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Let Them Learn: Recognizing and Codifying a Design-Build Self-Critical Analysis Privilege in Texas

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LET THEM LEARN: RECOGNIZING AND CODIFYING A DESIGN-BUILD SELF-CRITICAL ANALYSIS PRIVILEGE IN TEXAS

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Abstract

Organizations often conduct probing self-studies to review internally existing policies, procedures, and business methods. Yet, despite an increasing social need for these studies, the Texas legislature has yet to construct a privilege designed to protect an organization from being harmed from these studies by adverse litigants. The self-critical analysis privilege, or SCAP, is an alluring, common law doctrine that protects the free flow of information sharing through an organization's self-assessment. This Comment proposes a model statute for the codification of the SCAP for the consideration of the Texas legislature. This model statute is not a general codification of the privilege. Instead, the statute is meant to apply only to Texas's Design-Build industry. This Comment discusses the significant policy considerations supporting the SCAP and analyzes case law to derive proper drafting language. Although this proposed model statute narrowly applies to Texas's Design-Build industry, the hope is to have a workable statute that could apply to general products, oil and gas, and other property related industries.

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I. INTRODUCTION

In Texas, the scope of discovery covers "any matter that is not privileged and is relevant to the subject matter of the pending action."[1] This means any conclusory opinions based on internal investigations are discoverable.[2] Enter the Self-Critical Analysis Privilege ("SCAP"), which shields the "opinions and recommendations of corporate employees engaged in the process of critical self-evaluation for the purpose of improving health and safety."[3]

The SCAP may be one of the most misunderstood common law protections.[4] It has applied very narrowly to hospital committee reports, certain business investigation reports, and some Title VII

1. TEX. R. CIV. P. 192.3(a).
2. *See generally The Privilege of Self-Critical Analysis*, Note, 96 HARV. L. REV. 1083, 1083 (1983).
3. Felder v. Wash. Metro. Area Transit Auth., 153 F. Supp. 3d 221, 224–25 (D.D.C. 2015).
4. Hardy v. N.Y. News Inc., 114 F.R.D. 633, 641 (S.D.N.Y. 1987) (applying the privilege to certain communications only after noting that "several courts have raised serious questions about [its viability]").

actions.[5] Largely, courts refuse to acknowledge the existence of the SCAP outright.[6] This Comment argues that the SCAP should be adopted in Texas to allow businesses to candidly make improvements in the quality and safety of goods and services.

The premise of this Comment's argument is that businesses do not have the appropriate incentives to take the steps to improve themselves absent the SCAP.[7] But this Comment does not argue for, as others have, a broad SCAP statute applicable to all industries.[8] Rather, this Comment urges an adoption of the SCAP solely to those internal reports used in the Texas architecture and construction ("Design-Build") industry.

Although there are many benefits to having the SCAP, this Comment understands a wide adoption would likely not be feasible in light of the significant policy concerns other scholars have rightly pointed out.[9] These concerns impacted the decision to narrow the SCAP to the Design-Build industry. The hope, however, is that the SCAP's success in the Design-Build industry will eventually be adopted to the products-liability, oil and gas, or other property related industries in Texas.

Fortunately, Texas's Design-Build industry presents ample ground for development and would massively benefit from the SCAP.[10] As shown in Part II of this Comment, the Design-Build industry is adopting "lessons-learned" policies to create safe and innovative work environments inside and outside of the field.[11] These lessons-learned policies effectuate the same policy rationales underlying the SCAP.[12]

Part III will compare and contrast the federal and Texas privilege laws to derive guidance and support for a proposed statute.[13] For reasons discussed in Part III, the Texas Legislature must codify the SCAP.[14] As such, this Comment will also discuss various

5. *The Privilege of Self-Critical Analysis*, *supra* note 2, at 1090–91.
6. *Id.* at 1091.
7. *See generally* David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988).
8. *Id.*
9. *See, e.g.*, *The Privilege of Self-Critical Analysis*, *supra* note 2, at 1091.
10. *See infra* Part II.
11. *Id*.
12. *See infra* Part II–III.
13. *See infra* Part III.
14. *Id*.

approaches the language of a proposed SCAP statute could take. Part IV will discuss the SCAP in detail and explore its application in a myriad of industries, drawing important lessons from case facts and court rationales.[15] Part V will discuss the ineffectiveness of other privileges to further the needs of Texas's Design-Build industry.[16] Finally, Part VI and VII will conclude with the proposed statute, using the rationales developed throughout this Comment.[17]

II. TEXAS DESIGN-BUILD INDUSTRY AND LESSONS-LEARNED POLICIES

In 2018, Texas contributed roughly $1.8 trillion to the total U.S. gross domestic product ("GDP") of $20.6 trillion.[18] Texas Design-Build projects contributed $94.2 billion (approximately 5.3% of Texas GDP).[19] In 2019, the Dallas-Fort Worth metroplex was the second-busiest building market in the country, totaling $22.5 billion.[20] Only New York City had more total construction.[21] Astoundingly, this was the fourth year in a row north Texas construction broke $20 billion, with nonresidential commercial projects rising 14% from 2018.[22]

As with most booming industries, the estimated cost of industry-related litigation is expected to rise.[23] There are two main reasons why litigation expenses may rise in Texas. First, Texas has a horrid reputation for construction worker safety.[24] The payout for these types of claims can rise to astronomical levels; for example, a

15. *See infra* Part IV.
16. *See infra* Part V.
17. *See infra* Part VI–VII.
18. Ken Simonson, *The Economic Impact of Construction in the United States and Texas*, ASS'N GEN. CONTRACTORS AM. (Sept. 17, 2019), https://www.agc.org/learn/construction-data/state-fact-sheet [https://perma.cc/39GD-JP2N].
19. *Id.*
20. Steve Brown, *Dallas-Fort Worth's Construction Boom Ranks Second Nationally in 2019*, DALL. MORNING NEWS (Feb. 11, 2020, 5:14 AM), https://www.dallasnews.com/business/real-estate/2020/02/11/d-fw-was-a-top-us-market-for-construction-in-2019/ [https://perma.cc/HE2E-Q8XU].
21. *Id.*
22. *Id.*
23. Jeffrey Kozek, *Five Construction Litigation Trends for 2019*, THE BUILDER ONLINE: BLOG (Jan. 3, 2019) https://www.builderonline.com/building/five-construction-litigation-trends-for-2019 [https://perma.cc/5253-DCVR].
24. *See* Gus Bova, *Texas Workers Are Dying on the Job at Alarming Rates*, TEX. OBSERVER (July 22, 2019, 6:00 AM), https://www.texasobserver.org/texas-workers-are-dying-on-the-job-at-alarming-rates/ [https://perma.cc/TE2B-93LD].

