

Recent Developments in Indiana State and Federal Evidence Law

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I. INTRODUCTION

This Article addresses recent noteworthy developments in both state and federal evidence law applicable to Indiana practitioners including the use of partial settlement agreements, expert testimony, the physician-patient privilege, remedial measures, the amendments to Federal Rule of Evidence 609(a), the "Frye Test," and attorney-client privilege. The first section of the Article discusses significant state court decisions. The second section highlights recent federal law developments.

II. INDIANA EVIDENTIARY ISSUES

A. Admissibility of Partial Settlements

In *Manns v. Indiana Department of Highways*,¹ the Indiana Supreme Court clarified evidentiary uses of partial settlement agreements at trial.² The controversy in *Manns* was the use at trial of a partial settlement agreement between the plaintiff and another party.

1. *Background*.—Generally, offers to compromise are inadmissible in Indiana.³ Likewise, evidence of offers made by one party to non-parties have been inadmissible to demonstrate a weakness in the offering

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1. 541 N.E.2d 929 (Ind. 1989).

2. Documents evidencing partial settlement include a release, covenant not to sue, covenant not to execute, guaranty agreements ("Mary Carter Agreements"), and loan receipts. The release probably would not raise an issue for trial in multi-party litigation because generally a release of one tortfeasor is a release of all. See *Griffin v. Carmel Bank & Trust*, 510 N.E.2d 178 (Ind. Ct. App. 1987).

3. 12 R. MILLER, INDIANA PRACTICE § 408.101, at 317 (1984) [hereinafter INDIANA PRACTICE]. The rule seeks to encourage settlements without prejudicing a party whose good faith attempts to settle have failed.

party's case.⁴ In contrast, prior to *Manns*, covenants were admissible for the purpose of allowing the jury to determine whether the consideration given for the covenant was in full or partial satisfaction of the plaintiff's claim.⁵

2. *The Manns Decision*.—Manns sued Hintz and the Indiana Department of Highways for injuries received when Manns and Hintz collided after Hintz stopped at a stop sign but failed to yield the right of way to Manns on the preferential highway.⁶

Prior to trial, Hintz paid \$125,000 to Manns in exchange for a covenant not to sue and dismissal.⁷ At trial, Manns called Hintz as a witness.⁸ On cross-examination the State was permitted, over Manns's objection, to question Hintz about the settlement agreement. On Manns's redirect of Hintz, however, the trial court excluded the covenant not to sue.⁹

The Indiana Court of Appeals affirmed the trial court on the issue of the admissibility of the covenant.¹⁰ In doing so, it interpreted the supreme court's opinion in *State v. Ingram*¹¹ as holding that settlement agreements were admissible for jury consideration.¹²

The supreme court in *Manns* disagreed and stated, "Our holding in *Ingram* did not rule that the amount or existence of a settlement agreement was necessarily admissible."¹³ Holding that such evidence is generally inadmissible, the supreme court departed from a line of cases allowing the jury to consider settlement agreements to determine whether the consideration given for a covenant is full or partial satisfaction of the claim.¹⁴ The *Manns* court further held that even when a defendant asserts full or partial satisfaction as an affirmative defense, and the existence and amount of the settlement is not disputed by the plaintiff, the settlement agreement should not be presented to the jury; rather,

4. 12 INDIANA PRACTICE, *supra* note 3, § 408.103 at 322.

5. *Bedwell v. DeBolt*, 221 Ind. 600, 50 N.E.2d 875 (1943); *see also Sanders v. Cole Mun. Fin.*, 489 N.E.2d 117 (Ind. Ct. App. 1986).

6. *Manns*, 541 N.E.2d at 931.

7. *Id.*

8. *Id.* The court does not describe whether Hintz' testimony was favorable to Manns.

9. *Id.* Indiana's Third District Court of Appeals observed that at trial Manns offered the entire agreement containing "references to insurance and representations beneficial to the plaintiff concerning the asserted liability of the state and the extent of plaintiff's damages." *Manns v. Indiana Department of Highways*, 524 N.E.2d 334, 336 (Ind. Ct. App. 1988).

10. *Manns*, 524 N.E.2d 334.

11. 427 N.E.2d 444 (Ind. 1981).

12. *Manns*, 524 N.E.2d at 336.

13. 541 N.E.2d at 932.

14. *Id.* at 933. *See cases cited supra* note 5.

the trial court should make a "pro tanto adjustment" or set-off of the verdict according to the settlement.¹⁵

In so holding, the supreme court distinguished covenants not to sue or execute from loan receipt agreements,¹⁶ which are agreements between a co-defendant and a plaintiff wherein the co-defendant agrees to pay money to satisfy the plaintiff's claim against that defendant in exchange for a release and a promise by the plaintiff to reimburse the co-defendant if he obtains a judgment in a certain amount from the other defendant. Because pecuniary bias could be present on the part of the defendant-witness who executes the loan receipt agreement and testifies in favor of the plaintiff,¹⁷ loan receipt agreements continue to be admissible on the issue of the lender's credibility.¹⁸

Distinguishing loan receipt agreements from settlement agreements, the *Manns* court disallowed use of settlement agreements (as opposed to loan receipt agreements) to impeach a witness, explaining:

We recognize that situations may occur in which a defendant may seek to impeach a witness by arguing that a prior settlement facilitated his lack of involvement in the action. Under our decision today, such ground is insufficient to justify admission of the settlement with its attendant potential for confusion and unfair prejudice.¹⁹

This holding differs from current law being applied by federal courts. Federal Rule of Evidence 408 provides that even settlement agreements may be admissible when the evidence is offered to prove bias or prejudice of a witness.²⁰

15. 541 N.E.2d at 934.

16. *Id.* at 933.

17. *State v. Thompson*, 179 Ind. App. 227, 245, 385 N.E.2d 198, 210 (1979), *transfer denied*.

18. *Manns*, 541 N.E.2d at 934. Loan receipt agreements have long been held admissible in Indiana. *See also* 12 INDIANA PRACTICE, *supra* note 3, § 611.209, at 601. For recent developments regarding loan receipt agreements in Indiana, see Maley, *Developments in Federal Civil Practice Affecting Indiana Practitioners: Survey of Supreme Court, Seventh Circuit and Indiana District Court Opinions*, 22 IND. L. REV. 103, 131-38 (1989) and Strohmeyer, *Loan Receipts Revisited Recognizing Substance Over Form*, 21 IND. L. REV. 439 (1988).

19. *Manns*, 541 N.E.2d at 934 (citation omitted). The *Manns* court indicated it was taking a different approach than that found in *Gray v. Davis Timber & Veneer Corp.*, 434 N.E.2d 146, 148 (Ind. Ct. App. 1982). *Gray*, however, also involved the use of a loan receipt agreement to impeach a former agent of the company-defendant entering into the agreement, who, arguably, may not have retained any pecuniary bias.

20. The rule provides that the evidence of a compromise may also be admissible when offered to rebut a contention of undue delay or to prove efforts to obstruct criminal

The *Manns* court also determined that when the fact and amount of a settlement agreement are made known to a jury, the opposing party is permitted to introduce evidence explaining the intent and circumstances of the agreement, including the documents evidencing settlement. Because the evidence could further confuse and prejudice the jury, however, the trial court may, in its discretion, "redact such an exhibit by excising inflammatory, evocative language irrelevant to a fair explanation of the motivating intent and circumstances of the settlement agreement."²¹

The court did not discuss the line of cases requiring exclusion of the amount of the settlement rather than the fact of settlement.²² By allowing the trial court to excise prejudicial information in a settlement agreement, however, it appears *Manns* follows precedent on this issue.

Finally, *Manns* confirms that a joint tortfeasor is not a "collateral source."²³ The appellate court cited the collateral source rule codified

prosecution or delay. Federal Evidence Rule 408 provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. *Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408 (emphasis added). The federal rule also differs from Indiana law to the extent that in Indiana, statements of fact independent of the negotiation but made during negotiations are admissible. See 12 INDIANA PRACTICE, *supra* note 3, § 408.102, at 320. The trend, however, is to extend the "exclusionary rule" to all statements made during negotiations. See E.W. CLEARY, MCCORMICK ON EVIDENCE § 274, at 812 (3d ed. 1984) [hereinafter MCCORMICK] (stated reason that rule of admissibility of independent facts gleaned in negotiations is difficult to apply). Indeed, Indiana cases are confusing as to application of the rule. See *Tyree v. State*, 518 N.E.2d 814, 816 (Ind. Ct. App. 1988), in which the factual basis established for a guilty plea was ruled inadmissible due to inability to separate from the plea.

21. *Manns*, 541 N.E.2d at 935.

22. See *Gray*, 434 N.E.2d at 148-49; *Ohio Valley Gas, Inc. v. Blackburn*, 445 N.E.2d 1378, 1383 (Ind. Ct. App. 1983). *Gray* clarified the previous holdings in *Ingram* and *Erskine v. Duke's GMC, Inc.*, 413 N.E.2d 305 (Ind. Ct. App. 1980), in which both courts held entire settlement agreements were admissible to rebut defendant's submission of evidence of the fact a settlement occurred. The *Gray* court stated:

We ruled that it was error not to allow the plaintiff to introduce the agreement and held that either the entire applicable portion of the agreement is admissible or none of it is. Our ruling in *Erskine* does not mean that an irrelevant or highly prejudicial portion could not be properly deleted prior to its introduction.

Gray, 434 N.E.2d at 149.

23. 524 N.E.2d at 336.

at Indiana Code section 34-4-36-2²⁴ as alternative support for admitting settlements into evidence.²⁵ The supreme court disagreed and distinguished settlement agreements from the collateral sources addressed in the statute.²⁶ Since partial settlements offset a verdict, they will not provide a double recovery like the collateral sources addressed in the statute.²⁷ Therefore, settlements with other tortfeasors are not admissible pursuant to the "collateral source rule."

