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## A LOOK AT INDIANA CODE 34-1-14-5: INDIANA'S PHYSICIAN-PATIENT PRIVILEGE

K. RICHARD OLSON\*

### INTRODUCTION

The basic purpose of the physician-patient privilege is to foster the free and uninhibited exchange of information between the doctor and his patient,<sup>1</sup> thus allowing the physician to make the most informed decision for the treatment of his patient. Despite the admirable intention of the privilege, it has been severely criticized by legal scholars.<sup>2</sup> Wigmore attacked the privilege by declaring that only in a very few cases is the matter communicated to the physician confidential; and, even if it is confidential, the absence of the privilege would not inhibit the patient from fully confiding in the doctor. While agreeing that the relationship between the physician and his patient should be fostered, Wigmore emphatically denied that the injury to that relationship which would result from abolishing the privilege is greater than the injury to justice which occurs due to the existence of the privilege.<sup>3</sup>

At the common law the physician-patient privilege did not exist.<sup>4</sup> It was never incorporated into English law,<sup>5</sup> and in the United States twelve jurisdictions have never adopted it.<sup>6</sup> A comparison of recent state and federal approaches to the physician-patient privilege<sup>7</sup> indicates that the privilege's present scope remains unsettled.

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1. Note, *Evidence—Physician-Patient Privilege—Compelling Disclosure of Privileged Information—Discretion of the Trial Judge*, 41 N.C.L. REV. 627, 628 (1963).

2. 8 J. WIGMORE, WIGMORE ON EVIDENCE, § 2380 (McNaughton ed. 1961); C. MCCORMICK, MCCORMICK ON EVIDENCE, § 105 (Cleary ed. 1972).

3. 8 J. WIGMORE, *supra* note 2, at 829-30.

4. *Collins v. Blair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904).

5. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 611 (1964).

6. Comment, *Evidence: The Physician-Patient Privilege: Alternatives to the Rule as it Now Exists in Oklahoma*, 24 OKLA. L. REV. 380, 383 (1971). The states which have failed to adopt the rule are: Alabama, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina, Tennessee, Texas and Vermont.

7. Compare PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, rule 504, 46 F.R.D. 161, 257-62 (1969) (Rule 504 allows confidential communications to be privileged only between psychotherapists and their patients) with WISCONSIN RULES OF EVIDENCE, rule 805.04 in 46 WIS. BAR BULL. 57, 63 (1973)

The privilege has been established by statute in Indiana for some time,<sup>8</sup> and it has been the subject of much comment and criticism by the Indiana courts.<sup>9</sup> The present statute reads:

The following persons shall not be competent as witnesses:

. . . . .

Fourth. Physicians, as to matters communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.<sup>10</sup>

Most of the litigation concerning the Indiana statute has centered around the following questions: the meaning of the word "physician"; the meaning of the terms "matters communicated" and "professional business" and the relationship of these terms to each other; the effect of a third person's presence during communications between the physician and patient; the question of waiver while the patient is still alive; and waiver of the privilege after the patient's death. What follows is a general analysis of the physician-patient statutory privilege in Indiana. The Indiana cases concerning the privilege will be discussed with reference to the five areas specified above, with the goal of determining the present status of the privilege and its possible future in Indiana.

#### INTERPRETING THE STATUTE

##### *Overview*

Generally, the Indiana courts have been asked to resolve questions concerning the physician-patient privilege in the following types of actions: personal injury cases,<sup>11</sup> cases involving the pay-

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(Rule 805.04 allows for the general physician-patient privilege with some exceptions).

8. The first statute to confer a privilege was passed in 1861. It read: "[P]hysicians as to any matters confided to them in the course of the duties of their profession . . . shall not, . . . be competent witnesses, unless with the consent of the party making such confidential communications . . . ." ch. 27, § 3 (1861) Ind. Laws Regular Session 41. The current law was passed in 1881. ch. 38, § 275 (1881) Ind. Laws (Special session).

9. See notes 11 to 17 *infra* and accompanying text.

10. IND. CODE 34-1-14-5 (1971).

11. *Collins v. Blair*, 256 Ind. 230, 268 N.E.2d 95 (1971) (personal injuries sustained in auto accident); *Acme-Evans Co. v. Schnepf*, 214 Ind. 394, 14 N.E.2d 561 (1938) (injuries resulting from negligent operation of a truck); *Schlarb v. Henderson*, 211 Ind. 1, 4 N.E.2d 205 (1936) (injuries sustained from automobile collision); *Chicago, S.B. & L.S.R. Co. v. Walas*, 192 Ind. 369, 135 N.E. 150 (1922) (injuries sustained by passenger because allegedly pushed off train by conductor); *Cincinnati, H. & D. R. Co. v. Gross*, 186 Ind. 471, 114 N.E.

ment of insurance proceeds,<sup>12</sup> criminal cases,<sup>13</sup> contested will cases,<sup>14</sup>

962 (1917) (brakeman sued for injuries sustained while on the job); *New York, C. & St. Louis R. Co. v. Shields*, 185 Ind. 704, 112 N.E. 762 (1916) (injuries sustained due to company moving its cars); *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N.E. 1014 (1910) (injuries sustained from falling on slippery floor); *Pittsburgh C. C. & St. Louis Ry. Co. v. O'Conner*, 171 Ind. 686, 85 N.E. 969 (1908) (injuries sustained when struck by passenger train); *Springer v. Byram*, 137 Ind. 15, 36 N.E. 361 (1894) (injury sustained while in public elevator); *Williams v. Johnson*, 112 Ind. 273, 13 N.E. 872 (1887); *Shaneff v. Sabo*, 143 Ind. App. 1, 237 N.E.2d 277 (1968) (injuries sustained in automobile collision); *Boger v. Krinn*, 141 Ind. App. 418, 228 N.E.2d 788 (1940) (injuries due to collision of ambulance with automobile); *Northern Indiana Public Service Co. v. McClure*, 108 Ind. App. 253, 24 N.E.2d 788 (1940) (injuries sustained from carbon monoxide poisoning allegedly due to gas leak); *State Farm Mutual Automobile Insurance Co. v. Kramer*, 105 Ind. App. 591, 14 N.E.2d 741 (1938) (action alleging fraudulent conduct in securing signed release of person who sustained personal injuries in a truck collision); *General Accident, Fire and Life Assurance Co. v. Tibbs*, 102 Ind. App. 262, 2 N.E.2d 229 (1936) (suit by passenger in car that was struck by a truck); *Southern Indiana Gas and Electric Co. v. Vaughn*, 88 Ind. App. 35, 163 N.E. 107 (1928) (husband sued for loss of wife's services after she was struck by automobile); *Grossnickle v. Avery*, 96 Ind. App. 479, 152 N.E. 288 (1926) (injuries sustained in bicycle-automobile collision); *City of Princeton v. Fields*, 72 Ind. App. 278, 125 N.E. 653 (1920) (injuries due to defective sidewalk); *Capital Rattan Co. v. Francher*, 64 Ind. App. 685, 116 N.E. 593 (1917) (injuries sustained in factory elevator); *Chicago, E. & E. R. Co. v. Schenkel*, 57 Ind. App. 175, 104 N.E. 50 (1914) (switchman injured on the job); *Mortimer v. Daub*, 52 Ind. App. 30, 98 N.E. 845 (1912) (injuries sustained from negligent operation of interurban car); *Rump v. Woods*, 510 Ind. App. 347, 98 N.E. 369 (1912) (injuries sustained from automobile collision); *Chicago, I & L Ry. Co. v. Gorman*, 47 Ind. App. 432, 94 N.E. 730 (1911), *aff'd on other grounds*, 58 Ind. App. 381, 106 N.E. 897 (1912) (injuries sustained from collision with train when plaintiff was passing over tracks of defendant in a wagon); *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N.E. 356 (1909) (suit for personal injuries sustained when plaintiff was alighting from a car operated by defendant); *City of Warsaw v. Fisher*, 24 Ind. App. 46, 55 N.E. 42 (1899) (personal injuries sustained due to defective sidewalk); *New York, Central & St. Louis R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N.E. 954 (1894) (father sued for death of his minor son who was run over by train).

