

Revisiting Bulger v CTA: The Case for Admitting Transportation Company Investigation Results

***By
Jeffrey J. Kroll
and
J. Ryan Potts***

A professional driver causes a collision injuring an innocent victim and the transportation company immediately undertakes an investigation. Neither the collision nor the investigations are oddities in the transportation industry. In fact, both happen every day. The post-occurrence safety evaluation stemming from the collision concludes that the professional driver failed to utilize proper operating procedures at the time of the injury producing event. At trial, the transportation company attempts to bar their investigation and conclusions of the internal rule violations arguing that it is a subsequent remedial measure or falls under a self-critical analysis privilege. Until Bulger v. Chicago Transit Authority,¹ this argument was flatly rejected and these facts were routinely admitted as both relevant and admissible. However, the Bulger decision has changed the playing field - or has it?

A narrow reading of Bulger would appear to bar the admissibility of such information. However, case law from Illinois and several other states suggests that these findings and conclusions still should be admitted as relevant evidence and not barred by any evidentiary rule. As such, at trial, attorneys representing an injured party should still obtain this information and use these admissions and findings against the transportation company and driver at trial.

I. UNDER BULGER, IS A COMPANY'S VIOLATION OF AN INTERNAL POLICY ADMISSIBLE AS AN ADMISSION OF NEGLIGENCE?

In Illinois, admissions of a party, whether consisting of a statement or conduct, are admissible.² It is black letter law that any statement, written or not, made by a party or in his behalf which is inconsistent with their present position may be introduced into evidence against them.³

Therefore, when a party investigates a collision and concludes there has been a violation of their own policy or procedure, this conduct can be construed as an admission.

Prior to Bulger, the seminal Illinois case on allowing evidence related to an internal investigation of a transportation company as an admission of negligence was Pearl v. Chicago Transit Authority.⁴ In Pearl, the First District Appellate Court held that post-occurrence findings and conclusions of a bus company are admissible as admissions of negligence. The Pearl decision lends support that any violations found by a company following a collision are admissible as admissions of negligence against that company and its agent. The Pearl court held that evidence stemming from a post-occurrence safety evaluation by a Chicago Transit Authority's supervisor was admissible as an admission of negligence against the driver and the corporation. The Pearl court permitted evidence from the bus company's post accident evaluation report that concluded the driver "failed to be alert for the conditions that caused the accident and failed to utilize proper operating procedures at or near the intersection at the time of the collision."⁵ The Pearl court further emphasized that evidence stemming from routine evaluations of knowledge and ability of a driver are admissible as admissions of negligence in a trial.⁶

The Pearl decision had remained undisturbed by reviewing courts in Illinois until Bulger. In Bulger, the First District Appellate Court held that the trial court abused its discretion in admitting evidence that the driver violated internal rules and had been sent to retraining, as both the violation *and* retraining were found to be post-accident remedial measures. Although the appellate court abandoned and circumvented years of well established law, it did recognize the difficulty in distinguishing factual "time of the accident" evidence and evidence of post accident remedial measures. The Bulger decision distinguishes the Pearl decision to carve an exception to Illinois

precedent and the trend in countless jurisdictions admit such evidence.

However, such information is not *per se* inadmissible. In reaching its decision in Bulger, the appellate court left undisturbed the Poltrock v. Chicago and Northwestern Transportation Company⁷ decision. In Poltrock, a Chicago Northwestern train struck and killed the pedestrian plaintiff attempting to cross the street. At trial, plaintiff sought to introduce an accident investigation report prepared by the defendant following the collision. The defendant objected to the report; however, the trial court permitted the admission of the report. The First District Appellate Court affirmed the trial court and held that the collision report prepared by the defendant was admissible and could be used as evidence of negligence. The appellate court reviewed the report and acknowledged:

[W]hen the party seeking its admission is not the [defendant] but the adverse party . . . and it is offered against the party for whom it is prepared, the [defendant], the rule [precluding the evidence] does not apply and the report is admissible.⁸

