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Case Comment

Civil Procedure: Self-Evaluative Reports— A Qualified Privilege in Discovery?

It has become fairly common for large public institutions and business entities to initiate self-evaluative investigations into various aspects of their operations, including the occurrence of accidents and the degree of compliance with applicable regulatory laws. Recently, a few federal courts have held that a "qualified privilege" will apply to protect the results of such internal investigations from discovery. This is a somewhat surprising development in a period otherwise marked by a drastic narrowing of testimonial privileges and an increase in the availability of discovery.¹

The two most recent decisions have relied on a social policy of encouraging candid self-evaluation to restrict discovery of reports resulting from such investigations. In the first decision, a suit under the Federal Tort Claims Act,² the widow of a mental patient who had committed suicide at a Veteran's Administration hospital charged that her husband's death had resulted from the hospital's negligence. Defendant asserted a claim of privilege in objecting to the production of 1) the reports of a board established by the hospital director to inquire into the incident, 2) the report of the director made after receiving the board's report, and 3) statements obtained by the board from hospital personnel.³ The district court *held* the reports of the board and director, and statements by hospital personnel pertaining to future hospital procedures, were privileged from discovery because of the public interest in facilitating such evaluations by maintaining the confidentiality of the investigation.⁴ However, production was ordered of those parts of the

1. See note 33 *infra*.

2. 28 U.S.C. § 1346(b) (1970).

3. Plaintiff requested production pursuant to Fed. R. Civ. P. 34, which provides in relevant part:

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . .

4. Plaintiff had moved for production under Fed. R. Civ. P. 37(a), which provides:

If . . . a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be per-

statements made by hospital personnel which merely described the incident. *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971).

The second case raised the same issue in the context of a Title VII⁵ employment discrimination suit brought against a government contractor. The defendant company had appointed a team of employees to study its employment practices, as required by law of all government contractors.⁶ Plaintiffs requested production of all reports and written materials prepared by the team. Defendant agreed to produce a copy of a formal report prepared for submission to the government,⁷ but objected to the production of the team's actual report, a much more comprehensive document which included candid self-analysis and evaluation. The defendant argued that discovery would discourage employers from engaging in extensive self-criticism of their compliance with equal employment opportunity laws. The district court, after stating that the report might be considered nondiscoverable work product,⁸ held that allowing discovery would be contrary to the public policy of encouraging frank self-criticism of employment practices. However, disclosure was ordered of the facts available to the team at the time the report was prepared. *Banks v. Lockheed*, 53 F.R.D. 283 (N.D. Ga. 1971).

1. Federal Rule of Civil Procedure 26 and the Qualified Privilege

The scope of discovery in the federal courts is governed by

mitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling . . . inspection in accordance with the request.

5. 42 U.S.C. § 2000e-5(e) (1970).

6. 41 C.F.R. § 60-1.40 (1972), adopted pursuant to Executive Order 11246, 3 C.F.R. 339 (Comp. 1964-65), provides:

(a) *Requirements of programs.* Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of \$50,000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of \$50,000 or more to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of the opportunities for utilization of minority group personnel

Affirmative action program requirements are described in 41 C.F.R. § 60-2.10 to 2.24 (1972).

7. The defendant was required to submit a report on Standard Form 100 regarding his compliance with Executive Order 11246 to the Department of Defense Contracts Compliance Office. 41 C.F.R. § 60-1.7(a) (1972). Standard Form 100 is not a lengthy or complex form, and in itself would provide the plaintiff with limited information.

8. See note 30 *infra*.

Rule 26 of the Federal Rules of Civil Procedure, which permits discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Under Rule 26(c) the trial court has the power to limit or prevent discovery to protect a person from embarrassment, oppression, or undue burden or expense.⁹ Parties opposing discovery of self-evaluative reports have presented three arguments under Rule 26:¹⁰ 1) the material sought is not relevant; 2) production would be

9. FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26(c).

10. Initially, the argument might be made that self-evaluative reports are conclusions rather than facts and are thus not discoverable. Prior to the 1970 amendments to the discovery rules, the weight of authority opposed the discovery of non-factual matter. 4 J. MOORE, FEDERAL PRACTICE ¶26.56[3] (2d ed. 1972). However, Professor Moore has suggested that the "question should be not whether as a theoretical matter the inquiry calls for an expression of opinion, but rather whether it is practicable and feasible to answer the inquiry and, if so, whether the answer might expedite the litigation . . .", and this approach has been adopted by an increasing number of courts. 4 J. MOORE, *supra* at 164, and cases cited therein. This view is reinforced by a comparison with FED. R. CIV. P. 26(b)(3), which provides special protection for the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation" when discovery is ordered of trial preparation materials. Several courts have held that mental impressions, etc. are protected from discovery *only* if they are included in a document otherwise within the scope of Rule 26(b)(3). *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 15 FED. RULES SERV. 2d 26b.71, at 1343 (N.D. Ill. 1972); *Abel Investment Co. v. U.S.*, 53 F.R.D. 485 (D. Neb. 1971); *Peterson v. U.S.*, 52 F.R.D. 317 (S.D. Ill. 1971); *Merrin Jewelry Co. v. St. Paul Fire & Marine Ins. Co.*, 49 F.R.D. 54 (S.D.N.Y. 1970). *But see Clower v. Walters*, 51 F.R.D. 288 (S.D. Ala. 1970); *Crocker v. U.S.*, 51 F.R.D. 155 (N.D. Miss. 1970).