12. Insurance company refused to pay value of life insurance policy claiming the deceased fraudulently misrepresented himself on the application for insurance in the following cases: *Metropolitan Life Insurance Co. v. Fidelity Trust Co.*, 214 Ind. 134, 14 N.E.2d 911 (1938); *Houghton v. Aetna Life Insurance Co. of Hartford*, 165 Ind. 32, 73 N.E. 592 (1905); *Aetna Insurance Co. v. Deming*, 123 Ind. 384, 24 N.E. 86 (1890); *Penn Mutual Life Insurance Co. v. Wiler*, 100 Ind. 92 (1885); *Excelsior Mutual Aid Association of Anderson, Indiana v. Riddle*, 91 Ind. 84 (1883); *Masonic Mutual Benefit Association v. Beck*, 77 Ind. 208 (1881); *Mathews v. Rex Health and Accident Insurance Co.*, 86 Ind. App. 335, 157 N.E. 467 (1927); *Metropolitan Life Insurance Co. v. Head*, 86 Ind. App. 326, 157 N.E. 448 (1927); *Traveler's Insurance Co. v. Fletcher American National Bank*, 84 Ind. App. 563, 150 N.E. 825 (1926). Further cases that have dealt with the privilege in life insurance cases are: *North American Union v. Oleske*, 64 Ind. App. 435, 116 N.E. 68 (1917) (company claimed decedent committed suicide); *Mason's Union Life Insurance Association v. Brockman*, 26 Ind. App. 182, 59 N.E. 401 (1961) (company claimed deceased violated conditions of application after the policy was issued).

13. *Green v. State*, \_\_\_ Ind. \_\_\_, 274 N.E.2d 267 (1971) (first degree murder); *Summerlin v. State*, 256 Ind. 652, 271 N.E.2d 411 (1971) (assault and battery with intent to kill); *Doss v. State*, 256 Ind. 174, 267 N.E.2d 385 (1971) (second degree burglary); *Alder v. State*,

suits to enforce oral contracts,<sup>15</sup> medical malpractice suits<sup>16</sup> and actions to set aside conveyances of land.<sup>17</sup> In these cases the courts have struggled with the problem of protecting the physician-patient relationship while, at the same time, trying to allow for the fullest disclosure of relevant facts necessary for proper adjudication. Conceivably, the Indiana statute could silence the physician as to relevant matters. The Indiana rule states that a physician "shall not be competent" to testify. If a court were to construe this provision as an absolute prohibition against a doctor's testimony concerning his patient, the statute would often prevent the discovery of necessary information even though the patient had no objections to the discovery. Thus, realizing the possible injustices of a strict interpretation, the Indiana Supreme Court in *Penn Mutual Life Insurance Company v. Wiler*<sup>18</sup> stated:

The purpose of the statute is not the suppression of truth needed for reaching the correct results in litigating though this may sometimes incidentally occur . . . but the

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239 Ind. 68, 154 N.E.2d 716 (1958) (reckless homicide); *Myers v. State*, 192 Ind. 592, 137 N.E. 547 (1922) (defendant convicted of manslaughter); *Seifert v. State*, 160 Ind. 464, 67 N.E. 100 (1903) (crime of producing an abortion); *Hauk v. State*, 148 Ind. 238, 46 N.E. 127 (1897) (crime of producing an abortion); *Robertson v. State*, \_\_\_\_ Ind. App. \_\_\_\_, 291 N.E.2d 708 (1973) (driving an automobile while intoxicated); *Post v. State*, 14 Ind. App. 452, 42 N.E. 1120 (1896) (prosecution for bastardy).

14. Cases where it was claimed the will was invalid due to mental incompetency, undue influence or fraud: *McCord v. Strader*, 82 N.E.2d 893 (Ind. 1948), *aff'd on other grounds*, 227 Ind. 389, 86 N.E.2d 441 (1949); *Pence v. Myers*, 180 Ind. 282, 101 N.E. 716 (1913); *Heaston v. King*, 167 Ind. 101, 77 N.E. 805 (1906); *Brackney v. Fogle*, 156 Ind. 535, 60 N.E. 303 (1901); *Bower v. Bower*, 142 Ind. 192, 41 N.E. 523 (1895); *Gurley v. Park*, 135 Ind. 440, 35 N.E. 279 (1893); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889); *Heustan v. Simpson*, 115 Ind. 62, 17 N.E. 261 (1888); *Vaughn v. Martin*, 145 Ind. App. 455, 251 N.E.2d 444 (1969); *Sager v. Moltz*, 80 Ind. App. 122, 139 N.E. 687 (1923).

15. *In re Beck's Estate*, 143 Ind. App. 291, 240 N.E.2d 88 (1968) (action for services rendered the deceased); *Hauch v. Fritch*, 99 Ind. App. 65, 189 N.E. 639 (1934) (action for services rendered deceased over six year period); *Minnis v. Steele*, 79 Ind. App. 45, 132 N.E. 702 (1921) (action for services rendered as caretaker of decedent's home); *Hays v. Hays*, 49 Ind. App. 298, 97 N.E. 198 (1912) (action on quantum meruit for services rendered for managing a store); *Miller v. Miller*, 47 Ind. App. 239, 94 N.E. 243 (1911) (personal attendant of deceased sued for services rendered).

16. *Aspy v. Botkins*, 160 Ind. 170, 66 N.E. 462 (1902) (negligent treatment of right knee); *Lane v. Boicourt*, 128 Ind. 420, 27 N.E. 1111 (1891) (negligent treatment of woman during and after childbirth); *Beckwell v. Hosler*, 10 Ind. App. 5, 37 N.E. 580 (1894) (negligent setting and treatment of dislocated hip).

17. Cases involving fraud and undue influence claimed in securing the transfer: *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Baker v. Whittaker*, 33 Ind. App. 347, 182 N.E.2d 442 (1962); *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N.E. 318 (1912).