Texas jury awarded a construction worker $44 million in damages in connection with injuries that he sustained while working.[25] Second, the overall number of construction defect cases has exploded for the past two decades and will no doubt cause many more claims in Texas.[26] This will be especially true because many Design-Build contractors are hiring less experienced workers whose work often results in defect claims.[27]

Adoption of lessons-learned policies could prevent the causes of increased litigation expenses.[28] The idea of these policies is simple: Like individuals, business organizations cannot afford to keep making the same mistakes again and again.[29] Businesses, however, cannot readily collect, analyze, store, disseminate, and reuse previously acquired knowledge from their memories as an individual can.[30] This is because human memory reflects the individual's natural ability to gain, store, and retrieve knowledge.[31] Whereas, organizational memory refers to the *collective* ability to accumulate, store, and retrieve knowledge.[32]

As such, organizational memory relies on employee experience and knowledge.[33] Without a repository to store collective knowledge, the organizational memory may vanish through employee turnover.[34] In an attempt to preserve and maintain organizational

25. John Chapman, *Houston Construction Worker Awarded $44 Million Verdict for Leg Amputation Caused by Crane Accident*, HEYGOOD, ORR, & PEARSON (May 15, 2015), https://www.hop-law.com/houston-construction-worker-awarded-44-million-verdict-leg-amputation-crane-accident/ [https://perma.cc/B7CU-G3ZH].

26. *See generally* Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 REAL PROP. TR. & EST. L.J. 729 (2009).

27. Kozek, *supra* note 23.

28. *See generally* Ximena Ferrad et al., *A Lessons-learned System for Construction Project Management: A Preliminary Application*, 226 PROCEDIA - SOC. & BEHAV. SCI. 302, 303 (2016).

29. Stephanie A. Trevino & Vittal S. Anantatmula, *Capitalizing from Past Projects: The Value of Lessons Learned*, PROJECT MGMT. INST. (July 16, 2008), https://www.pmi.org/learning/library/business-benefits-value-lessons-learned-7116 [https://perma.cc/X7H3-9H73].

30. *Id.*

31. *Organizational Memory – Definition and Meaning*, MKTG. BUS. NEWS, https://marketbusinessnews.com/financial-glossary/organizational-memory-definition-meaning/ [https://perma.cc/KWK4-WLEP] (last visited May 18, 2019).

32. *Id.*

33. *Id.*

34. *Organizational Memory*, BUS. DICTIONARY, http://www.businessdictionary.com/definition/organizational-memory.html

memory and to prevent reinventing the wheel regarding projects with overlapping characteristics, businesses are implementing lessons-learned policies.[35] These policies allow the business to improve and reduce costs by learning from past projects and incorporating those lessons into new projects or policies.[36]

The practice of capturing and archiving knowledge is not new.[37] The concept of lessons-learned, however, has evolved into a formal and structured management practice.[38] In general, the practice requires two essential activities: capturing important lessons from projects and making effective use of them.[39] As such, lessons-learned policies often require businesses to document both the success and failures of a project.[40]

The Design-Build sector is a prime field for the adoption of lessons-learned policies.[41] Design-Build companies are project-based organizations, because much of their knowledge is generated on site from projects they carry out.[42] Projects are an important source of expert know-how and organizational knowledge.[43] As such, the Design-Build industry is actively attempting to incorporate lessons-learned policies into the business model.[44]

In essence, lessons-learned policies in the Design-Build industry are a way for companies to learn from their mistakes and take the steps necessary to prevent worker harm or construction defects. As these are the main reasons why costs of litigation will increase, the industry should feel free to implement lessons-learned policies without fear of their conclusions being discovered. As will be explored below, the primary rationale underlying the SCAP is to prevent the "chilling effect of disclosure."[45] Thus, the industry seems to be in the

[https://perma.cc/7MV2-4FWR] (last visited Oct. 20, 2019).

35. Trevino & Anantatmula, *supra* note 29.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Ferrad et al., *supra* note 28, at 305.
42. *Id*. at 302.
43. *Id.*
44. *Id*. at 303.
45. Josh Jones, *Behind the Shield? Law Enforcement Agencies and the Self-Critical Analysis Privilege*, 60 WASH. & LEE L. REV. 1609, 1638–39 (2003) (citing Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 382 (N.D. Ga. 2001)).

best position to benefit from the SCAP as it is attempting to use self-disclosure to improve services for others.

III. THE LANDSCAPE OF PRIVILEGES

Privileges "reflect societal choices that certain relationships or activities (such as seeking legal or medical advice) should be valued above others."[46] "[S]ociety needs privileges because in their absence, individuals will be discouraged from engaging in certain socially desirable behavior."[47] For example, the attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law."[48] Its purpose is to encourage full and frank communication between attorneys and their clients, thus promoting broader public interests in the observance of law and the administration of justice.[49]

Yet, there are clear reasons against adopting privileges. As Justice Scalia noted, "justice . . . is severely harmed by contravention of 'the fundamental principle that "the public has a right to every man's evidence."'"[50] As such, "[privileges] are not lightly created . . . for they are in derogation of the search for truth."[51] This conflict between the need for privileges and the need for compulsory disclosure demonstrates how arguments for new privileges, such as the SCAP, should be well-reasoned and account for the right to every man's evidence as well as incentives to encourage socially desirable behavior.

This Comment analyzes arguments for and against adopting the SCAP in Texas. First, this Comment discusses the federal rules covering privileges; this discussion highlights the benefits of a flexible common-law-based system of privileges. Second, this Comment reviews the legal landscape of privileges in Texas. In doing so, this

46. Pam Jenoff, *The Case for Candor: Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569, 576 (2011).

47. *Id.* at 577.

48. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

49. *Id.*

50. Jaffee v. Redmond, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (3d ed. 1940)).

51. United States v. Nixon, 418 U.S. 683, 710 (1974).

Comment will explain how the SCAP can be adopted and why it should be adopted.

A. *Federal Rules on Privileges*

Under the Federal Rules of Civil Procedure ("FRCP"), "[p]arties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense and proportional to the needs of the case."[52] Thus, the question becomes: Which matters are privileged, and which matters are nonprivileged? Federal Rule of Evidence ("FRE") 501 answers: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege."[53] The language of the rule shows that "Congress turned its back to the idea of codified privileges and decided that its evolution will be governed largely by federal common law."[54]

In addition to the rule's plain language, the legislative history of FRE 501 shows the intent to support the development of common law privileges.[55] To start, the original FRE Article V proposal to Congress contained thirteen rules.[56] In its original form, Article V bound the courts to honor nine different non-constitutional privileges.[57] These nine privileges protected government-required reports, lawyer-client conversations, psychotherapist-patient conversations, husband-wife conversations, communications to clergymen, political vote privacy, trade secrets, secrets of state and other official information, and the identity of informers.[58] Further, in its original form, Article V bound the federal courts to only recognize the privileges laid out in Article V or specified by Congress.[59]

Yet, the committee amended Article V to eliminate most of the specified privileges.[60] Instead, the finalized Article V turned solely into FRE 501, leaving United States courts to develop the law of

52. FED. R. CIV. P. 26(b)(1) (emphasis added).
53. FED. R. EVID. 501.
54. PAVEL WONSOWICZ, EVIDENCE: A CONTEXT AND PRACTICE CASEBOOK 494 (Michael H. Schwartz et al. eds., 2d ed. 2017).
55. *Id.*
56. FED. R. EVID. 501 advisory committee notes to 1974 enactment.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

privileges.[61] The advisory committee justified this position in response to psychiatric organizations arguing against the deletion of one of the nine aforementioned privileges—the privilege on psychotherapist-patient relationships. Here, the advisory committee declared:

