Discoverability of Privileged Physician-Patient and Peer Review Communications: Not What the Doctor Ordered

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The most fundamental goal of the trial process is the discovery of truth. Yet the truth-seeking function is subverted by the rules of privilege, which have as their objective the suppression of credible and often critical information in the furtherance of some extrinsic social policy. Privileges are justified only by their "protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice."[1] That is why privileges are generally looked upon with disfavor and are strictly construed to limit their application.

During the survey period, Indiana courts have announced several new rules with regard to the discovery of privileged communications, particularly as concerns the medical community. Doctors and patients will be surprised to learn that privileged physician-patient communications now are discoverable, although not necessarily admissible. Meanwhile, communications of medical "peer review" committees have been held to be virtually absolutely insulated from discovery, which means doctors and other health-care providers will find it more difficult to defend against challenges to their professional qualifications.

Indiana courts also have announced decisions construing the privileges attaching to confidential spousal and attorney-client communications, and have emphatically rejected the once-touted "self-analysis" privilege notwithstanding its embrace by some federal courts.

I. Physician-Patient Communications: *Canfield v. Sandock*[2]

The Indiana Civil Code of 1881 provides in pertinent part:

> The following persons shall not be competent witnesses:
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> Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases . . . .[3]

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1. Ernst & Ernst v. Underwriters Nat'l Assur. Co., 381 N.E.2d 897, 901 (Ind. Ct. App. 1978) (quoting McCormick, Evidence § 74, at 152 (2d ed. 1972)).
2. 521 N.E.2d 704 (Ind. Ct. App. 1988).
3. Ind. Code § 34-1-14-5 (1988).

The statute appears to absolutely prohibit testimony by physicians as to applicable physician-patient communications but it long has been construed as a privilege which the patient may claim or waive.[4] The purpose of the privilege is to foster the patient's unqualified confidence in his physician and to give the patient the assurance that communications with the physician will be treated as confidential.[5] The privilege is not absolute. It applies only to those communications necessary to treatment or diagnoses;[6] the privilege may be invoked only on the patient's behalf[7] by the patient himself and not by the patient's parent;[8] and the privlege protects only communications to physicians as opposed to other health-care providers[9] (although communications to chiropractors fall within the privilege).[10] When a patient puts in issue his medical or mental condition, the privilege is waived as to all matters either historically or causally connected to the matters put in issue.[11]

In *Canfield v. Sandock*,[12] the court of appeals held that a litigant may discover arguably privileged physician-patient communications by way of a request for production served directly upon a non-party physician pursuant to Trial Rule 34(C).[13] The case, a negligence action arising from an automobile-pedestrian accident, illustrates the tension in personal injury actions between the need for confidentiality of physician-patient communications and the need for some workable means of identifying which medical information is non-privileged by virtue of its relevance to the matters at issue.

In *Canfield*, the injured pedestrian and his wife sued for damages arising from the husband's physical injury, pain and mental suffering. The plaintiffs also sought recovery for the wife's loss of consortium. The defendant sought from the plaintiff's physician, pursuant to Trial Rule 34(C):[14]

> a copy of each and every document contained within your file pertaining to plaintiff . . . . This request includes, but is not

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4. Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92 (1885).
5. Pennsylvania Co. v. Marion, 123 Ind. 415, 421, 23 N.E. 973, 975 (1890).
6. Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971); Myers v. State, 192 Ind. 592, 599, 137 N.E. 547, 550 (1922); State v. Jaggers, 506 N.E.2d 832, 833 (Ind. Ct. App. 1987).
7. Hauk v. State, 148 Ind. 238, 46 N.E. 127 (1897); *Jaggers*, 506 N.E.2d at 834.
8. Lomax v. State, 510 N.E.2d 215, 219 (Ind. Ct. App. 1987).
9. Whitehead v. State, 511 N.E.2d 284, 294 (Ind. 1987).
10. *Jaggers*, 506 N.E.2d at 833.
11. *Collins*, 256 Ind. at 241, 268 N.E.2d at 100-01.
12. 521 N.E.2d 704 (Ind. Ct. App. 1988).
13. IND. R. TR. P. 34(C).
14. *Id.*

> limited to, copies of any and all physician's notes, nurse's notes, clinical reports, hospital reports, laboratory reports, questionnaires completed by the patient, and any other document contained within your file.[15]

The trial court granted a protective order barring discovery of the requested documents and granted attorney's fees to plaintiffs' counsel pursuant to Trial Rules 26(C) and 37(A)(4).[16] The defendant filed an interlocutory appeal challenging the protective order and fee award.

