

Environmental Privileges Foxes in the Henhouse

“But who is to guard the guards themselves?”

- Juvenal (A.D. c.55 - c.130), *Satires, I, l. 347*

“Chief, can we use the Cone of Silence now?”

- Maxwell Smart, Agent 86, CONTROL

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The Louisiana chemical industry proposes to make the state safer by shielding its pre-accident environmental audits and post-accident investigations from courts and environmental agencies. Industry plans to accomplish this by an "environmental audit privilege" which, like the privilege of "self-critical analysis", prevents the disclosure of confidential or deliberative material whenever the public interest in confidentiality outweighs an individual's need for information. Companies analogize the privilege to Rule 407 of the Federal and Louisiana Rules of Evidence, which excludes evidence of subsequent remedial measures, and point out that some federal courts have recognized an evidentiary privilege of self-critical analysis. Industry has tried, but failed in Louisiana, to legislatively create a privilege. This article examines the wisdom of creating a new privilege for the chemical and business community.

Louisiana leads the nation in per capita toxic emissions.¹ Improvement looks dim since industry² admits emission reduction efforts have “bottomed out” due to cost considerations.³

At the same time, public confidence in Louisiana environmental regulatory authorities is very low,⁴ and recent enactments seriously impair regulation through the private tort system.⁵ Flush with success, industry now desires to place Max's “Cone of Silence” over its environmental and safety activities and remove them from the only remaining check, the court of public opinion. Contrary to Juvenal's simple logic, industry asks the public to let industry guard itself. Although industry cannot be blamed for trying to seize its day, industry's “trust us” argument flies in the face of simple economics and psychology. For sound policy reasons, which belie the superficial reason of industry's position, the courts and the Legislature have repeatedly rejected this privilege in favor of public disclosure. Given the present environment of high emissions/low liability, recognition would march 180 degrees in the wrong direction.

THE JUDICIALLY CREATED PRIVILEGE

Industry agrees that no Louisiana statute or case recognizes either an environmental

audit privilege or a general self-critical privilege. Industry, in an uncharacteristic plea for judicial activism, is thus forced to turn to a highly criticized minority of federal cases. The argument for a judicially created privilege thus ignores a fatal flaw - since privileges are construed *stricti juris* in Louisiana,⁶ a court simply has no power to create one out of whole cloth.⁷ Moreover, even in the limited areas where Congress or the Legislature has created a partial self-critical privilege, such as highway safety or medical review, the scope of the privilege is rigorously limited to the precise statutory language.⁸ Thus, there is simply no authority for Louisiana courts to recognize a privilege created solely by the federal courts.

One must also question whether a federal privilege exists. The authors could find only one case recognizing a privilege for environmental audits, and two cases clearly rejecting it.⁹ On a more general level, the leading federal practice commentator sharply questions the self-critical privilege from which the environmental audit privilege allegedly arises.

“In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of ‘self-evaluative reports.’ Although the term and its usage are imprecise, it is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which the report is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside the required reports privilege.”¹⁰

In fact, a survey by the commentator demonstrates the vast majority of cases reject the privilege.¹¹

The weakness of the federal privilege argument flows from the case which gave birth to it and the only Supreme Court case which considered the policies underlying it. *Bredice v. Doctors Hospital, Inc.*,¹² the source case, involved discovery of a hospital review under pre-1970 FRCP 34. In a brief opinion, the District Court denied discovery since the need for confidentiality rebutted the extant good cause requirement for a Rule 34 motion for production. Present FRCP 34 and the analogous CCP Article 1461 dispense with the good cause requirement and the necessity for a motion,¹³ thereby shifting the burden from one biased against production to one in favor. Thus, the only legal authority for the privilege announced in *Bredice* was eliminated shortly after the opinion was written. Although *Bredice* was reheard after the amendment, the rehearing opinion is extremely brief and does not substitute any authority for the eliminated good cause requirement.¹⁴ Thus, whatever *Bredice*'s continuing effect in the District of Columbia, it is an extremely weak reed upon which to construct a wholesale national privilege.¹⁵

At the other end of the federal pyramid, in *University of Pennsylvania v. E.E.O.C.*,¹⁶ the Supreme Court carefully considered all of the policy arguments advanced for a self-critical privilege and roundly rejected it, even where the asserted privilege also implicated the extra element of First Amendment protection associated with academic freedom. In the course of investigating a charge of discriminatory denial of tenure, the E.E.O.C. requested production of the charging party's tenure file, including peer review information. Employer claimed an

academic version of the self-critical privilege. First finding no legal authority for such a privilege, the Court went on to weigh the same policies advanced for the self-critical privilege, holding that the potential for abuse and overuse far outweighed the need for confidentiality. Production was ordered because the documents were relevant. Any privilege argument based on a smattering of lower federal cases must overcome this very strong policy statement by the Supreme Court.