> [I]n approving [FRE 501], the action of Congress should not be understood as disapproving any recognition of . . . any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege . . . *should be determined on a case-by-case basis*.[62]

In *Jaffee v. Redmond*, the Supreme Court found FRE 501 did not freeze the law governing privileges of witnesses but instead directed federal courts to "continue the evolutionary development of testimonial privileges."[63] In *Jaffee*, the Court addressed the issue of whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence."[64] The Court applied "reason and experience" in accordance with FRE 501, finding the standard promoted the idea that "the common law is not immutable but flexible."[65] In doing so, the Court upheld the decision to protect the notes concerning a patient and her therapist, thus crafting a privilege within the federal common law.[66]

Further, FRE 501 recognizes the need for individual states to develop their own rules on privileges. FRE 501 states, "in civil cases, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[67] The advisory committee notes the rationale of this provision is that "federal law should not

61. *Id.* (FRE 502 was later added in 2007 specifying the attorney-client and work-product privileges).
62. *Id.*
63. Jaffee v. Redmond, 518 U.S. 1, 8–9 (1996) (citing Trammel v. United States, 445 U.S. 40, 47 (1980)).
64. *Id.* at 9–10.
65. *Id.* at 8.
66. *Id.* at 10.
67. FED. R. EVID. 501.

supersede that of the states in substantive areas such as privilege."[68] Further, there is no federal interest strong enough to justify departure from state policy.[69]

B. *Texas Rules on Privileges*

Texas holds a stricter, less flexible approach than the federal framework, resembling the original FRE Article V proposal.[70] Texas intermediary courts are prohibited from recognizing and creating common law privileges.[71] In fact, Texas Rule of Evidence ("TRE") 501 explicitly states that no privilege shall be recognized unless it derives from "a Constitution, a statute, . . . or other rule[] prescribed under statutory authority."[72] Texas seems to have adopted this strict approach with the recognition that "privileges expressly subordinate [the] goal of truth-seeking to other societal interests."[73]

Some Texas lawyers argue the state should adopt the federal approach or, at the least, recognize privileges already established under the federal common law. For example, *In re Andrew Silver* involved a contract dispute relating to the "Ziosk."[74] This device allowed restaurant patrons to order meals, play games, and pay checks at a dining table.[75] The court inquired into whether the trial court abused its discretion by failing to adopt the patent-agent privilege.[76] At the time, the patent-agent privilege was recently recognized by the federal courts.[77] The court noted federal courts hold the ability to expand and create privileges under FRE 501, however, no court in Texas holds such ability.[78] Citing additional rationale against privileges, the court refused the patent-agent privilege.[79]

68. FED. R. EVID. 501 advisory committee's notes to 1974 enactment.
69. *Id.*
70. TEX. R. EVID. 501 *et seq.*
71. TEX. R. EVID. 501; *In re* Silver, 500 S.W.3d 644, 646 (Tex. App.—Dallas 2016, no pet.).
72. TEX. R. EVID. 501.
73. Ludwig v. State, 931 S.W.2d 239, 242 (Tex. Crim. App. 1996) (citing Trammel v. United States, 445 U.S. 40, 51 (1980)).
74. *Silver*, 500 S.W.2d at 642.
75. *Id.* at 645.
76. *Id.* at 646.
77. *Id.* at 645–46; *In re* Queen's Univ., 820 F.3d 1287, 1296 (Fed. Cir. 2016).
78. *Silver*, 500 S.W.2d at 646.
79. *Id.* at 647.

Although there is a ban against judge-made privileges, Texas has still managed to create numerous privileges through the legislature alone. Some people have even commented the Texas Legislature "seems perpetually bent on creating more statutory privileges."[80] Yet, because of Texas's recodification process, these privileges are incredibly difficult to piece together without the proper sources because they are scattered about varying subject-matter codes, causing many litigants to default to only those privileges found in the TRE.[81]

For example, many researchers will look to the Health and Safety Code to find the "medical committee" and "peer-review" privileges.[82] In that code, the researcher will find the section stating medical committees' records and proceedings are confidential and not subject to a court subpoena.[83] Without the proper research or practice guide, the researcher will likely miss the applicable exception to the privilege found in the Occupation Code, stating the privilege will not apply to civil rights or anticompetitive actions.[84] This dilemma has caused some to say, "finding any sort of privilege within the codes is as easy as finding a needle in a haystack."[85] This complicated privilege scheme, in turn, causes some of these privileges to generate a fair amount of litigation,[86] while others are lost in the statutory thicket.[87]

Further, Texas limits the use of privileges by incorporating the offensive use doctrine into its law.[88] The concept of the doctrine is that evidentiary privileges are meant to be used as shields, not swords.[89] Under the offensive use doctrine, a party seeking affirmative relief may not use a privilege to prevent an opposing party from discovering

80. STEVEN GOODE & OLIN G. WELLBORN III, GUIDE TO THE TEXAS RULES OF EVIDENCE—TEXAS PRACTICE SERIES § 501.1 (4th ed.), Westlaw (database updated May 2019).

81. Ellen Desrochers, *That's Privileged! Or Is It?: Uncovering Lost Privileges and Exceptions in Texas Codes*, 47 TEX. TECH L. REV. ONLINE EDITION 1, 2 (2014).

82. TEX. HEALTH & SAFETY CODE ANN. §§ 161.031–.033.

83. § 161.032.

84. TEX. OCC. CODE ANN. § 160.007.

85. Desrochers, *supra* note 81 at 21.

86. GOODE & WELLBORN, *supra* note 80.

87. Desrochers, *supra* note 81 at 5.

88. William V. Dorsaneo III, Texas Litigation Guide § 90.06, LEXIS (database updated March 2020).

89. *Id.*

outcome-determinative information regarding the nature of the claim.[90]

Thus, it appears Texas has imposed its own measures to limit the use of privileges. By refusing the federal approach and vesting the power to create privileges largely with the legislature, privileges are not allowed to freely and flexibly develop under Texas common law principles. And although the legislature has created numerous privileges, it has scattered them throughout a complex system of subject-matter codes rendering it increasingly difficult for litigants to use them.

C. *Fitting into the Texas Framework*

As discussed above, the Texas and federal landscapes differ as to the development of new privileges.[91] The federal system allows the development of privileges through the courts in light of reason and experience.[92] Whereas, Texas prohibits the creation of court-crafted privileges, vesting the power to create and recognize privileges largely with the legislature.[93] The SCAP developed under the federal system.[94] Thus, the rationales supporting the SCAP found in the federal court system will not be enough to support its creation in the Texas system because they were expounded under a framework supporting flexibility.