18. 100 Ind. 92 (1885).

purpose is the promulgation and protection of confidence of a certain kind, the inviolability of which is deemed to be of more importance than the results sought through compulsory disclosure in a court of justice. Notwithstanding the absolute prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. It gives no right to the physician to testify, and creates no absolute incompetency. To hold otherwise would result in many cases in obstructing justice without subserving the purpose of the statute.<sup>19</sup>

The Indiana court obviously felt that a competency statute would be too suppressive; therefore, the statute was transformed into a privilege statute. As such, the privilege's protection could be waived or claimed only by the patient; the physician was given no control over the assertion of the privilege. Although these interpretations are clearly contrary to the literal meaning of the statute, they are still controlling, since the legislature has not seen fit to correct these inconsistent judicial constructions.<sup>20</sup>

A general observation of the cases which have dealt with the privilege indicates that initially the courts expanded the concept of privilege, because to be effective the privilege had to protect not only matters orally communicated to the physician but also all information acquired through observation of the patient.<sup>21</sup> Subsequent cases, however, were concerned with limiting the statute.<sup>22</sup> Language typical of these later cases is found in *Stayner v. Nye*,<sup>23</sup> an action to set aside a deed because it was procured through fraud and undue influence. In *Stayner* the Supreme Court of Indiana declared that since the physician-patient privilege often prohibits the ascertainment of truth,<sup>24</sup> the rule of construction that statutes

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19. *Id.* at 100-1.

20. Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256, 259 (1952).

21. See generally *Cincinnati, H. & D. R. Co. v. Gross*, 186 Ind. 471, 114 N.E. 962 (1917); *Masonic Mutual Benefit Association v. Beck*, 77 Ind. 203 (1881); *Hays v. Hays*, 79 Ind. App. 298, 97 N.E. 198 (1912).

22. See generally *Collins v. Blair*, 256 Ind. 230, 268 N.E.2d 95 (1971); *Alder v. State*, 239 Ind. 68, 157 N.E.2d 716 (1958); *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 446 (1949); *Myers v. State*, 192 Ind. 592, 137 N.E. 547 (1922); *General Accident Fire and Life Assurance Co. v. Tibbs*, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

23. 227 Ind. 231, 85 N.E.2d 446 (1949).

24. *Id.* at 238, 85 N.E.2d at 449.

in derogation of the common law are to be strictly construed should be followed in privilege cases.<sup>25</sup> Therefore, the statute's prohibitions were not to be extended by implication.<sup>26</sup> Although one commentator declared that the Indiana courts have not sufficiently limited the privilege,<sup>27</sup> a closer look at the results of Indiana's judicial interpretation will lend itself to a more exacting criticism.

### *Meaning of "Physician"*

The word "physician" appears in the statute, and questions concerning the scope of the term have arisen. In *William Laurie Co. v. McCullough*,<sup>28</sup> a slip-and-fall personal injury case, the plaintiff invoked the privilege in an attempt to keep her gymnastic instructor from testifying as to the plaintiff's physical condition. The Indiana Supreme Court held that, for the purpose of the statute, "physician" describes a person who has received the degree of doctor of medicine from an incorporated institution, and who is lawfully licensed to engage in the practice of medicine.<sup>29</sup> Obviously, the gym instructor did not qualify under this definition, and the privilege was not applied to silence him.

Indiana courts have applied the above definition in a number of situations. To illustrate, it has been held that a chiropractor falls within the standard.<sup>30</sup> In contrast, the Seventh Circuit Court of Appeals, in applying Indiana law, held that a psychologist did not satisfy the Indiana requirements for inclusion under the privilege statute.<sup>31</sup> This decision seems correct. A psychologist does not have the type of training that even a chiropractor is required to obtain.<sup>32</sup>

Several writers have argued for a broad psychotherapist-patient privilege,<sup>33</sup> and the Indiana legislature has provided for a limited

25. *Id.*

26. *Id.*

27. Note, *supra* note 20, at 267.

28. 174 Ind. 477, 90 N.E. 1014 (1910).

29. *Id.* at 488, 90 N.E. at 1018.

30. *Collins v. Blair*, 256 Ind. 230, 268 N.E.2d 95 (1971).

31. *Elliott v. Watkins Trucking Co.*, 406 F.2d 90 (7th Cir. 1969).

32. See IND. CODE 25-33-1-5 (1971) (statutory requirements for basic certification of a psychologist), also IND. CODE 25-10-1-2 (1973) (requirements in order to practice as a chiropractor).

33. See generally Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964); and Comment, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32 (1952).

One commentator has put the particular need for confidentiality for the psychotherapist

psychologist-client privilege.<sup>34</sup> There is merit in the argument for a broad privilege for psychotherapeutic relationships, because a psychotherapist's effectiveness depends completely upon the patient's willingness to talk and reveal very personal information.<sup>35</sup> The proposed Federal Rules of Evidence have expressly recognized the importance of keeping matters communicated between psychotherapist and patient confidential.<sup>36</sup> Of all those in the medical field, the psychotherapist has the strongest arguments for demanding a broad privilege. Although this is an interesting area, other sections of the statute have received more attention by the Indiana courts.

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as follows:

The privilege which exists for the protection of confidential communications made by a patient to a physician has been criticized on many grounds. One of the most popular criticisms has been that communications made to physicians are rarely of a confidential nature, that only in quite unusual instances would the content of such communications be the subject of second thoughts, let alone controversy. In contrast to those communications common to the physician-patient relationship, those made by a client-patient to a psychotherapist are of an extremely confidential character. The patient that hesitates to consult the therapist because knowledge of this consultation by other persons will cause an inference by those persons that the patient has need for divulging confidences which, if widely known, would be humiliating to the patient. It can be nothing but embarrassing to reveal one's deepest emotions, unfulfilled wishes, frustrations, fantasies, etc. In fact, a troubled person will often be impelled to see a psychotherapist because the nature of the declarations which he feels required to make to someone are such as cannot be revealed to anyone else, and especially not to one's intimates. Thus, almost by definition, and in practice, the psychotherapeutic relationship is not only one in which one is required to feel free to discuss those matters which usually would not be discussed under any other circumstances, but usually depends for its success upon the creation of an atmosphere in which embarrassing facts will be freed from conscious and unconscious censorship. This is quite different from the physician-patient relationship. [footnotes omitted]

Fisher, *supra* at 620-21.

34. IND. CODE 25-33-1-17 (1971), reads as follows:

No psychologist certified under provisions of this act (25-33-1-1—25-33-1-11) shall disclose any information he may have acquired from persons with whom he has dealt in his professional capacity, except under the following circumstances: (1) in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of said homicide; (2) in proceedings the purposes of which is to determine mental competency, or in which a defense of mental incompetency is raised; (3) in actions, civil or criminal, against a psychologist for malpractice; (4) upon an issue as to validity of a document as a will of a client; and (5) with the express consent of the client or subject, or in the case of his death or disability of his legal representative.

35. PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 260 (1969).

36. *Id.* at 260.



