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by PAUL A. WEISS*

But it would be bizarre, ironic and sad if the law in effect virtually required these journalistic inquiries to be made only by lawyers, for fear that a contrary practice would make such internal inquiries available to anyone filing a libel complaint. In the final analysis the public trust is ours, the journalists.

—Edward R. Cony, Vice President/News of Dow Jones and Company

[A] lawyer would have done a "more sensible" report.

—David Boies, outside counsel for CBS, regarding the Benjamin Report

I

Introduction

The first amendment to the U.S. Constitution grants to the press the special role of watchdog over the functioning of our government. With this special status come constitutional limitations on the ability of government to regulate the press. As the power and influence of the newsgathering media have increased, however, the public has come to feel that it is from the press that it needs protection. Thus, a major societal concern has become facilitating the ability and incentive of the watch-

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5. See infra notes 99-101 and accompanying text.
6. See infra notes 93-98 and accompanying text.
dog to watch itself. The two primary methods of curbing journalistic excesses have been the civil suit for defamation and the encouragement of the media to monitor and regulate themselves.

The case of Westmoreland v. CBS, Inc. raised the issue of the relative viability of these two methods in a litigation context. At odds were the right of a network news division to conduct a candid self-evaluation in confidence and the right of a defamation plaintiff to obtain information in preparation for trial. The trial court did not answer the question whether the public interest in encouraging media responsibility was best served by granting the defendant an evidentiary self-evaluation privilege, but instead ruled that CBS waived any privilege that may have existed.

This note analyzes the self-evaluative privilege (SEP) under the Westmoreland facts. First, it examines the nature, limitations, and policies of the privilege. Next, it considers whether the SEP should be extended to newsgathering media defendants. Finally, the note scrutinizes the ruling in Westmoreland that CBS waived its privilege, in light of the policies underlying the SEP.

II

Background

On January 23, 1982, CBS News aired “The Uncounted Enemy: A Vietnam Deception,” a ninety-minute documentary which charged that the highest levels of American military intelligence consistently suppressed and altered troop count reports during the Vietnam War. Three days later, Generals William C. Westmoreland and Daniel Graham held a press conference, denouncing the show and demanding an apology from CBS. CBS News responded by announcing an in-house investigation. The controversy surrounding the show was further fueled by a TV Guide investigative report that sharply criticized the journalistic practices followed in producing the program.

7. See infra notes 113-14, 124-25 and accompanying text.
10. Kowet and Bedell accused CBS News, inter alia, of tailoring the evidence presented to fit its preconceived conclusions, rehearsing "friendly" witnesses, quoting out of context, paying $25,000 to a consultant "obsessed" with proving the show's
On July 15, 1982, one week after receiving the results of the in-house study, Van Gordon Sauter, President of CBS News, made public an eight-page memorandum that supported the substance of the "Uncounted Enemy" broadcast but also criticized the editorial procedures used.\textsuperscript{11}

The CBS in-house study was conducted by Burton Benjamin, a Senior Executive Producer for CBS News. Although CBS contemplated using either inside or outside counsel to conduct and/or supervise the investigation, Sauter wished the resulting report to reflect "a journalistic, not a legalistic judgment."\textsuperscript{12} Benjamin, a documentary producer himself, was chosen to conduct the study because of his reputation for impeccable honesty and for strict interpretation of the CBS News Guidelines.\textsuperscript{13} The resulting report was a retrospective review of the editorial decisions made in producing the show and dealt primarily with adherence to the Guidelines.\textsuperscript{14} The Sauter Memorandum did not disclose the contents of the Benjamin Report, other than to report the manner in which the study was conducted. It did, however, purport to reflect Benjamin's conclusions, as well as those of Edward Joyce, Executive Vice President of CBS News, and of Sauter himself.\textsuperscript{15}

In September 1982, Gen. Westmoreland filed suit in federal district court,\textsuperscript{16} alleging that CBS had defamed him both in broadcasting the "Uncounted Enemy" show and in issuing the Sauter Memorandum.\textsuperscript{17} CBS resisted Westmoreland's attempts to obtain the Benjamin Report through pretrial discovery.\textsuperscript{18} The network argued that the Benjamin Report was a confidential self-evaluative analysis and therefore within the ambit of a premise, violating its own guidelines, and failing to review the producer's work properly. \textit{Id.} at 4, 15.

\begin{itemize}
  \item \textsuperscript{11} A copy of the Sauter Memorandum is on file in the Comm/Ent Office.
  \item \textsuperscript{12} Bruck, \textit{supra} note 3, at 84.
  \item \textsuperscript{13} \textit{Id.} at 84, 86.
  \item \textsuperscript{14} A copy of the Benjamin Report is on file in the Comm/Ent Office.
  \item \textsuperscript{15} Sauter Memorandum, \textit{supra} note 11, at 2.
  \item \textsuperscript{16} Bruck, \textit{supra} note 3, at 82.
  \item \textsuperscript{17} \textit{See Westmoreland, 97 F.R.D. 703.}
  \item \textsuperscript{18} Litigants in a federal court proceeding "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." \textit{FED. R. Civ. P. 26(b)(1).} CBS later contested the admissability of the Benjamin Report at trial. The court ruled that the greater portion of the Report was inadmissible as either irrelevant, hearsay, or opinion evidence. Westmoreland v. CBS, Inc. No. 82 Civ. 7913 (PNL), slip op. at 4-8 (S.D.N.Y. Dec. 13, 1984). A copy of the slip opinion is on file in the Comm/Ent Office. \textit{See also infra} notes 117 and 120.
\end{itemize}
common law privilege which has evolved for such documents.\(^{19}\) Westmoreland discounted both the weight\(^{20}\) and the scope\(^{21}\) of the authority establishing such a privilege and argued that, if any privilege existed, CBS had waived it in releasing the Sauter Memorandum.\(^{22}\) CBS distinguished Sauter's and Benjamin's conclusions from the sources that served as the basis for those conclusions. The network maintained that the latter had always been confidential and that no waiver had occurred.\(^{23}\)

It was on this last issue of waiver that the court based its Opinion and Order. Ruling that CBS had "not treated the Benjamin report as a confidential internal matter,"\(^{24}\) it found "no occasion to consider whether defendants' arguments would prevail in establishing . . . a [self-evaluative] privilege on appropri-

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The merits of CBS's alternative theories for resisting discovery of the Benjamin Report—that production would be oppressive, Defendants' Opposition, supra, at 13-16, that the Report was protected under the New York Shield Law, N.Y. Civ. RIGHTS LAW § 79-h (McKinney 1979 & Supp. 1983-1984), Defendants' Response, supra, at 14, and that the Report would be insufficiently likely to lead to the discovery of relevant evidence, Defendants' Response, supra, at 15-16—are beyond the scope of this note. See Westmoreland, 97 F.R.D. 703. Copies of Defendants' Opposition and Defendants' Response are on file in the Comm/Ent Office.