So, what Texas-specific policy considerations can be added to the rationales originally supporting the SCAP? Recall the dilemma explored above concerning the numerous statutory privileges found in Texas.[95] The sheer number of privileges in Texas does not necessarily mean the state legislature acts in similar accordance to the courts in the federal system. But consider the following: Texas recognizes a chiropractor-patient privilege, a podiatrist-patient privilege, and a veterinarian-patient privilege.[96] These privileges evidence the legislature's willingness to adopt many privileges *so long as* they are

90. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 107–08 (Tex. 1985).
91. *See* discussion *supra* Part III.A.
92. FED. R. EVID. 501.
93. *See* discussion *supra* Part III.B.
94. *See infra* Part IV.
95. *See supra* Part III.B.
96. GOODE & WELLBORN, *supra* note 80, at § 501.1.

narrow in application. For this reason, a proposed codification of the SCAP will work if it is confined to the Design-Build industry.

Further, recall the issue discussed above concerning the medical peer-review privilege.[97] There, a privilege exception was found within the Texas Occupation Code, despite the fact that the privilege was placed in the otherwise appropriate Health and Safety Code.[98] The exception to the peer-review privilege disallowed the privilege in civil rights or anticompetitive actions.[99] From this example, one can see an additional policy consideration that will support the adoption of the SCAP. The SCAP should be flexible and incorporate, or be designed to incorporate, exceptions found in different subject-matter codes.

This seems fitting for a privilege designed solely for the Design-Build industry because many of Texas's construction and architecture statutes are already scattered about different subject-matter codes.[100] Many of these laws reflect specific requirements for certain types of Design-Build projects one can undertake.[101] With construction and architecture statutes being strewn about the varying subject-matter codes, the SCAP would be readily capable of working with and across different codes.

Finally, additional policy support comes from those Texas privileges already in place. The state legislature recognizes the need for doctors to be evaluated without fear such evaluations will lead to litigious recourse. This is recognized through the medical peer-review privilege, as referenced above. The medical peer-review privilege "extends to the committee's initial and subsequent credentialing decisions, as well as documents 'generated' by a committee or 'prepared by or at the direction of the committee for committee

97. *See* discussion *supra* Part III.B.
98. *Id.*
99. *Id.*
100. For construction *see* TEX. PROP. CODE §§ 53.202 & 53.284; TEX. INS. CODE § 151.102–.104; TEX. BUS. & COM. CODE § 272.001. For architecture *see* TEX. OCC. CODE ANN. §§ 1051.001–.801 (Architecture Practice Act); TEX. PROP. CODE § 201.011; TEX. GOV. CODE § 2166.408.
101. *See* TEX. GOV. CODE § 311.023; TEX. EDUC. CODE § 44.038; TEX. BUS. & COM. CODE § 17.44 *et seq.* (Texas Residential Construction Liability Act).

purposes.'"[102] The underlying rationales of the medical peer-review privilege are practically the same as the SCAP.[103]

Similarly, Texas recognizes another statutory privilege to shield the collection, compilation, and analysis of nursing home care.[104] This "nursing home" privilege also incorporates a peer-review mechanism.[105] In fact, this peer-review requirement led to the court's decision in *Capital Senior Mgmt. 1, Inc. v. Tex. Dep't of Hum. Servs*.[106] There, the operator of a nursing home sued Human Services to prevent disclosure of information regarding the nursing home.[107] The documents included investigations regarding complaints of abuse and neglect.[108] The court held the operator did not engage a *deliberate* peer-review and simply gave the documents to Human Services as required.[109] Because of the lack of deliberate peer-review, the court allowed Human Services to disclose the information.[110]

With Texas's peer-review privileges in mind, a statute for the SCAP should specify that *deliberate* communications are protected. Like the peer-review privileges mentioned above, the deliberateness of the communication ultimately dictates whether the SCAP will attach or not. The state legislature can readily include this requirement in a proposed statute. As discussed below, this requirement would also square nicely with previous decisions interpreting the SCAP's applicability in certain situations.

102. Zenith Ins. v. Texas Inst. for Surgery, 328 F.R.D. 153, 163 (N.D. Tex. 2018) (citing *In re* Memorial Hermann Hosp. Sys., 464 S.W.3d 686, 698–700 (Tex. 2015)).

103. Richard L. Kaiser, *The Self-Critical Analysis Privilege for Products Liability: What Is It, And How Can It Be Achieved in Wisconsin?*, 1999 WIS. L. REV. 119, 120 (1999).

104. TEX. HEALTH & SAFETY CODE ANN. § 242.049(d)–(e).

105. Capital Senior Mgmt. 1, Inc. v. Tex. Dep't of Hum. Servs., 132 S.W.3d 71, 79 (Tex. App.—Austin 2004, no pet.).

106. *Id.*

107. *Id.* at 73.

108. *Id.* at 75.

109. *Id.* at 79.

110. *Id.*

IV. THE SELF-CRITICAL ANALYSIS PRIVILEGE

A. *Development*

As stated above, Congress did not intend to "freeze the law of privilege."[111] Instead, FRE 501 provided the courts with "the flexibility to develop rules of privilege on a case-by-case basis," and "leave the door open for change."[112] This flexibility allowed the federal system to recognize the SCAP.[113]

The SCAP "is designed to protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company's policies for the purpose of improving health and safety."[114] In essence, the SCAP "seeks to encourage candid self-criticism," and "prevent[s] a 'chilling' effect on self-analysis and self-evaluation prepared for the purpose of protecting the public by instituting practices assuring safer operations."[115] Thus, the SCAP is based on the rationale that society benefits when a party's employees engage in critical evaluations of the party's conduct, unfettered by the fear that such comments may be discoverable and used adversely.[116]

The SCAP was first recognized in *Bredice v. Doctors Hosp*. during a medical malpractice suit.[117] The court in *Bredice* denied access to the minutes and reports of a hospital staff meeting, stating that "[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded."[118] The D.C. Circuit Court affirmed the *Bredice* decision without opinion.[119] Thus, the SCAP generally

111. Trammell v. United States, 445 U.S. 40, 47 (1980).
112. *Id.* (citations omitted) (quoting Cong. Rec. 40891 (1974)).
113. MaryAnn Joerres, *Privileges and the Oil Patch*, 18TH ANNUAL ADVANCED OIL, GAS AND MINERAL LAW COURSE, CH. 6, 14 (2000), http://www.texasbarcle.com/Materials/Events/2137/47843_01.pdf [https://perma.cc/N7DF-HBSL].
114. Felder v. Wash. Metro. Area Transit Auth., 153 F. Supp. 3d 221, 224–25 (D.D.C. 2015) (citing Granger v. Nat'l R.R. Passenger, 116 F.R.D. 507, 508 (E.D. Pa. 1987)).
115. *Id.* at 225 (citing FTC v. T.R.W., Inc., 628 F.2d 207, 210 (D.C. Cir. 1980)).
116. *Id.* (citing Bradley v. Melroe Co., 141 F.R.D. 1, 3 (D.D.C. 1992)).
117. 50 F.R.D. 249 (D.D.C. 1970).
118. *Id.* at 251.
119. Joerres, *supra* note 113, at 14.

applied to records containing internal evaluations that, if produced, would impede the candid discussion of ideas.[120]