The suggested “analogy” to LCE Article 407 as legal authority actually contradicts the privilege. Article 407 prohibits a very special use (as evidence) of a very specific act (a remedial measure) to prove a very specific legal element (negligence). It is not a discovery privilege like the self-critical privilege. Unlike the self-critical privilege which seeks to protect mere discussion and analysis, much of which occurred before the accident, Article 407 protects only subsequent acts of remediation.¹⁷ Finally, Article 407 allows use of even subsequent acts to show knowledge, feasibility, control, etc. The documents sought to be shielded by the self-critical privilege are needed to show these latter elements of a victim’s case. For example, pre-accident safety committee meetings are relevant to show knowledge of a dangerous condition and any recommendation would show feasibility. The explicit terms of Article 407 allow this evidence, yet industry argues that an “analogy” to 407 should bar them. The “analogy” is simply inapposite.¹⁸

THE LEGISLATIVELY CREATED PRIVILEGE

Having generally struck out in the courts, industry trained its sights on state legislatures around 1990. Thus, the question became one of public policy rather than law. The only policy industry articulates is the facially seductive notion that industry will audit more if its audit results create no penalty. There are numerous policy reasons against.

Privileges Do Not Encourage Audits

A simple look at chronology establishes that a company’s decision to audit bears no relationship to the availability of a privilege. In 1992, Arthur Anderson and Co. surveyed general counsels for 257 companies and found that 60% had performed compliance audits.¹⁹ In 1994, a similar survey of 249 companies was conducted by the Investor Responsibility Research Center and found 85% with audit programs which, on average, had been in effect for 8 years.²⁰ Oregon enacted the first statutory environmental audit privilege in 1993.²¹ Given that audits long predated the first statutory protection, industry’s superficial logic cannot pass the test of history.

A 1995 survey by Price Waterhouse again found a long history of auditing by the vast majority of companies.²² This time, the survey examined reasons for audits and found that 90% of the auditing companies credited “good business practice” or proactive reasons as the motivating factor. One source for this good practice is EPA’s recommendation of and standards for audits since 1986²³ which reflects even earlier good practice in workplace safety.²⁴ When asked what factors might encourage more audits, the auditing companies asked for an enforcement program which gave partial immunities for voluntary disclosures and did not mention a privilege. When viewed from this perspective, the specter of litigation actually encourages effective audits. If a company does not audit, then it does not observe the “good

business practice” followed by the vast majority of its peers and recommended by EPA. Thus failure to audit constitutes one count of negligence. Failure to conduct a reasonable audit constitutes a second. Compare these incentives for a reasonable audit with industry’s “trust us” philosophy.

A Much Less Restrictive Alternative Exists

Industry’s request for penalty reductions in exchange for more audits, reflected in the Price Waterhouse survey, has been the guiding principle at the federal level. All of the policy reasons pro and con the privilege were thoroughly aired before the EPA in 1995 proceedings which formulated a policy statement on environmental audits. Some industry sectors sought a privilege for voluntary audits based on the incentive argument. After full consideration, EPA denied a privilege, reasoning that the burden on the justice system far outweighed any theoretical audit incentive. Sufficient incentives existed in the EPA penalty structure creating a sliding scale of immunities if a company finds a violation in an audit and reports it to EPA.²⁵ Since that time EPA has threatened to withdraw its delegation of authority over federal programs to states with audit privileges.²⁶ The federal experience shows that penalty adjustments tailored to the precise violation are far more reasonable than a broad privilege which is ripe for abuse.

The Risk of Unfair Prosecution Counsels Against A Privilege

Industry evokes Chicken Little by raising the specter of overzealous criminal and civil prosecutions based on voluntary audit disclosures. This claim rings hollow. A July, 1994 survey of all fifty states conducted by the National Association of Attorneys General revealed just one case that involved the use of information contained in a voluntarily-initiated audit in a civil penalty action. And, even in that case, criminal prosecution was waived because of the voluntary disclosure.²⁷ On the other hand, there is a punitive aspect to some privilege statutes which directly conflict with long-standing and recently expanded Legislative policy. A provision of the Colorado statute, which is often used as a model, imposes penalties on anyone who discloses privileged material.²⁸ This threat to conscientious citizens runs directly afoul of the special environmental whistle blower protection statute passed in 1981²⁹ and the more comprehensive general whistle blower protection enacted last session.³⁰