A specific provision regarding discovery of non-factual matter by interrogatory was added to FED. R. CIV. P. 33 in 1970:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until designated discovery has been completed or until a pretrial conference or other later time.

The Advisory Committee's Note responds to the objection that such interrogatories might reintroduce undesirable aspects of earlier pleading practice, "whereby parties were chained to misconceived notions or theories, and decision on the merits was frustrated," by stating that ordinarily the interrogating party will not be entitled to rely on the unchanging character of the answer he receives, and cannot base prejudice on such reliance. *Advisory Committee's Note, Fed. R. Civ. P. 33*, 48 F.R.D. 524.

The amendment to Rule 33 should not be read to restrict inquiry into opinions, conclusions or contentions by means of depositions or the production of documents, since the Rule does not speak to these problems and it would be unreasonable to create a technical requirement that such inquiry be made by interrogatory. 4 J. MOORE, *supra*, ¶26.56[3].

unduly burdensome or oppressive; and 3) the material is subject to a qualified privilege.¹¹

For the purposes of discovery, relevancy is not only defined very broadly, but discovery of materials whose relevancy is borderline is often allowed where compliance with the request will impose no substantial burden on the opposing party.¹² In addition, materials sought during the discovery process need not be admissible at trial if they appear reasonably calculated to lead to admissible evidence.¹³ In spite of this liberal standard, lack of relevancy has occasionally been raised to prevent discovery. For example, it has been successfully argued that disclosure of self-remedial information would contravene the public interest in encouraging accident prevention measures.¹⁴

Disclosure is also said to create an "undue burden" upon ameliorative self-investigation. Protection from such burdens is provided by Rule 26(c), which functions as an exception to the general policy of broad discovery; it permits a court to "make any order which justice requires to protect a party or person from embarrassment, oppression, or undue burden . . . including . . . (1) that discovery not be had."¹⁵ The powers conferred by

11. Prior to the 1970 amendments to the discovery rules, Rule 34 required a showing of "good cause" for the production of documents and tangible things. Many courts then found a lack of good cause where disclosure would violate public policy, rather than, or in addition to, relying on "privilege", lack of relevancy, or the protective provisions then embodied in Rule 30(b). While in most cases only a minimal showing was required to constitute good cause for production, the standard was much more demanding where disclosure might conflict with the public interest. *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970) (alternative holding). Cf. *United States v. Procter & Gamble*, 356 U.S. 677 (1958).

12. C. WRIGHT, *FEDERAL COURTS* § 81 (2d ed. 1970).

13. *FED. R. CIV. P.* 26(b)(1).

14. In *Richards v. Maine Cent. Rd.*, 21 F.R.D. 590 (D. Me. 1957), the court noted that the public interest in employee discipline is so great that a court should not "impose . . . hazards which will render unlikely the resort to such discipline." It held interrogatories regarding disciplinary action taken against an employee involved in an accident irrelevant and violative of public policy. *Id.* at 592.

15. *FED. R. CIV. P.* 26(c). Although Rule 26(c) requires that protective orders be made on motion and for good cause shown, when protection is sought in connection with interrogatories or the production of documents the rules provide for filing of objections instead of answers. Professor Moore suggests that since the 1970 amendments were designed to reduce the necessity of judicial intervention, the need for protective orders should be considered at the hearing on the motion to compel production or answers, and the party from whom disclosure is sought need not move under 26(c). 4 J. MOORE, *FEDERAL PRACTICE* ¶26.68 at 492 (2d ed. 1972).

Rule 26(c) were designed to handle "the many situations, not capable of governance by precise rule, in which the court must exercise judgment."¹⁶ For example, a court must be given wide latitude to determine whether a protective order should be issued in an antitrust suit where, in response to an interrogatory, a company complains that it would be an "undue burden" to reconstruct production figures for a number of past years.

This type of situation brings into focus both the need for providing a court with wide latitude and the precise scope of Rule 26(c). The court must be free to consider in each particular case whether there will, in fact, be an undue burden if an answer is required. The resolution of that question requires that the scope of Rule 26(c) be determined. The express language clearly permits protection of a "party or person." If the Rule is limited to the express language, a court will have less latitude to decide whether there is an undue burden than if the Rule is held to encompass protection of general societal interests.

Support for the latter position is provided by *Ballard v. Terrak*,¹⁷ a civil rights action against a policeman. The police department had already conducted its own investigation of the officer's conduct and had completed a written report.¹⁸ Nonetheless, the police chief was granted a Rule 26(c) protective order. It seems clear that the court did not base its decision on any real or potential burden to the police department itself, since the report sought was already prepared. Rather, with a view toward general societal concerns, the court relied on the rationale that discovery might impair the internal reporting process essential to an efficient police force.¹⁹

16. *Advisory Committee's Note, Fed. R. Civ. P. 26(c)*, 48 F.R.D. 487, 505.

17. 16 FED. RULES SERV. 2d 26c.21, at 301 (E.D. Wis. 1972).

18. *Id.* The court held that although plaintiff was entitled to those records maintained by the police department in the ordinary course of its operation, records concerning an internal investigation were immune from discovery.