Despite Bulger, findings and conclusions of a transportation company should be admitted at trial as an admission of negligence. The longevity and soundness of the Pearl and Poltrock opinions were not abrogated by Bulger. Evidence stemming from routine evaluations of knowledge and ability of a driver are still admissible in Illinois. In fact, these candid assessments are relevant pieces of evidence which accurately reflect the incident. When the transportation company investigates a collision and concludes that its agent or driver violated a company rule, there is a strong degree of trustworthiness present. The evidence tends to show that the conclusions or violations found were not contrived by the entrant for litigation. Conversely, a report prepared by a transportation company which contains admissions of a driver's negligent conduct truly *does* reflect the incident and lacks bias in their favor. This evidence is material and relevant to the driver's negligence.

Therefore, despite Bulger, those reports or violations should be admitted against the defendants as an admission of negligence.

II. THE BULGER COURT'S DETERMINATION THAT INVESTIGATIVE OPINIONS, CONCLUSIONS AND FOLLOW-UP ACTIONS ARE SUBSEQUENT REMEDIAL MEASURES DOES NOT PRECLUDE THE USE OF SUCH EVIDENCE IN OTHER ACTIONS.

The Bulger court has failed to lend credence to the body of well settled law in other jurisdictions in determining that internal investigations and conclusions are inadmissible as a subsequent remedial measure. Furthermore, a strict reading of Bulger creates hurdles to admission of such evidence where such hurdles were not intended. As a result, a strict reading of Bulger creates an anomaly of law inconsistent with well settled principles. Several other jurisdictions also permit the use of internal corporate investigations and conclusions at trial and have rejected the subsequent remedial measure argument. More importantly, such evidence does not fall within the subsequent remedial measures rule.

Like the CTA in Bulger, defendants will inevitably seek to bar their policy mandated internal investigative findings at trial. The most common defense by transportation companies is that any findings or conclusions are merely subsequent remedial measures. Defendants will argue, as in Bulger, that pursuant to Federal Rules of Evidence 407,⁹ any internal findings of negligent conduct should not be admitted at trial. However, a number of courts throughout this country have had the opportunity to address this issue and have rejected this common defense argument.¹⁰

In Johnson v. Washington County,¹¹ the Defendant, Washington County, attempted to circumvent the admissibility of a damaging letter by raising the subsequent remedial

measurement argument. There, the Supreme Court of Minnesota allowed into evidence a letter from a corporate defendant as it constituted an admission of a party in a wrongful death action. In Johnson, school employees were responsible for supervising children on a school field trip to a local swimming pond. After a tragic occurrence, the employer, a school, stated in their termination letters to various employees that their “neglect of duty” led to the drowning death of a child while on the school field trip.¹² While the school district attempted to preclude the letters as “subsequent remedial measures,” the Minnesota Supreme Court held that the trial court properly admitted the letters as admissions of negligence of a party opponent.

Likewise, conclusions and opinions of a transportation company are also admissible under the logic and reasoning of the Johnson case. When a transportation company concludes that their driver was negligent in failing to take reasonable action to avoid an accident, that conclusion would be admissible under the rationale of the Johnson decision. The termination letter in Johnson noted the employee’s “unsatisfactory performance” led to the drowning of a child. The logical corollary is that the same analysis would conclude that a driver’s inability to take “reasonable and prudent action” is admissible as an admission of negligence at a personal injury trial.

Oregon, Massachusetts and North Carolina courts were also presented with similar arguments by defense counsel and all rejected the subsequent remedial measure argument. In Ensign v. Marion County,¹³ the court admitted the findings and conclusion of a sheriff’s review board with regard to a motor vehicle collision involving a sheriff’s vehicle. The sheriff’s board determined that “the accident could have been prevented had the deputy been

operating in compliance with local laws.” The court, in admitting this finding and conclusion, held that the principal’s opinion was an admission of negligence against the agent and was not a subsequent remedial measure, as argued by that defendant. The Ensign court went further and held that in order for an action to constitute a subsequent remedial measure, it must be one that could have been taken before the event that gave rise to the claim. As such, the Ensign court announced:

[O]ne cannot investigate an accident before it occurs, so an investigation and report of the cause of an accident, such as the board letter at issue here, cannot be a measure that is excluded from evidence under the rule.¹⁴

In Hochen v. Bobst Group, Inc.,¹⁵ the United States District Court in Massachusetts held that the opinions of a company investigator as to the “preventability” of accidents and the findings surrounding those opinions are not subsequent remedial measures. In Hochen, a negligence suit was brought after a press exploded and an investigative group determined the cause and effect of the explosion. Defendant argued that the investigative reports were inadmissible at trial and constituted subsequent remedial measures. A Federal Court disagreed and held that the post-accident report and the findings were admissions which failed to fall within the definition of a subsequent remedial measure. Conversely, the United States District Court ruled that the opinions and conclusion of a corporate defendant were admissible as evidence of negligence.

Other courts have acknowledged that these internal investigations and conclusions of a transportation company are both material and relevant to a personal injury lawsuit and should be admitted. They note that any kind of investigation or reconstruction undertaken by a transportation company is admissible as the purpose of their post-accident investigation is to assess and judge the driver’s activities at the time of the collision. Therefore, this evidence is not found to be subsequent

remedial measure evidence. In fact, the proper reading of Bulger notes this distinction and does not preclude these findings.

A subsequent remedial measure aims to bar evidence of measures taken after an event takes place which would have made the event less likely to occur. Any type of reconstruction or investigation of a transportation company where it finds a violation of internal rules should be permitted as this conduct is investigatory; not remedial. Bulger specifically notes:

In the context of the instant case, the CTA's investigative opinions, conclusions, and follow-up actions are inadmissible as post-accident remedial measures. However, this opinion should not be interpreted as precluding the admission of factual "time of the accident" evidence. We limit our holding, in the context of the instant case, to preclude admission of evidence of post-accident remedial measures to prove negligence.¹⁶

This view is further supported by courts in other jurisdictions. Notably, in Greyhound Lines, Inc. v. Alderson,¹⁷ a personal injury action was brought by bus passengers for injuries sustained when a Greyhound bus driver collided with an automobile and pickup truck. There, the issue involved the admissibility of a dismissal letter from Greyhound to the bus driver. The letter stated that Greyhound's investigation revealed that the bus driver "failed to exercise required defensive and professional driving practices." The Maryland Court of Appeals held that the letter was an admission by Greyhound that was material and relevant to the issue of the driver's negligence.¹⁸

In Alderson, the defendant, Greyhound, contended that the letter could not be construed as an admission "since it merely state[d] the company's opinion that their driver failed to exercise some unknown, unspecified defensive and professional driving practices." The Maryland Court of Appeals flatly rejected Greyhound's argument and specifically noted that Greyhound supervisors had, in fact, investigated the collision. Moreover, the appellate court held that the Greyhound letter was properly admitted into evidence by the trial court and the weight to be accorded to its contents

was a matter for the jury. The admissions contained in the letter sent by Greyhound indicated that the driver “failed to exercise required defensive and professional driving practices.” The court admitted the letter because it was “material and relevant to the issue of the driver’s negligence.”¹⁹

Therefore, even in light of Bulger, the internal investigation should be allowed and the subsequent remedial measure argument must be rejected.

III. A TRANSPORTATION COMPANY’S FINDINGS IS NOT PROTECTED BY THE SELF-CRITICAL ANALYSIS PRIVILEGE

Although not addressed in Bulger, another argument that is advanced by a defendant transportation company to preclude their internal investigation is the report falls under a self-critical analysis privilege. Defendants will argue that the self-critical analysis privilege protects the post-accident reports at issue from disclosure. These authors disagree.