Preliminarily, the court of appeals determined that a Rule 34(C) request for production of documents upon a non-party is an appropriate vehicle for discovering medical records, notwithstanding the theoretical risk that a physician may respond to such a request before the patient has an opportunity to invoke the privilege.[17] The court also noted that a party-patient who injects his medical condition into the litigation necessarily waives his privilege as to the medical matters put in issue.[18] The difficulty arises when some of a party-patient's medical information is relevant and therefore non-privileged and discoverable, but some is irrelevant and therefore still privileged. How is the court to determine which medical information may be discovered?

The usual answer is to conduct an *in camera* inspection of the disputed materials so that the court may determine which items are relevant and discoverable and which are not. The court of appeals, however, concluded that in the case of medical records an *in camera* inspection is unworkable due to the "unique technical nature of medical information."[19] Medical information is so complex that the trial court must have expert guidance in determining which information is causally or historically connected to the medical condition in issue, especially where the plaintiff describes his damages with such unspecific terms as "physical injury" and "mental suffering." The only workable procedure

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15. 521 N.E.2d at 706.

16. IND. R. TR. P. 26(C), 37(A)(4).

17. The possibility that attorneys might take advantage of Rule 34(C) to obtain privileged materials was deemed too speculative to warrant limiting the use of Rule 34(C) in the pursuit of medical records. *Canfield*, 521 N.E.2d at 706.

18. *Id.*

19. The court stated:

> It is not practical to assume a trial judge has such a high degree of medical knowledge to know what portions of a medical history might bear on the condition at issue without the benefit of expert opinion. This is especially true where, as here, the pleadings refer to the condition in such general terms as "physical injury" and "mental suffering."

521 N.E.2d at 707. It is not apparent why trial courts are less well-equipped to decipher technical medical information than they are as to technical business or scientific information, matters which are grist for the courts.

is to (1) let the discovering party have access to the disputed materials and (2) convene a hearing where the court can hear argument and expert opinion from both parties as to whether the material bears a relation to the medical condition in issue. In other words, the only way to determine whether medical material is privileged is to breach the privilege, giving the discovering party what it seeks so that the party may then argue in favor of discovery.

The court was sensitive to the fact that its approach entailed an obvious degree of circularity.[20] The court, however, found precedent for discovery of privileged medical information in cases applying Ohio law,[21] under which a party does not waive his physician-patient privilege until he actually testifies at trial about his medical condition.[22] In that situation, courts have permitted discovery of relevant yet legally privileged information in anticipation of the patient's testimony so as not to disrupt the trial for discovery at the point the patient testifies and waives his privilege. The Ohio cases, however, authorize pre-waiver discovery only where the waiver is quite likely and only to the extent that the information sought is relevant.[23] The approach chosen by the Indiana court, however,

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20. 521 N.E.2d at 707. The court stated it seemed "ridiculous" at first glance to permit the discovering party to receive the disputed materials in order to argue that the party is entitled to discover the material. *Id.*

21. Urseth v. City of Dayton, 653 F. Supp. 1057 (S.D. Ohio 1986); Huzjack v. United States, 118 F.R.D. 61 (N.D. Ohio 1987).

22. Ohio Rev. Code Ann. § 2317.02 (Anderson 1981), provides in pertinent part:

> The following persons shall not testify in certain respects:
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> * * *
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> (B) A physician concerning a communication made to him by his patient in that relation or his advice to his patient, except that the physician may testify by express consent of the patient, if the patient is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased patient and except that, if the patient voluntarily testifies or is deemed by section 2151.421 (2151.42.1) of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject, or if the patient, his executor or administrator, files a medical claim, as defined in division (D)(3) of section 2305.11 of the Revised Code, the filing shall constitute a waiver of this privilege with regard to the care and treatment of which complaint is made.