19. This reasoning was rejected in *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972), a factually similar case in which the court allowed the plaintiff to discover an internal investigation file which had been found in an *in camera* inspection to consist solely of factual information rather than policy discussion. Before reaching this result, however, the court discussed public policy and explicitly noted that it had the power to suppress discovery in such a case under Rule 26(c). See also *Carter v. Carlson*, 16 FED. RULES SERV. 2d 26b.43, at 709 (D.D.C. 1972), which involved a District of Columbia police internal investigation file, including the evaluations and conclusions regarding the investigating officer and his superior. Discovery was ordered against a claim of executive privilege.

Finally, self-evaluative reports have been protected in some cases, independent of Rule 26(c), by the assertion of a "qualified privilege" based on a public policy of fostering frank self-evaluations. In addition to the absolute privileges traditionally recognized at trial, which are inviolate except on waiver by the possessor, there have arisen a small number of "qualified privileges" which may be overcome by a showing of sufficient hardship by the party seeking disclosure or admission.²⁰ For exam-

20. The three most commonly recognized qualified privileges are for grand jury transcripts and testimony, trade secrets, and for executive or official government information.

1) *Grand jury transcripts*. Defendants have generally been denied access to grand jury transcripts except when the reasons for secrecy have been minimized by the passage of time and the termination of criminal proceedings, or when the government has obtained evidence for use in civil actions by its misuse of the grand jury process, thereby making it unfair to deny the defendants access. *United States v. Procter & Gamble*, 356 U.S. 677 (1958); *United States v. Rose*, 215 F.2d 617, 628 (3d Cir. 1954); 4 J. MOORE, *FEDERAL PRACTICE* ¶26.61[6.-3] (2d ed. 1972). Protection was most frequently provided by reliance on the "good cause" requirement for the production of documents under former Federal Rule of Civil Procedure 34. See note 11 *supra*. This approach was taken in *United States v. Procter & Gamble*, *supra* at 684, in which Justice Douglas, speaking for the majority, held that good cause for the production of a grand jury transcript had not been shown:

It is only when the criminal procedure is subverted that a finding of "good cause" for wholesale discovery and production of a grand jury transcript would be warranted.

There have been few cases involving requests for grand jury transcripts since the "good cause" requirement for the production of documents was eliminated. However, in *Sol S. Turnoff Drug Distrib., Inc. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 16 Fed. Rules Serv. 2d 32a.22, at 113 (E.D. Pa. 1972), the court, citing *United States v. Procter & Gamble*, required a particularized showing of need for discovery of information obtained from grand jury witnesses and summaries of grand jury proceedings (the court also relied in the alternative on the work product protection).

It seems unlikely that wholesale discovery of grand jury proceedings will be precipitated by the amendment to Rule 34. Some control is likely to be maintained either through Rule 26(c) protective orders or by reliance on a public policy argument based on the traditional secrecy of grand jury proceedings. See *FED. R. CRIM. P.* 6(e), which provides in part that disclosure of matters occurring before a grand jury may be made "only when so directed by the court preliminary to or in connection with a judicial proceeding" and implies that the court has a certain amount of discretion regarding disclosure.

2) *Trade Secrets*. Trade secrets have been protected at discovery by virtue of a provision in Federal Rule of Civil Procedure 26(c), formerly Rule 30(b), which states that the court may order "(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Prior to the 1970 amendments to the discovery rules, some courts also protected trade secrets by holding that insufficient good cause for the

ple, a vaguely defined executive or official information privilege²¹ is often used to protect certain confidential government documents, including portions of internal agency memoranda and reports of government investigations.²² The rationale un-

production of documents was shown. This policy will be continued in Federal Rule of Evidence 508, which provides:

A person has a privilege . . . to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

See 4 J. MOORE, *FEDERAL PRACTICE* §26.60[4] (2d ed. 1972); 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2212(3) (McNaughton rev. 1961); *Advisory Committee's Note, Fed. R. of Evid.* 508, 56 F.R.D. 250, and cases cited therein.

3) *Executive privilege.* See text accompanying note 21 *infra*. This privilege has traditionally been recognized in the federal courts, although its dimensions have never been clear. Some courts formerly based the privilege on the Federal Housekeeping Statute, former 5 U.S.C. § 22 (Aug. 12, 1958, Pub. L. 85-619, 72 Stat. 547), which was used by administrative agencies to justify departmental regulations limiting disclosure of information. However, in 1958 the statute was amended by the addition of a sentence providing that the section does not authorize withholding information from the public. The purpose of the amendment was to make clear that the statute was not intended to grant any privilege to government officials to withhold information from the public. In 1966, Congress enacted the Public Information Act (now 5 U.S.C. § 552), which made the files of departments and agencies available to the public with certain specified exceptions. The exceptions included:

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

(b)(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

These exceptions, through the reference "by law," incorporate the Federal Rules of Civil Procedure and thus make no change in the existing law of executive privilege. The exceptions to free availability are broader than the privilege available under Federal Rules of Evidence because the Act deals with public information—that which will be supplied to any member of the public regardless of need. 4 J. MOORE, *FEDERAL PRACTICE* §26.61[4-2] (2d ed. 1972). Nevertheless, some courts have interpreted the Act to provide a privilege to the government in the areas covered by the exceptions. See, e.g., *Distillery, Rectifying, Wine & Allied Workers Int'l Union of America, AFL-CIO v. Miller*, 16 *FED. RULES SERV.* 2d 26c.31, at 299 (W.D. Ky. 1972).