The rules of Civil Procedure establish a broad policy which favors full disclosure of facts during discovery.²⁰ Modern discovery rules and procedures are designed to effectuate disclosure, for truth is at the heart of all discovery.²¹ These rules embody a departure from viewing trial as a “battle of wits,” with surprise as a coveted weapon, and a move toward utilizing trial as a joint endeavor to uncover the truth.²² Extensive disclosure of relevant material before trial facilitates the search for truth and comports with the recognition that “if justice is to be achieved, both sides must have an equal opportunity to prevail in terms of available resources.”²³

The law disfavors privileges because privileges, by its very nature, interfere with the fundamental judicial process, i.e., revealing the truth about an incident and providing a remedy to a party that has been unnecessarily harmed.²⁴ As the United States Supreme Court has acknowledged, privileges “are not lightly created nor expansively construed for they are in

derogation of the search for truth.”²⁵ The Supreme Court is reluctant to expand common law privileges. In fact, the Supreme Court has noted that “the public . . . has a right to every man’s evidence.”²⁶

Courts have considered the self-critical analysis privilege in many different settings and have issued several different opinions on whether to trigger the privilege’s protection. Some fact patterns favor the privilege while many have rejected it. One thing that is in agreement; however, is the notion that the fundamental purpose of the privilege is to protect from disclosing documents containing candidly and potentially damaging self-criticisms.²⁷ However, in a personal injury action, this notion is very rarely followed by courts.

The self-critical analysis privilege was initially developed to promote public safety by encouraging business to voluntarily evaluate safety procedures. For example, in Bredice v. Doctor’s Hospital, Inc.,²⁸ the court held that the privilege applied to hospital committee meeting minutes in which members of the committee were asked for their frank and honest analysis. The court held the minutes were non-discoverable. Subsequent decisions have chipped away at the Bredice logic.

One of the seminal cases in this area is Dowling v. American Hawaii Cruises, Inc.,²⁹ There, an employee was injured on the job and sued his employer for damages under a federal statute. The Dowling court announced that the self-critical analysis privilege may only attach if the party asserting the privilege shows the following:

1. The information sought resulted from a critical self-analysis undertaken by the party seeking protection;
2. The public has a strong interest in preserving the free flow of the type of information sought;
3. The information is of the type who’s flow would be curtailed if discovery was allowed; and
4. The document was prepared with the expectation that it would be kept

confidentially, and is in fact been kept confidential.³⁰

Under the Dowling analysis, it is the authors' opinion that self-critical privilege should rarely be allowed in tort cases. For example, in Morgan v. Union Pacific Railroad Company,³¹ the court determined that the defendant railroad failed to carry its burden of showing that the self-critical analysis privilege applied. There, Union Pacific failed to demonstrate that it generated the reports with the expectation that the reports are kept confidential and, were in fact, kept confidential. Without a showing the defendant railroad intended the reports to be confidential and did in fact preserve their confidentiality, courts will not afford defendants the privilege of self-critical analysis.

Courts that enforce the self-critical analysis privilege only protect objective opinions or impressions rather than objective facts.³² An internal report detailing the facts and possible contributing causes of an accident is the type of information which is reasonably calculated to lead to the discovery of admissible evidence. Therefore, a transportation company's internal reports should be disclosed. In fact, the Morgan court agreed and stated:

The cause of an accident and the factors contributing to that accident are at the heart of every personal injury action brought by an employee to recover for his or her work place injuries. In this case, Morgan has the burden of proving that his injuries resulted in whole or in part from Union Pacific's negligence. The railroad's interest in protecting these reports from discovery does not clearly outweigh Morgan's need for these documents in order to prepare his case. Under these broad discovery standards and the tests articulated in Dowling, there is no reason why these documents should not be disclosed to Morgan.³³

As case law dictates in a personal injury action, the self-critical analysis privilege should rarely be allowed. In an injury producing collision, the public does have a strong interest in allowing the free flow of a company's findings and conclusions. Similarly, these investigations and subsequent reports are often undertaken by a mandated company policy. Therefore, a transportation company can hardly have an expectation of confidentiality. In fact, transportation companies often

work in conjunction with local law enforcement or the National Transportation Safety Board when performing an investigation. As such, this privilege should not be permitted in tort cases.

IV. A TRANSPORTATION COMPANY'S FINDING IS ADMISSIBLE AS IT CONSTITUTES A VIOLATION OF ITS OWN INTERNAL RULES

The causes of a collision and the factors contributing to that collision are at the heart of every personal injury action brought by a victim to recover for injuries. The framework guiding a corporate defendant's actions is also at the forefront of any claim. Therefore, any violations of a company's internal rules should always be argued at trial by the plaintiff. In fact, this evidence is directly relevant to proving a negligence case.

