NEW MEXICO LAW REVIEW

Volume 32
Issue 3 *Summer 2002*

Summer 2002

Evidence: Protecting Privileged Information - A New Procedure for Resolving Claims of the Physician-Patient Privilege in New Mexico - Pina v. Espinoza

Valerie Reighard

EVIDENCE: Protecting Privileged Information—A New Procedure for Resolving Claims of the Physician-Patient Privilege in New Mexico—*Piña v. Espinoza*

VALERIE REIGHARD*

I. INTRODUCTION

In *Piña v. Espinoza*,[1] the New Mexico Court of Appeals determined that a plaintiff can invoke the physician-patient privilege with respect to some medical records even if the suit involves a claim of personal injury. Once a trial court determines that such records are protected under New Mexico's physician-patient privilege, Rule 11-504 of the New Mexico Rules of Evidence,[2] a person's confidential communications with his or her physician will be protected and thus undiscoverable by an adverse party.

In *Piña*, the court of appeals held that the trial court abused its discretion by ordering a blanket authorization of the plaintiff's entire medical history, which included her obstetrician and gynecological records, for discovery by the defendant in a personal injury case.[3]

The court found that where "confidential medical communications [are] made for the purposes of diagnosis or treatment"[4] and when the particular condition is "not an element of the patient's claim,"[5] the communications are privileged. Once that determination is made, the discovery inquiry ends.

The court then established a new procedure for the privilege determination of physician-patient communications. The new procedure in *Piña* represents an attempt to instruct courts how to resolve colorable claims of the physician-patient privilege by allowing plaintiffs the opportunity to assert a claim of privilege while permitting defendants an opportunity to rebut it. The procedure permits plaintiffs to determine which medical records are privileged. The plaintiff first selects the medical communications and documents that which he or she believes to be privileged and compiles them into a privilege log. Each assertion of the privilege must be particularized so that the court and the opposing party may adequately assess the privilege with respect to each communication.[6] If, at this point, there is no resolution between the parties, the privilege log is then reviewed by the trial court in camera.[7]

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* Class of 2003, University of New Mexico School of Law. I would like to thank my faculty advisor, Michael Browde, and my manuscript editor, Sean Sullivan, for their guidance with this Note. I would also like to thank my family for their love and support.

1. 2001-NMCA-55, 130 N.M.661, 29 P.3d 1062, *cert. denied*, 130 N.M. 558, 28 P.3d 1099 (2001).
2. Rule 11-504 states,

> *A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental, or emotional condition*, including drug addiction, among the patient, the patient's physician, or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including the members of the patient's family.

N.M. R. EVID. 11-504 (emphasis added).

3. *Piña* ¶ 1, 130 N.M. at 663, 29 P.3d at 1064.
4. N.M. R. EVID. 11-504(B).
5. N.M. R. EVID. 11-504(D)(3).
6. *Piña* ¶ 24, 130 N.M. at 668, 29 P.3d at 1069.
7. *Black's Law Dictionary* defines "in camera review" as, "[I]n a judge's chambers; in a courtroom with

The basis for this procedure is found not only in New Mexico case law, but also in the law of other jurisdictions and mirrors Federal Civil Procedure.

Additionally, the decision to develop a new method for the resolution of privilege claims in New Mexico conforms to the widespread policy that recognizes a need to keep privileged medical documents confidential and further acknowledges the importance of a privileged relationship between physician and patient.

This Note examines how courts have historically dealt with assertions of privilege, describes the new procedure established in *Piña*, considers the court's rationale, and explores the implications of this decision in future New Mexico cases.

II. STATEMENT OF THE CASE

Plaintiff Bernadette Piña sued Charlene Espinoza after the defendant rear-ended the plaintiff's vehicle while driving in Las Cruces.[8] Piña alleged that she sustained personal injuries to her back and neck that resulted in pain and suffering, medical expenses, lost earnings, and loss of enjoyment of life as a result of the collision.[9] During discovery, the defendant served interrogatories directing the plaintiff to identify each health professional who had treated her for any reason in the last five years before the accident along with a description of the conditions treated in each instance.[10] The defendant also served requests for production of documents that included a request that the plaintiff execute a general medical release, which was at the time the current practice under the New Mexico rules of discovery.[11]

The plaintiff responded to the defendant's requests by filing a motion for a protective order in which she claimed that her medical records, specifically those regarding her OB/GYN history, were privileged. The plaintiff argued that she had an expectation of privacy in her medical records, and her records were confidential under both Rule 11-504 and N.M. Stat. Ann. § 14-6-1.[12] The plaintiff also filed a motion for a protective order to prevent the defendant from using her medical

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all spectators excluded; or (of a judicial action) taken when the court is not in session—Also termed (in reference to the opinion of one judge) in chambers." BLACK'S LAW DICTIONARY 763 (7th ed. 1999).