21. This privilege should be distinguished from the absolute privilege for military and state secrets. See note 20 *supra*.

22. See note 20 *supra*. *Mackin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Olson Rug Co. v. NLRB*, 291 F.2d 655 (7th Cir. 1961); *Simon-Eastern Co. v. United States*, 55 F.R.D. 88 (N.D. Ga. 1972); *FTC v. Brammen*, 54 F.R.D. 364 (W.D. Mo. 1972); *U.S. v. Beatrice Foods Co.*, 15 *FED. RULES SERV.* 2d 26b.41, at 597 (D. Minn. 1971); *Black v. Sheraton Corp. of America*, 50 F.R.D. 130 (D.D.C. 1970); *Olsen v. Camp*, 328 F. Supp. 728 (E.D. Mich. 1969); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*,

derlying this qualified privilege is that confidentiality is required to preserve administrative integrity and encourage cooperation in government investigations.²³ Trial courts frequently balance the public interest in non-disclosure against the litigant's need for the materials in order to determine whether the executive privilege should be overcome in a particular case.

The "qualified privilege" for confidential self-evaluations, which resembles the executive privilege and supports a similar policy of preserving the free flow of communication vital to an important public interest, was first recognized in *Bredice v. Doctors Hospital*.²⁴ In that case, plaintiff sued the defendant hospital for malpractice and moved for production of the minutes and reports of a staff meeting called to review the death of plaintiff's decedent. The district court held that the documents were subject to a qualified privilege based on the public interest in furthering candid evaluation of patient care.²⁵ The court also indicated that the plaintiff had not shown "good cause" for production, as was required under Rule 34 prior to the 1970 amendments.²⁶

40 F.R.D. 318 (D.D.C. 1966); *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57 (N.D. Ohio 1964); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

23. *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Farrell v. Piedmont Aviation, Inc.*, 50 F.R.D. 385 (W.D.N.C. 1970); *Cooney v. Sun Shipbldg. & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *McFadden v. Avco Corp.*, 278 F. Supp. 57 (M.D. Ala. 1967). Similarly, statements given to government investigators on the strength of a promise that the information would only be used in an accident prevention program are generally not ordered disclosed. See, e.g., *Machin v. Zuckert*, *supra*.

The Federal Rules of Evidence recognize government privilege only for secrets of state and the identity of informers, eliminating the qualified executive privilege entirely. Fed. R. Evid. 509. The failure to provide for a broader executive privilege does not necessarily mean that all internal government documents will automatically be discoverable. The Advisory Committee Note explains that other existing limitations on compulsory disclosure, such as relevancy, attorney-client privilege, and discovery restrictions, particularly in criminal cases, were thought to afford sufficient protection to these documents. *Advisory Committee's Note, Fed. R. of Evid. 509*, 56 F.R.D. 252-54.

24. 50 F.R.D. 249 (D.D.C. 1970). Compare *Pennsylvania v. Automobile Ins. Co.*, 27 F. Supp. 336 (D. Ore. 1939), an unusual case in which the court denied discovery of a list of defendant's witnesses on the "public policy" grounds that disclosure might have allowed the plaintiff to devise an alibi to a related criminal charge, even though disclosure was authorized by former Rule 33.

25. Additionally, the court noted that the hospital was required to hold committee review proceedings to maintain its accreditation. *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 250-51 (D.D.C. 1970).

26. See note 11 *supra*.

2. The *Gillman* and *Banks* Cases

The courts in *Gillman* and *Banks* relied on *Bredice* in refusing to allow discovery of the opinions and conclusions in confidential documents prepared in the process of self-evaluation. The fact that these two cases were decided subsequent to the 1970 amendments, which eliminated the "good cause" requirement for the production of documents, highlights the independent significance of the "qualified privilege" rationale in *Bredice*.

The fact situation in *Gillman* roughly paralleled that in *Bredice*. However, the *Gillman* court not only denied discovery of the reports of the special investigatory board and the hospital director but also extended protection to suggestions or comments on future procedures made by hospital personnel in statements to the board.²⁷ *Banks* applied the *Bredice* holding²⁸ in the entirely new context of self-evaluations concerning compliance with Title VII of the Civil Rights Act of 1964,²⁹ indicating that the newly developed protection would not be limited to situations involving accidents and medical care. The court found that allowing discovery of the requested report would discourage companies from engaging in candid self-criticism and evaluation and would, therefore, be contrary to the public policy favoring compliance with the civil rights laws.³⁰ Together, then, *Gillman*

27. After noting that statements taken shortly after an event are unique and that these particular statements were important to the plaintiff's ability to discover the facts, the *Gillman* court allowed discovery of the portions of the statements of the hospital personnel which described "what actually happened." It is possible the court would have denied discovery of even these factual portions of the statements had the plaintiff's need not been so great.

28. Although the *Banks* court never used the word "privilege" in its opinion and the *Gillman* court spoke of a "qualified privilege" only in describing the *Bredice* holding, both opinions relied so heavily on *Bredice* that it may be inferred that the courts viewed the protection as a privilege.

29. 42 U.S.C. 2000e-2 (1964).