21. Plaintiff’s Motion, supra note 20, at 7-8. See also Plaintiff's Reply to Defendants' Opposition to Motion to Compel Production of "Benjamin Report" at 4-14, Westmoreland, 97 F.R.D. 703 [hereinafter cited as Plaintiff's Reply]. A copy of Plaintiff's Reply is on file in the Comm/Ent Office.


23. Defendants' Opposition, supra note 19, at 12; Defendants' Response, supra note 19, at 5-6.

ate facts." Because the Benjamin Report is "central to the public message of the Sauter Memorandum" and because it "implies, or states, that the Benjamin report substantiates the conclusions of the Uncounted Enemy broadcast," the court concluded that CBS could no longer "decline to reveal the Report contending that it is a confidential internal study utilized solely for self-evaluation and self-improvement."

III Status of the Self-Evaluative Privilege

A common law privilege has evolved in the federal courts for self-evaluative materials in medical malpractice and employment discrimination litigation. In these contexts, the public's interest in fostering candid, confidential self-analysis outweighs the plaintiff's need for full disclosure. The privilege is subject to limitations, the most important of which is the rule that the SEP does not extend to factual material and statistics.

A. Applicable Law

The Federal Rules of Evidence provide that a person's privilege shall be determined by state law in cases in which state law applies as the rule of the decision.

In Westmoreland, a defamation action maintained in the U.S. District Court for the Southern District of New York, issues relating to privilege should be settled by reference to New York law. Unfortunately, there is no statutory or case law regarding the SEP in New York. New York state courts are nevertheless capable of creating common law privileges and, indeed, have done so in other contexts. Furthermore, New York courts have held that "even where there is no legal privilege against disclosure, certain types of information, confiden-
tial in nature . . . should be accorded judicial safeguards whenever possible.”32 While there exists no self-evaluative privilege in New York, the case law of that jurisdiction provides ample room for its recognition, by reference to the law of other jurisdictions.

Federal case law regarding the SEP is considerably more developed than that of the states that have addressed the issue33 and is, therefore, much more expositive of the privilege’s underlying limitations and policies. Hence, the genesis and scope of the SEP is considered here primarily in the context of its development in the federal courts.

B. Does a Common Law SEP Exist?

The judicial creation of a privilege for confidential self-analysis can be traced to Bredice v. Doctors Hospital, Inc.34 In Bredice, a malpractice action brought in the District of Columbia, plaintiff sought discovery of any hospital review committee reports that related to the death of plaintiff’s decedent.35 The court held that the records of medical staff review committee meetings were entitled to a qualified privilege based on an “overwhelming public interest.”36 The court reasoned that

32. La Monte v. Smith, 10 A.D.2d 678, 678, 197 N.Y.S.2d 251, 252 (1960).
33. Research for this note uncovered case law from only seven state jurisdictions that deals directly with a common law SEP. The Wisconsin and Arizona Supreme Courts found public policy considerations insufficiently compelling to warrant judicial creation of the privilege. Davison v. St. Paul Fire & Marine Ins. Co., 75 Wis. 2d 190, 204, 248 N.W.2d 433, 441 (1977); Jolly v. Superior Court, 112 Ariz. 186, 190, 540 P.2d 658, 662 (1975). In Sherman v. District Court, 637 P.2d 378, 384 (Colo. 1981), the court expressed particular reluctance to create a general SEP where the legislature had created a confidential reports privilege of narrow applicability. Nebraska judicially adopted the SEP without significant discussion in Oviatt v. Archbishop Bergan Mercy Hospital, 191 Neb. 224, 226-27, 214 N.W.2d 490, 492 (1974), whereas Kentucky rejected the privilege more or less out-of-hand in Nazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177, 179 (Ky. 1973). The court in Berst v. Chipman, 232 Kan. 180, 191-93, 653 P.2d 107, 116-17, (1982), declined to protect confidential self-critical documents, at least “where the information [sought] goes to the ‘heart of the plaintiff’s claim.’” The Florida Court of Appeals, following federal precedent, created an SEP in Dade County Medical Ass’n v. Hlis, 372 So. 2d 117 (Fla. Dist. Ct. App. 1979); for some inexplicable reason, however, a different panel of the same court concluded that the policies that supported the adoption of the privilege were inapposite when the party seeking production was the subject of the confidential study. Auld v. Holly, 418 So. 2d 1020, 1026 (Fla. Dist. Ct. App. 1982). Of these state court opinions, only Berst considers in depth the policy issues underlying recognition of the SEP.
35. 50 F.R.D. at 249.
36. Id. at 251.
public policy favors doctors' having access to the most up-to-date technology and knowledge and that such access would be impeded if staff meetings lost their confidentiality.\textsuperscript{37}

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a \textit{sine qua non} of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques . . . . The value of these discussions and reviews . . . is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.\textsuperscript{38}

This rationale was applied very soon after \textit{Bredice} by a Georgia district court in \textit{Banks v. Lockheed-Georgia Co.}\textsuperscript{39} The \textit{Banks} court broadened considerably the ambit of the SEP, finding it applicable to internal studies regarding employment practices conducted by a defendant charged with employment discrimination.\textsuperscript{40} Like \textit{Bredice}, the ruling was grounded on public policy considerations; the court felt that compelled disclosure would discourage effective self-evaluation, thereby inhibiting the development of affirmative action programs.\textsuperscript{41} The \textit{Banks} holding has been followed now in at least eleven other employment discrimination cases.\textsuperscript{42}

\begin{footnotes}
\item[37] Id.
\item[38] Id. at 250. Hospital committee reports have also been held privileged in proceedings under the Federal Tort Claims Act. Gillman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971).
\item[40] Id. at 285.
\item[41] Id.
\end{footnotes}
In some sixteen cases, federal courts have refused to grant a self-evaluative privilege; in fifteen of these, however, the holdings do not conflict with *Bredice*, *Banks*, and their progeny. Seven courts found that the self-analyses in question were not confidential, while four concluded that the material sought was not self-evaluative. In three instances, the SEP was declared unavailable when the party seeking disclosure was a U.S. government agency. Two confidential self-evaluations were held not to be of a type subject to the rationale behind the privilege. It should also be noted that many of the courts that declined to apply the SEP still cited *Bredice* and its progeny with approval.