3. *Conclusion.*—Attorneys should be aware that most partial settlement agreements are inadmissible, and should consider filing a motion in limine to assure exclusion of the evidence. If for some reason the fact of a partial settlement agreement is made known to the jury, attorneys objecting to the admissibility should consider explaining the circumstances of the agreement. Counsel opposing such an explanation should request the court to excise the amount of the settlement and any prejudicial and inflammatory language.

B. Expert Testimony

During the survey period, expert testimony also received attention by Indiana courts. *Hegerfield v. Hegerfield*²⁸ discussed the necessity for the expert to explain underlying formulas and calculations while *In re Paternity of K.G.*²⁹ clarified the expert's use of information received from third parties when rendering an opinion.

24. IND. CODE § 34-4-36-2 (1988) provides:

Sec. 2. In a personal injury or wrongful death action the court shall allow the admission into evidence of:

(1) proof of collateral source payments, other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by the state or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

(2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

Id.

25. *Manns*, 524 N.E.2d at 336.

26. *Manns*, 541 N.E.2d at 934.

27. *Id.*

28. 555 N.E.2d 853 (Ind. Ct. App. 1990).

29. 536 N.E.2d 1033 (Ind. Ct. App.), *aff'd and remanded*, 545 N.E.2d 564 (Ind. 1989).

1. *The Hegerfield Decision*.—In *Hegerfield*, the Indiana Third District Court of Appeals held that the trial court abused its discretion by allowing a certified public accountant, Wunrow, to testify as an expert about the value of Mr. Hegerfield's pension benefit in a proceeding to divide the Hegerfields' property.

It is well established that the competency of a witness to testify as an expert witness is a determination for the trial court and is within the court's discretion.³⁰ A witness may qualify as an expert based upon his or her training, education, and experience.³¹ The expert is not required to "demonstrate his knowledge of specific scientific principles, formulas or calculations in order to be qualified to state his opinion."³² Generally, the expert's specific knowledge goes to the weight, not the admissibility, of the testimony.³³

Prior to the *Hegerfield* decision, in *Martin v. Roberts*,³⁴ the supreme court reversed a Second District Court of Appeals decision which held that the trial court abused its discretion in permitting a police officer/investigator to give his opinion concerning the speed of a vehicle. The appellate court reversed the trial court because the expert had not presented his opinion with any formula, calculation, or principle.³⁵ The supreme court, however, held that the officer's specific knowledge of formulas, calculations, and principles was a subject for cross-examination:

There are doubtless many formulas and principles which experts use in this field or any other to arrive at their ultimate opinions. The determination of which factors, formulas or calculations are necessary, either singly or in conjunction with each other, to form an expert opinion is within the knowledge and judgment of the expert and, again, is a subject which can be approached and examined in the cross-examination or by bringing forward other expert witnesses.³⁶

Several Indiana cases have followed the general rule that the failure of the expert witness to state or explain a calculation or formula affected the weight, not the admissibility, of the expert's opinion.³⁷

30. *Hegerfield*, 555 N.E.2d at 855 (citing *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 365 (Ind. 1982)).

31. *Martin v. Roberts*, 464 N.E.2d 896, 899 (Ind. 1984).

32. *Id.*

33. *Id.* See also *Travelers*, 442 N.E.2d 349.

34. 464 N.E.2d 896 (Ind. 1984).

35. *Martin v. Roberts*, 452 N.E.2d 182, 187 (Ind. Ct. App. 1983).

36. *Martin*, 464 N.E.2d at 900-01.

37. *Id.* See also *Boarman v. State*, 509 N.E.2d 177 (Ind. 1987); *Estate of Hunt v. Board of Comm'rs of Henry County*, 526 N.E.2d 1230, 1235 (Ind. Ct. App. 1988).

The *Hegerfield* court appears to have applied a stricter standard to Wunrow's testimony. Reviewing the testimony to determine whether a proper foundation was laid, the court found that the requirements had not been met.³⁸ Those foundational requirements include first, that the expert's testimony is not within the common knowledge of the jury; second, that the witness is qualified to render an opinion; and third, that the opinion would aid the jurors in understanding the facts.³⁹

The court determined that although Wunrow was not required to possess experience in calculating mortality tables and discount rates, he was required to be familiar with mortality, discount rates and life expectancy. He was also required to "demonstrate that he knows first what the data represent and second, why or how that data applies to this particular case."⁴⁰

First, the court concluded from the record that Wunrow's experience related to tax consequences for small businesses, and consequently stated, "[T]his was the first clue that Wunrow was not competent to testify as an expert on pension valuation."⁴¹ Second, the court decided Wunrow needed to demonstrate his "knowledge of the process of ascertaining the present value of pension benefits."⁴² The court was influenced by Wunrow's inability to explain what the figures he obtained from a Pension Benefit Guaranty Corporation table represented.⁴³ Third, the court suspected Wunrow was merely parroting figures calculated by another firm.⁴⁴ Relying on *Terre Haute First National Bank v. Stewart*, the court concluded Wunrow was simply reading the other firm's calculations into evidence.⁴⁵

In short, the court concluded Wunrow was not qualified to testify as an expert regarding pension valuation.⁴⁶ Thus, the initial foundational requirements had not been met.

The Fourth District Court of Appeals in *Estate of Hunt* also noted that the standard of review on the issue of abuse of discretion is stringent; a reversal should occur only if the trial court has "drawn an erroneous conclusion clearly against the logic and effect of the facts and circumstances or the reasonable and actual deductions to be made from such evidence." *Id.* at 1235 (citation omitted).

38. *Hegerfield*, 555 N.E.2d at 856.

39. See 13 INDIANA PRACTICE, *supra* note 3, § 705.101, at 73; *Summers v. State*, 495 N.E.2d 799, 802 (Ind. Ct. App. 1986), *transfer denied*.

40. *Hegerfield*, 555 N.E.2d at 856.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (citing 455 N.E.2d 362 (Ind. Ct. App. 1983)).

46. "[N]o precise knowledge or quantum of knowledge is required, if the witness shows an acquaintance with the subject such as to qualify him to give an opinion"

At first glance, *Hegerfield* appears to tighten the requirements concerning an expert's knowledge of formulas and calculations forming the basis of the expert's opinion. The court was careful, however, to avoid this appearance by finding the expert did not possess the qualifications necessary to aid the trier of fact concerning pension valuation. It appears, however, that the court did not determine Wunrow's lack of qualifications until reviewing cross-examination testimony.⁴⁷ The court explained that the proponent needed to show Wunrow's knowledge of the process of ascertaining the present value of pension benefits, but failed to do so.⁴⁸ It is not clear from the opinion whether Wunrow's inabilities were apparent during direct examination when the proponent attempted to lay the foundation for Wunrow's testimony.

Hegerfield warns counsel offering expert testimony that more than training, education, and experience may be necessary to qualify an expert witness who relies on another individual's calculations and tables in forming an opinion. Again, the attorney may argue that such explanation of calculations and formulas should be considered only when determining the weight to be given the testimony as in *Martin*, and not when determining whether the witness is qualified.

2. *In re Paternity of K.G.*—*In re Paternity of K.G.*⁴⁹ clarified the expert's use of third-party reports when rendering his opinion.

Expert opinion based in part upon a report of a third person is generally admissible in Indiana, even though the report may not be in evidence or is inadmissible.⁵⁰ The hearsay relied upon, however, must be the type customarily relied upon by experts in the same field.⁵¹

The foundation for expert testimony that relies in part on hearsay reports was set forth in *Duncan v. George Moser Leather Co.*⁵² and requires that

Spaulding v. State, 533 N.E.2d 597, 601 (Ind. Ct. App. 1989) (citation omitted). The standard when reviewing a determination of the expert witness's qualifications is also abuse of discretion. *Summers*, 495 N.E.2d at 802. See also 13 INDIANA PRACTICE, *supra* note 3, § 702.102, at 31-32.

47. "Wunrow's/Law Data's calculations were impossible to probe on cross-examination because Wunrow did not possess sufficient skill or knowledge . . ." *Hegerfield*, 555 N.E.2d at 856.

48. "As the questioning progressed, it became clear that Wunrow . . . did not understand . . . what the figures . . . represented." *Id.*

49. 536 N.E.2d 1033 (Ind. Ct. App. 1989), *aff'd and remanded*, 545 N.E.2d 564 (Ind. 1989).

50. 13 INDIANA PRACTICE, *supra* note 3, § 703.104, at 54. Until fairly recently, Indiana followed the traditional rule that expert testimony was admitted only if the opinion was based on facts personally known to the witness or upon facts contained in a hypothetical question. *Id.* at 53-54.

51. *Clouse v. Fielder*, 431 N.E.2d 148, 155 (Ind. Ct. App. 1982) (citing *Gooch v. Hiatt*, 166 Ind. App. 521, 337 N.E.2d 585 (1975)).

52. 408 N.E.2d 1332 (Ind. Ct. App. 1980).

1. the expert must have sufficient expertise to evaluate the reliability and accuracy of the report;
2. the report must be of a type normally found reliable; and
3. the report must be of a type customarily relied upon by the expert in the practice of his profession or expertise⁵³.