A company's conclusions that a driver failed to comply with one or more of their internal rules are always directly relevant and admissible at trial. The First District Appellate Court decision in Spence v. Commonwealth Edison Company³⁴ is illustrative. In Spence, the appellate court noted that parties are entitled to an instruction similar to I.P.I 60.01³⁵ for a violation of internal rules or regulations adopted by the defendant. There, a landowner brought an action against Commonwealth Edison for injuries to a child that was electrocuted. Plaintiff sought to set forth in a jury instruction a provision contained in defendant's engineering guide and inform the jury that a violation of the internal policy could be considered in determining whether the defendant was negligent. The trial court rejected plaintiff's proposed instruction.

In reversing the trial court, the First District Appellate Court noted that rules or regulations adopted by defendant serve a useful function in establishing the proper operating procedures to be exercised by the same defendant.³⁶ The court further noted that where such rules or regulations are admitted into evidence, the jury should be informed that they can consider them in determining the operating procedures and deciding whether a party's actions constituted a violation of that internal

standard or regulation.³⁷

This rule of law permitting evidence of violations of internal rules has been embraced by numerous other courts throughout the United States. A majority of the jurisdictions in which this question has been considered held that a violation of internal rules is admissible evidence and should be considered by the jury.³⁸ Recently, this rule of law has been extended to other courts and the number of states permitting this evidence has expanded.³⁹

Interestingly enough, Bulger court held that the jury should *not* be instructed on a driver's violation of an internal rule. The appellate court noted that the "creation of self-imposed rules or internal guidelines does not usually impose a legal duty, and violation of the rules or guidelines does not ordinarily constitute evidence of negligence."⁴⁰ The Bulger court ignored the holding and rationale of the Spence decision when it chose to create its own definition of a "force of law." The Bulger court ignored well founded Illinois case law and decisions from other jurisdictions when it noted that "internal rules do not necessarily create legally enforceable duties."⁴¹ Ironically, the Bulger court disregarded a company's own findings that its driver violated rules...rules not promulgated by an outside agency; rules not promulgated by some other state agency; a violation of its *own* rules.

Although the rules of a company had not been adopted by the State of Illinois, the City of Chicago or any federal or state regulatory agency, the import of the internal violation is not lessened. The authors find it ironic that the Bulger court would not allow the jury to consider the internal violations in deciding whether a party's actions constituted negligence. A company created self-imposed rule does impose a legal duty upon a driver and the violation of the rules should be considered by the jury. This is evidence that will assist the jury in deciding what was feasible and what the defendant knew or should have known.

A careful reading of the jury instructions will cure any problems the Bulger court had in allowing the jury to consider a violation of a company's self-imposed rules or regulations. A proper standard of conduct may be established by those rules, but they do not conclusively establish and determine the standard of care. If a jury finds a violation of an internal rule, they should be allowed to consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent a party was negligent.⁴²

Our search for justice is a search for truth. To admit into evidence and have a jury consider a report which is prepared in accordance with company rules and determines that an employee violated a known company rule, truly reflects the incident and is not biased. To follow the rationale and holding of the Bulger court, would be to not only blind lady justice but to gag and tie her hands and prevent her search for the truth. Surely, this not fair nor the intent of the law.

In light of the court's ruling in Spence and the vast majority of jurisdictions that have allowed the admissibility of a rule violation, the prudent attorney should always attempt to admit any evidence at trial suggesting that a defendant violated its internal rules. It is well settled that a company's violation of an internal policy is relevant and admissible. These violations are relevant to the adherence to the operating procedures and can be considered by the jury as evidence of negligence. Moreover, this evidence will aid the jury in deciding what was feasible and what the driver knew or should have known at the time of the injury producing event.