Privileges Promote Unfair Competition

What about the good corporate citizens? Full disclosure encourages companies to implement state-of-the art procedures and controls. Otherwise, they face regulatory action, civil liability, and public criticism. One trusts that responsible companies will take these steps anyway since state-of-the-art protects the public and workers while maximizing efficiency in cost areas such as raw materials and energy. Unfortunately, less responsible competitors can obtain short-term price advantages by avoiding initial state-of-the-art capital costs. If these competitors can cloak their substandard activities in a privilege, then they achieve an unfair advantage at the expense of the responsible company. This prospect of unfair competition underlies EPA’s refusal to allow a privilege and insistence that civil penalties equal the economic benefit obtained.³¹

Large Institutions Abuse Privileges

It appears to be a truism that any large institution composed of human beings seeks to hide its deliberations and internal activities from critical review by outsiders. This tendency existed long before modern litigation. Privileges are a gold mine for effectuating this very human tendency, and examples abound where institutions draw the Cone of Silence as broadly as possible. There is no reason to believe that the petrochemical industry and its conscientious advocates are immune from this bureaucratic imperative.

Proponents have suggested the attorney-client privilege as a device for shielding corporate audits and investigative reports from discovery. *United States v. Upjohn*³² sets forth a very careful structure for insuring that true attorney-led corporate investigations of internal wrongdoing are protected but only to the necessary extent. However, recent disclosures in the tobacco litigation industry show the institutional imperative toward overbroad privilege claims at work in this area as well. As far back as 1958, a tobacco executive asked that all future cancer literature collections “be collected ‘under the wing’ of counsel.”³³ This apparent project to cloak research activities with privilege claims continues since the companies maintain that the documents are inadmissible in civil litigation.³⁴ While the pros and cons of this legal debate are beyond the scope of this article, the functional point is clear - organizations will overuse a privilege if granted one and the justice system suffers. Thus, one only grants a privilege if there is an extreme need and no lesser alternative exists.

Companies facing products liability claims cannot resist the temptation to shovel relevant information under the Cone of Silence. In *Roberts v. Carrier Corp.*³⁵, a furnace manufacturer refused discovery of product documents on the basis that they formed part of a self-critical analysis required by the CSPC. While some subjective impressions were protected, the court denied protection for most information:³⁶

“If the privilege were allowed to prevent discovery of such documents, then any manufacturer could protect all of its internal documents from discovery in a products liability case by simply claiming they were given to CSPC. Such subterfuge would not only defeat the policies behind discovery, but would also provide manufacturers to cover up critical evidence of their knowledge concerning defective products they may have produced. Clearly, the policy behind the privilege does not sanction such a powerful tool for defendants to cover up their own internal documents.”

Implementation of the foundation self-critical privilege, hospital review, again shows the institutional imperative for abuse at work. As described by the leading federal treatise,

“Courts have frequently construed the privilege quite loosely,³⁷ in stark contrast to the ‘strict construction’ applied to other private privileges. A recent Colorado incident in which a boy died during ‘routine surgery’ due to the criminal negligence of a physician whose apparent drug use and carelessness during surgery was shielded from regulators and the courts by extravagant claims of the privilege might suggest that contrary to the claims of its proponents, ‘peer review’

is not a substitute for malpractice liability but simply a device for continuing the 'conspiracy of silence' that has long shielded physicians and hospitals from public accountability for their errors. One wonders how many more deaths it will take before courts begin to reconsider their enthusiasm for the privilege."³⁸

CONCLUSION

This article only indirectly addresses the fundamental burden on citizen's rights and the justice system imposed by an environmental audit privilege. Since privileges "obstruct the search for truth",³⁹ they place a heavy weight on the disclosure side of the policy balance. Rather, this article attempts to show that once the policies articulated by industry are examined, they are of such little weight that the balancing process need not ever take place.

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ENDNOTES

¹ Louisiana is second only to Texas in gross terms. EPA, *Toxic Release Inventory, 1994-1995*, rep'd in, World Almanac and Book of Facts 1998 186 (1997). However, while Louisiana emits 60% of Texas' total, Louisiana only has 23% of Texas' population and only 17% of Texas' land area. *Id.* at 185, 426, and 434.

² Since proponents refer to the self-critical privilege applicable generally to industry but focus on the environmental audit privilege peculiar to the toxics area, opponents will adopt the same emphasis. The reference to "industry" in the context of privilege excludes small business. Since only large corporations have the institutional need, due to sheer size, to document the type of activities sought to be shielded, only they urge the privilege. Small business proceeds on a much more informal and *ad hoc* basis. Privilege in the toxics area is particularly the province of large companies since the "100 facilities which are part of the Louisiana Chemical Association traditionally make up the bulk of the toxic chemical discharges reported in Louisiana." *Chemical industry's output up*, The Advocate, December 19, 1996, at 2B.

³ LCA Spokesperson, quoted *Id.* at 1B.

⁴ *Poll: Environmental record, tax breaks should be linked*, The Advocate, January 6, 1998, at 1A.