The extension of the SCAP beyond the medical malpractice area is slow and often narrowly drawn.[121] Some federal courts adopt the SCAP in a limited capacity while others have never even heard a case concerning its application.[122] Generally, it appears courts are increasingly unreceptive to the SCAP.[123] Some courts have even held, "it is unclear whether a federal self-critical analysis privilege exists" because of its inconsistent success rate among the various circuit courts.[124]

Indeed, the Northern District of Texas merely referenced the SCAP when attempting to balance the value of making documents and communications discoverable with the corporation's interest in self-investigation and preparation for litigation.[125] The Fifth Circuit also refused to recognize the SCAP when a government agency sought certain documents.[126] However, in that case, the Fifth Circuit declined to rule whether the SCAP may be recognized under different circumstances.[127]

Despite the utter lack of enthusiasm, jurisdictions have successfully applied the SCAP in a variety of contexts: such as workplace safety, products liability, legal compliance for pharmaceutical companies, police department safety reviews, securities litigation, and libel.[128] Additionally, many states have adopted statutes in some form of the SCAP in a narrowed and particular capacity.[129] For example, most states utilize a peer-review system for hospital incident reports.[130] One thing is certain, however,

120. *Id*.
121. *See id.* at 14.
122. *Id.*
123. CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION §§ 6.01 FN 1, 6.03 LexisNexis (database updated May 2019) (The SCAP is also known as self-evaluation privilege, self-evaluative privilege, or the privilege of self-critical evaluation).
124. *Id.*
125. *In re* LTV Secs. Litig., 89 F.R.D. 595, 621 n.22 (N.D. Tex. 1981).
126. *In re* Kaiser Aluminum & Chem. Co., 214 F.3d 586, 593 (5th Cir. 2000).
127. *Id.*
128. CORPORATE PRIVILEGES AND CONFIDENTIAL INFORMATION, *supra* note 123, at § 6.01.
129. Kaiser, *supra* note 103, at 120.
130. *Id.*

the SCAP is limited to evaluations and does not protect the underlying facts.[131]

B. *Specific Circumstances and Uses*

Case law can be a valuable tool to understanding potential paths a proposed statute could take. Fortunately, the SCAP has been found to apply in multiple industries—despite the small rate of use. Using these cases, this Comment hopes to find key language and approaches that a proposed statute could utilize.

1. Government Reports

Recently, the United States District Court for the District of Massachusetts addressed the applicability of the SCAP in the context of government-mandated reports.[132] In *Block Island Fishing, Inc.*, a lobster fishing boat crashed into a tanker.[133] The owner of the fishing boat filed suit, seeking a determination limiting his liability.[134] More importantly, however, the owner of the tanker asserted the SCAP to exclude deposition testimony evidencing the conclusions of a post-accident investigation report.[135] This report was mandated as part of an international treaty.[136]

Adopting the four-part test outlined in *O'Connor v. Chrysler Corp.*, the court found the SCAP applied.[137] Under the *O'Connor* four-part test, or "potential guidepost" for application, the SCAP applies when: (1) the materials are made pursuant to a mandatory government report; (2) its application is limited to only subjective, evaluative materials; (3) its application does not protect objective data in those same reports; and (4) the requesting party's need for such materials does not outweigh the need for protection.[138] The court

131. *Id.* at 125.
132. Kelly J. Bundy, *The Self-Critical Analysis Privilege: Under Construction or Built on Shaky Ground?*, AMERICAN BAR ASSOC. (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/self-critical-analysis-privilege/ [https://perma.cc/KUZ5-3LXS].
133. 323 F. Supp. 3d 158, 160 (D. Mass. 2018).
134. *Id.*
135. *Id.*
136. *Id.* at 162.
137. *Id.*
138. *Id.* at 161 (citing O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217 (D. Mass. 1980)).

allowed the privilege to stand, finding the post-accident report satisfied the four-part test.[139] That the report was part of a mandated international treaty, thus satisfying the first prong, was likely dispositive to the SCAP's applicability.[140]

The case is useful for discovering a potential, albeit very limited, pathway the proposed statute could take. The statute could be written to conform with the four-part test outlined in *O'Connor*, protecting only internal investigations compelled by the government. This path could limit the potential cost of litigation in workplace or accident lawsuits, but the goal of the SCAP is to allow for internal assessment for the sake of self-improvement. A statute protecting only mandated investigations and reports would not protect ordinary cost-saving measures such as lessons-learned reports and would require the government to determine what is worth improving—not the Design-Build company.

2. Environmental Compliance

The United States District Court for the Northern District of Florida addressed the applicability of the SCAP in the context of a chemical company's environmental compliance reports.[141] In *Reichhold Chems., Inc. v. Textron, Inc.*, the court extended the privilege to retrospective environmental reports.[142] The reports analyzed past conduct, practices, and occurrences relating to past pollution.[143] The court noted a strong public interest in promoting the voluntary identification and remediation of industrial pollution because pollution poses a serious public health risk.[144]

Fortunately, the Texas Environmental Health and Safety Audit Privilege Act provides an environmental "audit report" is privileged.[145] This "audit report" essentially would allow a business to protect the same type of report protected in *Reichhold Chems.* without the need for an additional SCAP statute.[146] As such, Texas has welcomed the court's conclusion that environmental compliance can

139. *Id.* at 162–63.
140. *Id.*
141. Reichhold Chems. v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994).
142. *Id.*
143. *Id.* at 527.
144. *Id.* at 526.
145. TEX. HEALTH & SAFETY CODE ANN. §§ 1101.001, .101 (2019).
146. *Id.*

be readily incentivized by the SCAP. As such, this Comment posits *Reichhold Chems.* stands for the general proposition that a business should be allowed to evaluate compliance with the law on the whole, rather than simply allowing businesses to assess compliance with environmental regulations.[147]

In the Design-Build context, compliance with other laws could save an enormous amount of resources because the industry is subject to a plethora of safety regulations.[148] For example, construction workers must adhere to strict safety-harness regulations.[149] Absent an accident, it would still be in the best interest of a company to internally investigate safety-harness use to ensure everyone utilized the correct rope length, buckles, or weight class. If, by a miracle, no accident occurred but the company found many workers violated the regulations, the company would be allowed to take the steps necessary to be legally compliant and ensure safety for their workers.

