly held corporations required under Federal securities laws.").

²⁰ See *supra* note 19.

²¹ See *id.*

review,²² provide the basis for such a conclusion. The following section undertakes to illustrate this point.

A. United States v. Arthur Young & Co.²³

Arthur Young & Co. ("Arthur Young"), a firm of certified public accountants, was hired by the Amerada Hess Corporation ("Amerada") to review financial statements prepared to satisfy federal securities law disclosure requirements.²⁴ As part of its obligation, Arthur Young was charged with reviewing Amerada's tax liabilities, as well as Amerada's reserve capacity to meet them.²⁵ The records produced as a result of this analysis were identified as "tax accrual workpapers."²⁶

A subsequent "routine audit" by the Internal Revenue Service ("IRS") revealed "questionable payments from a 'special disbursement account'" and resulted in a criminal investigation of Amerada.²⁷ Pursuant to the powers provided by § 7602 of the Internal Revenue Code, the IRS subpoenaed all of Arthur Young's files relating to its corporate client, including the tax accrual workpapers.²⁸

In accordance with Amerada's instruction, Arthur Young did not respond to the subpoena,²⁹ and the IRS then filed an action for compliance in the Southern District of New York.³⁰ Upon the district court's determination that the records must be produced, Arthur Young appealed to the Second Circuit.³¹

Arthur Young argued that because the tax accrual workpapers contained "projections, opinions, and hypotheses of possible tax consequences based on factual data derived from

²² See *id.*

²³ United States v. Arthur Young & Co., 677 F.2d 211 (2d Cir. 1982) [hereinafter *Arthur Young II*], *aff'd in part, rev'd in part*, 465 U.S. 805 (1984).

²⁴ See *id.* at 214.

²⁵ See *id.*

²⁶ *Id.* at 215.

²⁷ United States v. Arthur Young & Co., 465 U.S. 805, 805 (1984) [hereinafter *Arthur Young III*].

²⁸ See *id.*

²⁹ See *id.*

³⁰ See United States v. Arthur Young & Co., 496 F. Supp. 1152 (S.D.N.Y. 1980) [hereinafter *Arthur Young I*], *rev'd*, 677 F.2d 211 (2d Cir. 1982), *aff'd in part, rev'd in part*, 465 U.S. 805 (1984).

³¹ See *Arthur Young II*, 677 F.2d at 211.

the client's records,"³² to require their production would "undermine the ability of the client to deal candidly with its auditor[s]."³³ The firm also argued that a type of "auditor-client" privilege protected the documents, as the client would have an expectation of privacy with respect to such communications.³⁴

The court of appeals identified the conflict in the case before it as one "between 'the legitimate interests of society in enforcement of its laws and collection of the revenues' and the 'national public interest [in] insur[ing] the maintenance of fair and honest markets in [securities] transactions.'"³⁵ The court also stated the following:

Divulging [the] information [contained in the tax accrual workpapers] necessarily puts the taxpayer-corporation at a substantial disadvantage when it is audited. The prejudice involved in exposing to the [IRS] appraisals of the taxpayer's weaknesses and settlement positions [which are revealed in the tax accrual workpapers] on audit is of such proportions that a prudent organization might not be perfectly candid with independent auditors once it knew that the information revealed would be reachable under § 7602.³⁶

Thus, in order to "protect the investing public from inaccurate financial information,"³⁷ the court found that "[a] work-product privilege, similar to the privilege fashioned in *Hickman*, seems . . . appropriate."³⁸ Upon concluding that the IRS failed to make a sufficient showing of need to override the applicable qualified privilege, the court determined that the tax accrual workpapers need not be produced.³⁹

The Supreme Court reversed this determination,⁴⁰ stating that "[w]hile § 7602 is 'subject to the traditional privileges and limitations,' any other restrictions upon the IRS summons power should be avoided 'absent unambiguous directions from

³² *Arthur Young I*, 496 F. Supp. at 1155.