Only one federal court, in *Gray v. Board of Higher Education*, has weighed concerns similar to those considered in the *Bredice* and *Banks* decisions and yet has refused to protect confidential self-evaluative memoranda; the court's ruling, however, was a narrow one. The *Gray* court concluded that under certain circumstances, limited disclosure may be available. The court based its holding on three factors: plaintiff's compelling need for the information in order to prepare for trial, the fact that limited disclosure would have a minimal chilling effect in discouraging self-evaluation, and the fact that disclosure might favor the social policy which allegedly required

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45. FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980); Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); In re Horizon Corp., 88 F.T.C. 515 (1976).

46. Resnick v. American Dental Ass'n, 95 F.R.D. 372 (N.D. Ill. 1982), but see infra notes 87-91 and accompanying text; Davidson v. Light, 79 F.R.D. 137 (D. Colo. 1978), see also infra note 92 and accompanying text.

47. See, e.g., Jepsen, 610 F.2d at 1384; Lloyd, 74 F.R.D. at 522; Wright, 72 F.R.D. at 164.

48. 692 F.2d 901 (2d Cir. 1982).

49. Id. at 905-09.
confidentiality. It is apparent that a self-evaluative privilege has developed in the federal courts since Bredice. The SEP, however, is a relatively young common law privilege, and there is still a dearth of appellate commentary regarding it. Moreover, pretrial discovery privileges are generally looked upon with disfavor. As a result, the privilege is of somewhat uncertain application. Therefore, the policies underlying the SEP, as well as its recognized limitations, must be examined to ascertain its availability to newsgathering media defendants.

C. Policy Basis for the SEP

The first question asked when considering the creation of a privilege must be whether public policy is furthered by maintaining the confidentiality of the communication at issue. Essentially, the problem involves a balancing of the benefits of protection against the benefits of disclosure.

The Federal Rules of Civil Procedure allow “discovery re-

50. Id. One author has commented that, because the ruling was of limited scope, “the [Gray] opinion will be of little assistance to other courts confronted with disputes over disclosing peer-review material.” Flanagan, Rejecting a General Privilege for Self-Critical Analysis, 51 GEO. WASH. L. REV. 551, 580 (1983).
52. Note, supra note 51, at 1085 n.12; see also Defendants' Response, supra note 19, at 7 n.3 and accompanying text.
53. This has been especially true in employment discrimination suits, the major area in which the SEP has been asserted. Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972); Note, supra note 51, at 1090 n.29.
54. See supra notes 34-41 and accompanying text.
55. John H. Wigmore, in his treatise on evidence, set forth four fundamental criteria for the creation of a privilege:
(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized.
8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961) (emphasis in original). Certainly if the communication is not in fact confidential, no privilege should attach. See supra note 43 and accompanying text; infra notes 132-54 and accompanying text. Practically, whether Wigmore's second and third criteria have been met is a matter of degree and as such should be balanced in the analysis under criterion (4).
garding any matter, not privileged, which is relevant to the subject matter involved in the pending action.\textsuperscript{56} The Supreme Court has amplified the general policy favoring broad discovery of "every man's evidence,"\textsuperscript{57} instructing that privileges should neither be "lightly created nor expansively construed."\textsuperscript{58} Thus, the primary factors that weigh in favor of disclosure of self-evaluative materials are the adverse party's need for evidence to establish his or her case and the fact that any statement included in a self-evaluative study probably was made closer in time to the events giving rise to the cause of action than those statements made after discovery commences.\textsuperscript{59}

While it is in the public's best interest that certain confidential self-analyses are undertaken,\textsuperscript{60} disclosure of the conclusions and opinions expressed in these evaluations in the course of civil litigation "almost inevitably" will discourage such evaluations.\textsuperscript{61} First of all, critical information from colleagues and coworkers will likely be less candid, less forthcoming, and less constructive; therefore, any studies based on this inferior information will necessarily be of inferior value.\textsuperscript{62} Nor is the management of the evaluating entity immune from fear of disclosure; it may in fact choose not to conduct the self-analysis if in so doing it will expose the entity or its employees to adverse publicity or civil liability.\textsuperscript{63}

If the studies are mandated by statute, compelled disclosure may discourage cooperation and thus undermine the legislature's purpose.\textsuperscript{64} The self-evaluating entity, aware of the possibility of disclosure, may carry out the mandated investigation with a modicum of zeal and with less-than-perfect candor, or it may even set minimal performance goals for itself so as to avoid providing future plaintiffs with potentially damaging...

\textsuperscript{56} FED. R. CIV. PROC. 26(b)(1).
\textsuperscript{58} Id.; see also Trammel v. United States, 445 U.S. 40, 50 (1980) (husband-wife privilege).
\textsuperscript{60} Banks, 53 F.R.D. at 285; Bredice, 50 F.R.D. at 250.
\textsuperscript{62} Id. at 216-17; Banks, 53 F.R.D. at 285; Bredice, 50 F.R.D. at 250. Professor Flanagan suggests that this problem is especially applicable to peer-review studies. Flanagan, supra note 50, at 560-65.
\textsuperscript{63} O'Connor, 86 F.R.D. at 217-18; Banks, 53 F.R.D. at 285. See also Flanagan, supra note 49, at 559.
If disclosure does indeed discourage confidential self-evaluations, some litigants will conduct self-evaluations through counsel, thereby seeking protection under the attorney-client privilege or the work-product rule. This result will further reduce the value of the self-evaluation. Even assuming arguendo that the attorney is familiar with the subject matter of the study, diagnosis and correction of what are essentially management problems are rarely the functions of counsel. Assigning the task to a lawyer may also increase the cost of conducting the analysis and thus decrease incentive to conduct a thorough investigation.