3. Product Liability

The D.C. District Court applied the SCAP in the context of a product liability suit.[150] In *Bradley v. Melroe Co.*, the plaintiff sought to compel reports resulting from the product makers internal investigations.[151] The reports concerned seven different accidents involving the same product, which allegedly harmed the plaintiff.[152] When analyzing the applicability of the SCAP, the court took special care to frame the important steps the company took to investigate the accidents.[153]

First, the court found the company routinely and deliberately investigated the accidents for the purposes of ascertaining whether preventative measures could be taken.[154] Second, the court succinctly explained the type of information that could be protected under the

147. *Reichhold Chems. Inc.*, 157 F.R.D. at 524.
148. *OSHA – Workplace Safety and Health Requirements*, TEX. WORKFORCE COMM'N, https://www.twc.texas.gov/news/efte/osha.html [https://perma.cc/WP5D-PYP6] (last visited Oct. 20, 2019).
149. Eric Duncan, *OSHA Safety Harness Requirement*, LEGAL BEAGLE (Oct. 25, 2017), https://legalbeagle.com/13635666-osha-safety-harness-requirement.html [https://perma.cc/92PZ-TC2X].
150. Bradley v. Melroe Co., 141 F.R.D. 1, 3 (D.D.C. 1992).
151. *Id.* at 1.
152. *Id.*
153. *Id.* at 2.
154. *Id.*

SCAP as mental impressions, opinions, theories, recommendations, and evaluations.[155] Finding the reports were of this same nature, the court concluded the SCAP was applicable, resting its conclusions on the motivating public policy rationales previously mentioned.[156]

Additionally, the court took special care to define the nature of the SCAP.[157] By comparing the SCAP to the work product doctrine, the court held it was a qualified privilege.[158] Thus, the SCAP applied subject to the traditional test for qualified privileges at the federal level wherein the requesting party must show substantial need.[159] Ultimately, there was not a showing of substantial need in this case.[160] However, the court concluded the underlying facts present in the reports warranted partial disclosure.[161] Even still, the court ordered all mental impressions, opinions, theories, recommendations, and evaluations redacted.[162]

The specific lessons to be drawn from this case reinforce what the actual protections should be: mental impressions, opinions, theories, recommendations, and evaluations. A statute should use this language directly when determining the SCAP's scope. The *Bredice* court and the *O'Connor* court essentially upheld the SCAP as a qualified privilege as well. In *Bredice*, the court stated that an injured party could show "extraordinary circumstances" amounting to good cause to permit disclosure.[163] As such, regardless of the approach the statute should take, the SCAP for Design-Build companies should also be qualified.

C. *The Dowling Elements*

When constructing a proposed statute for the SCAP, the different approaches to construction are apparent after analyzing case law and the different contexts in which it applies. Some courts take full stock in the type of report and whether the investigation is mandated or not, as seen in the *Block Island Fishing, Inc.* court's

155. *Id.* at 3.
156. *Id.* at 2–3.
157. *Id.* at 3.
158. *Id.* at 2–3.
159. *Id.* at 3.
160. *Id.*
161. *Id.*
162. *Id.*
163. Bredice v. Doctors Hosp., 50 F.R.D. 249, 251 (D.D.C. 1970).

application of the *O'Connor* four-part test.[164] Other courts measure the deliberateness of the self-evaluations before applying the SCAP.[165] Another approach to applying the SCAP was set forth in *Dowling v. Am. Haw. Cruises, Inc*. This Comment posits the proposed model SCAP statute should replicate the framework outlined in *Dowling*.

In *Dowling*, a seaman sued his employer for negligent attendance.[166] The seaman fell while aboard the ship, severely injuring his back.[167] In discovery, the seaman attempted to compel minutes from the vessel's safety committee meetings for a period of two years prior to accident.[168] The trial court denied the motion to compel because the seaman was not entitled to "delve into the minds of the committee members."[169] The Ninth Circuit Court of Appeals reversed the decision because the trial court had concluded that the "essential test" of whether the privilege applies "involves balancing the public interest protected by the privilege against the plaintiff's need for the material to make his case."[170]

The Ninth Circuit Court refused to apply the same test used in the lower court and instead applied a three-factor test often used in other jurisdictions to determine the SCAP's applicability.[171] Under this three-factor test, a party asserting the SCAP must demonstrate the material satisfies the following criteria: (1) it results from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; and (3) the information must be of the type in which allowing discovery would curtail free flow of information.[172] Additionally, the Ninth Circuit Court added the general requirement that the materials be prepared with the expectation of confidentiality and that the materials have in fact been kept confidential.[173] Case law

164. *See* Block Island Fishing, Inc., 323 F. Supp. 3d 158, 161–65 (D. Mass. 2018).
165. *Bradley*, 141 F.R.D. at 3 (quoting Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982)).
166. Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 424 (9th Cir. 1992).
167. *Id.*
168. *Id.*
169. *Id.* at 425.
170. *Id.* at 426.
171. *Id.*
172. *Id.* at 425–26.
173. *Id.* at 426 (citing James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses,* 51 GEO. WASH. L. REV. 551, 574–76 (1983)).

interpreting these factors will be helpful to determine a proper course the statute should take.

First, the protected information must have resulted from a critical self-analysis.[174] Courts utilizing the *Dowling* elements have included accident reports, internal reviews, and committee reports as information resulting from a critical self-analysis.[175] For example, in *Gillman v. United States*, the court permitted a mental hospital to withhold information gained through critical self-analysis processes following the suicide of one of its patients.[176] These processes included broad inquiries conducted by the hospital to determine whether disciplinary or hospital procedures should be changed.[177] Citing the *Bredice* decision, and essentially following the first criteria set forth in *Dowling*, the court ultimately applied the SCAP to the conclusions drawn from the broad inquiries.[178]

The first criterion of the *Dowling* test is essential to the SCAP framework. As previously mentioned, it is the critical self-evaluation that gives rise to improvements in the long term. As such, a proposed SCAP statute should also require the materials be prepared through self-critical evaluation processes. Thus, this first criterion sets forth the SCAP's rule of attachment to protected materials. In the Design-Build context, this rule of attachment would ultimately protect accident reports, investigatory reports, and other lessons-learned reports that could encourage the improvement of safety and quality practices.

Collectively, the second and third criteria of *Dowling* state that the information must be of the type that allowing discovery of would curtail the flow of information, indicating a strong public interest for protection.[179] Although not citing directly to *Dowling*, the court in *Granger v. Nat'l R.R. Passenger*, dissected this criteria in detail by exploring the general policy underpinnings of the SCAP.[180] In *Granger*, the court denied the plaintiff's motion to compel in certain respects.[181] The motion requested compulsion of a committee report

174. *Id.*
175. Joerres, *supra* note 113, at 16.
176. 53 F.R.D. 316, 319 (S.D.N.Y. 1971).
177. *Id.* at 319.
178. *Id.* at 318–19.
179. *Dowling*, 971 F.2d at 423.
180. 116 F.R.D. 507, 508–09 (E.D. Pa. 1987).
181. *See id.* at 510–11.

with the following sections: (1) Accident Analysis; (2) Cause; (3) Contributing Factors; and (4) Committee Recommendations.[182] The court compelled as to sections 2 and 3 but denied compulsion as to sections 1 and 4.[183] The court granted the motion as to sections 2 and 3 because they clearly encompassed opinions and recommendations that come within the ambit of the SCAP.[184] In other words, the court protected these sections because they were prepared for the purpose of protecting the public by instituting practices assuring safer operations.[185] The court denied the motion as to sections 1 and 4 because "[t]he cause of an accident and factors contributing to an accident are at the heart of [the] action."[186]

And finally, the *Dowling* court adopted the requirement that the materials must be prepared with the expectation of confidentiality and have in fact been kept confidential.[187] As with many privileges, this general provision is based upon the rationale that "without confidentiality, there will be a loss of candor."[188] The court in *Peterson v. Chesapeake & Ohio Ry. Co.*, reiterated this point by stating, "it would make little sense to allow material to be protected from discovery that was not intended to be protected by those originating it."[189]

As stated above, the proposed model statute should incorporate the criteria set forth in *Dowling*. Specifically, a general definition section should set forth the criteria that allow the SCAP to attach. For example, under the first criterion, the protected information should result from an analysis of facts pertaining to a specific event or project. As seen in *Gillman*, these would include reports relating to specific accidents or procedures. The proposed SCAP statute should include the second and third criteria by including a purpose provision specifying that the purpose of SCAP is to facilitate the free flow of information to ensure safety and quality improvements in the Design-

182. *Id.* at 510.
183. *Id.* at 511.
184. *Id.* at 510.
185. *Id.*
186. *Id.*
187. Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992).
188. James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses,* 51 GEO. WASH. L. REV. 551, 563 (1983).
189. Peterson v. Chesapeake & Ohio Ry. Co., 112 F.R.D. 360, 363 (W.D. Mich. 1986).