30. Before reaching this point, the court discussed a highly questionable work product issue, stating that the investigation by the team "could have been made in preparation for trial" and "the report could be said to include the 'mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.'" 53 F.R.D. at 284-85.

The work product qualification to the ordinarily broad scope of discovery, developed in the landmark case of *Hickman v. Taylor*, 329 U.S. 495 (1957), was partially codified in 1970 in Federal Rule of Civil Procedure 26(b)(3):

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by

and *Banks* indicate that some federal courts are willing to exercise rather wide discretion in refusing to compel discovery, at least where 1) confidential materials are of a self-investigative and self-evaluative nature and 2) confidentiality is essential to the evaluative and investigative process.³¹ It is important to

or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery . . . when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

It has frequently been held that materials prepared in the ordinary course of business or pursuant to public requirements unrelated to litigation are not protected by Rule 26(c)(3). *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, *on later appeal* 336 F.2d 151 (4th Cir. 1963); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 15 FED. RULES. SERV. 2d 26b.71, at 1343 (N.D. Ill. 1972); *United States v. Maryland Shipbldg. and Drydock Co.*, 51 F.R.D. 159 (D. Md. 1970); FED. R. CIV. P. 26(b)(3), Advisory Committee's Note. Since the defendant in *Banks* was required to evaluate its compliance with the order's affirmative action requirements and submit a report on its progress to the Department of Defense Contracts Compliance Office, preparation for trial was at most an ancillary purpose of the team's investigation. See notes 6-7 *supra*.

The court in *Banks* relied on the dates of initiation of the suits and the fact that an attorney was placed on the research team to infer that the documents "could have been made in preparation for trial." Cf. *Prudential Ins. Co. of America v. Marine Nat'l Exch. Bank*, 52 F.R.D. 367 (E.D. Wis. 1971) (dates of inter-office memoranda and correspondence led court to believe documents were prepared in anticipation of litigation). But see *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971) (government required to affirmatively show that documents were trial preparation materials); *Technograph, Inc. v. Texas Instruments, Inc.*, 43 F.R.D. 416 (S.D.N.Y. 1967). The danger in requiring only this minimal showing for work product protection is immediately evident: by staffing research teams with attorneys, whole departments might be insulated from normal discovery procedures. See generally *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954). Litigation possibilities surround virtually every action taken by a large company and, unless preparation for trial is not inferred but is required to be specifically shown, abuse is likely. *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971); *Zenith Radio Corp. v. Radio Corp. of America*, *supra*.

Since the policy reasons for the work product doctrine—the encouragement of written preparation and adequate investigation, the protection of the privacy of the attorney in preparing his case, and the avoidance of sharp practices—are only slightly applicable in cases such as *Banks*, evidence that the requested materials were prepared in anticipation of litigation should be scrutinized carefully.

31. A third requisite not discussed here is that the evaluative or investigative process serve a strong public interest which outweighs the discovering party's need for the materials. The strength of the public interest in improved hospital care and equal employment opportunity compliance is apparent.

note, however, that both courts allowed discovery of factual data contained in the reports, suggesting an important limitation to the protection.³²

3. Methods of Protecting Confidential Documents

Although there are a number of possible methods of protecting self-evaluative materials, no one method is clearly appropriate. Initially, there are several reasons the protection granted such materials should not be labeled a privilege. First, the problem surrounding self-evaluative reports has arisen almost exclusively in the discovery context. Thus, stating the protection in terms of a privilege may cause confusion because privileges apply equally at both trial and discovery. Second, the policies supporting restriction of discovery are not always congruent with those supporting the recognition of a privilege at trial. Finally, the difficulty is compounded by the recent promulgation of the Federal Rules of Evidence which unequivocally limit the privileges that may be asserted and do not include a privilege for confidential self-evaluations. It seems unlikely that the "privilege" relied on to provide protection in *Banks* and *Gillman* can continue to be labeled a privilege after the new rules take effect.³³

Although both courts suggested that the protection might have been overcome by a showing of exceptional necessity by the plaintiff, neither opinion indicated what would constitute a sufficient showing. Two possibilities are: 1) the court will allow more extensive discovery only if the plaintiff can show he could not otherwise prove his case and 2) the necessity required to be shown might vary with the extent of the public interest in self-evaluation and the degree to which the specific disclosure requested will compromise that interest. Compare the standard in Rule 26(b) (3) for the discovery of work product, *supra* note 30.

It should be noted that even if discovery of work product is ordered, Rule 26(b) (3) requires that the court protect mental impressions, conclusions, and opinions. Thus, essentially the same distinction between factual and nonfactual matter drawn by the courts in the instant cases is applied when discovery of work product is ordered.

32. The *Banks* court ordered the defendant "to provide the plaintiffs . . . with any factual or statistical information that was available to the members of Lockheed's research 'team' at the time they conducted their study." 53 F.R.D. at 285.