The expert witness must also have expertise in evaluating the content of the information relied upon to assure the right to cross-examination and to assure that the expert is not merely repeating another expert's opinion.⁵⁴

In *In re Paternity of K.G.*, Dr. Chen supervised blood testing for the American Red Cross. After having been qualified as an expert witness, Chen explained procedures followed when blood was tested under his supervision. Chen testified as to testing done in the paternity case and gave his opinion as to paternity. Also, over objection, he was permitted to testify that someone under his supervision drew blood from the pertinent parties, the rules for chain of custody were followed, and the blood samples were tested.⁵⁵

In reaching its decision, the Indiana Court of Appeals first distinguished the factual testimony from the opinion testimony.⁵⁶ Because Chen had no first-hand knowledge of the testing procedures actually conducted in that case, the court determined that the trial court should not have permitted Chen's testimony concerning the *facts of testing*.⁵⁷

Second, the court determined that Chen's opinion testimony should not have been admitted because his opinion was unfounded. The court explained that the testimony was based neither upon first-hand knowledge nor upon a report "of a type normally found to be reliable and of a type customarily relied upon by him in the practice of his profession."⁵⁸ Further, the court noted that "[t]he State did not introduce a report

53. *Id.* at 1343 (citations omitted). Federal Rule of Evidence 703 provides: The facts or data in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

Miller notes that the Federal rule does not require the expert to be able to evaluate the reliability and accuracy of the report. 13 INDIANA PRACTICE, *supra* note 3, § 703.111, at 67.

54. *Duncan*, 408 N.E.2d at 1343.

55. *In re Paternity of K.G.*, 536 N.E.2d at 1034.

56. *Id.* at 1035.

57. *Id.* at 1035-1036.

58. *Id.* at 1036 (citing *Duncan*, 408 N.E.2d 1332).

prepared under Chen's supervision or by anyone else."⁵⁹ More importantly, before Chen rendered his opinion as to paternity, there was no showing that Chen had relied upon *any* report.⁶⁰

Thus, *In re Paternity of K.G.* establishes that an expert opinion can be based upon: (1) firsthand knowledge, (2) facts otherwise in the record or facts that can be assumed from the evidence and stated by a hypothetical question, and (3) in part upon a report not in evidence or inadmissible if the expert can evaluate the reliability of the report.⁶¹ Such expert opinion is of a type normally found to be reliable, and it is of a type customarily relied upon in the expert's profession.⁶²

C. *The Physician-Patient Privilege*

Two cases decided in this survey period examining the physician-patient privilege are significant to understanding the scope of the privilege. The first case, *Daymude v. State*,⁶³ addressed the scope of one of the "CHINS" reporting statutes⁶⁴ and is a case of first impression in Indiana. The second case, *In re C.P.*⁶⁵ addressed an issue conceded in *Daymude*: whether communications made to the agent of the physician are included in the privilege.

1. *Background.*—The physician-patient privilege is a legislative creation and did not exist at common law.⁶⁶ The purpose of this evidentiary privilege is to encourage honest communications by patients to physicians to ensure proper treatment. As the supreme court discussed in *Collins v. Bair*:⁶⁷

The privilege has been justified on the basis that its recognition encourages free communications and frank disclosure between

59. *Id.* Admissibility of the relied upon report is not a requirement for the expert opinion testimony.

60. *Id.*

61. *Id.* at 1035.

62. *Id.*

63. 540 N.E.2d 1263 (Ind. Ct. App. 1989).

64. IND. CODE § 31-6-11-8 (1988).

65. 563 N.E.2d 1275 (Ind. 1990).

66. *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904). 12 INDIANA PRACTICE, *supra* note 3, cites MCCORMICK ON EVIDENCE § 98 (2d ed. 1972) for the proposition that the privilege was unknown at common law. 12 INDIANA PRACTICE also cites Indiana cases that Miller contends mistakenly refer to a common law rule existing prior to the statute. "In light of the courts' inability to decide firmly whether the privilege should be strictly construed or liberally applied, that inconsistent holdings have resulted under the statute should not be surprising." 12 INDIANA PRACTICE, *supra* note 3, § 504.103, at 394-395.

67. 256 Ind. 230, 268 N.E.2d 95 (1971). *See also* 12 INDIANA PRACTICE, *supra* note 3, § 504.102, at 392 n.1.

patient and physician which, in turn, provide assistance in proper diagnosis and appropriate treatment. To deny the privilege, it was thought, would destroy the confidential nature of the physician-patient relationship and possibly cause one suffering from a particular ailment to withhold pertinent information of an embarrassing or otherwise confidential nature for fear of being publicly exposed.⁶⁸

Although the privilege's rationale has been questioned,⁶⁹ it resembles that which underlies the attorney-client privilege. The analogy is not a new one,⁷⁰ despite several differences in the way the privileges are applied.

As early as 1894, in *Springer v. Byram*,⁷¹ the Indiana Supreme Court analogized the attorney-client privilege to the physician-patient privilege. Noting that the physician-patient privilege was created by statute, the Court stated:

It was said in *Association v. Beck*, 77 Ind. 203, that the object of these statutes seems to be to place the communications made to physicians in the course of their professional employment upon the same footing with communications made by clients to their attorneys in the course of their employment.⁷²

Further, as to the attorney-client privilege, the *Springer* court examined the scope of the privilege with respect to agents of the attorney:

It has been held that communications made through a third person from a client to a solicitor are privileged, if otherwise entitled to be so; also, whoever represents a lawyer in conference or correspondence with the client is under the same protection as the lawyer himself. The privilege extends to the attorney's clerk, interpreter, assistant attorney, or other agent, while in the discharge of his duty. 19 Am. & Eng. Enc. Law, 131, 132.⁷³

In order for the privilege to apply to the attorney-client relationship, it must first be shown that the communication was intended to be confidential.⁷⁴ Most statutes affording protection to physician-patient

68. *Collins*, 256 Ind. at 232, 268 N.E.2d at 98.

69. See 12 INDIANA PRACTICE, *supra* note 3, § 504.122, at 417; McCORMICK, *supra* note 20, § 105, at 258. Miller noted that other commentators "have questioned the underlying assumption that assurance of confidentiality is necessary to foster full disclosure to physicians, and . . . have called for abandonment or abolition of the privilege." 12 INDIANA PRACTICE, *supra* note 3, § 504.122, at 417.

70. McCORMICK, *supra* note 20, § 105, at 258.

71. 36 N.E. 361 (Ind. 1894).

72. *Id.* at 363.

73. *Id.* at 362.

74. McCORMICK, *supra* note 20, § 91, at 217; 12 INDIANA PRACTICE, *supra* note 3, § 503.103 at 378 (citing *Lewis v. State*, 451 N.E.2d 50 (Ind. 1983)).

communication, however, do not require an initial foundational showing that the communication was intended to be confidential.⁷⁵

As for the presence of third parties during a communication, an agent of an attorney is generally included in the privilege.⁷⁶ Courts appear to analyze the presence of third parties or adjunct personnel with respect to the physician-patient privilege in a variety of ways: 1) whether the third person is a "needed and customary participant in the consultation;"⁷⁷ 2) whether the communication with or to the third person "was functionally related to diagnosis and treatment;" and 3) whether the third person was intended to be included in the privilege pursuant to a statute.⁷⁸

2. *Daymude v. State*.—The reporting statute at issue in *Daymude* provided as follows:

The privileged communication between a husband and wife, between a health care provider and that health care provider's patient, or between a school counselor and a student is not a ground for:

(1) excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect, or relating to the subject matter of such a report; or

(2) failing to report as required by this chapter.⁷⁹

The foregoing statute conflicts with the physician-patient privilege as codified in Indiana Code section 34-1-14-5.⁸⁰

75. IND. CODE § 34-1-14-5 (1990); McCORMICK, *supra* note 20, § 101, at 249.

76. *Id.* § 91, at 218; 12 INDIANA PRACTICE, *supra* note 3, § 503.103, at 378. See *Brown v. State*, 448 N.E.2d 10 (Ind. 1983) (privilege applied to defendant's statements to a polygraph expert hired by defendant's attorney). *But cf.* *Barnes v. State*, 537 N.E.2d 489 (Ind. 1989).

77. McCORMICK, *supra* note 20, § 101, at 250 (citing *Shultz*, 417 N.E.2d 1127 to support the view that if the third person is a "needed and customary participant in the consultation," the privilege should be extended to include such third person).

78. *Id.* McCormick criticizes this last method of analysis by contending: "[T]his seems to be sticking in the back of the statute, rather than looking at its purpose. Thus these courts, if casual third persons were present at the consultation, will still close the mouth of the doctor but allow the visitor to speak." *Id.* (citing two old Indiana cases, *Springer*, 36 N.E. at 363 and *Indiana Union Traction Co. v. Thomas*, 44 Ind. App. 468, 88 N.E. 356, 359 (1909)).

79. IND. CODE § 31-6-11-8 (1988).

80. The physician-patient privilege provides in part:

The following persons shall not be competent witnesses:

....

Physicians, as to matters communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases, except as

In *Daymude*, the defendant Daymude's daughter was defined as a "child in need of services" by a public welfare department when the department filed a petition in the juvenile court.⁸¹ The juvenile court then ordered the department to provide services to the daughter and her family. While the daughter was admitted as an in-patient at a hospital, Daymude underwent counseling with Walker, a certified clinic mental health *counselor*.⁸² Walker was an independent contractor working for the hospital under the supervision of the hospital's chief psychiatrist⁸³ for the hospital's child and adolescent division.⁸⁴

During Walker's counseling of Daymude, Daymude revealed information relating to instances of sexual abuse. After the State formally filed charges of child molesting, criminal deviate conduct, and incest, the State attempted to depose Walker concerning communications between Walker and Daymude. Daymude objected to the disclosure on grounds the communications were privileged and confidential and were not abrogated by the reporting statute. The issue was certified to the trial court which overruled Daymude's objection, and then came before the court of appeals via interlocutory appeal.⁸⁵ The parties apparently agreed that a privilege existed.⁸⁶

The court held that pursuant to the reporting statute,⁸⁷ the physician-patient privilege is abrogated only "to the extent that the health care provider must report all suspected or known instances of child abuse."⁸⁸ The court's decision rested on policy reasons and a refusal to construe the abrogation statute broadly. First, the purpose of the reporting statute

provided in IND. CODE 9-4-4.5-7.