³³ *Id.* at 1156.

³⁴ *Id.*

³⁵ *Arthur Young II*, 677 F.2d at 219 (alterations in original) (citations omitted).

³⁶ *Id.* at 220.

³⁷ *Id.*

³⁸ *Id.* at 221 (citing *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (establishing qualified work-product privilege)).

³⁹ *Id.*

⁴⁰ See *Arthur Young III*, 465 U.S. 805 (1984).

Congress.”⁴¹ Because Congress made no such unambiguous directive, the Court declined to foster a sort of “judicially created work-product immunity for tax accrual workpapers” that were summoned pursuant to the Internal Revenue Code.⁴²

The Court went on to note that “the very language of § 7602 reflects . . . a congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry” and that “[i]n light of this explicit statement by the Legislative Branch, courts should be chary in recognizing exceptions to the broad summons authority of the IRS or in fashioning new privileges that would curtail disclosure under [the statute].”⁴³

Clearly, then, the Court’s initial analysis in *Arthur Young* was heavily influenced by the broad authority provided to the IRS pursuant to the Internal Revenue Code.⁴⁴ The Court’s conclusion that, since the legislature designed the reach and scope of § 7602, it should be the legislature that imposes any limit on the same, is one that obviously militates against the recognition of any judicially-created privilege hindering a statute’s breadth.

Yet this aspect of the Court’s decision provides little instruction with respect to whether a lower court may recognize the self-evaluative privilege. This is simply because few, if any, of the factual contexts in which the privilege is addressed provide an analogue to § 7602 of the Internal Revenue Code. That is, there is rarely a set of records over which the privilege is asserted that falls within the province of a federal statute that mandates disclosure. Even if there were such an analogue, however, it is logical to assume it would take precedence over the application of the privilege. Indeed, where there exists a law requiring the production of certain documents, the determination with respect to competing interests has already been made, with the interests in disclosure superceding any interests that may be furthered by protection.⁴⁵

⁴¹ *Id.* at 816 (citations omitted).

⁴² *Id.*

⁴³ *Id.* at 816-17.

⁴⁴ *Id.*

⁴⁵ Lower courts seem to have adopted a hybrid of this principle upon considering whether the application of the privilege may withstand a request for documents from a government agency. See *Federal Trade Comm’n v. TRW, Inc.*, 628

More relevant to our purposes, however, is the manner in which the Court addressed the Second Circuit's conclusions with respect to the danger of impeding candid communications between auditor and client upon disclosure of the tax accrual workpapers. In light of the impact that the Court's treatment of this issue has on the instant analysis, its full reproduction is warranted:

To the extent that the Court of Appeals, in its concern for the "chilling effect" of the disclosure of tax accrual workpapers, sought to facilitate communication between independent auditors and their clients, its remedy more closely resembles a testimonial accountant-client privilege than a work-product immunity for accountants' workpapers. But as this Court stated in *Couch v. United States*, 409 U.S. 322, 335 (1973), "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." In light of *Couch*, the Court of Appeals' effort to foster candid communication between accountant and client by creating a self-styled work-product privilege was misplaced, and conflicts with what we see as the clear intent of Congress.⁴⁶

....

We cannot accept the view that the integrity of the securities markets will suffer absent some protection for accountants' tax accrual workpapers. The Court of Appeals apparently feared that, were the IRS to have access to tax accrual workpapers, a corporation might be tempted to withhold from its auditor certain information relevant and material to a proper evaluation of its financial statements. But the independent certified public accountant cannot be content with the corporation's representations that its tax accrual reserves are adequate; the auditor is ethically and professionally obligated to ascertain for himself as far as possible whether the corporation's contingent tax liabilities have been accurately stated. If the auditor were convinced that the scope of the examination had been limited by management's reluctance to disclose matters relating to the tax accrual reserves, the auditor would be unable to issue an unqualified opinion as to the accuracy of the corporation's financial statements. Instead, the auditor would be required to issue a qualified opinion, an adverse opinion, or a disclaimer of opinion, thereby notifying the investing public of possible potential problems inherent in the corporation's financial reports. Responsible corporate

F.2d 207, 210 (D.C. Cir. 1980) ("Whatever may be the status of the 'self-evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application where . . . the documents in question have been sought by a governmental agency.") (citations omitted).