*"Matters Communicated" and "Professional Business"*

Under the statute, matters communicated to the physician in the course of his professional business are protected. In *Alder v. State*<sup>37</sup> the Indiana Supreme Court defined the phrase "matters communicated" to include:

information obtained in the sick room, heard or observed by the physician, or of which he is otherwise informed pertaining to the patient and upon which he is persuaded to do some act or give some direction or advice in the discharge of his professional obligation.<sup>38</sup>

An important question raised by this definition is the meaning of "professional obligation or business." In *Vaughn v. Martin*<sup>39</sup> the Indiana Court of Appeals defined "professional business" to include "any contact between a doctor and a person—a patient—in the course of which the doctor is required to make some evaluation, perform such duty, or do some act based upon his medical expertise which is to benefit the patient."<sup>40</sup> The *Vaughn* case dealt with an action to invalidate a will; the claimant alleged that the testator was mentally incompetent to make the will. At the trial a physician was allowed to testify as to the decedent-testator's mental and physical condition. Because the decedent had adhered to the Christian Scientist faith, he had consulted the doctor only once in 25 years. The sole purpose for the consultation was to allow the decedent to obtain the physician's permission to enter a nursing home. The court held that it was error to allow the doctor to testify, because the knowledge was obtained by the physician in the course of his professional business. The doctor had to evaluate the patient's qualifications to enter the nursing home, and he had to use his medical expertise to do so. The fact that the patient had visited a doctor only once in 25 years did not make the physician's evaluation any less professional. The definition's applicability was to be determined on a qualitative basis rather than on a quantitative basis.<sup>41</sup>

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37. 239 Ind. 68, 154 N.E.2d 716 (1958). This case concerns the testimony of a doctor as to the contents of a blood sample taken from an unconscious patient; the information was held privileged as a matter communicated between the physician and his patient.

38. *Id.* at 76, 154 N.E.2d at 720.

39. 145 Ind. App. 455, 251 N.E.2d 444 (1969).

40. *Id.* at 462, 251 N.E.2d at 448.

41. *Id.*

"Matters communicated" and "professional business" are important concepts in understanding the statute, and they must be read and considered together in order to comprehend their true value. Several cases point this out. For example, in *Bower v. Bower*<sup>42</sup> an action was brought to set aside the will of one Andrew Bower. The testator's doctor was allowed to testify as to the mental and physical condition of the decedent through reference to knowledge obtained by the doctor when he encountered the decedent on the road one day. During that encounter, the doctor talked with the deceased about collecting a bill which the deceased owed to him. The Indiana Supreme Court admitted the evidence because the facts and knowledge were acquired after the existence of the professional relationship had ended, and thus the knowledge gained was not privileged.<sup>43</sup>

Even where the physician-patient relationship still exists, certain knowledge may not be protected by the privilege. The case of *Myers v. State*<sup>44</sup> involved a defendant-patient who was convicted of manslaughter. While leaving the examining room, the treating physician heard his patient utter a threatening statement. The Indiana Supreme Court held that under these facts the words uttered by the patient were not necessary for treatment nor were they intended to be heard by the doctor. Therefore, this knowledge fell outside of the privilege.<sup>45</sup>

An outcome similar to that of the *Myers* case is found in *Miller v. Miller*,<sup>46</sup> in which an attendant of the decedent-patient sued the estate for services rendered. At the trial the physician testified that on one of his professional visits to the decedent's home he was told by the decedent that plaintiff was to be paid for her services. The administrator of the estate objected to the doctor's testimony on the grounds that the information was privileged. The court of appeals disagreed, reasoning that even though the professional relationship was still in existence, this statement was not connected in any manner with the examination of the patient, a conversation about her ailments, the physician's employment or the care and attention the

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42. 142 Ind. 194, 41 N.E. 523 (1895).

43. *Id.* at 201, 41 N.E. at 525.

44. 192 Ind. 592, 137 N.E. 547 (1922).

45. *Id.* at 601, 137 N.E. at 550.

46. 47 Ind. App. 239, 94 N.E. 243 (1911).

patient should receive.<sup>47</sup> In short, the matters communicated had no reasonable connection with the physician's professional business, since the type of medical treatment or advice he gave did not depend upon the patient's personal attendant being paid.

Even though the information which is communicated may seem to have little relationship to medical treatment, such information may be necessary for the physician to discharge his professional obligation. An example is *Hays v. Hays*,<sup>48</sup> in which information concerning the patient's income was held to be within the privilege. In *Hays* the patient's income was discussed in order that the doctor could determine whether or not his patient could take a trip to improve her health. It might be argued that protecting such information places the physician in the unusual position of a financial advisor, an area obviously outside the physician's usual field of expertise. However, the knowledge did seem necessary to suggest the type of care the patient should receive, especially since the trip might financially overburden the patient, thus counteracting any medical value the trip would otherwise provide. For example, if the purpose of the trip were to allow the patient to relax and recuperate, such a purpose might be hindered if the patient were being driven further into debt with each passing day. Thus, although it might appear that one's income is irrelevant for the purposes of medical treatment, under certain situations the physician may require such information to discharge his professional obligation properly. However, it is clear that not all communications are necessary for medical treatment, and in such instances the information should be excluded from the privilege's protection. It would be absurd, therefore, to view the matters communicated in the abstract; the physician's need for that information must be considered in light of the particular facts presented.

Difficulties with the concepts of "matters communicated" and "professional business" can also arise after the patient's death. For example, the states disagree as to whether or not information ac-

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47. *Id.* at 247, 94 N.E. at 246. See also *Minnis v. Steele*, 79 Ind. App. 45, 132 N.E. 702 (1921), where there was an action against the patient's estate for services rendered; the court allowed decedent's physician to testify as to communications with deceased wherein she stated she wanted plaintiff to be well paid for her services rendered. The court held that these matters were not reasonably within the physician's professional business or facts about which he was expected to give advice.

48. 49 Ind. App. 298, 97 N.E. 198 (1912).

quired by a physician as a result of an autopsy on a former patient should be privileged.<sup>49</sup> The only Indiana case that has considered this question is *Mathews v. Rex Health and Accident Insurance Company*,<sup>50</sup> in which the Indiana Court of Appeals held such information to be privileged. In light of the facts in the *Mathews* case, the appellate court's decision seems questionable. Not only was the autopsy performed by a physician who had no previous dealings with the decedent, but the doctor had never even met the patient while the latter was alive. The doctor's only duties at the hospital were to act as director of the laboratories and to serve as pathologist. The court created the fiction that the pathologist was an assistant to the treating physician, and the privilege was, therefore, extended to cover the pathologist. Since the treating physician would not have been allowed to disclose his findings had he performed the autopsy, the court reasoned that it could not allow the privilege to be circumvented by another doctor performing the same procedure.<sup>51</sup>

It is difficult to see what purpose is served by excluding the pathologist's knowledge. The only relationship he had with the patient occurred after the patient's death. The basic concern of the privilege, free disclosure between the physician and his patient, seems valueless here, since the patient's full and uninhibited cooperation is no longer needed. Arguably, there may be some justification in enjoining the treating physician from disclosing what he discovered during the autopsy, because his knowledge may be tainted by what the patient had previously told him. Nevertheless, the reasoning is strained when the basic purpose of the privilege is considered. Surely very few patients would ever allow concern over postmortem disclosures to inhibit their communications with a doctor. Thus, it is clear that the pathologist in *Mathews* could have testified without defeating the purpose of the statutory privilege.