V. CONCLUSION

All these legal principals are meaningless if findings of internal violations are not discovered. It is impossible to present evidence of a violation of an internal policy or rule if such information is never uncovered. Therefore, it is important that the trial lawyer representing the victim of negligence discover any and all subsequent investigations, findings and any other information during discovery

to determine which corporate employees investigated the collision as part of their job responsibilities. A transportation company's finding and conclusions that a collision was preventable or that their agent was a cause of the collision must be admitted as an admission of negligence against the corporate defendant.

Moreover, these findings and conclusions are not subsequent remedial measures nor do they fall under the self-critical analysis privilege as defendant would advocate to the courts. Typically, these internal investigations will examine the accident in compliance with their standard company policy which mandates that a supervisor review the collision to determine whether it was "preventable." This automatic post-occurrence safety evaluation may conclude that an accident was "preventable." Correspondence that the transportation company sends to their driver will also lead to discoverable information. These "admissions" must be discovered. When they are discovered, this evidence must be admitted in every personal injury case against a transportation company as it is relevant, material and constitutes an admission of negligence. Moreover, the jury will rely on this information as evidence of a driver's negligent conduct. As such, given the litany of uses of such evidence, its proper discovery and its proper use can very well make the difference between a favorable and unfavorable verdict.

1. 2003 WL 22952047 (1st Dist. 2004).
2. Rinchich v. Village of Bridgeview, 235 Ill.App.3d 614, 601 N.E.2d 1202 (1st Dist. 1992), citing, Cleary and Graham's Handbook of Illinois Evidence §802, at 594-595 (5th Ed. 1990)("Relevant admissions by a party, whether consisting of a statement or conduct, are admissible when offered by the opponent as an exception to the Hearsay Rule.").
3. Nelson v. Union Wire Rope Corp., 31 Ill.2d 69, 115 (1964), *citing*, Contrad, Modern Trial Evidence, vol. 1, sec. 454; Cleary and Graham's Handbook of Illinois Evidence, § 13.10; Brown v. Calumet River Railway Co., 125 Ill. 600 (1888)("As a general rule any statement, written or not, made by a party or in his behalf which is inconsistent with his present position may be introduced in evidence against him.").
4. 177 Ill.App.3d 499, 532 N.E.2d 439 (1st Dist. 1988)("[T]he predominant rationale for excluding evidence of post-occurrence remedial measures, including discharge of an employee, is the policy against discouraging parties from undertaking safety measures....That rationale, however, finds no apparent application here because the testimony adduced at trial related to procedures automatically undertaken as a matter of CTA policy whenever an operator was involved in an accident with a pedestrian. We have difficulty understanding why the general rule prohibiting testimony of subsequent remedial measures should obtain in this case as the reason for the rule, the likelihood of discouraging the undertaking of safety measures, would seem obviated by mandated CTA policy.")
4. Pearl. 177 Ill.App.3d at 501.
6. Id. at 504.
7. 151 Ill.App.3d 250, 502 N.E.2d 1200 (1st Dist. 1987). *See also*, Leon v. Penn Central Co., 428 F.2d 528, 530 (7th Cir.1970)("Under the defendant's rules of employment, accident reports are required to be filed by the employees involved. To admit into evidence a report which is prepared in accordance with company rules, the court must conclude that the report truly reflects the incident and is not biased. There is no problem here with possible prejudice in the report since the plaintiff, and not the defendant, is seeking to submit it into evidence, and we conclude that the district court should have admitted it."); Keohane v. New York Central R.R., 418 F.2d 478 (2d Cir.1969); Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir.1951), *cert. denied* 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652 (1951)(Holding that letters from treating physicians to Defendant, railroad, were admissible as the "reports were made in the regular course of business of the doctors. All other requirements of the statute, including the making of a record at the time of the occurrence or 'within a reasonable time thereafter,' [were] fully complied with."); Pekelis v. Transcontinental & Western Air, 187 F.2d 122, 129, 130 (2d Cir.1951)("The reports in the case at bar were against the interest of the entrant when made...and whether or not completely accurate were clearly not part of a story cooked up in advance of litigation in the disguise of business records. Moreover, it is not the entrant who here sought to introduce the reports, but the plaintiff, and this too lends to show that

they were not contrived by the entrant for litigation.).