⁴⁶ *Arthur Young III*, 465 U.S. at 817.

management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return. Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers.⁴⁷

The Court thus rejected the Second Circuit's contention that a modified privilege protecting the tax accrual workpapers from disclosure would be necessary to ensure forthright communications between auditor and client.

Because an analogous "chilling effect" argument is submitted by proponents of the self-evaluative privilege, it may appear that the Court's determination in *Arthur Young* sheds doubt upon the privilege's viability.⁴⁸ Yet, when one looks beyond the surface appeal of this conclusion, distinctions between the factual contexts in which the self-evaluative privilege thrives and that which existed in *Arthur Young* are revealed. Moreover, one can see how the *Arthur Young* analysis actually compliments the theoretical basis for the privilege, rather than detracts from it.

First, it should be noted that the *Arthur Young* Court's "invisible hand" argument, which suggests that disclosure will not dissuade a corporate entity from engaging in self-critical analyses because such evaluations are necessary precursors for successful competition in the marketplace, may only be made within the confined context of the corporate or investigatory reports. That is, one would be hard-pressed to argue that independent marketplace incentives or an invisible hand exists so to propel self-analysis within the context of the equal employment opportunity studies or affirmative action plans. As such, the Court's rationale in *Arthur Young* is not readily applicable

⁴⁷ *Id.* at 818-19 (citations omitted).

⁴⁸ At least one commentator has propounded a similar argument with respect to the self-evaluative privilege:

Because a corporation functions in a competitive commercial environment, it must constantly evaluate its organization and personnel in order to survive. Failure to critically review its performance inevitably leads to misperceptions about the market, and within a short time, penalties from the marketplace. This pressure to conduct critical appraisals is not only imposed by the milieu in which the corporation operates, but also emanates from within the organization, which creates incentives for employees to review its operations.

Flanagan, *supra* note 2, at 561.

to a healthy segment of the cases in which the self-evaluative privilege is recognized,⁴⁹ and in this sense, the "invisible hand" is limited in its reach.

Yet, what of this independent incentive rationale outside of the context of equal employment cases? That is, may the privilege be recognized within the context of corporate or investigatory self-analyses in light of the Court's determination in *Arthur Young*? The answer to this query appears to be yes, simply because there remains room for its existence within the *Arthur Young* paradigm.

As articulated in the preceding section,⁵⁰ the defined self-evaluative privilege actually invites the type of analysis undertaken in *Arthur Young*, albeit on a case-by-case basis. That is, prior to determining the privilege's applicability, a court must ascertain whether the information at issue is "of the type whose flow would be curtailed if discovery were allowed."⁵¹ This essentially requires a court, as a threshold inquiry, to ascertain whether the "independent incentives" cited to by the Court counter any chilling effect that the threat of disclosure may beget. Upon a court's determination that said incentive exists, the privilege would not apply.

Put another way, the analysis required upon the application of the privilege incorporates the "independent incentive" principle enunciated in *Arthur Young*. This point undermines the conclusion that *Arthur Young* compels a finding that the theoretical basis supporting the self-evaluative privilege is