8. *Piña* ¶ 2,130 N.M. at 663, 29 P.3d at 1064.

9. Ms. Piña claimed that she suffered back and neck injuries as a "direct and proximate result of Defendant's negligence and resulting collision." *Id.*

10. Plaintiff-Appellant's Brief-in-Chief at 1, *Piña v. Espinoza*, 2001-NMCA-55, __ N.M. __, 29 P.3d 1062, *cert. denied*, 28 P.3d 1099 (2001)(No. 20,738).

11. *Piña* ¶ 4, 130 N.M. at 663, 29 P.3d at 1064.

12. The statute states,

> All health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public even if the information is in the custody of or contained in the records of a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees or such facilities.

N.M. STAT. ANN. § 14-6-1 (Repl. Pamp. 1995 & Cum. Supp. 2001).

The plaintiff originally argued that Section 14-6-1 was applicable in this case. However, Section 14-6-1 was not addressed either by the parties or the court in the subsequent appeal. The appeal was instead limited to arguments over which meaning of the relevancy standard should apply. The defendant argued that the discovery standard of Rule 1-026 was applicable, while the plaintiff argued that the evidentiary privilege standard of 11-504 was more pertinent to the issues presented in the case. As the court of appeals was faced with two different alternatives, they rightfully looked to both standards and determined that a new procedure should be applied that would satisfy the concerns of both parties. *See infra* section IV.B.

records for any purpose other than the present litigation.[13] The defendant responded by filing a motion to compel discovery arguing that the plaintiff had not shown good cause for the motion for the protective order because "the physician-patient privilege is waived once the Plaintiff has placed her physical, mental, or emotional condition at issue."[14] In addition, the defendant argued that discovery of the plaintiff's medical records was governed by the broad standard of Rule 1-026 of the New Mexico Rules of Civil Procedure, which states, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[15]

In reply, the plaintiff argued that information contained in her OB/GYN records was irrelevant to the subject matter of the litigation[16] and disclosure of such records violated her privacy. The plaintiff argued that the defendant confused the 11-504 privilege standard with the 1-026 relevance standard. Rule 11-504 provides that confidential medical records are privileged unless they are used as an element of a claim or defense.[17] Therefore, the records are privileged irrespective of whether they are relevant to the subject matter under Rule 1-026. Thus, Rule 11-504 has a narrower scope and, if privileged, the records are not discoverable.

The trial court denied the plaintiff's motion and found that the plaintiff had placed her medical condition at issue, and therefore, her right to invoke the privilege was lost under the 11-504(D)(3) exception.[18] In addition, the trial court refused to view any portion of Ms. Piña's medical records in camera.[19] The trial court then ordered the plaintiff to execute a blanket authorization of her medical records, including the OB/GYN records, to the defendant.[20] The plaintiff argued that in order

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13. *Piña* ¶ 4, 130 N.M. at 663, 29 P.3d at 1064.

14. *Id.* ¶ 5,130 N.M. at 663, 29 P.3d at 1064. The defense argued that Ms. Piña could not assert the physician-patient privilege because she had put her medical condition at issue simply by filing the suit. Specifically, the defense further argued that since Ms. Piña had claimed loss of enjoyment of life, this translated into hedonic damages that would allow the Defendant to discover all of Ms. Piña's medical records, including her OB/GYN records. The defense argued,

> Plaintiff's damage claim for loss of enjoyment of life constitutes a claim for hedonic damages. According to this court, the Plaintiff's claim for hedonic damages would allow a jury to compensate the Plaintiff for that which the Plaintiff can no longer enjoy. The Plaintiff's medical history would, at a minimum, provide information reasonably calculated to lead to the discovery of admissible evidence because, at minimum, Plaintiff's medical records would likely contain Plaintiff's self-described medical history.