IND. CODE § 9-4-4.5-7 has been amended and is now IND. CODE § 9-11-4-6. The statute abrogates the physician-patient privilege with regard to chemical tests performed at the behest of a law enforcement officer. *See* IND. CODE § 9-11-4-6 (1988).

81. *Daymude*, 540 N.E.2d at 1264. A "child in need of services" is defined by IND. CODE § 31-6-4-3 (1988).

82. *Daymude*, 540 N.E.2d at 1264. It is unclear whether Walker was a "certified" psychologist as contemplated by IND. CODE § 25-33-1-17 (1985), which prohibits a certified psychologist from disclosing information acquired from a patient except in limited circumstances. Although IND. CODE § 25-33-1-17 creates a privilege, it does not address the issue of "competency" as a witness as referred to in the physician-patient privilege statute, IND. CODE § 34-1-14-5, *supra* note 80.

83. Because a psychiatrist is a physician, the psychiatrist falls within the privilege. *Summerlin v. State*, 256 Ind. 652, 271 N.E.2d 411 (1971).

84. *Daymude*, 540 N.E.2d at 1264.

85. *Id.*

86. *Id.* at 1265 n.2.

87. IND. CODE § 31-6-11-8 (1988).

88. *Daymude*, 540 N.E.2d at 1265. IND. CODE § 31-6-11-3 (1979) provides that, ". . . any individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report. . ."

had been served because the abuse had already been reported. Second, the family counseling was essential to diagnosis and treatment. The court concluded that if the entire privilege were abrogated, child abusers "will be discouraged from openly and honestly communicating with their counselors."⁸⁹

The *Daymude* court attempted to distinguish the supreme court's opinion in *Baggett v. State*.⁹⁰ In *Baggett*, the supreme court held that the privilege between a husband and wife "is not a ground for excluding evidence in any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect, or relating to the subject matter of such a report."⁹¹ *Baggett's* attorney had failed to object to testimony from *Baggett's* former wife regarding marital conversations concerning *Baggett's* admissions to molesting his niece. The supreme court held that because the reporting statute abrogated the marital privilege, there was no basis for finding ineffective assistance of counsel.⁹²

The *Daymude* court distinguished its holding from *Baggett* by arguing that the supreme court had given the abrogation statute a "general interpretation" because the issue on appeal was ineffective assistance of counsel. The court stated:

The supreme court was not faced with the fact specific application of the statute as under the circumstances of this appeal. In the present case, the physician-patient privilege arose as a direct result of therapy ordered by the court during a CHINS proceeding. The privileged communications were made long after the report of the child abuse. Since the abuse already had been reported, the purpose of the reporting statute had been fulfilled. To allow the abrogation of the privileged communication under these specific facts goes beyond the purpose of the statute. Thus, because of the specific facts of the present case, we hold that the physician-patient privilege is not abrogated with regard to confidential communications disclosed by a defendant while participating in counseling sessions ordered by a trial court pursuant to a report of child molesting.⁹³

After *Daymude* was decided, the Indiana Supreme Court also addressed the abrogation statute⁹⁴ in *Davidson v. State*.⁹⁵ *Davidson* was

89. *Daymude*, 540 N.E.2d at 1267.

90. 514 N.E.2d 1244 (Ind. 1987).

91. *Id.* at 1245 (citing IND. CODE ANN. § 31-6-11-8 (Burns 1987)).

92. *Id.*

93. *Daymude*, 540 N.E.2d at 1267-68.

94. IND. CODE § 31-6-11-8 (1988).

95. 558 N.E.2d 1077 (Ind. 1990).

on trial for the murder of two of her children. Her husband testified over objection as to communications from Davidson to him concerning Davidson's methods of disciplining her fourteen month-old son. Davidson argued the privilege applied and was not superseded by the reporting statute because the statute did not apply to murder, but only to abuse and neglect.⁹⁶ Although *Davidson* focuses more on the CHINS abrogation statute⁹⁷ than privilege, it is worth noting because it relies on *Baggett* to the extent *Baggett* found the abrogation statute and abrogation of the marital privilege applicable to child molestation, as well as abuse and neglect.⁹⁸ Curiously, the parties in *Davidson* did not discuss the fact that the purpose of the reporting statute had already been fulfilled as in *Daymude*, nor was *Daymude* even mentioned.

3. *In re C.P.*—Another significant case concerning the physician patient privilege decided during the survey period, *In re C.P.*,⁹⁹ addressed the conceded issue in *Daymude*: whether a counselor supervised by a psychiatrist is included in the physician-patient privilege.¹⁰⁰ *In re C.P.* involved C.P., a delinquent child. L.K.P., C.P.'s mother, was the complaining witness to Indiana's petition alleging incorrigibility of C.P.¹⁰¹

Brown was a social worker and therapist from a community mental health center who diagnosed and treated C.P. the year before L.K.P.'s petition was filed. Like the counselor in *Daymude*, Brown was a counselor who worked under the supervision of a psychiatrist.¹⁰² The Indiana Supreme Court observed:

The evidence revealed that Brown has a bachelor's degree in special education and a master's degree in social work. He is a member of the Academy of Certified Social Workers. He is not, however, a certified psychologist or a psychiatrist. His diagnoses and treatment plans are subject to approval by a supervising psychiatrist with whom Brown consults on each case.¹⁰³

When the incorrigibility charges were filed, L.K.P. executed a "consent to disclose confidential information" allowing disclosure of C.P.'s

96. *Davidson*, 558 N.E.2d at 1090.

97. IND. CODE § 31-6-11-8 (1988).

98. *Baggett*, 514 N.E.2d at 1244. The *Davidson* court noted that the abrogation statute would apply to the murder charge because the statute would apply to the case had no death resulted. Although the abrogation statute addresses child "abuse" or "neglect," to not apply the abrogation statute to murder "would fly in the face of the statute's purpose of protecting children simply because the children died." *Davidson*, 558 N.E.2d at 1091.

99. 563 N.E.2d 1275 (Ind. 1990).

100. *Id.* at 1276.

101. *Id.*

102. *Id.*

103. *Id.*

treatment records from Brown and the mental health center to Walker of the county probation department.¹⁰⁴

When Brown was called to testify, C.P. objected on the ground of privilege. When Walker was called as a witness, he introduced C.P.'s treatment records which he had received pursuant to L.K.P.'s consent. Again, C.P. objected on the grounds of hearsay, physician-patient privilege, and L.K.P.'s invalid consent. Ultimately, the trial court overruled C.P.'s objections, and the case went to the court of appeals on an interlocutory order.¹⁰⁵ The Indiana Supreme Court granted transfer and recently also affirmed the trial court.¹⁰⁶

After making an important distinction, the supreme court held the communications between C.P. and Brown were *not privileged*.¹⁰⁷

We hold that a counselor who aids the psychiatrist is covered by the privilege. By contrast, a counselor who is in fact the caregiver and acts largely independently is not an adjunct to the psychiatrist and thus is not covered by the privilege.¹⁰⁸

To evaluate the supreme court's distinction fully, the court of appeals's opinion is also valuable. The court of appeals had also affirmed the trial court, but for different reasons.¹⁰⁹ In so holding, the appellate court compared C.P.'s communications to Brown with a patient's communications to a nurse. Relying on the holding in *General Accident, Fire & Life Assurance Co. v. Tibbs*,¹¹⁰ the appellate court stated:

Both nurses and social workers, while working under the supervision of a physician, gather patient information and indeed treat patients in their own right, but ultimately treatment must be approved by the physician. If communication between such adjunct personnel and patients is to be privileged, the legislature will have to specifically include such a clause in the privilege statute. We will not extend the physician-patient privilege to include adjunct personnel. But cf. *Daymude v. State* (1989), Ind.App., 540 N.E.2d 1263.

104. *In re C.P.*, 543 N.E.2d 410, 412 (Ind. Ct. App. 1989).

105. *Id.* at 411.

106. *In re C.P.*, 563 N.E.2d 1275 (Ind. 1990).

107. *Id.* at 1276.

108. *Id.*

109. *In re C.P.*, 543 N.E.2d 410.

110. 102 Ind. App. 262, 2 N.E.2d 229 (1936). In *General Accident*, the court held that a nurse's observations of a civil plaintiff's breath [offered to show contributory negligence] were admissible because, "the privilege does not extend to third persons who are present and overhear a conversation . . . unless such third person was necessary for the purpose of transmitting the information to the physician." *Id.* at 268-69, 2 N.E.2d at 232.

...
... We question whether the services received by C.P. are medical treatment as contemplated by the privilege statute.¹¹¹

The Indiana Court of Appeals majority did not mention *Shultz v. State*,¹¹² in which the Second District Court of Appeals held that a technician who drew blood from the defendant at the direction of the doctor was included in the physician-patient privilege.¹¹³ Shultz was involved in a collision with another car. Although the appellate court affirmed the trial court's decision to allow the technician's testimony concerning Shultz's blood alcohol content, the affirmation was based on Shultz's waiver of the privilege during direct examination.¹¹⁴ Nevertheless, the *Shultz* court expressly held that the technician was included in the physician-patient privilege.¹¹⁵ Judge Hoffman's persuasive dissenting opinion in *In re C.P.*, however, likened the *In re C.P.* facts to those in *Shultz*, and reasoned that both the nurse in *Shultz* and Brown in *In re C.P.* communicated with the patients at the behest of the physician:

Mr. Brown's responsibility was to gather information from the patient concerning the patient's background, presenting problem, medical history, social history and psychological status, which information was then submitted to the supervising psychiatrist for the formulation of a treatment plan. Mr. Brown was a necessary organ of communication between the patient and the psychiatrist.¹¹⁶

Unlike the appellate court majority, the Indiana Supreme Court held that communications between adjunct personnel have long been privileged and are privileged when the adjunct personnel is "necessary to enable the parties to communicate with each other."¹¹⁷ Nevertheless, Brown was not included in the privilege.¹¹⁸

111. *In re C.P.*, 543 N.E.2d at 412.