23. Neither *Urseth* nor *Huzjack* contemplated wide-open discovery so that the trial court would receive the benefit of counsel and expert testimony in determining which medical information was properly discoverable. In *Urseth*, the court seemed to contemplate inquiry into (1) the decedent's hearing loss, which both sides agreed was relevant to the events leading to the decedent's death, and (2) other aspects of the decedent's medical condition insofar as they related to the decedent's life expectancy. 653 F. Supp. at 1065. In *Huzjak*, the discovering party sought only information regarding the plaintiff's medical condition while a patient in 1983, which information was relevant to the subject matter of the lawsuit. The court expressly stated that inquiry into privileged medical communications would be permitted "subject to . . . the rules of discovery," which made clear

permits discovery of medical information, privileged and non-privileged, whenever a party's medical or mental condition is in issue. Only later does the court determine, with the assistance of counsel and expert witnesses, which pieces of information are irrelevant and privileged and should not have been disclosed in the first place.

The court insisted that its approach adequately respected the interests served by the physician-patient privilege because the privilege is designed to prevent only "public" disclosure of physician-patient confidences, and disclosures made in the course of discovery are not "public."[24] Physicians and patients, however, would be surprised to learn that compulsory disclosure of confidential communications concerning sensitive medical matters to litigants pursuing discovery is not a betrayal of the patient's trust and confidence. Judges would not tolerate open-ended discovery of attorney-client confidences on the ground that such disclosures are not really "public." It is not clear why similar concern should not be shown for confidential physician-patient communications.

Fortunately, there is an alternative to the discovery of privileged medical information which adequately addresses the court's concern regarding the technical and difficult nature of medical material. That is to permit the trial court to inspect disputed medical materials with the assistance of a court-appointed medical expert to ascertain the relevance of the materials to the issues being litigated. Trial courts have authority under Trial Rule 26(C) to fashion "any order which justice requires" to protect litigants from unreasonable discovery requests, including the power to order that discovery be had only on specified terms and conditions. Further, Trial Rule 35 empowers courts to order parties or persons to submit to physical or mental examinations whenever their physical or mental conditions are in controversy, which would appear to incorporate the lesser power of compelling the individual to submit his medical records to a court-appointed expert for examination. The expert could be chosen by the parties and compensated by the court as an element of the costs of the litigation. The point is that trial courts need not resort to open-ended discovery of privileged medical information whenever resolution of the relevance issue is difficult. Rather, courts may make the relevance determination *in camera* in consultation with a court-appointed expert.

II. Privileged Peer Review Committee Communications

An integral part of the Indiana statutory scheme for quality control of the medical profession is the "peer review committee," the mechanism

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that the physician in question was not expected to disclose irrelevant information. 118 F.R.D. at 66.

24. 521 N.E.2d at 707 (quoting Collins v. Bair, 256 Ind. 230, 236, 268 N.E.2d 95, 98 (1971)).

by which doctors and other health-care professionals police their ranks.[25] Peer review committees may be established by the professional staff of any Indiana hospital and have responsibility to review the quality of patient care and the qualifications of staff members. Because the medical community is extremely self-protective, Indiana law provides that all communications to a peer review committee shall be privileged.[26] Except in cases of required disclosure to a health-care provider under investigation, no communication of a peer review committee may be subject to discovery or admitted into evidence in any judicial or administrative proceeding without a written waiver by the committee.[27]

The confidentiality of peer review committee communications is designed to foster open and honest review of the conduct of physicians and other health-care providers. But absolute confidentiality may have other unintended consequences. The statute grants immunity from suit to any peer review committee member, or anyone else who provides a committee with information, provided that such individuals act in "good faith."[28] Unless peer review communications are subject to discovery,

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25. IND. CODE §§ 16-10-1-6.5, 34-4-12.6-1 to -5 (1988).