⁴⁹ See, e.g., *Trezza v. The Hartford, Inc.*, No. 98-2205, 1999 WL 511673 (S.D.N.Y. July 20, 1999) (applied); *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546 (S.D.N.Y. 1996) (applied); *Sheppard v. Consolidated Edison Co.*, 893 F. Supp. 6 (E.D.N.Y. 1995) (applied); *Reilly v. Metro-North Commuter R.R.*, No. 93-7317, 1995 WL 105286 (S.D.N.Y. Mar. 13, 1995) (recognized, not applied); *Abel v. Merrill Lynch & Co.*, No. 91-6261, 1993 WL 33348 (S.D.N.Y. Feb. 4, 1993) (does not recognize); *Flynn v. Goldman, Sachs & Co.*, No. 91-0035, 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993) (applied); *Cobb v. Rockefeller Univ.*, No. 90-6516, 1991 WL 222125 (S.D.N.Y. Oct. 24, 1991); *Hardy v. New York News Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987) (recognized, not applied); *Boyd v. City of New York*, No. 86-4501-CSH, 1987 WL 6915 (S.D.N.Y. Feb. 11, 1987); *Mazzella v. RCA Global Communications, Inc.*, No. 83 Civ. 3716, 1984 WL 55541 (S.D.N.Y. Mar. 28, 1984); *Zahorik v. Cornell Univ.*, 98 F.R.D. 27 (N.D.N.Y. 1983) (recognized, not applied).

⁵⁰ See *supra* Part I.

⁵¹ *Spencer v. Sea-Land Serv., Inc.*, No. 98-2817, 1999 WL 619637, at *2 (S.D.N.Y. Aug. 16, 1999).

infirm. To the contrary, the viability of the privilege's foundation is strengthened upon the determination that its application harnesses the key component of the *Arthur Young* analysis.

District courts that have recognized the privilege apply the "independent incentive" aspect of the privilege's analysis thoughtfully. For example, in *Spencer v. Sea-Land Service, Inc.*,⁵² the district court confronted the issue of whether the privilege was applicable to a redacted portion of an "Incident Investigation Report" which was created by a crew member of the ship upon which plaintiff was injured.⁵³

The court began its analysis with the language of suspicion that has become almost a prerequisite to any discussion of the privilege, irrespective of its recognition. It noted that "some courts have suggested the availability . . . of the so-called self-critical analysis privilege to block discovery of information pertaining to a party's evaluation of its own performance . . . [while] [o]ther courts have been skeptical about the viability of the principle, and many courts have rejected it altogether."⁵⁴ It then found that even "assum[ing] the potential availability of such a privilege," the defendant had not justified its application.⁵⁵ In an argument reminiscent of the Supreme Court's position in *Arthur Young*, the court explained that it did "not believe that disclosure would impede accurate and truthful reporting by defendant of accident analyses in the future."⁵⁶ This was because "[a] company in the business of supplying or operating ocean-going vessels has significant incentives to assess and correct malfunctions in its equipment and to undertake corrective measures to avoid future accidents."⁵⁷

⁵² *Id.*

⁵³ *Id.* at *1.

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.* at *2.

⁵⁶ *Spencer*, 1999 WL 619637, at *3.

⁵⁷ *Id.* (citing *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (rejecting application of self-critical analysis privilege to routine safety reviews, noting that "[o]rganizations have many incentives to conduct such reviews that outweigh the harm that might result from disclosure"); *In re Salomon Inc. Sec. Litig.*, No. 91-5442, 1992 WL 350762, at *4 (S.D.N.Y. Nov. 13, 1992) (observing that "economic efficiencies, the accuracy of financial reporting and the improvement of business standards achieved by internal auditing programs and management control studies are so integral to the success of a business that the free flow of information is not likely to be stemmed by the possibility of future disclosure")

Thus, despite the hedging language in which the review of the privilege is placed, *Spencer* provides an example of the theoretical harmony which may be reached between the principles of *Arthur Young* and the privilege's application. Specifically, the court's analysis identifies and applies the *Arthur Young's* directive in a manner that is not inconsistent with its philosophy.