112. 417 N.E.2d 1127 (Ind. Ct. App.), *reh'g denied*, 421 N.E.2d 22 (Ind. Ct. App. 1981). TANFORD AND QUINLAN, INDIANA TRIAL EVIDENCE MANUAL § 46.6, at 263 (2d ed. 1987), concluded that nurses and technicians working under the direction of the physician are "probably included" in the privilege, as did McCORMICK, *supra* note 20, § 101, at 250 (2d ed. 1972).

113. *Shultz*, 417 N.E.2d at 1134.

114. *Id.* Subsequent to the trial in *Shultz*, the legislature enacted IND. CODE § 9-4-4.5-7, which excluded from the privilege the results of chemical blood tests when the prosecutor requests the results as part of an investigation. *Shultz*, 417 N.E.2d at 1135 n.3.

115. *Schultz*, 417 N.E.2d at 1134.

116. *In re C.P.*, 543 N.E.2d at 414.

117. *In re C.P.*, 563 N.E.2d at 1278 (quoting *Springer*, 137 Ind. at 22, 36 N.E. at 363).

118. *Id.* at 1276.

First, the court noted that the physician-patient privilege is conferred by statute and did not exist at common law.¹¹⁹ The court further noted that the statute¹²⁰ does not mention a "privilege;" rather, it states that physicians "shall not be competent witnesses"¹²¹ with respect to communications by patients to the physicians.¹²² Further, despite the statute's wording, the supreme court "has long regarded the statute as erecting a privilege."¹²³ Second, because the "privilege" is statutory and is in derogation of common law, it must be strictly construed.¹²⁴ Third, the court contended that the Indiana Supreme Court "has long recognized that the privilege covers both physicians and those who aid physicians . . .,"¹²⁵ including a "third person" if the third person is "'necessary for the purpose of transmitting information and aiding the physician.'"¹²⁶ The court cited *Shultz*¹²⁷ as support for this rule.

Lastly, the court distinguished counselors and caseworkers who function as primary caregivers, holding that they are not included in the privilege.¹²⁸ In highlighting this distinction between caregivers and a physician's adjunct personnel, the court relied on *In re L.J.M.*¹²⁹ and *Hulett v. State*.¹³⁰ Both *In re L.J.M.* and *Hulett* involved counselors or caseworkers who were *not* certified psychologists and who were working independently, without supervision of a psychiatrist. Because Brown in *In re C.P.* was supervised by a psychiatrist, the court proceeded to measure "the nature and degree of control exercised by the psychiatrist."¹³¹

After examining the testimony from the record, the Indiana Supreme Court held that the "existence of the relationship is a question of fact

119. *Id.* at 1277.

120. IND. CODE § 34-1-14-5(4) (1988).

121. *Id.*

122. *In re C.P.*, 563 N.E.2d at 1277.

123. *Id.*

124. *Id.*

125. *Id.* at 1278 (citing and quoting *Springer*, 137 Ind. 15, 36 N.E. 361, for the proposition that the privilege covers "other persons whose intervention is strictly necessary to enable the parties to communicate with each other").

126. *Id.* (citing and quoting *Doss v. State*, 256 Ind. 174, 181, 267 N.E.2d 385, 390 (1971)). The issue in *Doss*, however, was whether the privilege extended to a deputy sheriff who was present when a physician removed a bullet from the defendant and then gave the bullet to the sheriff. The defendant had objected to the sheriff's testimony regarding his observations.

127. 417 N.E.2d 1127.

128. *In re C.P.*, 563 N.E.2d at 1278.

129. 473 N.E.2d 637 (Ind. Ct. App. 1985).

130. 552 N.E.2d 47 (Ind. Ct. App. 1990).

131. *In re C.P.*, 563 N.E.2d at 1278.

to be determined by the trial court,"¹³² and concluded that the evidence supported the trial court's decision that Brown was not included in the privilege because C.P. never saw the psychiatrist and because Brown worked with very little supervision by the psychiatrist.¹³³ The court relied heavily on a commentator's opinion (which the court quoted) that "'paraprofessionals who are left virtually unsupervised . . . are probably not considered by the patient as psychotherapists and they should not be included in the privilege.'"¹³⁴ It seems the opposite could be argued with the same set of facts; a patient seeing a counselor, infrequently seeing the counselor's supervisor, would more likely look to the counselor as the physician. Further, perhaps the more intervention or supervision by the psychiatrist, the less the patient would rely on the counselor. Unfortunately, however, analysis from the patient's perspective was not the basis of the holding.

In re C.P. appears to be a rather narrow holding, applying only to instances in which the treatment is almost entirely delegated to a third-party not included in the privilege statute. As for treatment by a physician with the assistance of adjunct personnel, *In re C.P.* embraces "functional" analysis for determining whether a patient's communication to the physician's assistant is privileged. Although counselors and case workers, often under the direction of physicians, provide valuable "treatment" for many who arguably view them as physicians, it is clear that communications to such counselors will not be privileged without legislative action. Such action is necessary if society wishes to reinforce the rationale for the physician-patient privilege, to encourage full disclosure by patients in order to ensure proper diagnosis and treatment.

D. Subsequent Remedial Measures

Indiana courts have long followed the common law rule that evidence of remedial measures or repairs by a defendant subsequent to an accident is generally inadmissible to prove a defendant's negligence.¹³⁵ In 1989, the Indiana Court of Appeals expanded application of this rule to exclude evidence of firing an employee after the employee was engaged in allegedly negligent conduct.¹³⁶

132. *Id.* at 1279.

133. *Id.*

134. *Id.* at 1278 (citing and quoting J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 504[05], at 504-26 (1989)).

135. See, e.g., *Dukett v. Mausness*, 546 N.E.2d 1292 (Ind. Ct. App. 1989); *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383, 392 (Ind. Ct. App. 1986); *City of Indianapolis v. Swanson*, 436 N.E.2d 1179, 1182 (Ind. Ct. App. 1982); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

136. *Dukett*, 546 N.E.2d at 1294.

1. *Background.*—The rule concerning treatment of subsequent remedial conduct is well established in Indiana.¹³⁷ Courts following this rule have relied primarily on two rationales supporting application of the rule. The first and most often cited reason for reliance on the rule is premised on public policy. Courts have been reluctant to allow evidence of subsequent remedial conduct because of concern that use of this evidence will deter defendants from making repairs or improvements.¹³⁸ Recognizing that defendants should be encouraged to make repairs rather than deterred by the fear that taking remedial measures will be construed as an admission of guilt, Indiana courts have held that evidence of remedial measures must be excluded.¹³⁹

The second rationale for excluding evidence of subsequent remedial measures stems from doubt over the probative value of such evidence.¹⁴⁰ The primary purpose for offering this type of evidence is to show that the defendant, by his conduct, admitted that he was negligent.¹⁴¹ However, many reasons may exist to explain the defendant's conduct, some of which are not attributable to consciousness of wrongdoing. For example, "evidence of repair may also connote the defendant's exercise of care beyond that required by the law: the plaintiff's having been injured despite the exercise of reasonable care, the defendant turns to measures beyond those required by reasonable care."¹⁴² Although such evidence may be relevant, it poses the danger that a jury would misconstrue the evidence, causing prejudice to the defendant.¹⁴³ Balancing the lack of probative value against the highly prejudicial effect of such evidence, courts have chosen to exclude this type of evidence on most occasions.¹⁴⁴

There are circumstances in which the rule does not apply because the probative value of the evidence outweighs its inherently prejudicial nature. Evidence of subsequent remedial measures has been allowed under the following circumstances: (1) to prove defendant's ownership or control of property;¹⁴⁵ (2) to show the feasibility of preventative

137. See cases cited *supra* note 135.

138. See *Dukett*, 546 N.E.2d at 1294; *Terre Haute & Indianapolis R.R. v. Clem*, 123 Ind. 15, 23 N.E. 965 (1890); 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 312.

139. See sources cited *supra* note 138. See also 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 312 (notes that scholars have criticized this rationale as unsound).

140. *Ortho Pharmaceutical Corp. v. Chapman*, 180 Ind. App. 33, 388 N.E.2d 541 (1979).

141. See 12 INDIANA PRACTICE, *supra* note 3, § 407.101, at 313.

142. *Id.*

143. *Chapman*, 180 Ind. App. at 41, 388 N.E.2d at 561.

144. *Id.*

145. *City of Indianapolis v. Swanson*, 436 N.E.2d 1179, 1182 (Ind. Ct. App. 1982), *vacated*, 448 N.E.2d 668 (Ind. 1983) (citing *City of Lafayette v. Weaver*, 92 Ind. 477 (1883); *Town of Argos v. Harley*, 114 Ind. App. 290, 49 N.E.2d 552 (1943)).

measures when the defendant denies feasibility;¹⁴⁶ (3) “to prove a faulty condition, later remedied, was the cause of the injury by showing that after the change the injurious effect disappeared;”¹⁴⁷ and (4) impeachment.¹⁴⁸ Interestingly, although these exceptions have been recognized, they have seldom been applied.