If earnest self-evaluation is discouraged, there may be little data to form a basis for self-correction. If this occurs, the only sanctions that may be enforced for media misconduct will be external; at least in some circumstances, these might be much less effective than internal controls.

Perhaps most significantly, one commentator has suggested that if self-analysis is discouraged, denial of an SEP will be self-defeating. If potential litigants merely fail to perform self-evaluations, or do an inadequate job, the desired information would remain unavailable to potential adverse parties just as if it were privileged. Moreover, if an evaluation is not undertaken, self-critical materials outside the scope of the privilege are also not collected.

Within certain boundaries, courts seem to have struck the balance between plaintiffs' need for disclosure and the need to encourage candid self-evaluation by defendants in favor of rec-


67. See supra text accompanying note 12 and infra note 131 and accompanying text.

68. Note, supra note 51, at 1088.

69. See infra notes 81-85 and accompanying text.
ognizing the SEP. Most of the decisions that have dealt with the SEP have been rendered in employment discrimination cases in which the plaintiff employee asserted statutorily protected civil rights of a constitutional nature. But while the public interest in protecting these rights—as expressed through detailed legislation—makes the argument in favor of disclosure particularly persuasive, the privilege has nevertheless been upheld. If the public policy underlying plaintiff's claim is of common law origin and has not been codified, courts may be even less willing to hold that the policy requires disclosure.

D. Limitations to the SEP

The SEP is not an absolute privilege and federal courts have placed numerous limitations on its exercise.

1. Case-by-Case Determination

One unresolved issue is the weight to be given precedent recognizing the SEP in subsequent cases. Some courts have retained the right to decide on a case-by-case basis whether the privilege exists or have chosen to override the privilege because of a plaintiff's "compelling need." The problem with this ad hoc approach is that the effectiveness of the privilege in encouraging the flow of information depends on the extent to which people may rely on continuing confidentiality.

71. See, e.g., Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977). The Keyes court upheld the SEP in a sex discrimination suit that was "based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Fourteenth Amendment of the Federal Constitution." Id. at 579.
72. See supra note 51.
73. See supra note 42 and accompanying text. In some cases courts have held that, although the need for disclosure is especially strong, the interest at stake is better protected in the long run by granting the SEP. Roberts v. National Detroit Corp., 87 F.R.D. 30, 32 (E.D. Mich. 1980); O'Connor, 86 F.R.D. at 215.
74. However, there may exist situations in which public policy, although not statutorily expressed, may mandate disclosure. For a discussion of the policy considerations in Westmoreland, see infra notes 115-30 and accompanying text.
75. Bredice, 50 F.R.D. at 251.
77. Gray, 692 F.2d at 907.
78. See Upjohn Co. v. United States, 449 U.S. 383 (1981), wherein the Court said of the attorney-client privilege: "An uncertain privilege, or one which purports to be
the Federal Rules of Evidence declare that the laws relating to privileges “shall be governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience,”79 this discretion should be exercised by the courts in developing the rules to govern the SEP on a case-by-case basis, rather than in deciding ad hoc whether the privilege should be recognized.80 The Bredice decision is a little more than a decade old; it seems that courts will treat precedent with greater deference as the still nascent self-evaluative privilege matures.

2. Facts Versus Subjective Conclusions and Evaluations

A general rule has developed which provides that only subjective conclusions are protected by the SEP and that statistics and other factual material compiled for the self-evaluation should be disclosed.81 While it has been criticized,82 the rule is well established and not without justification. Because the quality of the facts and statistics compiled has no real relationship to the confidentiality fostered by the SEP, and because their accuracy is readily verifiable and often available notwithstanding the privilege, the rationale behind the privilege is not applicable to this objective type of information.83 Furthermore, the public has a much greater interest in the disclosure of relevant facts than in gaining access to the subjective evaluations of a source of confidential information.

The confidentiality of subjective opinions may be protected through in camera examination;84 the burden, however, may then be placed on the party seeking protection to edit out any

79. FED. R. EVID. 501.
80. United States v. Gillock, 445 U.S. 360, 367 (1980); Upjohn, 449 U.S. at 396; Note, supra note 51, at 1097-98. But compare Flanagan, supra note 50, at 576, in which the author argues that the SEP is in fact “not an evidentiary privilege but rather an exercise in discretionary protection founded in the court’s power over discovery.” Thus, Professor Flanagan concludes that each self-evaluative privilege case should be decided individually. Id. at 582.
82. Note, supra note 51, at 1094-96.
83. Dickerson, 14 Fair Empl. Prac. Cas. (BNA) at 1449.
material subject to the SEP.\textsuperscript{85}

3. \textit{Subpoena by Administrative Agency}

The public interest in disclosure has been held to outweigh the potential harms where the SEP is asserted in response to a subpoena issued on behalf of an administrative agency; thus, the protection will be denied in such situations.\textsuperscript{86}

4. \textit{Government-Required Documents}

In both \textit{Resnick v. American Dental Association}\textsuperscript{87} and \textit{Webb v. Westinghouse Electric Corp.},\textsuperscript{88} the courts held the SEP inapposite where the analysis was not required by the government, based on the assumption that the SEP had never been applied to such documents.\textsuperscript{89} Obviously, this conclusion reflects an ignorance of the origins of the privilege in \textit{Bredice}, which did not involve any government report. Therefore, \textit{Webb} and \textit{Resnick} are of dubious precedential value on this point.

In addition, the \textit{Resnick} court declared that the SEP's rationale was inapplicable where the self-evaluation was required by the government.\textsuperscript{90} The opinion, however, took no cognizance of the main public policy justification for the privilege—i.e., encouraging parties to undertake candid confidential self-analyses.\textsuperscript{91} This rationale may be especially strong if the study is not mandated by government regulation.