Build industry. The statute must also include a waiver provision spelling out the conditions where the privilege is inapplicable, such as when confidentiality is compromised.

V. THE FAILURE OF ALTERNATIVE PROTECTIONS

Other scholars have noted that businesses may be able to shield self-critical documents through other and more widely recognized privileges.[190] However, this Comment posits other privileges neither offer sufficient protections for self-evaluation reports conducted in the Design-Build space,[191] nor are these privileges appropriate for use in the Design-Build space given their policy underpinnings.[192]

A. *Subsequent Remedial Measures Doctrine*

It is not uncommon for scholars to compare the SCAP to the subsequent remedial measures doctrine.[193] The doctrine is codified in the FRE and bars evidence of subsequent measures that could have made a harm less likely to occur to prove negligence and culpable conduct.[194] The TRE also contains the same doctrine.[195] One can see the clear parallels between the doctrine of subsequent remedial measures and the SCAP.

Both doctrines exclude relevant evidence to allow individuals to prevent future problems by utilizing self-help.[196] Similarly, each method recognizes the basic unfairness in requiring parties to produce for subsequent lawsuits a "smoking gun" that they created in an attempt to correct perceived shortcomings internally.[197] However, there are several distinctions between the two doctrines.

First, the subsequent remedial measures doctrine relates only to admissibility of evidence at trial and not to discoverability, which is what the self-critical analysis privilege aims to protect.[198] The present, chilling effects of discovery would therefore persist

190. Bundy, *supra* note 132.
191. *See infra* Part V.
192. *Id.*
193. Kaiser, *supra* note 103, at 148.
194. FED. R. EVID. 407.
195. TEX. R. EVID. 407.
196. Jones, *supra* note 45, at 1639.
197. *Id.*
198. Kaiser, *supra* note 103, at 148.

unabated.[199] Further, the rule only protects studies or measures that are taken subsequent to an injury or claim.[200] In the case of most lessons-learned reports in the construction industry the investigation often takes place prior to the incident.[201]

Second, the purpose of the subsequent remedial measures doctrine is to encourage individuals to remedy defects that could cause injury.[202] This is a far too narrow policy consideration considering the SCAP, which is purposed on the idea of preventing injury to others and encouraging innovations.[203] Thus, under the subsequent remedial measures doctrine, lessons-learned policies would not be well protected.

B. *Attorney-Client and Work Product Privilege*

Most often, the strongest grounds for protecting internal information are the attorney-client and the attorney work product privileges.[204] Based on a foundation similar to the SCAP, the attorney-client privilege protects confidential communications based upon public policy concerns regarding the chilling effect of disclosure.[205] Thus, the attorney-client privilege recognizes that fostering open dialogue between parties often requires that the communications not be used as weapons against those involved.[206]

Empirical evidence shows the attorney-client privilege does enhance transparency among parties.[207] Courts often import this reasoning into an analysis of the SCAP's applicability in certain situations.[208] Additionally, the attorney-client privilege protects only the communications, and not the underlying facts, the same way that

199. Jenoff, *supra* note 46, at 604.
200. *Id.* at 605.
201. Ferrad, *supra* note 28, at 303.
202. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 407.03 [1] (Joseph McLaughlin, ed., Matthew Bender 2d ed. 1997).
203. Jenoff, *supra* note 46, at 605.
204. Hope T. Cannon & Kelly E. Jones, *Critically Challenged—The Recognition and Scope of the Self-Critical Analysis Privilege*, PRESNELL ON PRIVILEGES, 59 https://presnellonprivileges.files.wordpress.com/2017/12/scap.pdf [https://perma.cc/UPL3-G67M] (last visited Mar. 1, 2020).
205. Jones, *supra* note 45, at 1634.
206. *Id.* at 1634–35.
207. *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 244 (1989) (noting that clear majority of attorneys and CEOs believe that privilege enhances candor).
208. Jones, *supra* note 45, at 1638.

the SCAP does.[209] However, this privilege falls far short of protecting lessons-learned reports in the design-build industry.

The attorney-client privilege only applies where a client is seeking legal advice from counsel, but lessons-learned reports are often made by corporate employees to better some aspect of project management.[210] Moreover, lessons-learned reports do not solely, or even primarily, consist of the kind of legal advice that would be protected by attorney-client privilege.[211] Instead, the reports cover a wide range of topics, such as allocation of hours, deadlines on project milestones, or delivery procedures.[212]

Additionally, with respect to the attorney-client privilege in the corporate context, there is "a question of who the client is".[213] Generally, the protection of the privilege only extends to corporate officers and supervisory personnel.[214] Thus, communications by many of the participants in lessons-learned reports, including the rank and file employees, would not be protected.[215]

For similar reasons, the attorney work product doctrine, which protects documents containing the attorney's opinions, mental processes, and opinions of counsel, would not suffice to protect the reports.[216] In addition to sharing the problem with attorney-client privilege, the attorney work product doctrine only protects documents prepared in anticipation of litigation.[217] Lessons-learned reports are undertaken proactively rather than in anticipation of litigation and therefore would fall outside the privilege.[218]

209. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.")

210. TEX. R. EVID. 503(b)(1).

211. *See Lessons learned report for building design and construction*, DESIGNING BUILDINGS, https://www.designingbuildings.co.uk/wiki/Lessons_learned_report_for_building_design_and_construction [https://perma.cc/6EHY-MYZZ] (hereinafter *Lessons Learned Report*).

212. *Id.*

213. *See* James A. Matthews III, *Attorney-Client Privilege Within the Client Organization - Part I*, THE LEGAL INTELLIGENCER (May 23, 2012), https://www.foxrothschild.com/content/uploads/2015/05/Matthews-Attorney-Client-Privilege-Update.pdf [https://perma.cc/CY2N-CEPM].

214. *See* TEX. R. EVID. 503.

215. *See* Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

216. TEX. R. CIV. P. 192.5(d).

217. *Id.*

218. *Lessons Learned Report*, *supra* note 211.

Thus, the limitations of the attorney-client or work product privileges highlight an additional benefit of the SCAP. Mainly, the SCAP saves time and money because corporate employees may freely discuss ideas to improve the business without the need for attorneys. In the Design-Build industry, this is incredibly special because it would allow multiple architects and construction project managers to work together without having the expensive and otherwise useless lawyer present. The SCAP would essentially avoid the "who is privileged" question and the requirement to seek legal advice.