2. *Dukett v. Mausness*.—In *Dukett v. Mausness*,¹⁴⁹ two separate actions arose from a collision between Floyd Mausness, and Joseph Dukett, an employee of Indianapolis Yellow Cab, Inc. Mausness’s car was struck by a taxi cab driven by Dukett and owned by Indianapolis Yellow Cab, Inc.¹⁵⁰ In the first action, Mausness’s wife, Waneda, sued Dukett and Yellow Cab for loss of consortium. In the second lawsuit, Yellow Cab sued Floyd Mausness for property damage. In response to the latter action, Mausness filed a counterclaim against Yellow Cab and a cross-claim against Dukett for personal injuries.¹⁵¹ For the sake of efficiency, the trial court consolidated the two actions.¹⁵²

Although the court disposed of the Mausnesses’ claims against Yellow Cab on a directed verdict, it submitted their claims against Dukett to a jury, which returned a verdict in their favor. Yellow Cab was unsuccessful in its claim for property damage.¹⁵³ The Mausnesses then filed a motion for proceedings supplemental, naming Yellow Cab as a garnishee defendant, which was granted by the trial court. Dukett and Yellow Cab appealed. They argued, among other things, that the trial court improperly allowed testimony that Yellow Cab terminated Dukett immediately after the accident.¹⁵⁴ According to Dukett and Yellow Cab, this testimony constituted evidence of subsequent remedial conduct; thus, it was inadmissible.

In a brief decision, the *Dukett* court considered the admissibility of the following testimony of Dukett during the Mausnesses’ case-in-chief:

146. *Id.* (citing *Indianapolis & St. Louis R.R. v. Horst*, 93 U.S. 291 (1876); *Toledo, Wabash and Western R.R. v. Owen*, 43 Ind. 405 (1873); *Hickey v. Kansas City Southern R.R.*, 290 S.W.2d 58 (Mo. 1956)).

147. *Id.* (citing *Kentucky Utilities Co. v. White Star Coal Co.*, 244 Ky. 759, 52 S.W.2d 705 (1923)).

148. *Id.* (citing *Kenney v. Southeastern Pennsylvania Transport*, 581 F.2d 351 (3d Cir. 1978), *cert denied*, 439 U.S. 1073 (1979); *Daggett v. A.T. & S.F.R. Co.*, 48 Cal. 2d 655, 313 P.2d 557 (1957); *Brazil Block Coal Co. v. Gibson*, 160 Ind. 319, 66 N.E. 882 (1903)).

149. 546 N.E.2d 1292 (Ind. Ct. App. 1989).

150. *Id.* at 1293.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

Q. Did you not state in your deposition, Mr. Dukett, in response to the question, you got fired as a result of this accident on December 12 and your answer was yes.

A. Yes, I used those words.

Q. Now, who did you talk to on that date?

A. I had talked to a

Q. On December 13, the day after the accident? Who fired you?

A. The man who fired me was Mr. Hunt.¹⁵⁵

Counsel for Yellow Cab and Dukett sought to exclude this testimony as evidence of subsequent remedial measures by filing a motion in limine, which was denied, and interposing objections at trial, which were overruled.¹⁵⁶

On appeal, the court only briefly discussed the basis for its ruling. It set forth policy considerations underlying the general rule that evidence of subsequent remedial conduct is generally inadmissible.¹⁵⁷ The court stated that remedial measures should be encouraged, rather than deterred by a fear among defendants that by making subsequent repairs, such conduct can be used as proof of consciousness of wrongdoing.¹⁵⁸ Noting that this rule had never been applied in this context in Indiana, the court of appeals examined cases from other jurisdictions to determine whether evidence of firing can be considered a subsequent remedial measure.¹⁵⁹

In determining the admissibility of evidence of an employee's termination, those courts seemed to rely on the second rationale underlying the rule of conduct by looking to the purpose for the tender of evidence of termination.¹⁶⁰ Finding that the evidence was offered as proof of negligence or as an admission, these courts held that such reasons were not legitimate.¹⁶¹ One court, in *Engle v. United Traction Co.*, recognized that employees are discharged for a variety of reasons, some of which are totally unrelated to an employee's careless or negligent conduct.¹⁶² It found that the discharge of an employee is just as likely to raise

155. *Id.*

156. *Id.*

157. *Id.* at 1294 (citing *Terre Haute & Indianapolis R.R. v. Clem*, 123 Ind. 15, 19, 23 N.E.2d 965, 966 (1890)).

158. *Id.*

159. *Id.*

160. *Rymar v. Lincoln Transit Co.*, 129 N.J.L. 525, 30 A.2d 406 (1946) (trial court improperly admitted evidence of permanent severance of relationship between driver and bus company); *Engel v. United Traction Co.*, 203 N.Y. 321, 96 N.E. 731 (1911) (evidence of discharge of motorman inadmissible); *White v. Missouri Motors Distributing Co.*, 266 Mo. App. 453, 47 S.W.2d 245 (1932) (discharge of driver inadmissible).

161. *See supra* note 129.

162. 203 N.Y. at 323, 96 N.E. at 732.

inferences of legitimate reasons for discharge unrelated to the accident as it is an inference that the discharge was prompted by the employee's negligence.¹⁶³

In *Dukett*, although the Indiana Court of Appeals set forth the policy reason for the rule as the basis for its decision, it actually relied on the rationale followed by other courts in decisions such as *Engle*. The court in *Dukett* found that evidence of Dukett's termination was offered to prove, by Yellow Cab's attitude toward the defendant, that Dukett was careless.¹⁶⁴ Because this evidence was not "legitimate or competent for that purpose," and constituted evidence of subsequent remedial conduct, the court ruled that it should have been excluded at trial.¹⁶⁵ The trial court's failure to exclude such evidence constituted reversible error.

Despite the brevity of the court's decision in *Dukett*, the court's ruling is instructive and helpful to the defense bar in general. When litigation arises involving an employee fired after his or her involvement in a controversy forming the basis of a lawsuit, defense counsel should consider filing a motion in limine to avoid introduction of evidence of the discharge if negligence and liability on the part of the employer or employee is alleged. In addition, the defendant should avoid raising the issue by presenting this evidence directly or by introducing evidence that could justify application of an exception to the rule.¹⁶⁶ Plaintiff may be able to introduce evidence of the discharge by arguing that the defendant waived its right to object by introducing same or similar evidence of its own remedial conduct or by arguing that an exception to the rule applies.

III. FEDERAL EVIDENTIARY ISSUES

A. Amendment to Federal Rule of Evidence 609(a)

In 1990, the United States Supreme Court amended Rule 609(a)(1) and (2) of the Federal Rules of Evidence, which allows use of certain prior convictions to impeach a litigant or witness.¹⁶⁷ Prior to promulgation of these amendments, courts disagreed about Rule 609's interaction with

163. *Id.*

164. 546 N.E.2d at 1294.

165. *Id.*

166. See *supra* notes 145-48 and accompanying text.

167. FED. R. EVID. 609 (a)(1), (2).

Rule 403,¹⁶⁸ which provides for the exclusion of otherwise relevant evidence if the evidence is unduly prejudicial.¹⁶⁹ The rule was amended to lay to rest this confusion among courts and inconsistency in application. To accomplish this goal, two major changes were made. First, the amendment removed from the rule the limitation that a prior conviction can be elicited only on cross-examination.¹⁷⁰ Second, the rule resolves the ambiguity as to the relationship between Rule 609 and 403 by specifically engrafting into the rule the requirement that the general balancing test of Rule 403 be applied.¹⁷¹

1. *Application of Rule 609(a)(1), (2) Prior to Amendment.*—
Prior to December 1, 1990, Rule 609(a)(1), (2) provided:

(a) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.¹⁷²

The question of how to interpret this rule in both criminal and civil contexts has been the subject of considerable controversy among courts and commentators.¹⁷³ Some courts held that Rule 609(a) was to be applied in conjunction with Rule 403 with the result being that evidence of prior convictions of witnesses or litigants other than the criminal defendant otherwise admissible under Rule 609 could still be excluded if its probative value was substantially outweighed by its prejudicial effect on any lit-

168. FED. R. EVID. 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Id.

169. *Id.*

170. FED. R. EVID. 609(a)(1), (2) (effective Dec. 1, 1990).

171. *Id.*

172. *Id.*

173. See *Donald v. Wilson*, 847 F.2d 1191 (6th Cir. 1988); *Wierstak v. Hefferman*, 789 F.2d 968 (1st Cir. 1986). See also Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 *FORDHAM L. REV.* 1063 (1986).

igant.¹⁷⁴ In contrast, other courts held that Rule 609 was all inclusive and was not meant to be read in tandem with Rule 403.¹⁷⁵ Pointing to language of the rule, which was regarded as mandatory, these courts also found that evidence falling within the scope of the rule "shall be admitted," thus precluding any additional consideration under Rule 403 of the probative value or prejudicial effect of the evidence.¹⁷⁶ The Seventh Circuit followed the latter view.¹⁷⁷

In *Campbell v. Greer*, the Seventh Circuit held that except as to defendants in criminal cases, prior convictions meeting the Rule 609(a) requirements were *always* admissible to impeach a witness and were not reviewed to determine whether their probative value outweighs their prejudicial effect.¹⁷⁸ The court found that the trial court was permitted to weigh only the prejudicial effect of such evidence on a defendant in a criminal trial.¹⁷⁹ The court also held that Rule 609 was all-inclusive, meaning that no independent balancing test under Rule 403 could be applied.¹⁸⁰ The Seventh Circuit reaffirmed this view in *Hernandez v. Cepeda*.¹⁸¹

In 1989, the Supreme Court resolved the controversy with regard to civil witnesses and parties in *Green v. Bock Laundry Machine Co.*¹⁸² The Court noted after a review of the Rule's legislative history that the balancing test was intended only to apply to bar impeachment by prior felony convictions when admission of such evidence would unduly prejudice a defendant in a criminal matter.¹⁸³ Thus, in the civil context, the balancing test was inapplicable.¹⁸⁴ Analyzing the mandatory language of Rule 609 and finding that its language prevented an independent application of Rule 403, the Court held that Rule 609(a)(1) "requires a judge to permit impeachment of a civil witness with evidence of prior

174. See, e.g., *Jones v. Board of Police Comm'rs*, 844 F.2d 500 (8th Cir. 1988); *Petty v. IDECO*, 761 F.2d 1146 (5th Cir. 1985); *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983); *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983).