### *Presence of Third Persons*

The statute only concerns itself with the physician and his patient. Therefore, it is not surprising that, although the immediate physician-client privilege remains intact,<sup>52</sup> third persons are not

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49. Tortella, *Physician-Patient Privileged Communications*, 9 TRIAL 59, 60 (1973).

50. 86 Ind. App. 335, 157 N.E. 467 (1927).

51. *Id.* at 348, 157 N.E. at 471.

52. *Indiana Union Traction Corp. v. Thomas*, 44 Ind. App. 468, 88 N.E. 356 (1909).

prohibited from testifying as to overheard physician-patient communications. For example, the knowledge which two ambulance drivers gained while overhearing a physician-patient conversation was held not privileged.<sup>53</sup>

Not all third persons are permitted to testify, however. For example in *Aetna Life Insurance Co. v. Deming*<sup>54</sup> two doctors were partners in the practice of medicine, and one physician overheard a discussion between his partner and a patient. Since the doctors were partners, the Indiana Supreme Court held that the business of one was that of the other, and the privilege applied to both men.<sup>55</sup> In *North American Union v. Oleske*<sup>56</sup> it was necessary for the patient's wife to tell the physician about her husband's symptoms; her husband was unable to do so since he was unconscious at the time of the physician's arrival. The wife's knowledge was held to be privileged, since her disclosures were necessary for the intelligent communication between physician and patient.<sup>57</sup>

Nurses and police officers deserve special attention in any discussion of third parties and the physician-patient privilege. In Indiana the privilege does not extend to nurses who might overhear the physician-patient communications.<sup>58</sup> The Indiana Court of Appeals in *General Accident, Fire and Life Assurance Co. v. Tibbs*<sup>59</sup> stated:

The privilege does not extend to third persons who are present and overhear a conversation under our decisions unless such third person was necessary for the purpose of transmitting the information to the physician.<sup>60</sup>

Although the plaintiff-patient argued that public policy requires nurses to be included within the privilege, the court refused to expand the statute and cover such third persons. However, in the

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53. *Springer v. Byram*, 137 Ind. 15, 36 N.E. 361 (1894). See also *Mason's Union Life Insurance Association v. Brockman*, 26 Ind. App. 182, 59 N.E. 401 (1901) (patient in doctor's office overhears conversation between physician and a patient; his knowledge held not privileged).

54. 123 Ind. 384, 24 N.E. 86 (1890).

55. *Id.* at 390, 24 N.E. at 88.

56. 64 Ind. App. 435, 116 N.E. 68 (1917).

57. *Id.* at 444, 116 N.E. at 70.

58. See *General Accident, Fire and Life Assurance Co. v. Tibbs*, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

59. *Id.*

60. *Id.* at 269, 2 N.E.2d at 232.

recent case of *Doss v. State*<sup>61</sup> the Indiana Supreme Court, in upholding the concept that third persons are not incompetent to testify, said:

The patient-physician privilege . . . does not extend to third persons who overhear conversations unless such persons are necessary for the purpose of transmitting information and aiding the physician.<sup>62</sup>

Except for the use of the conjunctive "and" in the above statement, the emphasized segment provides hope for including nurses within the protection of the privilege. The use of the conjunctive indicates that the nurse's presence during the examination must be based on more than mere aid to the physician; that is, she would have to be present for the purpose of transmitting information as well. However, the nurse may often be used to transmit information. In a very real sense, her assistance alone fosters communication between the physician and his patient. For example, if the nurse draws a blood sample, this increases the amount of information communicated to the physician about the patient. In addition, the nurse is such a familiar and necessary part of the medical profession that her presence normally would not inhibit the patient at all. Thus, there is no reason to treat the nurse as a stranger to the physician-patient relationship; she should be included within the privilege's protection.

Third party police officers are also outside the protection of the privilege. In two recent cases a police officer's eligibility to testify as a third person has been upheld. In both cases a patient was under arrest for committing a felony, and the officer was present at the hospital while a bullet was being removed from the suspect. In *Doss v. State*<sup>63</sup> the Supreme Court of Indiana emphasized that because the patient-suspect was conscious, he waived his objection to the officer's testimony at the trial by not objecting to the officer's presence in the operating room. In the case of *Green v. State*<sup>64</sup> the Supreme Court of Indiana held that a police officer has a right, if not a duty, to be present in the operating room. In addition, the *Green* court held that no breach of the physician-patient privilege

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61. 256 Ind. 174, 267 N.E.2d 385 (1971).

62. *Id.* at 181, 267 N.E.2d at 390 (emphasis added).

63. 256 Ind. 174, 267 N.E.2d 385 (1971).

64. \_\_\_\_ Ind. \_\_\_\_, 274 N.E.2d 267 (1971).

occurred when the doctor handed the bullet to the officer who witnessed its removal.<sup>65</sup> The court further indicated that the evidence already known by the police officer diminished the importance of this physical evidence; the officer already knew of the bullet's existence prior to its removal, and the defendant had admitted the crime.<sup>66</sup> Furthermore, the court clearly indicated its attitude concerning the use of the privilege in criminal cases:

We should keep in mind that the objective of the privilege in such cases is namely to inspire full and complete disclosure of knowledge pertinent and necessary to a trustful and proper relationship in such cases. Where that objective is not served and the privilege is used to conceal the commission of a crime, it has no social value and serves no public purpose but in fact is turned into a shield to the criminal and the commission of the crime.<sup>67</sup>

The quote states a compelling reason for allowing a police officer's testimony to escape the prohibition of the privilege, and the fact that the patient was a suspected criminal provides no reason for an exception to the general rule that third persons can testify concerning physician-patient communications.

A meaningful physician-patient relationship could not exist under the facts in the *Doss* and *Green* cases. The officer's presence in the examining room certainly inhibited each patient. However, even if the officer was not present, the conditions were not appropriate for the establishment of a free and open relationship between the physician and the defendant-patient. The only result accomplished by extending the privilege to cover third party police officers, therefore, would be concealment of evidence necessary to establish criminal guilt.<sup>68</sup>

### *Waiver by the Patient*

The concept of waiver has become an important part of the

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65. *Id.* at \_\_\_\_, 274 N.E.2d at 272.

66. *Id.*

67. *Id.* at \_\_\_\_, 274 N.E.2d at 273.