5. \textit{Retrospective Review}

Amplifying dictum in \textit{Bredice}, one court concluded that the SEP may not be asserted successfully if the self-evaluation is performed in order to solve a current specific problem, rather than to retrospectively review procedures in general.\textsuperscript{92}

\textsuperscript{85} O'Connor, 86 F.R.D. at 218.
\textsuperscript{86} FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980); Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); \textit{In re Horizon Corp.}, 88 F.T.C. 515 (1976).
\textsuperscript{87} 95 F.R.D. 372 (N.D. Ill. 1982).
\textsuperscript{88} 81 F.R.D. 431 (E.D. Pa. 1978).
\textsuperscript{89} \textit{Resnick}, 95 F.R.D. at 374-75; \textit{Webb}, 81 F.R.D. at 434-35.
\textsuperscript{90} \textit{Resnick}, 95 F.R.D. at 374-75.
\textsuperscript{91} \textit{Resnick}, 95 F.R.D. at 374-75.
\textsuperscript{92} See supra notes 36-41 and accompanying text.
IV
Application of the SEP to Westmoreland

A. Regulating Media Responsibility

As our society's newsgathering institutions grow in size and diminish in number, and as the technology of newsgathering becomes more complex and efficient, the power of the newsgathering media increases. 93 With this increased power comes a greater capacity for harm if the power is exercised irresponsibly. This possibility is especially true of television news because of its emphasis on conflict and the visually spectacular, as well as its intrusiveness on both subject and viewer.

There seems to be little doubt that the American press is viewed with increasing distrust. 94 This trend can be attributed to a variety of factors. The media's power is largely unrestrained, and its defenders can be self-righteous to the point of arrogance. 95 Several recent scandals bear this out. 96 Furthermore, the damage which results from irresponsible journalism is often irreversible. 97 In essence, many fear and hate the press because it is seen as creating, rather than responding to, public opinion. 98

While there appears to be a problem with the media's abuse of its power, solutions are not so evident. Governmental regu-

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95. See Barrett, Panel Statement, THE PRESS: FREE AND RESPONSIBLE?, supra note 94, at 28 (“I find it ironical that the established press, one of the most powerful institutions in modern society, and well able to fight its own battles in the political arenas, has an apparently insatiable appetite for constitutional guarantees.”); Kraft, Panel Statement, id. at 33 (“I think we [the press] are alive and well and eating our attackers for breakfast every day . . . . I think we are full of ourselves.”). See also Cox, Panel Statement, id. at 30; Henry, supra note 94, at 77; Lehrer, Concluding Remarks, THE PRESS: FREE AND RESPONSIBLE?, supra note 94, at 99.
96. For several examples, see Henry, supra note 94, at 79-82; Purvis, supra note 94, at 1-6.
98. See generally Henry, supra note 94; Sheran & Isaacman, supra note 94, at 8-31.
loration of journalistic responsibility is problematical at best. Any attempt at direct regulation of media conduct through licensing or other legislation faces difficult, if not impossible, constitutional obstacles, especially with regard to the print media. Even though the electronic media is licensed under the auspices of the Federal Communications Commission, it is given considerable responsibility to self-regulate its programming in the public interest.

If any such regulation were found not to have a chilling effect on freedom of the press, the social utility of making the newsgathering media answerable to government would still be questionable. Some self-censorship would result, and editorial decisions could become politicized. The extensive fact-finding necessary to make the regulatory process effective would drain both the public coffer and the media's time and energies. But perhaps most importantly, external regulation would put the newsgatherer in a defensive posture. Instead of using this data to critically question its past performance, the journalistic entity subject to external regulation would be primarily concerned with maintaining its freedom from governmental restriction. The newsgathering organization is, in fact, the party best able to assess its performance simply because it has the greatest access to the necessary data.

Assuming the newsgatherer has, in fact, performed below standard, a suit for defamation remains the traditional means of redress for an individual who claims to have been wronged by the press; the threat of civil liability, however, is an ineffective means of deterring media misbehavior. Since New York Times Co. v. Sullivan and its progeny established the "actual malice" standard for liability in defamation actions brought by public-figure plaintiffs, it has been extremely dif-

99. Any detailed treatment of this issue is beyond the scope of this note. For a discursive treatment of the subject, see Sheran & Isaacman, supra note 94, at 55-89.
100. See, e.g., Tornillo, 418 U.S. at 256-58 (first amendment forbids mandatory right of access statute); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-62 (1976) (prior restraint on newspaper must undergo strict scrutiny notwithstanding criminal defendant's right to fair trial).
102. Sheran & Isaacman, supra note 94, at 44.
105. Sullivan held that the first amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he
difficult to establish the legal elements of libel.\textsuperscript{106} Liberalization of libel law in recent years\textsuperscript{107} has greatly increased litigation costs, in terms of time, money, and energy to media defendants\textsuperscript{108} without necessarily helping to vindicate deserving plaintiffs.\textsuperscript{109} Furthermore, it is questionable whether facilitating libel recovery encourages responsible journalism.\textsuperscript{110}

Recent statistical studies have clearly shown that in defamation litigation against media defendants, plaintiffs are far more likely to receive favorable verdicts from juries, while defendants are much more likely to be successful on appeal.\textsuperscript{111} The public, as represented by juries, seems to be outraged by the conduct giving rise to the litigation. The data indicate that although the legal requirements for establishing defamation proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," 376 U.S. at 279-80 (emphasis added).

\textsuperscript{106} Sheran & Isaacman, supra note 94, at 44 n.151.

\textsuperscript{107} See, e.g., Herbert v. Lando, 441 U.S. 153 (1979) (plaintiff may inquire into editorial process in attempting to establish actual malice).


\textsuperscript{109} See infra note 111 and accompanying text.

\textsuperscript{110} See infra notes 120-22 and accompanying text.

\textsuperscript{111} In his first statistical study of defamation litigation, Professor Marc Franklin reported that 90\% (18 out of 20) of jury verdicts in cases reaching trial between 1976 and mid-1979 were for plaintiffs. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 AM. BAR FOUND. RESEARCH J. 455, 473. Two-thirds of these verdicts (12) were reversed on appeal. \textit{Id.} at 474. Overall, plaintiffs had a five percent (7 out of 138) success rate on appeal, as compared with a 60\% (83 out of 138) success rate for media defendants; 35\% of the appeals were remanded. \textit{Id.} at 476.