175. See, e.g., *Cambell v. Greer*, 831 F.2d 700 (7th Cir. 1987); *Diggs v. Lyons*, 741 F.2d 577, 582 (3d Cir. 1984); *United States v. Kuecker*, 740 F.2d 496 (7th Cir. 1984); *United States v. Wong*, 703 F.2d 65 (3d Cir.) (*per curiam*), *cert. denied*, 464 U.S. 842 (1983); see also *McCORMICK*, *supra* note 20, § 43, at 95 (3d ed. 1984); 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 416, at 554 (1982).

176. See sources cited *supra* note 175.

177. *Campbell*, 831 F.2d at 706; see also *Hernandez v. Cepeda*, 860 F.2d 260 (7th Cir. 1988).

178. *Campbell*, 831 F.2d at 703-04.

179. *Id.*

180. *Id.* at 706.

181. *Hernandez*, 860 F.2d 260 (7th Cir. 1988).

182. 109 S. Ct. 1981 (1989).

183. *Id.* at 1991-92.

184. *Id.*

felony convictions, regardless of the ensuing unfair prejudice to the witness or the party offering the testimony."¹⁸⁵

The implication of this decision was that a trial court could no longer exercise discretion and balance the probative value of prior convictions against the prejudicial impact of their admission at trial. Rather, under *Bock Laundry*, the court was required to permit such impeachment regardless of its prejudicial effect.¹⁸⁶

The issue of the interaction of Rule 403 with Rule 609 was also raised in criminal cases when prior convictions were used to impeach witnesses to the detriment of the government. There seemed to be confusion as to whether the balancing test applied when the evidence of prior felony convictions of witnesses other than the criminal defendant was offered as impeachment.¹⁸⁷ Some courts determined that Rule 609(a) applied to evidence of witnesses' prior felony convictions without regard to its prejudicial impact on the government.¹⁸⁸ This approach ignored the government's interest in a fair trial and the potential for frustrating this interest by introduction of highly prejudicial impeachment evidence.

Because Rule 609 was the source of so much confusion and discord, amendment was necessary to resolve the conflicts.

2. *The Amended Rule 609 (a)(1), (2)*.—As amended, Rule 609 now reads in relevant part:

(a) General rule.—For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, *subject to Rule 403*, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.¹⁸⁹

As previously noted, this version contains two major changes. First, the rule omits the limitation that the conviction may only be elicited

185. *Id.* at 1993.

186. *Id.*

187. *See, e.g.,* *United States v. Thorne*, 547 F.2d 56 (8th Cir. 1976); *United States v. Nevitt*, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979).

188. *See* cases cited *supra* note 187.

189. FED. R. EVID. 609(a)(1), (2) (effective Dec. 1, 1990) (emphasis added).

on cross-examination.¹⁹⁰ Recognizing the common practice of eliciting this information from witnesses on direct examination to “remove the sting” of the impeachment, the Conference Committee on Rules of Practice and Procedure noted that this limitation was ineffective and found to be inapplicable by virtually every circuit.¹⁹¹

The second change resolves the uncertainty of the relationship between Rule 609 and 403 concerning impeachment of witnesses other than a criminal defendant.¹⁹² The amendment simply provides that the Rule 403 balancing test will be applied when proof of prior convictions is offered as impeachment.¹⁹³ With the exception of the criminal defendant who chooses to testify, this rule applies to all litigants (that is, the civil plaintiff, the civil defendant, and the government in criminal cases).¹⁹⁴ Explaining the purpose for this amendment, the Committee stated:

The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.¹⁹⁵

In addition, the Committee stated, “[T]he amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results.”¹⁹⁶

The Committee also clarified the role of Rule 403 with regard to government witnesses. As already stated, the amendment applies to impeachment of government witnesses.¹⁹⁷ The amendment recognizes that the government’s interest in a fair trial may be compromised by evidence of prior convictions to impeach the witness when the prior convictions only remotely relate to credibility.¹⁹⁸ The Committee noted, however, that in most criminal cases it is unlikely that prior convictions of the

190. *Id.*

191. Advisory Committee Note, Amendments to Federal Rules of Evidence — Rule 609, 129 F.R.D. 353 (1990) [hereinafter Committee Note].

192. *Id.*

193. *See supra* note 168 and accompanying text.

194. Committee Note, 129 F.R.D. at 354. *See also* FED. R. EVID. 404 (evidence of other crimes is only admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

195. Committee Note, 129 F.R.D. at 353-54.

196. *Id.* at 354.

197. *Id.*

198. *Id.*

ordinary government witness will be unduly prejudicial.¹⁹⁹ Thus, trial courts "will be skeptical when the government objects to impeachment of its witnesses with prior convictions."²⁰⁰

Finally, the Committee noted that amendment of the Rule to include language limiting use of prior convictions only for impeachment purposes is unnecessary because the title of the Rule, its first sentence, and its placement among other impeachment rules clearly show that such evidence can be offered under Rule 609 only for the purpose of impeachment.²⁰¹

3. *Affect of the Amendment in the Seventh Circuit.*—Because courts in the Seventh Circuit previously adhered to the view that the determination of the admissibility of evidence of prior convictions under Rule 609 did not include an analysis under Rule 403, the amendments to Rule 609 represent a substantial change in those courts' approach to such evidence. Although courts routinely allowed such evidence prior to the amendment, they now must engage in an analysis that balances the probative value of the evidence against its prejudicial impact any time evidence of prior convictions is offered to impeach a witness. The effect of this shift will be that evidence of prior convictions is not as likely to be introduced if the opponent of the evidence is aware of the change in the rule and can illustrate the prejudicial impact of the evidence to the court. To take advantage of the benefit of the amendment, counsel should be prepared to argue that introduction of the evidence of prior convictions will be unduly prejudicial.

Thus, civil and criminal litigants who fear that evidence of their own prior convictions or of their witnesses might be introduced for impeachment may wish to file a motion in limine to obtain a pre-trial ruling regarding the admissibility of the evidence, citing the new rule and showing the court the prejudicial impact that would result from admission of such evidence. It is important to note, however, that a trial court's determination of admissibility under Rule 403 is discretionary²⁰² and is unlikely to be overturned on appeal unless the court has abused its discretion. Therefore, it is important to convince the *trial court* of the proper ruling before or during trial rather than attempt to persuade the appellate court of the trial court's harmful error.

B. *The "Frye Test" and Spectrographic Voice Analysis*

In 1989, the Seventh Circuit decided *United States v. Smith*.²⁰³ This decision is noteworthy for two reasons. First, the Seventh Circuit re-

199. *Id.*

200. *Id.* at 354-55.

201. *Id.* at 355.

202. *See* *Thronson v. Meisels*, 800 F.2d 136 (7th Cir. 1986).

203. 869 F.2d 348 (7th Cir. 1989).

affirmed its commitment to use of the Frye test as a method for assessing the admissibility of scientific evidence.²⁰⁴ Second, applying the Frye test, the court ruled for the first time that expert testimony concerning spectrographic voice analysis is admissible.²⁰⁵

1. *Background.*—Prior to adoption of the Federal Rules of Evidence, courts generally applied a test articulated in *Frye v. United States* to determine the admissibility of scientific evidence and expert testimony premised upon scientific data.²⁰⁶ This standard, known as the Frye test, was set forth in 1923 and described in the following manner:

Just when a scientific principle or discovery crosses a line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of a principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction must be made must be sufficiently established to have gained general acceptance in a particular field in which it belongs.²⁰⁷

After the Federal Rules of Evidence were adopted, specifically Federal Rule 702²⁰⁸ and 703,²⁰⁹ the Frye test began being criticized by commentators and abandoned by courts as being unnecessarily restrictive.²¹⁰ The Seventh Circuit, however, has continued to affirm and apply the Frye test.²¹¹

204. *Id.*

205. *Id.*

206. 293 F.2d 1013 (D.C. Cir. 1923).

207. *Id.* at 1014.

208. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

209. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

210. See *United States v. Hope*, 714 F.2d 1084, 1087 n.3 (11th Cir. 1983); see also *McCORMICK*, *supra* note 20, § 203, at 606-08.

211. *Smith*, 869 F.2d at 351; *United States v. Carmel*, 801 F.2d 997 (7th Cir. 1986); *United States v. Franowski*, 659 F.2d 705 (2d Cir. 1981).

In *Smith*, the Seventh Circuit once again showed its resolve to adhere to the rule, despite this increasing criticism.²¹² In *Smith*, the Seventh Circuit applied the Frye test to determine for the first time the admissibility of expert testimony concerning spectrographics voice identification.²¹³

2. *The Smith Decision*.—Tanya and Tamara Smith, identical twins, were charged with conspiracy to commit bank and wire fraud and substantive counts of bank, credit card, and wire fraud. The twins, posing as bank employees, telephoned various banks and authorized them to make fictitious transfers of nonexistent funds. The women then arranged for other persons to retrieve the money at transferee banks or Western Union. After retaining a small portion of the money themselves, these persons turned the remainder over to the twins.²¹⁴

To establish the twins' identity, a crucial issue at trial, the government called a spectrographic voice identification expert to testify. The expert who testified at trial based his testimony on data compiled by another voice identification expert who was unable to testify at the last minute. After comparing the recorded voices of Tamara and Tanya Smith to the recorded voice of the person who called a number of banks and falsely identified herself as a bank employee attempting to arrange a wire transfer, the expert concluded that it was highly probable that the caller was Tanya Smith rather than Tamara Smith.²¹⁵

Tamara Smith, the appellant, was convicted of thirty-one of the thirty-seven counts with which she was charged. On appeal, Tamara challenged the use of the expert testimony concerning spectrographic voice identification, arguing that voice spectrograms are not generally accepted by the scientific community.²¹⁶

Confronted with this issue of whether to use the Frye test to determine the admissibility of the evidence, the Seventh Circuit declined to depart from precedent. Rather, it reviewed with approval other circuits that applied the Frye test to find that expert testimony concerning spectrographic voice analysis is admissible when the proponent of the testimony has established a proper foundation.²¹⁷

212. 869 F.2d at 351.