68. It must be remembered that the physician was still prohibited from testifying. And if the police officer attempted to testify as to what the injuries he observed indicated, this testimony would be subject to objection, since a police officer is not competent to draw conclusions from the type of wound he observed. Furthermore, he could not relate what the physician told him for that would be objectionable as hearsay testimony.

physician-patient privilege in Indiana.<sup>69</sup> Since the privilege was created for the patient's benefit, it has been held that only he can claim or waive it.<sup>70</sup> Such waiver can be accomplished expressly by agreeing that one's opposing counsel can discover any and all medical information,<sup>71</sup> or by not making a timely objection to privileged information introduced at trial.<sup>72</sup>

In contrast to these clear waivers, many cases have been concerned with the more difficult question of implied waiver. The majority of these latter cases have treated implied waiver in three areas. First, the privilege has been held to be impliedly waived in medical malpractice cases. For example, in the 1891 case of *Lane v. Boicourt*<sup>73</sup> the Indiana Supreme Court reasoned that when the patient voluntarily published the occurrence by making it the basis for his cause of action, he could not later assert the confidentiality which the statute is designed to protect.<sup>74</sup> In *Lane* the physician was charged with being negligent in his care and treatment of the plaintiff's wife during and after childbirth. The court ruled that it would be very unfair to allow the wife and plaintiff to detail what happened and compel the physician to remain silent,<sup>75</sup> especially since oftentimes no other witnesses are available to provide the physician's interpretation. Furthermore, in such a case there is a voluntary disclosure by the patient. So in fact there is no real reason to allow the privilege to exist.

A second area dealing with implied waiver can be illustrated by *Baker v. Whittaker*.<sup>76</sup> In *Baker* the decedent-patient requested her physician's presence for the sole purpose of determining whether she was physically and mentally competent to execute a deed. In addition, third persons were present at the examination. Considering the

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69. *Penn Mutual Life Insurance Co. v. Wiler*, 100 Ind. 92 (1885).

70. *See* *Masonic Mutual Benefit Association v. Beck*, 77 Ind. 208 (1881); *Penn Mutual Life Insurance Co. v. Wiler*, 100 Ind. 92 (1885).

71. *See* *Bogen v. Krinn*, 141 Ind. App. 418, 228 N.E.2d 426 (1967) (action for personal injuries where plaintiff-patient signed a document which allowed discovery of "any and all medical and psychological information concerning [himself]").

72. *In re Beck's Estate*, 143 Ind. App. 291, 240 N.E.2d 88 (1968); *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N.E. 318 (1912).

73. 128 Ind. 420, 27 N.E. 1111 (1891).

74. *Id.* at 423, 27 N.E. at 1113. *But see* *Aspy v. Botkins*, 160 Ind. 170, 66 N.E. 462 (1902) (court held information secured by physicians, other than defendant, after the treatment by defendant-physician had ended was privileged).

75. 128 Ind. at 423, 27 N.E. at 1113.

76. 133 Ind. App. 347, 182 N.E.2d 442 (1962).



presence of third persons and the express reason for the consultation, the Indiana appellate court held that if any confidential relationship had existed, it was waived by the decedent himself.<sup>77</sup> The court ruled that it was a demonstration to all those present that she possessed a sufficient mental competency to execute a deed.<sup>78</sup> The decision seems correct, for the decedent utilized her physician-patient relationship to broadcast to the world her competency. The last thing she desired was confidentiality.

Finally, the privilege can be waived when the patient presents his side of the medical story at trial. As in medical malpractice cases, the patient-plaintiff cannot suppress damaging testimony by invoking the protection of the privilege after presenting *his* interpretation of the facts. The case of *Northern Indiana Public Service Co. v. McClure*<sup>79</sup> involved a personal injury action in which a doctor testified that the cause of the plaintiff-patient's injury was due to carbon monoxide poisoning. When the defense attempted to call another physician who had also examined the plaintiff, the plaintiff claimed that the information was privileged. The Indiana appellate court held that the plaintiff had waived his right to object to the defendant's medical evidence when the first physician's testimony was introduced.<sup>80</sup> Similar facts existed in *Schlarb v. Henderson*,<sup>81</sup> an action for personal injuries alleged to have resulted from the negligent operation of an automobile. In *Schlarb* the plaintiff called two physicians who advised and treated her after the accident. The defendant then sought to introduce the testimony of a third doctor who had participated with the two testifying physicians. The Indiana Supreme Court admitted the testimony, holding that if the details of the medical diagnosis and treatment were voluntarily disclosed and the injuries were relied upon as the basis of an action for damages, the inquiry could not be limited to the version selected by the plaintiff.<sup>82</sup>

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77. *Id.* at 354, 182 N.E.2d at 446.

78. *Id.*

79. 108 Ind. App. 253, 24 N.E.2d 788 (1940).

80. *Id.* at 258, 24 N.E.2d at 790.

81. 211 Ind. 1, 4 N.E.2d 205 (1936). *See also* Lane v. Boicourt, 128 Ind. 420, 27 N.E. 1111 (1891).

82. 211 Ind. at 2, 4 N.E.2d at 206. *But see* Acme-Evans v. Schnepf, 214 Ind. 394, 14 N.E.2d 561 (1938), where the court, in a case on somewhat similar facts, held there was no waiver involved by plaintiff-patient introducing the medical testimony of one of his physicians. The court felt it could distinguish this case from *Schlarb v. Henderson* on the facts,

As seen from the above two cases, the question of waiver in personal injury cases is often crucial. Until recently the *McClure* and *Schlarb* cases accurately stated the law in Indiana concerning waiver in personal injury cases—waiver did not occur until the plaintiff presented his own medical testimony at the trial. In 1971, however, the case of *Collins v. Blair*<sup>83</sup> modified the law regarding waiver in personal injury cases. In *Collins* the plaintiff introduced the testimony of physicians who had treated him for injuries allegedly sustained in an automobile accident. The defense attempted to introduce the testimony of a doctor of chiropractic medicine to prove that prior to the accident the plaintiff had been treated for the same condition allegedly caused by the defendant. Although the plaintiff attempted to invoke the privilege, the Supreme Court of Indiana stated:

Where a party-patient, of his own, does an act which will require disclosure of a condition otherwise protected from disclosure, there would appear to no longer be a basis upon which to allow that party to selectively suppress relevant medical evidence pertaining to the same specific condition. By so holding we do not discount the concern of the Indiana General Assembly that the confidential nature of the physician-patient relationship be preserved at the cost of rendering certain evidence inadmissible. Nevertheless, acknowledgement of the privilege's continued existence in a particular case can only be rationalized where such acknowledgement serves to effectuate the purpose for which the privilege was designed—the *preservation of confidential communications*. Where a patient in effect elects to publish the substance of these communications, the privilege's objective can no longer be legitimately accomplished and the privilege must be deemed waived. By holding otherwise, we would fail to serve the policy underlying the physician-patient privilege while coincidentally frustrating the truth determining process.<sup>84</sup>

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because the physician in question did not attend the plaintiff-patient at the time the other doctors were and he had no relationship with the other doctors.

83. 259 Ind. 230, 268 N.E.2d 95 (1971). See also Harvey, *Rules and Rulings for the Trial Lawyer—Discovery—Doctor-Patient Privilege—Waiver*, 15 RES.GESTAE 16 (1971). (Dean Harvey hailed the *Collins* decision as unique and called it the leading case in the United States on the subject.)

84. 259 Ind. at 237-38, 268 N.E.2d at 99 (emphasis by the court).