33. "[I]t should be clear that the term 'not privileged,' as used in Rule [26], refers to 'privileged' as that term is understood in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6 (1953). See also C. WRIGHT, *FEDERAL COURTS* § 81 (2d ed. 1970). Rule 43(a), presently the source of the laws of evidence for the federal courts, permits admission of all evidence admissible under the statutes of the U.S., under the rules of evidence formerly applied in equity suits in federal courts, or under the court rules of the state in which the federal court sits. Under this rule, federal courts have generally recognized state-created eviden-

Another possible method of protecting self-evaluative materials involves the requirement of Rule 26(b)(1) that the material sought be "relevant to the subject matter" of the action. A court could conceivably rely on the public policy of fostering compliance with regulatory laws and increased safety in determining whether certain materials are relevant under the Rule. However, if public policy considerations are to enter into the determination of the scope of discovery, they should be separately articulated so as not to distort the meaning of relevancy.³⁴

Finally, discovery might also be limited by using Rule 26(c), as in *Ballard v. Terrak*,³⁵ to order that discovery either be limited to facts and factual statements or that it not be had. As noted earlier, it is questionable whether Rule 26(c), as presently drawn, permits the issuance of protective orders on public policy grounds. Nonetheless, the use of a protective order under an articulated standard would avoid many of the problems associated with the use of the privilege and relevancy concepts.

4. The Rationale for Protection

The *Banks* and *Gillman* courts reasoned that, if discovery were allowed, organizations in the future might be unwilling to evaluate themselves or, even if willing, might be less likely or able to do an adequate job. Several circumstances suggest that discovery orders in cases such as *Banks* and *Gillman* would not necessarily greatly deter future self-evaluations or substantially reduce their thoroughness. First, evaluations will occur in many cases even if the threat of discovery is present. For example, the self-evaluation in the instant cases was not entirely voluntary. The *Banks* defendant, as a contractor with the federal government, was required to engage in an evaluation pro-

tiary privileges as well as privileges created by federal law. However, the new Federal Rules of Evidence provide only a limited number of privileges. Once these rules become effective, state-created privileges will be recognized only in certain designated situations. *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315 (1971). The Rules were promulgated by the Supreme Court on November 20, 1972, and are scheduled to take effect on July 1, 1973. The rules restrict the number and scope of evidentiary privileges to be recognized by the federal courts and provide for recognition of state law privileges only in circumscribed situations. 41 U.S.L.W. 4021 (U.S. Nov. 20, 1972).

34. C. WRIGHT, *FEDERAL COURTS* § 81 (2d ed. 1970).

35. 16 FED. RULES SERV. 2d 26c.21, at 301 (E.D. Wis. 1972). See text accompanying note 17 *supra*.

gram.³⁶ And, although the hospital director in *Gillman* was not formally required to hold an investigation,³⁷ pressure for a review proceeding was probably brought to bear by the director's staff and superiors and possibly by the public. Second, in some cases there may be significant deterrents to candid self-evaluation even absent the possibility of discovery. Administrative sanctions against employees are often a possibility when self-evaluative investigations are undertaken.³⁸ Particularly in the case of a hospital investigation, it is doubtful that the chilling effect caused by possible disciplinary action would be greatly compounded by the additional possibility of testimony being discoverable in a subsequent civil action. An employee's interest in protecting himself and his fellow employees from discipline is likely to be at least as great as his interest in protecting his employer from suit. Thus, the additional deterrence of investigation occasioned by the possibility of discovery may be minute.

The above limitations do not, however, significantly detract from the courts' reasoning. A lack of confidentiality almost inevitably will result in some cramping of the investigative process, simply because the incentives for any institution to engage in self-evaluative investigation pale considerably with the knowledge that the results may be used against it. The company might initially decide not to investigate or, if an investigation is held, there might at least be an unconscious effort to tailor the findings with an eye towards eventual litigation. In addition, even if the hospital administration in *Gillman* continued to encourage thorough investigation of patient care, it would be less able to ensure candid testimony and deliberations on the part of the staff and the investigatory board.

Further, there are two more broadly-based notions that might justify protecting materials from discovery in these situations. First, it may simply seem unfair to allow a party's careful self-assessment to be used against him. The opposing party should perhaps be made to prove his case without relying on a

36. See notes 6-7 *supra*.

37. 53 F.R.D. at 318.

38. Cf. *Ballard v. Terrak*, 16 FED. RULES SERV. 2d 26c.21, at 301 (E.D. Wis. 1972) (see text accompanying note 17 *supra*) and *Wood v. Breier*, 54 F.R.D. 7 (E.D. Wis. 1972), in which personnel investigations, the files of which were sought by the plaintiffs, were called to determine if disciplinary action would be taken against the police officers involved. It is likely that the threat of discipline against a fellow officer would chill this type of investigation at least as much as the more remote possibility of discovery in future litigation.

self-evaluation undertaken by his adversary for a laudatory objective. This argument is compelling when the opposing party can in fact obtain comparable information through his own efforts. However, where it is apparent that the opposing party would be unable to obtain the approximate equivalent of the materials independently, the argument loses force. Several factors indicate this may often be the case: witnesses might not be as candid in an independent investigation, it will often be physically impossible to repeat the investigation, and the facts might not be as fresh.

Second, disclosure of self-assessments may be an unwarranted invasion of an individual's privacy. In several cases, protection of privacy has been an independent basis for a denial of discovery. In *Williams v. Thomas Jefferson University*,³⁹ for example, the defendant was not required to produce the names of women who had received abortions at its hospital.⁴⁰ Although in *Williams* the privacy interest was not that of the party defendant, it would seem that the holding should also apply to protection of a party's privacy. However, where a hospital or business is concerned, it is questionable whether the privacy consideration should be given the same weight as when the interest is that of an individual.