26. *Id.* § 34-4-12.6-2(a) provides:

All proceedings of a peer review committee shall be confidential, and all communications to a peer review committee shall be privileged communications to the peer review committee. Neither the personnel of a peer review committee nor any participant in a proceeding therein shall reveal any content of communications to, or the records or determination of, a peer review committee outside the peer committee. However, the governing board of a hospital or professional health care organization may disclose the final action taken with regard to a professional health care provider without violating the provisions of this section. Except as otherwise provided in this chapter, no person who was in attendance at any such peer review committee proceeding shall be permitted or required to disclose any information acquired in connection with or in the course of such proceeding, or to disclose any opinion, recommendation, or evaluation of the committee or of any member thereof. Information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because it was presented during proceedings before such peer review committee, nor is a member, employee or agent of such committee or other person appearing before it to be prevented from testifying as to matters within his knowledge and in accordance with the other provisions of this chapter, but the witness cannot be questioned about this testimony or other proceedings before such committee or about opinions formed by him as a result of committee hearings.

27. *Id.* § 34-4-12.6-2(c).

28. *Id.* § 34-4-12.6-3 provides:

(a) There shall be no liability on the part of, and no action of any nature shall arise against, the personnel of a peer review committee for any act, statement made in the confines of the committee, or proceeding thereof made in good faith in regard to evaluation of patient care as that term is defined and limited

the good faith requirement would be difficult, if not impossible, to enforce. Physicians whose hospital staff privileges are limited or terminated for illegitimate reasons will find it difficult or impossible to establish that fact since the basis of a peer review committee's decision is inadmissible in evidence. And medical tort victims, who know better than anyone the degree of difficulty involved in persuading medical experts to provide evidence against a fellow medical professional, will be unable to use peer review investigations in establishing their claims. More importantly, tort victims will be unable to play any oversight role in the peer review committee system by holding committee members accountable when they wilfully or fraudulently fail to act against deficient health-care providers.

In three recent opinions, the Indiana Court of Appeals has held that the confidentiality of peer review communications is not subordinated by any of the foregoing concerns. In *Parkview Memorial Hospital, Inc. v. Pepple*,[29] the court held that the statutory privilege for peer review committee communications means just what it says, and that such communications may not be used in evidence by a physician challenging a private hospital's denial of surgical privileges. Judge Garrard filed a concurring opinion pointing out the possibility of conflict between the peer review committee privilege and the right of a physician to challenge a hospital in court over its decision limiting the physician's staff privileges.[30] A later opinion in the same case,[31] however, made clear that physicians have no right to challenge a credentials decision made by a private hospital on the ground that the decision was arbitrary and capricious.[32]

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in section 1(b) [IND. CODE § 34-4-12.6-1(b)] of this chapter.

(b) Notwithstanding any other law, a peer review committee, an organization, or any other person who, in good faith and as a witness or in some other capacity, furnishes records, information, or assistance to a peer review committee that is engaged in: (1) the evaluation of the qualifications, competence, or professional conduct of a professional health care provider; or (2) the evaluation of patient care; is immune from any civil action arising from the furnishing of the records, information, or assistance, unless the person knowingly furnishes false records or information.

(c) The personnel of a peer review committee shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care as that term is defined and limited in section 1(b) of this chapter.

(d) No restraining order or injunction shall be issued against a peer review committee or any of the personnel thereof to interfere with the proper functions of the committee acting in good faith in regard to evaluation of patient care as that term is defined and limited in section 1(b) of this chapter.

29. 483 N.E.2d 469 (Ind. Ct. App. 1985).

30. *Id.* at 470.

31. Pepple v. Parkview Mem. Hosp., Inc., 511 N.E.2d 467 (Ind. Ct. App. 1987) (construing IND. CODE § 34-4-12.6-4 (1988)).

32. 511 N.E.2d at 469.