Thus, the court held that the very filing of an action for personal injuries impliedly waived the privilege. The waiver occurred when the party-patient voluntarily placed his medical condition in issue by way of claim, counterclaim or affirmative answer.<sup>85</sup> In so doing, the party-patient waived the privilege as to all matters either casually or historically related to the condition.<sup>86</sup> The effect of the *Collins* case, therefore, is that in personal injury actions the plaintiff can no longer utilize a doctor-patient privilege so far as discoverable information is concerned.<sup>87</sup> This is not to say that a "fishing expedition" can be made. If the opponent seeks information about matters which are irrelevant to the condition placed in issue, a protective order should be sought.<sup>88</sup> In addition the medical condition must be voluntarily raised by the protected party-patient. The court left little doubt that an opposing party could not raise a question as to the physical or mental condition of the party-patient and therefore force a waiver.<sup>89</sup> The reasoning in *Collins* is sound; there is no purpose for allowing the privilege to exist in personal injury actions as to matters related to the physical condition placed in issue. The patient cannot claim confidentiality when he is publicly announcing his injuries.<sup>90</sup>

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85. *Id.* For a discussion of when waiver is deemed to be triggered in other jurisdictions, see Cosden, *The Physician-Patient Privilege in Oklahoma*, 7 TULSA L.J. 157 (1971) (Oklahoma); Urborn, *Medical Discovery in the Fifty States Plus Two*, 33 INSUR. COUNS. J. 376 (1966) (general discussion and breakdown of the law in all of the states); Comment, *Evidence: Waiver of Physician-Patient Privilege*, 51 MINN. L. REV. 575 (1967) (Alaska); Comment, *Recent Developments, Accelerated Waiver of the Physician-Patient Privilege*, 42 WASH. L. REV. 1107 (1967) (Washington).

86. 256 Ind. at 239, 66 N.E.2d at 101.

87. Harvey, *supra* note 83, at 16.

88. 256 Ind. at 242, 66 N.E.2d at 102.

89. *Id.* at 243, 66 N.E.2d at 103.

90. Two concepts tangentially related to waiver deserve mentioning. In Indiana, if the physician was employed by the party-opponent of the patient, this has no bearing on whether or not the privilege is deemed waived. See generally, *Cincinnati, H. & D. R. Co. v. Gross*, 186 Ind. 471, 114 N.E. 962 (1917); *Chicago & E.R. Co. v. Schenkel*, 57 Ind. App. 175, 104 N.E. 50 (1914); *New York, Chicago & St. Louis R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N.E. 954 (1894). What is important is that the matters were communicated to the physician in the course of the doctor discharging his professional obligation. Only in one case, *Chicago, I. & L. Ry. Co. v. Gorman*, 47 Ind. App. 432, 94 N.E. 730 (1911), was the privileged relationship deemed not to exist. This occurred because the physician involved never attempted to treat the patient. He expressly told the patient that he was only there to gather information for his employer. The doctor was acting in the capacity of investigator, not physician.

It is also clear that a waiver is not necessary for a hypothetical question to be asked of the treating physician. In the case of *Robertson v. State*, \_\_\_ Ind. App. \_\_\_, 291 N.E.2d

### *Waiver After the Patient's Death*

In Indiana the privilege does not terminate upon the patient's death.<sup>91</sup> It has been held to exist until one who stands in the place of the deceased and whose interest is affected by the proposed disclosure waives the privilege.<sup>92</sup> In several cases the courts have been concerned with identifying such persons. Two groups of people appear to fit the definition. First, it is generally conceded that the heirs may waive the privilege.<sup>93</sup> Second, the administrator or executor of the patient's estate has the power of waiver for the purpose of conserving the interests of the estate.<sup>94</sup>

A case which supports these general rules is *Stayner v. Nye*.<sup>95</sup> In this case an action was brought to set aside a deed executed by the decedent-patient on the grounds that the execution was procured through fraud and undue influence. The plaintiffs were the grantor's only surviving heirs, while the defendant-grantees were of no blood relation to the deceased. In the course of proving undue influence, the plaintiffs offered the testimony of two physicians who had treated the decedent. Each was questioned regarding the decedent's physical and mental condition at the time treatment was

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708 (1973), the defendant-patient was charged with driving an automobile while under the influence of intoxicating liquor. Prior to the physician's appearance on the stand, rather overwhelming evidence was presented. Two state troopers testified that the defendant had run into the back of their squad car; they gave the defendant a breathalyzer test, and the results of the test indicated that the defendant was intoxicated. They also testified as to his appearance, speech and general demeanor. The physician who had treated the defendant at the hospital was then called to the stand. He was asked a hypothetical question based on the evidence already in the record as to whether, in his opinion, one displaying such characteristics would be considered intoxicated. Predictably, the defense raised the objection of privileged communications. The court overruled the objection stating that just because the expert witness happened to be a treating physician did not make him incompetent. He was not testifying as to matters communicated to him in his professional capacity, but only from the facts already proven. However, if the privilege is to remain inviolate, the better choice would be to require the use of another expert to comment upon the facts already in evidence, and not one whose opinion could be tainted by previous knowledge.

91. See generally Note, *Physician-Patient Privilege—Waiver in Deed and Will Contests*, 23 IND. L.J. 295 (1948).

92. *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203, 209 (1881).

93. *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N.E. 318 (1912).

94. *Heaston v. Kreig*, 167 Ind. 101, 77 N.E. 805 (1906); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889); *Vaughn v. Martin*, 145 Ind. App. 455, 251 N.E.2d 444 (1969); *Sager v. Moltz*, 80 Ind. App. 122, 139 N.E. 687 (1923); *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N.E. 318 (1912).

95. 227 Ind. 231, 85 N.E.2d 496 (1949).

96. *Id.* at 240, 85 N.E.2d at 500.

administered. The plaintiffs and the administrator of the estate expressly waived the privilege as to the doctors, and the defendants objected to the waiver. The Indiana Supreme Court held that the physicians' testimony was properly admitted.<sup>96</sup> Following the logic of Wigmore,<sup>97</sup> the court stated that as the personal representative of the deceased, the administrator had an interest even though the litigation involved real estate which the deceased had transferred prior to his death.<sup>98</sup> His interest was represented by the concern which an administrator has for satisfying the debts of and claims against the estate. Thus, if the estate's personal property were not sufficient to pay the claims, then the real estate, if brought back into the estate, would make up the deficiency. Further, the children of the deceased were presumed to have a greater interest in protecting the memory of their father than the defendants, who were strangers in blood to the decedent.<sup>99</sup> Since the people who have the natural desire to protect the decedent were willing to expose privileged communications, there was no reason to allow strangers to close the door to the ascertainment of facts relevant to the adjudication. To hold otherwise would encourage fraud in similar instances, for strangers could claim the privilege and prohibit the use of the best available evidence concerning the mental competency of persons who are easily subjected to fraudulent schemes.<sup>100</sup>

The general rule that administrators and heirs can waive the privilege does not exist without exception. For example, an adminis-

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97. 8 J. WIGMORE, WIGMORE ON EVIDENCE, § 2391 (McNaughton ed. 1961). Wigmore states:

The *personal representative* of the deceased may waive the privilege. One who is entrusted with the management of the deceased's property may surely be trusted to protect the memory and reputation of the deceased in so far as it is liable to injury by the disclosure of his physical condition when alive. It is incongruous to hold that the person who manages the litigation of the deceased's property interests has no power to waive rules of evidence for the purpose of advancing those interests. The power of an heir may also be conceded if we remember that the heir, first, is at least equally interested in preserving the ancestor's reputation, and second, has an equal moral claim to protect the deceased's property rights from unwarranted diminution. The futility, under the circumstances, of predicating any privilege is more apparent when (as in the usual case) the issue turns upon the fact of a testator's sanity, which is so bruited publicly in the litigation that the pretense of preserving secrecy is a vain one.