5. Relationship of Protection at Discovery to Protection at Trial

The standards for admitting information into evidence are in general more stringent than those for discovery; Rule 26(b) specifically provides that it is not a ground for objection that the testimony sought will be inadmissible at trial if it appears reasonably calculated to lead to admissible evidence. Therefore, the restrictions on the number and scope of privileges contained in the new Federal Rules of Evidence should make courts reluctant to expand the areas protected from disclosure at the discovery stage beyond that permitted in the Rules of Evidence.⁴¹ It would be a violation of the policy and scheme of both the discovery and the evidence rules to limit discovery in instances

39. 16 FED. RULES SERV. 2d 26b.45, at 444 (E.D. Pa. 1972).

40. See also *Peterson v. United States*, 52 F.R.D. 317 (S.D. Ill. 1971), in which the court rejected the government's argument that discovery of reports by an Internal Revenue Service appellate conferee would deter full and candid evaluation by employees, but indicated that the public policy in favor of confidentiality would protect *non-party* tax returns from discovery absent a strong showing of need. Cf. *Carr v. Monroe Mfg. Co.*, 431 F.2d 384 (5th Cir. 1970).

41. See note 33 *supra*.

where the requested material would be admissible at trial. On the other hand, if material is inadmissible, some of the same policies which support its exclusion at trial may also support denial of discovery.

The materials in *Banks* and *Gillman* would probably be admissible under the federal evidence rules as within the business records or admissions exceptions to the hearsay rule.⁴² If such self-evaluative reports are in fact admissible, they should be discoverable under the more liberal discovery procedures.

However, an argument for finding materials such as those in the instant cases inadmissible may be based on Federal Rule of Evidence 407, which prohibits admitting evidence of "measures . . . which, if taken previously, would have made the event less likely to occur" in order to prove negligence or culpable conduct⁴³ in connection with an earlier event. The exclusion "rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety."⁴⁴ Since the materials sought in *Banks* and *Gillman* were not evidence of remedial measures, technically the rule does not apply. But if evidence of remedial measures is inadmissible, the deliberations, recommendations, opinions and conclusions leading up to the measures must also be inadmissible to give the exclusion its proper effect. For example, if the defendant hospital in *Gillman* instituted new security procedures as a result of the board's investigation, evidence of the new procedures would not be admissible to prove prior negligence. This protection would be of little use to the defendant, however, if the dis-

42. Hearsay is inadmissible under Federal Rule of Evidence 802. Rule 801(d), however, provides that a statement is not hearsay and may be offered against a party if it is made by a person authorized by him to make a statement about the subject or by his agent or servant concerning a matter within the scope of his agency or employment, during the existence of the relationship. It is likely that the reports of the affirmative action "team" in *Banks* and of the board and director in *Gillman* would fall within this exception.

If the documents are not deemed admissions, they nevertheless might be admissible as "records of regularly conducted activity" under Rule 803(6). The rule specifically includes diagnoses and opinions as well as acts, events and conditions, but its application here would be questionable.

43. The evidence of such measures may be admitted on issues in the action other than negligence or culpable conduct.

44. *Committee on Rules of Practice and Procedure*, *supra* note 33, at 352. The subsequent remedial features exclusion was formerly based on lack of relevancy, but the Advisory Committee Note indicates that under a liberal theory of relevancy this ground alone would not support exclusion.

cussions and reports leading up to the decision to institute new measures could be admitted.

This argument for inadmissibility does not necessarily control the issue of *discovery* of such materials since the scope of discovery is broader than admissibility at trial. Nevertheless, at least one court has reasoned by analogy that the conclusions and recommendations of a Coast Guard investigator's report were non-discoverable. In *Reliable Transfer Co. v. United States*,⁴⁵ the court stated:

Denial of disclosure here is supported by the analogy of evidence concerning remedial measures taken after an accident, which would not be admissible even under the liberalized provisions of the proposed Federal Rules of Evidence A Coast Guard investigator might feel less free to suggest "appropriate measures for promoting safety . . ." if he thought that any suggestion of additional precautions might result in imposing pecuniary liability on the government.⁴⁶

If the *Reliable* holding is followed, it will bolster the *Banks-Gillman* rationale and closely tie discovery limitations to restrictions on the admission of evidence.

This linkage of discovery protection to inadmissibility at trial has not escaped criticism. In *Lindberger v. General Motors Corp.*,⁴⁷ a Wisconsin federal district court ordered defendant to answer interrogatories regarding changes made in the braking system of a front end loader after an accident, even though evidence of such changes would have been inadmissible at trial under the subsequent remedial measures rule. The court based its refusal to derive a privilege at discovery from the subsequent remedial measures exclusion at trial on the differences

45. 15 FED. RULES SERV. 2d 26b.43, at 189 (E.D.N.Y. 1971).