8. Poltrock, 151 Ill.App.3d at 254-55.
9. Rule 407. Subsequent Remedial Measures:
When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
10. See, e.g., Prentiss & Carlisle v. Koehring-Waterous Div. Of Timberjack, 972 F.2d 6, 10 (1st Cir. 1992)(“[T]he fact that the analysis may result in remedial measures being taken does not mean that evidence of the analysis may not be admitted.”).
11. 518 N.W. 2d 594 (Minn. 1994).
12. Johnson, 518 N.W.2d at 601.
13. 140 Or.App. 114, 914 P.2d 5 (1996).
14. Ensign, 140 Or.App. at 119. See also, Smith v. Pass, 95 N.C.App. 243, 382 S.E.2d 781 (1989)(Accident reconstruction taken by defendant was admissible evidence, as “the purpose of their actions was to assess whether the driver’s activities [at the time of the original incident] were safe and proper. Since Federal Rule of Evidence 407 only bars evidence of measures taken after an event which would have made the event less likely to occur, the reconstruction was not barred because it was merely investigatory and not remedial”)
15. 193 F.R.D. 22, 54 Fed. R. Evid. Serv. 830 (Mass. 2000).
16. 2003 WL 22952047 *9.
17. 336 A.2d 811, 26 Md.App. 277 (1975)
18. Alderson, 26 Md.App. at 282.
19. Id.
20. See, e.g., Wei v. Bodner, 127 F.R.D. 91, 95-96 (D.N.J. 1989)(“[T]he framework provided for discovery by Fed.R.Civ.P. 26 evinces a broad policy favoring full disclosure of facts before trial to aid the search for the truth. Under the current liberal rules, discovery is intended to prevent the old practice of fostering surprises at trial.”).
21. Buehler v. Whalen, 70 Ill.2d 51, 67 (1977).

22. Krupp v. Chicago Transit Authority, 8 Ill.2d 37, 40-41 (1956); Farley Metals, Inc. v. Barber Colman Company, 269 Ill.App.3d 104, 645 N.E.2d 964 (1st Dist. 1995).
23. Farley Metals, Inc., 269 Ill.App.3d at 109, *citing*, Richard A. Michael, Civil Procedure Before Trial §31.3, at 104.
24. See, e.g., Trammel v. United States, 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980)(“Testimonial exclusionary rules and privileges contravene the fundamental principle that ‘the public . . . has a right to every man's evidence.’ United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’ Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., *dissenting*). Accord, United States v. Nixon, 418 U.S. 683, 709-710, 94 S.Ct. 3090, 3108-3109, 41 L.Ed.2d 1039 (1974)”).
25. United States v. Nixon, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.E 2d 1039 (1974).
26. United States v. Brian, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950).
27. Donald P. Vandergriff, Jr., The Privilege of Self-Critical Analysis: A Survey of the Law, 60 Albany, L.Rev. 171, 175-76 (1996).
28. 50 F.R.D. 249, 251 (D.D.C. 1970),
29. 971 F.2d 423, 426 (9th Cir. 1992).
30. Dowling, 971 F.2d at 426.
31. 182 F.R.D. 261 (N.D. Ill. 1998).
32. See, e.g., Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 508-509 (E.D. Pa. 1987)(“[T]his Court has determined that the portions of the report entitled "Accident Analysis" and "Committee Recommendations" should be protected from discovery. There is no question that the public has an interest in the institution of practices assuring safer operations of railroads. The production of these portions of the report would tend to hamper honest, candid self-evaluation geared toward the prevention of future accidents. The "critical self-analysis" doctrine should not, however, be applied to those portions of the report entitled "Cause" and "Contributing Factors". These portions should be discoverable. The cause of an accident and factors contributing to an accident are at the heart of every action brought by an employee to recover for his or her injuries. In cases such as these, the plaintiff has the burden of proving that the injury resulted in whole or in part from the negligence of the railroad. Therefore, there is no reason why the information set forth in the "Cause" and "Contributing Factors" portions should not be disclosed to the plaintiff.”).