In a subsequent study Professor Franklin found that, of 24 media libel cases tried before juries from 1977 through early 1980, 20 resulted in verdicts for plaintiff. Franklin, Suing Media for Libel: A Litigation Study, 1981 AM. BAR FOUND. RESEARCH J. 795, 804. While 12 of these 20 were reversed on appeal, \textit{id.} at 806, all four jury verdicts for media defendants were affirmed on appeal. \textit{Id.} More recent studies conducted by the Libel Defense Resource Center bear out the trends noted by Franklin. LIBEL DEFENSE RESOURCE CENTER BULLETIN 1, 2, 10, 15, 16, 33, 37-39, 58 (Mar. 15, 1984) (available in the Comm/Ent Office).

One commentator attributes the willingness of defamation plaintiffs to bring suit, although their claims do not meet legal and constitutional standards set by appellate courts, to the prospect of large trial court awards. Smolla, \textit{Let the Author Beware: The Rejuvenation of the American Law of Libel}, 132 U. PA. L. REV. 1, 7 (1983). In turn, he suggests that these large awards are partly due to "an unconscious infiltration of strict liability values into the law of defamation," \textit{id.} at 24, and partly due to "anti-media bias on the part of juries." \textit{Id.} at 63. See supra notes 94-98 and infra note 120 and accompanying text.
are not being met, juries still feel that the press deserves punishment for its misbehavior. Thus, the public interest lies in encouraging the press to set stricter standards for its professional conduct. As case law has suggested, however, disclosure of self-evaluative materials may encourage potential defendants to set minimal performance goals.112

It appears that the best method of inducing fair, professional journalistic behavior is to encourage media self-regulation.113 Indeed, even the litigants in Westmoreland agreed on this point. As plaintiff’s counsel noted, “The real issue here is not General Westmoreland. It is, will the press police themselves?”114 The disagreement, then, in Westmoreland was whether disclosure or application of the SEP would better serve this goal.

B. Public Policy and the SEP

The rationale for the SEP set forth in Bredice and Banks115 is relevant to a case such as Westmoreland. Numerous affidavits were submitted to the Westmoreland court by journalists, industry executives, and their counsel, all strenuously asserting that newsgathering media self-evaluations will be discouraged by compelled disclosure.116 CBS asserted that the conclusions voiced in the Sauter Memorandum “would not have been possible if the process of arriving at them had not been confidential.”117

112. See supra note 68 and accompanying text.
113. See SHERAN & ISAACMAN, supra note 94, at 115-42 (proposing a comprehensive “unenforceable" media code of ethics, promulgated by and for journalists); see also affidavits submitted in Westmoreland (on file in the Comm/Ent Office). CBS and ABC have appointed executive vice-presidents to investigate complaints submitted by the public.
114. BRUCK, supra note 3, at 82.
115. See supra notes 34-53 and accompanying text.
116. Copies of the affidavits of Edward R. Cony (Vice-President/News, Dow Jones and Co., Inc.), Reuven Frank (President, News Division, NBC), Ernest J. Schultz, Jr. (Executive Vice-President, Radio-Television News Directors Association), Stephen E. Nevas (First Amendment Counsel, National Association of Broadcasters), Richard M. Smith (Executive Editor, NEWSWEEK), George Watson (Vice-President, ABC News), and William L. Green (Director of University Relations, Duke University) are on file in the Comm/Ent Office.
117. Defendant’s Response, supra note 19, at 8. CBS made a similar argument in contesting the admissibility of the Benjamin Report at trial. It argued that the Report was undertaken as a subsequent remedial measure and should therefore be inadmissible under Fed. R. Evid. 407. Westmoreland v. CBS, Inc., No. 82 Civ. 7913, slip op. at 2-4. The court rejected this contention, dismissing the Gilman and Bredice cases, upon
This argument went uncontroverted; instead, plaintiff's counsel argued the compelling need\textsuperscript{118} of libel plaintiffs for open discovery and the right of the public to know the true facts.\textsuperscript{119} In effect, Westmoreland contended that the news-gathering media's responsibility to the public was of utmost importance and that it could best be encouraged by facilitating libel plaintiffs' access to defendants' confidential self-evaluative reports.

The studies discussed in the previous section indicate that even if libel law effectively deters the newsgathering media from acting maliciously, it does not regulate their unfair behavior.\textsuperscript{120} Thus, the notion that making media self-evaluations available to defamation plaintiffs will somehow encourage the media to be more responsive to public standards of fairness and integrity seems questionable.

Such a conclusion is deducible without resort to statistics. Malice and lack of professionalism are two separate and independent standards for judging the performance of journalists and journalistic institutions. In a defamation cause of action, disclosure that makes it easier to show actual malice will arguably deter newsgathering media defendants from acting with malice. Disclosure, however, will not only deter malicious behavior, but will also discourage newsgathering media from vigorously investigating the more common journalistic transgressions that may not be malicious, but may be merely unfair, irresponsible, shoddy, insensitive, or unprofessional.\textsuperscript{121}

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which CBS relied, as mere "exceptions to the rule [rather than] the rule itself." \textit{Id.} at 4.
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\textsuperscript{118} Plaintiff's Reply to Defendant's Response to "Plaintiff's Reply to Defendant's Opposition to Motion to Compel Production of Benjamin Report" at 3 (hereinafter cited as Plaintiff's Response). A copy of Plaintiff's Response is on file in the Comm/Ent Office.

\textsuperscript{119} Plaintiff's Reply, supra note 21, at 8-9.

\textsuperscript{120} Sanford, \textit{Fairness and the Recent Trend in Libel Law}, Wall. St. J., Dec. 15, 1982, at 28, col. 5. Indeed, the \textit{Westmoreland} court itself recognized this distinction between unfair and malicious behavior. Noting that "[t]he \textit{fairness} of the ['Uncounted Enemy'] broadcast is not at issue in the libel suit," and that "[t]he jury would not be permitted to consider whether the publisher had acted fairly or unfairly," \textit{Westmoreland} v. CBS, Inc., No. 82 Civ. 7913, slip op. at 5 (emphasis added), the court ruled that "the extensive discussions and expressions of opinion in the Benjamin Report of fairness and related subjects" were inadmissible at trial to demonstrate legal malice. \textit{Id.} at 6. The court further held that the relevances of any violations of CBS guidelines discussed in the Report would be "far outweighed by the potential for [juror] misunderstanding, confusion and prejudice." \textit{Id.} at 6-7.