B. University of Pennsylvania v. EEOC

Another Supreme Court case to which courts cite⁵⁸ when postulating the viability, or the lack thereof, of the privilege is *University of Pennsylvania v. EEOC* ("EEOC").⁵⁹ In *EEOC*, Rosalie Tung ("Tung") asserted that she had been sexually harassed by a department chairperson at the University of Pennsylvania ("University"), and that upon her insistence that their relationship remain professional, she was denied tenure.⁶⁰ Tung also stated her qualifications for tenure were either equal or better than that of her five male colleagues who had received more favorable treatment.⁶¹ Tung filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC" or "Commission") pursuant to Title VII.⁶² The EEOC undertook an investigation and eventually subpoenaed both Tung's tenure review files and those of her five male colleagues.⁶³ The University requested that the Court deem the peer review documents privileged to "protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities."⁶⁴

In denying to so protect the sought documents, the Court stated that it "do[es] not create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to

(further citation omitted).

⁵⁸ See *supra* note 19.

⁵⁹ 493 U.S. 182 (1990).

⁶⁰ See *id.* at 185.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.* at 186.

⁶⁴ *EEOC*, 493 U.S. at 189.

outweigh the need for probative evidence,” and “[w]ith . . . this in mind, [it] [could] not accept the University’s invitation to create a new privilege against the disclosure of peer review materials.”⁶⁵ The Court also noted that “Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege to peer review documents.”⁶⁶ Indeed, the “plain language of the text of § 2000e-8(a), [mandates] that the Commission ‘shall . . . have access’ to ‘relevant’ evidence.”⁶⁷

Particularly relevant to our review is the Court’s evaluation of the University’s argument that protecting the documents is in the public interest:

We readily agree with petitioner that universities and colleges play significant roles in American society. Nor need we question, at this point, petitioner’s assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, government interest. Often, as even petitioner seems to admit, disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a “smoking gun” to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files.⁶⁸

⁶⁵ *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

⁶⁶ *Id.* The Court expounded on this point, noting:

When Title VII was enacted originally in 1964, it exempted an “educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.” Eight years later, Congress eliminated that specific exemption by enacting § 3 of the Equal Employment Opportunity Act of 1972. This extension of Title VII was Congress’ considered response to the widespread and compelling problem of invidious discrimination in educational institutions.

Id. at 189-90 (citations omitted).

⁶⁷ *Id.* at 192. The Court went on to note that Congress “did address situations in which an employer may have an interest in the confidentiality of its records,” and provided for a modicum of protection in this respect. *EEOC*, 493 U.S. at 192. This point harms the University’s argument, the Court opined, because the University’s application essentially requests that the Court provide more protection than that deemed appropriate by Congress. *See id.* at 192-93.

⁶⁸ *Id.* at 193.

As in *Arthur Young*, it is clear that in *EEOC*, the crux of the Court's decision to deny protection of the documents sought is that there exists a relatively clear (and broad) statutory directive that the documents be produced. As the Court stated: "[T]he EEOC may obtain 'relevant' evidence. Congress has made the choice."⁶⁹ And again, one strains to think of an instance where the self-evaluative privilege has gone toe to toe against a similar legislative mandate.⁷⁰ In this sense, *EEOC* fails to provide a paradigm under which one may evaluate application of the self-evaluative privilege where there is an absence of a statutory edict.

A similar factual distinction, and perhaps one that is more important, is that the documents sought in *EEOC* did not contain a self-evaluation.⁷¹ To the contrary, the Commission sought employee analyses which were routinely generated in the University's ordinary course of business. This context is clearly distinguishable from the instance where an internal analysis is undertaken with respect to a particular issue, such as where a corporation "in good faith, seeks to improve its employment practices and to comply with pertinent [employment] laws"⁷² through self-evaluation. Accordingly, reliance on *EEOC* for the proposition that its analysis precludes recognition of the privilege is misplaced.