That opinion further held that a statutory provision permitting the use of peer review information "for legitimate internal business purposes," including a health-care provider's own defense, does not afford aggrieved physicians the right to use privileged communications for the purpose of suing for the reinstatement of staff privileges.[33] A third opinion, *Terre Haute Regional Hospital, Inc. v. Basden*,[34] held that a patient suing a private hospital for fraud in connection with a staff physician's malpractice has no right to discover peer review committee communications concerning the physician. The fact that the legislature limited civil immunity for peer review committee members to actions taken in good faith did not constitute a limitation on the confidentiality and privilege extended to peer review proceedings, determinations and materials. The court acknowledged that the privilege could not be invoked to shield criminal conduct or fraud, but the discovering party must first make a *prima facie* showing that a crime or fraud occurred before a confidential communication will lose its privilege protection.[35]

Collectively, the opinions suggest that the peer review committee privilege is virtually ironclad. Aggrieved physicians and medical malpractice plaintiffs will have to look elsewhere, possibly in vain, for evidence to support claims that the peer review committee system has broken down. All three opinions, however, involved private hospitals. Different results arguably would be reached in cases concerning public hospitals since constitutional due process considerations would be implicated. The court of appeals acknowledged that credentials decisions involving physicians at public hospitals would be subject to judicial review to determine whether the decisions were arbitrary or capricious.[36] Such review would seem to require some disclosure of peer review committee communications in court.

III. Other Privileges

A. Attorney-Client Communication

In *Indiana State Highway Commission v. Morris*,[37] Chief Justice Shepard wrote in a concurring opinion that confidential communications by state agency employees to the Attorney General qualify for the attorney-client privilege and are not subject to compulsory disclosure.[38]

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33. *Id.*
34. 524 N.E.2d 1306 (Ind. Ct. App. 1988).
35. *Id.* at 1310 (plaintiff had merely asserted the existence of fraud, which was insufficient to preclude application of the privilege).
36. Pepple v. Parkview Mem. Hosp., Inc., 511 N.E.2d at 469 n.2.
37. 528 N.E.2d 468 (Ind. 1988).
38. *Id.* at 475 (Shepard, C.J., concurring).

The case involved a negligence claim against the Indiana State Highway Commission arising from an automobile accident on a state bridge. The Supreme Court held that the plaintiff's claim was not barred by the plaintiff's failure to serve notices of the tort claim on both the state agency and the Attorney General, as required by Indiana's Tort Claims Act.[39] The plaintiff's notice was properly served upon a highway commission employee, who acknowledged during discovery that he had made copies and forwarded them to the Attorney General. The Indiana Supreme Court held that the employee's transmittal satisfied the statute's dual notice requirement.[40]

The rationale underlying the attorney-client privilege is that clients must be assured that confidences shared with an attorney will not be revealed so that the attorney will be fully advised in serving the client.[41] Chief Justice Shepard wrote in his concurrence that the rationale applies as forcefully to state agency clients as to private clients. Accordingly, the fact that a highway commission employee forwarded a tort claims notice to the Attorney General was privileged information that need not have been disclosed to the plaintiffs.[42]

B. Husband-Wife Privilege

In *Baggett v. State*,[43] the defendant's former wife testified as to conversations involving child molestations by the defendant with two girls, ages twelve and eight. The defendant's attorney did not object to the admissibility of the ex-wife's testimony, which the court of appeals held was "clearly" protected by the spousal communications privilege. The court held that the defendant was entitled to a new trial in light of his trial counsel's deficiency in failing to object.[44] The Indiana Supreme Court thereafter granted transfer and vacated the court of appeals opinion, holding that the spousal communications privilege is not a ground for excluding evidence resulting from a report of a child who may have been a victim of abuse or neglect.[45]

In *Kindred v. State*,[46] the Indiana Supreme Court elaborated on the spousal communications privilege, holding that the privilege applies not

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39. *Id.* at 470-71. IND. CODE § 34-4-16.5-6 (1982) provides in pertinent part: "Except as provided in [IND. CODE § 34-4-16.5-8] a claim against the state is barred unless notice is filed with the attorney general and the state agency involved within one hundred eighty (180) days after the loss occurs.

40. 528 N.E.2d at 471.

41. *Id.* at 474 (Shepard, C.J., concurring).

42. *Id.*

43. 507 N.E.2d 637 (Ind. Ct. App. 1987), *vacated*, 514 N.E.2d 1244 (Ind. 1987).