\textsuperscript{121} See supra notes 60-69 and accompanying text.
Thus, compelling discovery of self-critical analyses will lead the press to ignore such undesirable but less-than-outrageous behavior. Moreover, if self-evaluations are discouraged, disclosure will have little long-term effect on the ability of plaintiffs to prove their cases; if such studies are facile or self-serving, or are based on incomplete or false information, they are no more helpful to libel plaintiffs than no evaluations at all.\textsuperscript{122}

If one does not accept the argument that disclosure will encourage media responsibility and earnest self-evaluation, the SEP must be analyzed as any other common law privilege. Recognition of this privilege in a case such as \textit{Westmoreland} will depend on a balancing of the public interest in protecting the confidential self-analyses of newsgathering media defendants against the public interest in allowing libel plaintiffs open discovery.\textsuperscript{123}

On the one hand, there exists a particularly strong public interest in fostering \textit{candid} self-evaluation by the newsgathering media. Governmental and judicial controls cannot effectively regulate media responsibility.\textsuperscript{124} In the absence of some powerful government agency with broad investigative powers, the effectiveness with which any third party can examine the performance of a newsgatherer will be limited by the candor with which the newsgatherer examines itself. If there is to be any insightful analysis into journalistic integrity, the journalists themselves must be involved.\textsuperscript{125}

On the other hand, the plaintiff in a defamation action is asserting injury to private common law dignitary rights. While undoubtedly of great significance to the defamation plaintiff, these rights may be of less public importance than those involved in an employment discrimination suit. By definition, a victim of discrimination is injured by virtue of his or her association with a class of society rather than through his or her individual status.\textsuperscript{126} Furthermore, such a victim's cause of action rests on rights of constitutional stature, under a statute or law of national standing.

\begin{itemize}
\item \textsuperscript{122} See supra note 69 and accompanying text.
\item \textsuperscript{123} See supra notes 54-59 and accompanying text.
\item \textsuperscript{124} See supra notes 99-114 and accompanying text.
\item \textsuperscript{125} See generally Sheran & Isaacman, supra note 94.
\item \textsuperscript{126} Discrimination is "the effect of a statute or established practice which confers particular privileges on a \textit{class arbitrarily selected from a large number of persons}, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found." Black's Law Dictionary 420 (5th ed. 1979) (emphasis added).
\end{itemize}
pressed scheme of enforcement. Yet, although there is a particularly strong public policy argument for allowing discrimination plaintiffs broad discovery to develop their cases, the SEP has been recognized even for employment discrimination defendants.

An additional consideration is that much of the material that could be protected by an SEP for the newsgathering media would also fall within the attorney-client privilege and the work-product rule if the self-analysis is conducted by an attorney. Thus, if the SEP is rejected for journalist defendants, it seems likely that much of the self-analysis would be performed by attorneys rather than journalists in an attempt to circumvent discovery rules.

The resulting reports will have considerably less effect in encouraging journalistic responsibility if written by lawyers instead of journalists. A lawyer has different concerns, different training, and a different perspective than does a journalist. In effect, nonrecognition of the SEP would punish those organizations with the integrity to investigate their own professionalism before they prepare for court. Moreover, if the newsgathering media conducts its self-analysis in contemplation of litigation, it will not be performing a truly "journalistic" evaluation. In the end, it will be the public that suffers.

C. Waiver

The foregoing discussion rests on the assumption that the self-evaluation in question has been conducted in confidence. If the communications at issue in a case are not made in confidence, any rationale for maintaining their "confidentiality" is obviously not applicable, and the privilege should not attach. Accordingly, the court in Westmoreland found that, because the Benjamin Report was not confidential, there was "no occa-

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127. See supra note 53.
128. See supra notes 71-74 and accompanying text; cf. Defendants' Response, supra note 19, at 9-10 (citing In re Consumers Union, Inc., 32 Fed. R. Serv. 2d (Callaghan) 1373 (S.D.N.Y. 1981) (public interest in impartial confidential studies conducted by a non-party to the action)).
129. See supra text accompanying note 66.
130. Indeed, Sauter was under pressure to conduct CBS's in-house study through counsel. See supra text accompanying note 12.
131. See supra text accompanying notes 66, 67 and 125; see supra note 113 and accompanying text; see also Sheran & Isaacman, supra note 94, at 91 n.341.
132. See supra note 43 and accompanying text.
sion to consider whether defendants' arguments would prevail in establishing such a [self-evaluative] privilege on appropriate facts." 133 Perhaps the court wished to avoid this more controversial issue; whatever its reason for so holding, the court's conclusion that the Report lacked confidentiality does not withstand a reasoned analysis.

Westmoreland's main argument was that CBS never intended the Benjamin Report to be confidential and that it had in fact released its results through the Sauter Memorandum to its own advantage. 134 The court agreed and found further that the Sauter Memorandum "implies or states, that the Benjamin Report substantiates the conclusions of the Uncounted Enemy broadcast." 135 The court concluded that "CBS . . . [could not] at once hold out the Benjamin Report to the public as substantiating its accusations and, when challenged, decline to reveal the Report contending that it is a confidential internal study utilized solely for self-evaluation and self-improvement." 136

The court's declaration that the Sauter Memorandum relied on the Benjamin Report in standing behind the original broadcast is patently wrong. The Sauter Memorandum explicitly states that its support of the substance of the original broadcast was based on the documentation presented in the original show. 137

The Memorandum does rely on the Benjamin Report to support its conclusions with regard to journalistic practices utilized in producing "The Uncounted Enemy." This does not necessarily imply, however, that the entire Benjamin Report should be discoverable. For analytical purposes, the Benjamin Report may be divided into three elements: factual data, subjective commentary by Benjamin's sources, and Benjamin's own subjective conclusion.