*Id.* at 856.

98. 227 Ind. at 240, 85 N.E.2d at 500.

99. *Id.*

100. *Id.*

trator cannot waive the privilege in order to protect his own personal position.<sup>101</sup> Rather, he can waive it only to protect or conserve the interests of the estate, and justifying his actions as administrator does not qualify as concerning the interests of the estate.<sup>102</sup> Likewise, heirs cannot always waive the privilege. In *Towles v. McCurdy*<sup>103</sup> the controversy concerned the heirs-at-law and devisees under a will; children of the deceased were present in each group. The heirs objected to probating of the will, claiming that it was procured through undue influence and that it was not properly executed. The Indiana Supreme Court held that in such a controversy the heirs or devisees who attempted to avoid the will could not, for their own benefit, waive the objections to the physician's testimony.<sup>104</sup> The court said that the decision was based upon "obvious reasons,"<sup>105</sup> although the reasons were not explained. One can only speculate that the court was confused as to which party would protect the interests of the deceased. Since here both parties were presumed to have a natural interest in protecting the deceased's reputation and property,<sup>106</sup> the court could not decide whose desires should be favored. Thus, the course most advantageous to the deceased was to disallow the waiver.

It is doubtful that the *Towles* court made the proper decision. The question of mental condition was relevant to the issues raised. In terms of training and experience, the physician's knowledge would be very reliable. However, the greatest single argument against the court's ruling in *Towles* is that the true purpose of the statute was not considered. The main concern of the privilege in Indiana is the preservation of confidential communications which the patient does not want disclosed.<sup>107</sup> This concern over the pa-

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101. *Scott v. Smith*, 171 Ind. 453, 85 N.E. 774 (1908).

102. *Id.* at 457, 85 N.E. at 775. Although the main thrust of this section of the article is not concerned with the inconsistencies within the concept of waiver after the patient's death, the administrator's plight is worth noting. The administrator should be able to waive the privilege in order to show that the estate did in fact owe a debt to a particular person and that his payment of the debt was correct. It is difficult to imagine what purpose is being served by placing the administrator in the precarious position of having to satisfy legitimate claims and obligations which the estate owes, and at the same time, not allowing him to waive the privilege to establish the authenticity of the obligations.

103. 163 Ind. 12, 71 N.E. 129 (1904).

104. *Id.* at 15, 71 N.E. at 130.

105. *Id.* See also Note, *Physician-Patient Privilege—Waiver in Deed and Will Contests*, 23 IND. L.J. 295, 296 (1948).

106. 163 Ind. at 15, 71 N.E. at 130.

107. *Collins v. Blair*, 256 Ind. 230, 238, 286 N.E.2d 95, 99 (1971).

tient's desires is designed to encourage him to discuss embarrassing matters that may be necessary for proper medical treatment. Thus, the privilege seeks to assure the patient that his statements will be kept confidential unless he desires otherwise. While he is alive, it is necessary to maintain the patient's trust and confidence in order to assure a free and uninhibited relationship. After his death, however, the patient can no longer be embarrassed by the physician's testimony. In fact, the cases demonstrate that holding the physician's knowledge privileged after the patient's death results in the suppression of the best or only evidence as to the existence of fraud,<sup>108</sup> undue influence<sup>109</sup> and mental incompetence.<sup>110</sup>

Therefore, if the privilege were held to terminate upon the patient's death, such unlawful activity would not go unnoticed, because freer discovery of relevant information would be allowed. This would be accomplished without damaging the confidential communications which promote an uninhibited relationship between the physician and his patient.

### CONCLUSION

As far as discovery of relevant information for litigation is concerned, the physician-patient privilege is undesirable. It may promote free discussion between the doctor and his patient, but it inhibits the court's search for facts on which to base its decisions. The courts are forced to work with this hindrance. It is the legislature's role to determine social policy priorities, and they have deemed that the physician-patient relationship in some instances is more important than the discovery of information.

What the courts should not accept is that the statute be expanded beyond its natural boundaries. The performance of the Indiana courts has been admirable in some areas. An example is the case of *Collins v. Blair*,<sup>111</sup> the decision in which the Indiana Supreme Court abrogates the privilege in personal injury actions. However, the courts have failed in the area of allowing the privilege to reach

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108. See generally *Aetna Insurance Co. v. Deming*, 123 Ind. 384, 24 N.E. 86 (1890); *Excelsior Mutual Aid Association of Anderson, Indiana v. Riddle*, 91 Ind. 84 (1883).

109. See generally *McCord v. Strader*, 82 N.E.2d 893 (Ind. 1948), *aff'd on other grounds*, 227 Ind. 389, 86 N.E.2d 441 (1949); *Vaughn v. Martin*, 145 Ind. App. 455, 251 N.E.2d 444 (1969).

110. See generally *Stayner v. Nye*, 227 Ind. 231, 85 N.E.2d 496 (1949); *Studabaker v. Faylor*, 52 Ind. App. 171, 98 N.E. 318 (1912).

111. 256 Ind. 230, 268 N.E.2d 95 (1971).

beyond the life of the patient.<sup>112</sup> Fortunately, the trend of Indiana cases has been to limit the statutory privilege. This is also the trend of most recent enactments.<sup>113</sup> It is suggested that the best route for the Indiana courts to follow would be to continue to limit the statute as much as possible and to hold that the privilege no longer exists after the patient's death.

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112. *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904) (heirs brought suit against devisees of will, *held* privilege could not be waived); *Mathews v. Rex Health and Accident Insurance Co.*, 86 Ind. App. 335, 157 N.E. 467 (1927) (holding that information gained by pathologist during an autopsy was privileged).

113. C. McCORMICK, *McCORMICK ON EVIDENCE*, § 105, (Cleary ed. 1972) at 227-28. McCormick suggests the best alternative would be to abolish the privilege entirely. *See also* Note, *Hearsay—Admissibility of Hospital Records*, 41 N.C. L. REV. 621 (1963). This note discusses and criticizes one court's ruling using the North Carolina privilege statute which allows the judge to compel disclosure when, in the court's opinion, disclosure is necessary for the administration of justice. *But see* WISCONSIN RULES OF EVIDENCE, Rule 805.04 in 46 WIS. BAR BULL. 57, 63 (1973), newly enacted rules of evidence that provide for the general physician-patient privilege, with the following situations not being privileged: communications relevant to hospitalizing a patient for mental illness; when the examination is ordered by a judge; as to a condition which is an element of a claim or defense; when facts are related directly to the facts or immediate circumstances of a homicide or the information is about an abused or injured child who is a suspected victim of child abuse.





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