44. 507 N.E.2d at 640.

45. *Baggett*, 514 N.E.2d at 1245.

46. 524 N.E.2d 279 (Ind. 1988).

only to utterances but to communicative acts where there is "some indication [that] the communicating spouse invite[s] the other's presence or attention"[47] and manifests some intent "to communicate the knowledge imparted by the act. When circumstances indicate the communicating spouse is indifferent to the presence of the other, the privilege [would] be inapplicable as it would do nothing to promote its purpose."[48] Accordingly, in this check forgery case, the trial judge properly excluded testimony by the defendant's wife that he had given her cash and a bank book to hide during a police search since the defendant obviously communicated to her a request that the materials be concealed. The trial judge, however, properly admitted the wife's testimony that the bank book contained her husband's handwriting since no confidential communicative act was involved in the wife's examination of the bank book after her husband's arrest.[49]

C. Self-Analysis Privilege

In *Scroggins v. Uniden Corp. of America*,[50] the court confronted the discoverability of a manufacturer's self-evaluation prepared in compliance with the Federal Consumer Product Safety Act. The Act requires manufacturers to report to the federal government defects in goods that would create a substantial hazard.[51] In *Scroggins*, the plaintiff sought discovery by interrogatories of communications between the Consumer Product Safety Commission and Uniden, the manufacturer of a cordless telephone which the plaintiff claimed caused a loss of hearing when it rang unexpectedly in his ear.[52]

The self-analysis privilege was discussed recently in *Roberts v. Carrier Corp.*,[53] where the court recognized such a common-law privilege under the following standards: (1) to be privileged, the materials in question must have been prepared for mandatory government reports; (2) the privilege extends only to subjective, evaluative materials; (3) the privilege does not extend to objective data in the same reports, and (4) discovery of privileged self-analysis reports is denied only where the policy favoring exclusion clearly outweighs the discovering party's requirements for the information.[54] The public policy behind the privilege is (1) to assure

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47. *Id.* at 296.
48. *Id.*
49. *Id.* at 294-96.
50. 506 N.E.2d 83 (Ind. Ct. App. 1987).
51. 15 U.S.C. §§ 2051-83.
52. 506 N.E.2d at 84.
53. 107 F.R.D. 678 (N.D. Ind. 1985).
54. *Id.* at 684 (citing Resnick v. American Dental Assoc., 95 F.R.D. 372, 374 (N.D. Ill. 1982)).

fairness to persons required by law to engage in self-evaluation and (2) to make the self-evaluation process more effective by creating an effective incentive structure for candid and unrestrained self-evaluation. Thus, the privilege protects only those evaluations that the law requires one to make. An evaluation made voluntarily, in a document not required by the government or not produced for the government, is not privileged.[55]

Notwithstanding *Roberts*, the Indiana Court of Appeals in *Scroggins* rejected the self-analysis privilege because the privilege was not provided by any statute.[56] Creation of privileges is "the sole power of the legislature," and accordingly no self-analysis privilege exists under Indiana law.[57] Further, the court was unpersuaded that a self-analysis privilege fostered any important public policy. Manufacturers will either file honest consumer product safety reports which disclose hazardous products, in which case the government will order production to cease or the manufacturer on its own will cease production; or manufacturers will irresponsibly file reports which misrepresent the existence of hazards. In either case, the court was unpersuaded that a self-analysis privilege would make an appreciable difference in the safety of consumer products.[58]

IV. Conclusion

The law of privilege in Indiana remains a multi-faceted body of rules, which vary depending upon the policy served by the privilege in question. Privileges will continue to be narrowly construed to foster discovery and the full exchange of all relevant information between litigants. The peer review committee privilege, however, is a dramatic exception to this general state of affairs. The present indication from the Indiana Court of Appeals is that the peer review committee privilege, at least, will receive great deference and may prove to be an absolute bar to the discovery and admissibility of confidential peer review communications.

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55. 107 F.R.D. at 684.
56. 506 N.E.2d 83, 85-86 (Ind. Ct. App. 1987).
57. *Id.* at 86.
58. *Id.*