The factual information contained in the Report is discoverable even under the SEP. 138 The Benjamin Report also contains numerous references to the confidential conclusions and opinions of the people Benjamin interviewed. While the Sauter

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133. Westmoreland, 97 F.R.D. at 706.
134. Plaintiff's Response, supra note 118, at 3; Plaintiff's Reply, supra note 21, at 2-3.
135. Westmoreland, 97 F.R.D. at 706.
136. Id.
137. Sauter Memorandum, supra note 11, at 3.
138. See supra text accompanying note 135.
Memorandum does refer to the interviews, nothing in it suggests that the interviews included subjective evaluations, let alone whether they support or negate Benjamin's ultimate findings. CBS asserted that while it did intend to release the results of Benjamin's study, it never intended to release the substance of these interviews. It was these communications—made to Benjamin and revealed in confidence only to those few who originally saw his Report—that CBS sought to protect.

Westmoreland could rightfully have requested access to the subjective evaluations made by Benjamin himself, as the substance of these was made public. If, however, the SEP had been held applicable, the court could have required CBS to edit the Report so as to maintain the confidentiality of those statements which were privileged.

Plaintiff's counsel anticipated this argument. Citing two federal cases, he contended that voluntary disclosure of part of a privileged communication effects a waiver of the privilege with regard to the entire communication about that subject. These cases, however, are not controlling here because the law of the forum state determined the existence of CBS's privilege in Westmoreland. Thus, New York state law should determine whether disclosure of part of the Benjamin Report resulted in a waiver with regard to any other portions of the Report.

Two relatively recent New York lower court decisions have directly held that a "partial waiver of a privilege effectively waives the entirety thereof." Neither case, however, discusses the justification for this rule or its application, but merely cites perfunctorily an earlier case, Clark v. Geraci.

In Clark, a litigant was found to have waived his patient-doctor privilege as to the nature of his illnesses by divulging the

139. Defendants' Opposition, supra note 19, at 12.
140. Defendants' Response, supra note 19, at 5.
141. See supra notes 84-85 and accompanying text.
143. Plaintiff's Motion, supra note 20, at 8.
144. FED. R. EVID. 501.
145. The Westmoreland court offered no legal precedent from any jurisdiction to justify its conclusion that CBS waived any putative privilege. 97 F.R.D. at 706.
The court apparently reasoned that, under those circumstances, the party receiving a partial disclosure would have been misled by receiving only half-truths. Indeed, the only sensible rationale for the Clark rule is that it would be unfair for a litigant to control the data available to the trier of fact or to the adverse party through selective, misleading revelation of information.

This rationale is not applicable to the Westmoreland situation. CBS did not seek to control the flow of information through selective disclosure. Any factual information in the Benjamin Report would have been available to plaintiff even if the Report had been held to be within the ambit of the SEP. Furthermore, the network had little to gain through its partial disclosure, for the subjective conclusions revealed in the Sauter Memorandum were nothing short of public self-chastisement for a job improperly done. Such disclosure cannot be said to be manipulation of the truth for strategic purposes.

This narrow reading of the Clark rule finds support in other New York cases. In Rosenstiel v. Rosenstiel, the court ruled that, in bringing an action for accounting against one's attorney, one does not waive the attorney-client privilege for all purposes; to do so “would in effect destroy this privilege.” More significantly, the New York Court of Appeals recently emphasized in In re Vanderbilt that

while it is true that the attorney-client privilege does not attach unless there is a “confidential communication” ..., this does not require that all aspects of the communication, including its topic, must be confidential to attach. Rather, the pertinent “confidence” arises from the attorney-client relationship and the privacy of the ... communication ...

The Benjamin Report contained two kinds of confidential self-evaluative communications: those between Benjamin and CBS, and those between Benjamin, as a representative of CBS, and individuals involved with “The Uncounted Enemy.” Only the former were in fact made public. Although the Sauter Memorandum disclosed that Benjamin interviewed various in-

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148. *Id.* at 793-94, 208 N.Y.S.2d at 568.
149. See infra text accompanying note 157.
151. *Id.* at 464, 251 N.Y.S.2d at 567.
153. *Id.* at 76, 453 N.Y.S.2d at 668 (emphasis added).
154. See supra note 137 and accompanying text.
dividuals regarding the program, Vanderbilt implies that this disclosure is not sufficient to destroy the confidentiality of the content of these discussions.

The SEP should not have been held waived by the Sauter Memorandum. If candid self-criticism is the goal to be fostered by the privilege, it should not be held to have been waived when the evaluating entity publicly acknowledges its mistakes.

V

Conclusion

In the long run, recognition of the SEP is more likely to encourage media self-evaluation and responsiveness to public opinion than is compelled disclosure of confidential reports. Public interest in fostering responsible journalism militates for providing such encouragement to the media, while the public interest in facilitating libel actions is relatively weak. Therefore, the benefits of protecting the confidential sources, which form the basis of voluntary media involvement, outweigh the potential harms to libel plaintiffs that may result from nondisclosure. Thus, the privilege for confidential self-evaluative memoranda should be extended to newsgathering media defendants in defamation cases.

The SEP, however, should be subject to the same limitations that have been recognized in other cases. Therefore, only subjective conclusions and opinions should be protected, not facts. The privilege should not be invoked to avoid an administrative agency subpoena. And lastly, an SEP for media defendants should apply only to retrospective studies of institutional procedures. In effect, ongoing editorial procedures would not be within the ambit of the privilege.

The value in granting a self-evaluative privilege to the newsgathering media lies in encouraging them to be more respon-

155. See supra notes 116-22 and accompanying text.
156. See supra notes 123-32 and accompanying text.
157. See supra text accompanying notes 81-83.
158. See supra note 86 and accompanying text.
159. See supra text accompanying note 92.
sive to public standards of quality and sensitivity.\textsuperscript{161} It is antithetical to this value to punish those newsgathering organizations that publicly take responsibility for their mistakes.\textsuperscript{162} Therefore, an acknowledgement that a self-analysis will be conducted and that the general conclusions of the study will be released should not be deemed to destroy the confidentiality of the communications that made the study possible.

\textsuperscript{161} See supra notes 94-131 and accompanying text.
\textsuperscript{162} See supra notes 142-54 and accompanying text.