46. *Id.* at 190. The court also relied on FED. R. Crv. P. 26(b)(4), which limits discovery of expert opinions, stating that "[t]he opinions of an investigating officer are like expert opinions." *Id.* This may be a misreading of the Rule since, even assuming that the investigator was an expert within the meaning of 26(b)(4), the Rule only applies to "facts known and opinions held by experts, otherwise discoverable . . . and acquired or developed in anticipation of litigation or for trial." The *Reliable* court quotes the language of a Coast Guard regulation, 46 C.F.R. § 136.07-1(b) (1972), to the effect that Coast Guard investigations are for the purpose of taking "appropriate measures for promoting safety of life and property at sea," and are not intended to fix civil or criminal liability, suggesting that the purpose of the investigation, and hence the "expert's" opinion, was not preparation for trial. The *Reliable* court probably used Rule 26(b)(4) and the analogy to the subsequent remedial measures rule, rather than relying on executive privilege, because of the imminent acceptance of the new evidence rules, which the court knew would abrogate that privilege.

47. 56 F.R.D. 433 (W.D. Wis. 1972).

in the policies underlying restrictions at discovery and at trial and on a finding that no prejudice would result from discovery of the remedial measures:

Stringent protection is afforded to the traditional privileges because disclosure, in itself, even outside the trial of the case, may cause harm to the parties. . . . [I]n the instant case . . . [i]t is disclosure at trial, where a jury may improperly draw an inference of negligence, which presents the danger to the defendants, and consequently to the public.⁴⁸

It is clear from *Lindberger* that the reasons which dictate protection at trial are not always congruent with the reasons favoring protection from discovery. A number of privileges do require total non-disclosure in order to prevent harm. For instance, the attorney-client privilege is necessary at both the discovery and trial stages in order to promote full client disclosure to the attorney. However, it is often the case that substantial harm can come to the party opposing disclosure only if the material is used against him at trial, as was true of the remedial measures in *Lindberger*.

The courts in *Banks*, *Gillman*, and *Reliable* were attempting to avoid discouraging future self-investigations by not allowing their results to prejudice the defendant. A partial accommodation between the rights of the discovering party to obtain information and the policy protecting the confidentiality of certain self-evaluative reports might have been reached in those cases by allowing full discovery but prohibiting use of the materials at trial, even for impeachment purposes. If it had been feared that the party seeking discovery intended to make the material public or use it for a purpose other than litigation, a suitable Rule 26(c) protective order could have been issued prohibiting general disclosure of the information. The objections noted earlier to issuance of Rule 26(c) orders on public policy grounds would not have full effect here, since the order would be based at least in part on the need to protect a person from embarrassment or oppression. Of course, such a protective order could not entirely eliminate the potential deterrent effect discovery might have upon future self-evaluations, since whenever discovery is of use to a party, the opposing party has given up an advantage, the loss of which will to some degree deter future preparation of reports.

6. Conclusion

In the future litigants will probably attempt to broaden the

48. *Id.* at 435.

scope of the *Banks* and *Gillman* holdings to include other types of confidential documents. For example, corporations may attempt to avoid discovery of internal evaluations of worker and plant efficiency, arguing an analogous public policy approach based on the public interest of improving production.⁴⁹ Whether the "privilege" recognized in *Banks* and *Gillman* has been fully developed or will instead expand to encompass more than the few peculiar fact situations to which it has heretofore been applied cannot yet be determined. Courts may be reluctant to expand the protection granted in the *Banks* and *Gillman* cases beyond its present narrow limits, since it represents an exception to the policy of broad discovery and may undercut some of the policies of the Federal Rules of Evidence.

If, despite the above considerations, courts are receptive to efforts to broaden the *Banks-Gillman* protection, criteria for granting protection on grounds of public policy should perhaps be added to Rule 26(c). A redrawn rule might incorporate a balancing test, requiring the court to weigh the public interest in non-disclosure against the equally pressing interest in conducting litigation on all the available facts.

The strength of the public interest in non-disclosure depends on both the importance to the public of the evaluative process which is sought to be protected and the extent to which disclosure would impair that process. To determine the negative effect that disclosure would have, a court would have to consider 1) the magnitude and nature of the requested intrusion; 2) whether there are sufficient independent incentives to undertake self-evaluation even when confidentiality cannot be assured; and 3) the prejudicial effect disclosure would be likely to have on the outcome of the case.

The liberal discovery provisions of the Federal Rules of Civil Procedure are based in part on the premise that litigation is best conducted when both parties have access to all available facts. Therefore, the need the party seeking discovery has for the materials is an important consideration. If the facts con-

49. A district court in the Northern District of Georgia, the district where *Banks* originated, has indicated that the *Banks* decision will not be used to give corporate documents blanket protection. After citing *Banks*, the court in *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, No. 115112 (N.D. Ga. Nov. 9, 1972) stated:

The public policy to encourage frank self-criticism and evaluation which was held to protect from discovery certain Equal Employment Survey Team Reports does not apply to documents prepared in the normal course of the defendant's business of investigating claims of its policy-holders.

tained in the reports are not available elsewhere, or if the party seeking discovery does not have the resources to conduct an independent investigation, the interest involved is substantial, since the true facts will not be available absent discovery.

If such a balancing approach is accepted, discovery should be allowed, for example, of such documents as internal evaluations of efficiency. The desire to increase profits ensures that efficiency studies will be undertaken regardless of secrecy. The opposing litigant would most likely be unable to obtain the equivalent of the materials through his own efforts. In addition, while the confidentiality of corporate documents relating to important public interests, such as fire protection, safety and health, might legitimately be protected even in the face of a strong showing of need by the party seeking discovery, documents related to less compelling interests, such as increased production, probably should not be protected.

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