C. *Trade Secret Privilege*

Under the TRE, individuals have a privilege to refuse to disclose or prevent others from disclosing a trade secret.[219] A trade secret is often defined as a formula, pattern, device, or compilation of information that provides one with the opportunity to gain an advantage over competitors that do not know the information.[220] The person who owns the trade secret, or the person's agent or employee, may claim this privilege.[221]

The trade secret must be confidential, and the information must not be publicly available or readily ascertainable by independent investigation.[222] In other words, there must be "a substantial element of secrecy" for the information to constitute a trade secret.[223] The owner is required to take efforts to maintain and protect the secrecy of the information.[224] If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice.[225]

The trade secret privilege would likely exclude the lessons-learned reports because often times, an outside investigation could lead to the facts creating the final opinion. Further, trade secrets are

219. TEX. R. EVID. 507.
220. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996).
221. TEX. R. EVID. 507.
222. Richardson & Assocs. v. Andrews, 718 S.W.2d 833, 837 (Tex. App.—Houston [14th Dist.] 1986, no writ); SCM Corp. v. Triplett Co., 399 S.W.2d 583, 586 (Tex. App.—San Antonio 1966, no writ).
223. Rimes v. Club Corp. of Am., 542 S.W.2d 909, 913 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.); Furr's, Inc. v. United Specialty Advert. Co., 338 S.W.2d 762, 765 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).
224. Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co., 764 S.W.2d 274, 276 (Tex. App.—Houston [1st Dist.] 1988, no writ).
225. TEX. R. EVID. 507.

factual in nature, often resembling formula or schematics. The final conclusion or opinion drawn from a lessons-learned investigation would likely not be covered.

VI. THE PROPOSED STATUTE AND COMMENTARY

DESIGN-BUILD PRIVILEGE OF SELF-CRITICAL ANALYSIS

Section (a). (Purpose.) The Legislature finds a strong and compelling rationale for the adoption of a limited and qualified form of the Self-Critical Analysis Privilege. This statute enables and facilitates candid discussion and innovation in the Design-Build industry.

The Title and Section (a) get to the point right away. Others have constructed a SCAP statute that would span across multiple industries and fields.[226] But as discussed in Parts II and III, a proposed model statute in Texas must be narrowly defined.[227] Recall further, that the primary purpose for this statute is to protect lessons-learned reports.[228] In turn, this will enable Design-Build companies to prevent risks associated with design-defect and employee injury claims.[229]

Section (b). (Definitions.) As used in this Statute:
1. "Design-Build Business" includes those companies, businesses, partnerships engaged in the act of designing or providing construction services to the general public, as defined by Tex. Civ. Prac. & Rem. §§ 16.009 and 150.001.
2. "Self-Critical Analysis" are those deliberate internal reviews, communications, or investigations into major policy or procedures, conducted by or on behalf of a Design-Build Business's management, which contain or result in subjective mental impressions, opinions, theories, and

226. Leonard, *supra* note 7, at 115.
227. *See* discussion *supra* Part II.
228. *See* discussion *supra* Part III.
229. *Id.*

> **recommendations concerning the policy, procedure, or otherwise compliance with applicable law, that has been kept confidential among the Design-Build Business's management.**
> **3. "Holder of the Privilege" is the Design-Build Business who engaged in Self-Critical Analysis prior to the time disclosure is sought.**

Section (b)(1) defines the Design-Build actors who may invoke the SCAP. As discussed in Part III, many of the Design-Build claims arise under the Texas Civil Practice Code.[230]

Section (b)(2) incorporates several elements discussed in Parts III and IV and essentially sets forth the rules of attachment.[231] The act triggering attachment must be deliberate.[232] As seen by Texas's peer-review privileges, there is more weight and acceptance of a privilege that requires deliberate action.[233] In this provision, there is also the recognition that a business should utilize the SCAP to assess legal compliance.[234] Further, the objects being protected are only subjective conclusions, allowing for discovery of the underlying facts while shielding the resulting reports.[235]

Section (b)(3) includes only those Design-Build actors who had the ability to and did pursue a self-critical analysis. This limitation ensures actors will not be compelled to use the SCAP as the work-product doctrine.

> **Section (c). (General Rule.) If discovery of a Self-Critical Analysis is sought by an adverse party, the Holder of the Privilege may refuse to disclose, and prevent another from disclosing, the Self-Critical Analysis.**
> **Section (d). (Waiver.) The Privilege is waived to the extent that the Holder of the Privilege voluntarily discloses a significant part of the self-critical**

230. *Id*.
231. *See* discussion *supra* Part III–IV.
232. *See* discussion *supra* Part II.
233. *Id*.
234. *See* discussion *supra* Part III.
235. *See* discussion *supra* Part IV.

> **analysis or consents to such disclosure by anyone, except as necessary to further the goals of the investigation. Consent to disclosure shall be found if the Holder of the Privilege acts in a manner inconsistent with an intention to maintain the Privilege.**

Sections (c) and (d) are at the core of the statute. Here, the confidentiality requirement discussed in *Dowling* is present.[236] The idea of waiver is that the management structure is in the best position to effect change to policy or procedure.[237]

> **Section (e). (Exception.)**
> **1. Where an adverse party shows the court Substantial Need or Extraordinary Circumstances, this Privilege yields to the extent necessary and compulsion or disclosure may occur.**
> **2. Exceptions to this statute may be created or modified by a reinterpretation of proceeding statutes by the highest court of this state or by subsequent legislation.**

Section (e)(1) defines the SCAP as a qualified privilege. Recall, that many courts applying the SCAP do so as a qualified privilege.[238] Section (e)(2) allows the SCAP to be flexible and incorporate or be designed to incorporate exceptions found in different subject-matter codes.[239] Recall that as a general observation, this flexibility of added exceptions was a predominant feature among the Texas's privileges.

VII. CONCLUSION

Texas's Design-Build sector is growing fast. With this trend, Texas can expect an increase in construct-defect, design-defect, and construction injury lawsuits. Rather than create economic waste by

236. *See* discussion *supra* Part IV(C).
237. *Id.*
238. *Id.*
239. *See* discussion *supra* Part II.

encouraging litigious recourse, Texas should adopt a very narrow, codified form of the SCAP. Doing so will allow Design-Build businesses to take the steps necessary to prevent defects and injury to others without fear their internal evaluations will be used against them at trial.

This Comment proposed a model statute for the Texas Legislature to adopt. This statute is written in a manner to comport with traditional notions of fairness, as its application is limited and qualified. For example, the scope of the SCAP is limited solely to those subjective evaluations resulting from internal investigations or the increasingly popular lessons-learned policies. Although the statute drafted above is limited to the construction industry, it forms the basis for further extensions into other industries. Specifically, this statute could easily be modified to other property-related industries such as product design, manufacturing, or oil and gas production. Texas needs to encourage others to prevent harm, waste, or loss when possible. It is time Texas implements a privilege to further this aim.