33. Morgan, 182 F.R.D. at 267.
34. 34 Ill.App.3d 1059, 340 N.E.2d 550 (1st Dist. 1975).
30. I.P.I. 60.01, *Notes on Use* (“This instruction should be given only where the evidence would support a finding that the injury complained of was proximately caused by a violation of a statute, ordinance, or administrative regulation, rule, or order intended to protect against such injury, and that the injured party is within the class intended to be protected by the statute, ordinance, or administrative regulation.”)
36. Spence, 34 Ill.App.3d at 1065, *citing*, Darling v. Charleston Hospital, 33 Ill.2d 326, 332 (1965)(“In the present case the regulations, standards, and bylaws which the plaintiff introduced into evidence, performed much the same function as did evidence of custom. This evidence aided the jury in deciding what was feasible and what the defendant knew or should have known”).
37. Id.; *See also*, Davis v. Marathon Oil Company, 64 Ill.2d 380 (1976)(“[T]he instructions did not conclusively determine the standard of care, for they provided that if the jury found a violation they could 'consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was contributorily negligent.”); The Board of Trustees of Community College District No. 508 v. Coopers & Lybrand, 333 Ill.App.3d 225, 775 N.E.2d 55 (1st Dist. 2002)(“...the instruction, together with the provisions cited therein, fully and fairly apprised the jury of the relevant principles, especially in deciding what the defendant knew or should have known.”); Clements v. Schless Construction Co., 8 Ill.App.3d 291, 290 N.E.2d 21 (2d Dist. 1972)(“[R]ules, as evidence, serve a useful function in establishing the proper standard of care to be exercised by the Defendant. Following the principles set forth in Darling v. Charleston Community Memorial Hospital, 33 Ill.2d 326, 211 N.E.2d 253, we hold that a proper standard of conduct may be established by these rules, but they do not conclusively establish and determine the standard of care”).
38. C.R. McCorkle, Annotation, *Admissibility in Evidence of Rules of Defendant in Action for Negligence*, 50 A.L.R.2d 16 (1956)(Listing Alabama, Arizona, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, South Carolina, Texas and Washington as states permitting such evidence).
39. Piper, Jaffray & Hopwood, Inc. v. Ladin, 399 F.Supp. 292 (S.D. Iowa 1975)([V]iolation of stock exchange and N.A.S.D. rules are admissible as evidence of negligence); Rupert v. Clayton Brokerage Company of St. Louis, Inc., 737 P.2d 1106 (Colo.1987)(“Although evidence of a broker’s violation of a custom or internal rule adopted for protection of its customer does not automatically establish liability, a court may consider the custom or rule in a case-by-case determination of whether the broker breached a fiduciary duty to

the customer.”); Robertson v. Duval County School Board, 618 So.2d 360 (Fl.App.1st Dist. 1993)(School Board’s ‘Single file/no talking’ rule could be admitted into evidence as it raised a jury question as to whether defendant used the proper standard of care); Callihan v. Great Northern Railway Company, 350 P.2d, 137 Mont. 93 (1960)(Holding that it was not error to admit evidence of defendant’s violation of their own safety rule); Hval v. Southern Pacific Transportation Company, 592 P.2d 1046, 30 Or.App. 479 (Ct.App.Ore. 1978)([E]vidence that defendant disciplined the defendant’s employee and not the plaintiff for violations of company rules was relevant and admissible); Chesapeake and Ohio Railway Company v. Richmond, 227 S.E.2d 707, 217 Va. 258 (1976)(Internal safety rule warning train men to keep a proper lookout was admissible in determining plaintiff’s comparative fault).

40. 2003 WL 22952047 *13.

40. Id at 11.

42. IPI 60.01 - Violation of Statute, Ordinance, or Administrative Regulation (There was in force ... at the time of the occurrence in question a certain rule which provided that: [*Quote or paraphrase applicable part of statute, ordinance or regulation as construed by the courts.*]

If you decide that [a party][the parties] violated the [statute][ordinance][regulation][rule] [order] on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, [a party][the parties][was][were] negligent before and at the time of the occurrence.