Even beyond these factual distinctions, it is also important to note that in *EEOC*, the University's interest in confidentiality was found to be in conflict with society's interest in "ferretting out . . . invidious discrimination."⁷³ The Court's determination that, on balance, the former was subordinate to the latter served to cement the conclusion that no privilege existed to protect the sought documents from disclosure. Yet interestingly, it is this same societal interest in the eradication of discriminatory employment practices⁷⁴ that is said to be per-

⁶⁹ *Id.* at 194.

⁷⁰ This is in contrast to the relatively common scenario where the applicability of the self-evaluative privilege is pondered in relation to an evaluation or analysis that was itself statutorily compelled.

⁷¹ *See id.* at 186.

⁷² *Trezza v. The Hartford, Inc.*, No. 98-2205, 1999 WL 511673, at *2 (S.D.N.Y. July 20, 1999).

⁷³ *EEOC*, 493 U.S. at 193.

⁷⁴ One court has commented that "in the area of employment discrimination

petuated, rather than impeded, by application of the privilege.

An illustration of this last point is provided by *Flynn v. Goldman, Sachs & Co.*⁷⁵ There, the court found that documents generated by an organization voluntarily hired by defendant to "stud[y] the barriers to . . . equal . . . employment" so to "identify and eliminate" the same were protected.⁷⁶ The court was "persuaded by [the organization's] argument that if such reports [were] discoverable absent a showing of compelling need, employers would be highly reluctant" to undertake such evaluations.⁷⁷ Because "[t]he goal of eliminating [discriminatory] barriers . . . is well served by encouraging such self-critical assessments," this goal "should not be undermined absent a compelling showing of need, [to] be determined in light of the plaintiff's claims."⁷⁸ The court then applied the self-evaluative privilege to protect the documents generated pursuant to the review.⁷⁹

Goldman provides an example of how the privilege's protection may be utilized to foster the very policy interest which provided the basis for compelling production in *EEOC*. That is, protecting self-evaluative documents from disclosure may legitimately function as a mechanism by which an entity may pursue the goal of purging discriminatory employment practices. In light of this point, *EEOC* should not be broadly identified as a justification from which one may easily conclude that the privilege is defunct.

virtually every court [that has recognized the privilege] has limited [it] to information or reports that are mandated by statute or regulation," *Hardy v. New York News Inc.*, 114 F.R.D. 633, 641 (S.D.N.Y. 1987), the theory being that it would be unfair to require an entity to undertake such an analysis, and then compel said entity to provide the same to their adversary. That is, where such an analysis is voluntarily undertaken "[n]o unfairness exists" upon mandating production, as "no third party required [the entity] to make a critical self-evaluation, or indeed, any evaluation at all." *Id.*

⁷⁵ No. 91-0035, 1993 WL 362380 (S.D.N.Y. Sept. 16, 1993).

⁷⁶ *Id.* at *1.

⁷⁷ *Id.* at *2.

⁷⁸ *Id.*

⁷⁹ See *id.* at *3.

CONCLUSION

The distinctions of fact which exist between *Arthur Young*, *EEOC*, and the prototypical facts of self-evaluative privilege cases are abundant. Similarly, the theoretical maxims delineated in these "privilege precedent" cases are not necessarily incongruent with the those which provide the basis for the privilege. These points, taken in conjunction with one another, lead to the conclusion that the ground upon which the privilege stands is not as unsteady as one might think.⁸⁰ This conclusion is proffered in the hope that it will assist courts confronted with such an analysis.

⁸⁰ It appears that some courts have reached this same determination, as, despite protestations to the contrary, the privilege continues to develop within this circuit. See *Troupin v. Metropolitan Life Ins. Co.*, 169 F.R.D. 546, 548 (S.D.N.Y. 1996). It is also interesting to note that "[a] trendy surge regarding the privilege of self-critical analysis has blossomed at the state level, with several states statutorily enacting laws shielding internal self-critical analysis from discovery." Brad Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 KAN. J.L. & PUB. POL'Y 221, 226 (1999).