⁵ Repeal of exemplary damages in the toxic substance area eliminated the most effective tool citizens possessed for regulating irresponsible industrial practices. Acts 1996, 1st Ex. Sess., No.2, §1.

⁶ La. Code Evid. art. 501, Authors' Note (8).

⁷ *State v. Taylor*, 94-0696 (La. 9/6/94), 642 So.2d 160, 166.

⁸ *Weideman v. Dixie Electric Membership Corp.*, 627 So.2d 170 (La. 1993); *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95), 656 So.2d 634.

⁹ *Reichold Chemicals, Inc. v. Textron Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); *United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990); *State ex rel. Celebreeze v. CECOS International, Inc.*, 583 N.E.2d 1118, 66 Ohio App.3d (1990).

¹⁰ 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, § 5431 at 428 (Supp. 1997). The more limited required reports privilege referred to never obtained general acceptance. It first saw light as a novel proposal to the privilege section of the Federal Rules of Evidence, Proposed Rule

502. Of course, the federal privileges were never enacted. Of those states that adopted the federal privileges (not Louisiana), only a “handful” accepted the required reports privilege. 24 *id* § 5453 at 12 (1980).

¹¹ 23 *id* § 5431, 431 n.97.3 (Supp. 1997). The actual case count is 9 for the privilege and 19 against.
¹² 50 F.R.D. 249 (D.D.C. 1970), *aff ‘d without opinion*, 479 F.2d 920 (D.C. Cir. 1973).

¹³ Fed. R. Civ. P. 34, *Advisory Committee Notes, 1970 Amendment*.
¹⁴ 51 F.R.D. 187 (D.D.C. 1970).

¹⁵ The judicial medical review privilege soon obtained a life of its own unconnected to the self-critical privilege since many states, like Louisiana, recognized a limited version by statute once the majority of courts refused a judicial privilege. 23 Wright & Graham, *supra* note 10, § 5431 at 835-840 (1980). This history only reinforces the basic point - privileges are a policy choice for the Legislature, not a legal one for the courts.

¹⁶ 493 U.S. 183, 110 S.Ct. 577 (1990).

¹⁷ *Northern Assurance Co. v. Louisiana Power & Light Co.*, 580 So.2d 351 (La. 1991).

¹⁸ The leading commentators label “dubious” the use of this analogy in *Reichold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994). 23 Wright & Graham, *supra* note 10, § 5431 at 431 n.97.3 (Supp. 997).

¹⁹ EPA Environmental Auditing Focus Group Paper (January 19, 1995).

²⁰ *Id.*

²¹ 1993 Or. Laws c. 422 s. 20, *as codified*, Or. Rev. Stat. § 468.963 (1996).

²² Price Waterhouse LLP, *The Voluntary Environmental Audit Survey of U.S. Business*, “Executive Summary” (March 1995).

²³ EPA, *Environmental Auditing Policy Statement*, 51 FR 25004 (July 9, 1986).

²⁴ Lucian E. Renes, *The Industrial Hygiene Survey and Personnel*, 1 Patty’s Industrial Hygiene and Toxicology 100-108 (3d rev. ed., George Clayton, *et. al.* eds., 1978).

²⁵ *EPA Signs Penalty Reduction Policy; Covers Audits, Due Diligence Systems*, 10 BNA Toxics Law Reporter 887 (1996).

²⁶ *EPA Memo on State Audit Privilege/Immunity Laws and Legislation*, 12 BNA Toxics Law Reporter 731 (1997).

²⁷ D. Ronald, *The Case Against An Environmental Audit Privilege*, 29 Chemical Waste Litigation Reporter 167 (1995).

²⁸ 1994 Colo. Sess. Laws S.B. 139, *as codified*, Colo. Rev.Stat. Tit. 13, Art. 25 § 126.5.

²⁹ La. Rev. Stat. Ann. 30:2027.

³⁰ La. Rev. Stat. Ann. 23:967.

³¹ *EPA Signs Penalty Reduction Policy; Covers Audits, Due Diligence Systems*, 10 BNA Toxics Law Reporter 887, 888 (1996).

³² 449 U.S. 383, 101 S.Ct. 677 (1981).

³³ *Bliley Releases 850 Confidential Documents; Industry Decries ‘Obsession with Events Past*, 12 BNA Toxics Law Reporter 829 (December 24, 1997).

³⁴ *Id.*

³⁵ 107 F.R.D. 678 (N.D. Ind. 1985).

³⁶ *Id.* at 684.

³⁷ But not in Louisiana, *see* cases cited *supra* note 8.

³⁸ 23 Wright & Graham, *supra* note 10, § 5431 at 429.

³⁹ *U.S. v. Roberson*, 859 F.2d 1376 (9th Cir. 1988).