213. *Id.*

214. *Id.* at 349-50.

215. *Id.* at 350.

216. *Id.* On appeal, Tamara also argued that admission of the substitute expert's testimony violated her rights to confrontation under the sixth amendment to the Constitution. In addition, she appealed the denial of her motion to sever her trial from that of her sister.

217. *Id.* at 351.

Specifically, the court relied on a two-pronged analysis applied by other circuits.²¹⁸ This inquiry focuses upon whether the scientific technique at issue is reliable and likely to mislead the jury.²¹⁹ With regard to the first element, the court stated that a scientific technique may be reliable if several factors are present, including "the potential rate of error, the existence and maintenance of standards, the care and concern with which a scientific technique has been employed (and whether it appears to lend itself to abuse), and its analogous relationship with other types of scientific techniques."²²⁰ An additional indicia of reliability is the presence of "fail-safe" characteristics, (that is, "characteristics the variability of which will lead to different rather than similar results").²²¹

When discussing the second prong of the analysis, the court emphasized the danger of a jury giving undue weight to scientific evidence because of the apparent objectivity of opinions premised upon scientific data.²²² It noted, however, that the tendency of such evidence to mislead the jury is reduced if the technique is comprehensible to a jury, the jury is able to make the same comparisons as the expert, the evidence is subject to cross-examination, and the trial judge instructs the jury about its responsibility to discredit such evidence if it is found to be unconvincing.²²³

Applying these factors to the facts of the case, the Seventh Circuit found that the government provided ample evidence of the reliability of spectrographic voice analysis through the testimony of the expert regarding the principles and techniques behind voice identification, his own studies, and the studies of other experts as to the reliability of the techniques. Despite the fact that the expert admitted that the technique was not infallible and was not unanimously supported by the scientific community, the court held that the expert's testimony contained several of the indicia of reliability and was therefore sufficiently reliable.²²⁴ The court also held that the presence of the safeguards mentioned above prevented the testimony from misleading the jury.²²⁵ Therefore, because the testimony was both reliable and unlikely to mislead the jury, it was admissible and properly presented to the jury.²²⁶

218. *Id.* (citing *United States v. Williams*, 583 F.2d 1194, 1198-1200 (2d Cir. 1978)). See also *United States v. Baller*, 519 F.2d 463, 465-67 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975).

219. *Smith*, 869 F.2d at 351.

220. *Id.* at 352.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 353-54.

225. *Id.* at 354.

226. *Id.* at 354-55.

3. *Conclusion.*—*Smith* is important for two reasons. First, the court's adherence to the Frye test in the midst of increasing criticism in other jurisdictions counsels attorneys to build the proper foundation for expert testimony under the test in cases involving innovative or new scientific techniques. Proof of the factors set forth above to establish general acceptance in the scientific community may be necessary in such cases. Failure to prepare expert testimony in this manner may result in exclusion of the evidence.

Second, *Smith* is noteworthy because of its determination that spectrographic voice identification passes the Frye test and is admissible in cases in which a sufficient foundation has been laid. It is important to note that the law in the Seventh Circuit now differs from the law followed in Indiana. With regard to spectrographic voice identification, Indiana courts have specifically rejected this technique as unreliable.²²⁷ However, because of the advancement in technology and the increasing acceptance by courts of this scientific technique as reliable, it is likely that an Indiana court will depart from its previous rulings when presented with the issue in the future. In the meantime, attorneys should be aware of the different approaches and should proceed accordingly.

C. *Attorney-Client Privilege*

Although the law concerning attorney-client privilege is well established in the Seventh Circuit, a recent case provides an interesting example of the application of this doctrine to information concerning the identity of a fee payer who sought legal advice from an attorney.²²⁸ In *In re Grand Jury Proceeding, Cherney*,²²⁹ the Seventh Circuit considered whether the identity of an individual who paid a legal fee is confidential, and therefore privileged. The court held that the identity of the person who paid legal fees was protected by the attorney-client privilege.²³⁰

1. *Background.*—The attorney-client privilege is an evidentiary doctrine that prohibits disclosure of confidential communications between an attorney and a client. This doctrine is premised on the theory that encouragement of full disclosure by a client allows the attorney to act in a matter that is more effective, efficient, and just, and that these benefits outweigh the risks raised by preventing full disclosure in court.²³¹ The privilege is narrowly confined, applying only when necessary to achieve its purpose.²³² Thus, the privilege applies only when a client

227. *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983).

228. *In re Grand Jury Proceeding, Cherney*, 898 F.2d 567 (7th Cir. 1990).

229. *Id.*

230. *Id.*

231. *See Fisher v. United States*, 425 U.S. 391 (1976).

232. *Id.*

makes confidential communications in order to obtain informed legal advice, and does not protect all communications that merely relate to or have a bearing upon the attorney-client relationship.²³³ The determination of whether the privilege protects disclosure of certain information is fact-sensitive and varies from case to case.

2. *The Cherney Case*.—In *Cherney*, the Seventh Circuit considered these general principles in the context of grand jury proceedings in which an attorney refused to disclose the identity of a person who paid his fee to represent another individual.²³⁴ The attorney, who had previously represented a man named Jack Hrvatin in a conspiracy-narcotics trial, was served with a subpoena to appear before a grand jury to answer questions concerning who paid him to represent Hrvatin. The attorney filed a motion to quash the subpoena on the ground that the fee-payer's identity was protected by the attorney-client privilege. After conducting an *in camera* review of documents submitted by the attorney, the district court granted the motion to quash based on application of the privilege. The government appealed.²³⁵

On appeal, the Seventh Circuit cited the general rule that "information regarding a client's fees is not protected by the attorney-client privilege because the payment of fees is not a confidential communication between the attorney and client."²³⁶ Although the court stated that payment of fees is incidental and does not usually involve disclosure of confidential communications, it recognized that under certain circumstances, "disclosure of fee-payer's identity could reveal a confidential communication."²³⁷ Under such circumstances, the privilege applies.²³⁸ The privilege does not apply, however, merely when disclosure of the identity of the fee-payer may be incriminating to that client.²³⁹ Thus, the appropriate inquiry is "whether the revelation of the identity of the fee payer along with information regarding the fee arrangement would reveal a confidential communication" between the attorney and the fee-payer.²⁴⁰

With this in mind, the court turned to the case at bar. It rejected the government's argument that despite the admitted existence of an attorney-client relationship between the attorney and the fee-payer, in-

233. *Cherney*, 898 F.2d at 567.

234. *Id.* at 566.

235. *Id.* at 566-67.

236. *Id.* at 567 (quoting *In re Witnesses Before Special March 1980 Grand Jury*, 729 F.2d 489, 491 (7th Cir. 1984)).

237. *Id.*

238. *Id.*

239. *Id.* at 568.

240. *Id.*

formation regarding the payment of fees could not be confidential.²⁴¹ The court stated that when disclosure of an unknown client's (*i.e.*, fee-payer) identity would reveal the client's motive for seeking legal advice, the client's identity is protected by the privilege.²⁴² It then found that disclosure of the fee-payer's identity would necessarily reveal the fee-payer's involvement in the drug conspiracy and would, therefore, reveal his motive for seeking legal advice.²⁴³ Because the client paid Hrvatin's fees in the same matter giving rise to the attorney-client relationship, the court ruled that disclosure of his identity would, in effect, reveal the substance of a confidential communication.²⁴⁴ In other words, the disclosure would have exposed the very reason that the client fee-payer initially sought legal advice from the attorney. Thus, although this information could have been incriminating, and incriminating information alone is not privileged, it was still shielded by the privilege because it was confidential.²⁴⁵

The court distinguished this situation from the typical case in which the government seeks information about a known client's fee. The court stated that the purpose of that inquiry is usually to determine whether the attorney was paid with illicit funds. Although revelation in that case would probably incriminate the client, it would not risk exposure of a confidential communication.²⁴⁶ In contrast, revelation of the fee-payer's identity in the case at bar would simultaneously reveal a confidential communication.

Finally, although the court recognized the frustration of the government in its effort to learn the identity of a suspected drug felon, it held that these interests had to succumb to interests served by the attorney-client privilege under the circumstances.²⁴⁷

3. *Conclusion.*—Although the Seventh Circuit specifically stated that its holding did not constitute an expansion of the attorney-client privilege,²⁴⁸ its decision provides clues regarding how it may decide similar cases in different contexts in the future. As governmental entities acquire increasing power to inquire about information concerning legal fees, this decision reveals that such power is not unlimited. Attorneys seeking to invoke the privilege on behalf of clients who paid fees should examine their own circumstances to determine whether this case could apply.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 569.

248. *Id.*

IV. CONCLUSION

Attorneys should recognize that numerous cases addressing evidentiary issues have been decided at both the state and federal level during the survey period — too numerous to mention here. This Article intends only to highlight some of the developments in the law of evidence significant to practitioners in federal and state courts in Indiana.

At the state level, this Article discusses the inadmissibility of settlement agreements, foundational requirements for expert testimony when the expert uses formulas, calculations, and information from third parties to form an opinion, the scope of the physician-patient privilege, and the inadmissibility of subsequent remedial measures, including the subsequent firing of an employee who was allegedly negligent.

At the federal level, this Article discusses the recent amendment to Rule 609 of the Federal Rules of Evidence involving impeachment of witnesses with evidence of prior crimes, the Seventh Circuit's use of the Frye test to admit expert testimony concerning spectrographic voice analysis, and a recent application of the attorney-client privilege to protect the identity of a fee-payer.