Defendant-Appellee's Answer Brief at 14, *Piña* (No. 20,738). The defense argued that this medical history would be discoverable under Rule 1-026 (B). *Id.* Therefore, according to the defendant's reasoning, Ms. Piña was barred from invoking the privilege under the 11-504 (D)(3) exception that states, "There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense." N.M. R. EVID. 11-504(D)(3). As a result, Ms. Piña's records were discoverable under Rule 1-026 because, not only were they relevant to the subject matter of the issues presented in the case, but they were also not privileged under the 11-504(D)(3) exception.

15. N.M. R. CIV. P. 1-026(B)(1).

16. The Plaintiff argued that some of her medical treatment within the previous five years had been related to OB/GYN conditions (exams and the birth of her child) that were not related to her back and neck injures that were sustained in the car accident. Plaintiff-Appellant's Brief-in Chief at 2-3, *Piña* (No. 20,738).

17. N.M. R. EVID. 11-504(B), (D)(3).

18. *Piña* ¶ 7, 130 N.M. at 663, 29 P.3d at 1064-65.

19. Plaintiff-Appellant's Brief-in-Chief, at 12-13, *Piña* (No. 20,738).

20. *Piña* ¶ 7, 130 N.M. at 663, 29 P.3d at 1064-1065. Instead of following the trial court's order, the plaintiff allegedly rewrote the release to restrict it to only the medical records that related to the automobile accident. *Id.* ¶

to preserve her claim of physician-patient privilege, she could not waive the privilege by signing the blanket release.[21] In doing so, she would be giving up her right to the privilege. Rather than holding the plaintiff in contempt for disobeying the order, the trial court dismissed the case with prejudice pursuant to Rule 1-037(B) of the New Mexico Rules of Civil Procedure.[22]

The plaintiff appealed to the New Mexico Court of Appeals claiming that the trial court erred in issuing a blanket authorization of the plaintiff's medical records, where a physician-patient privilege had been asserted, and where in camera review by the trial court had been denied.[23] The court of appeals reversed the trial court's decision, holding that the OB/GYN records might well contain privileged information and eliminated the common practice of blanket authorization of medical records in New Mexico, as they did not adequately protect parties asserting a privilege.[24] With respect to this case, the court determined that a portion of the OB/GYN records may well be privileged. The court acknowledged that the Plaintiff did not put her entire medical history, especially her gynecological history, at issue by simply filing a claim for pain and suffering as a result of back and neck injuries sustained in a car accident.[25]

III. BACKGROUND

A. The Basis for the Physician-Patient Privilege

A continuing concern in our legal system is the need for a proper balance between revealing the truth to serve justice and the public interest in protecting a right to

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9, 130 N.M. at 664, 29 P.3d at 1065. As a result, the defense argued that sanctions against the plaintiff were appropriate, which included dismissal of the case. The plaintiff responded to this allegation by stating that in order not to lose her right to the privilege, only three options were available: to refuse to comply with the trial court's order of a blanket release, to dismiss the case, or to appeal. The plaintiff explicitly stated that no disrespect was meant to the trial court, but she did not want to lose her right to the privilege. Plaintiff-Appellant's Brief-in-Chief at 6, *Piña* (No. 20,738).

At this point, the plaintiff also filed a writ of superintending control to the New Mexico Supreme Court in an attempt to avoid disobeying the trial court's order. The plaintiff claimed that this "extraordinary" writ or the interlocutory appeal process were "the only avenues open to Ms. Piña in absence of a final order" by the trial court. The New Mexico Supreme Court denied the writ. *Id.* at 6-7.

21. *Piña* ¶ 8, 130 N.M. at 664, 29 P.3d at 1065.

22. *Id.* ¶ 11, 130 N.M. at 664, 29 P.3d at 1066; Rule 1-037 provides sanctions for the failure of a party to attend [their] own deposition or serve answers to interrogatories or respond to a request for inspection. N.M. R. CIV. P. 1-037.

23. The court of appeals also asked the parties to brief whether or not the plaintiff, because she had disobeyed the trial court's order of the blanket release and the case had been dismissed, was precluded from raising the appeal under the Collateral Bar Rule. The defendant argued that the plaintiff could not simply refuse to withhold the documents and maintained that the plaintiff should have been held in contempt and then stayed the order. The court of appeals skirted the Collateral Bar problem, noting that the plaintiff had no means by which to challenge the trial court's order of the blanket release other than to disobey the order or lose the privilege. *Pina* ¶ 29-31, 130 N.M. at 669, 29 P.2d at 1070. For a discussion of the Collateral Bar Rule, *see* John E. Theuman, *Dismissal of State Court Action for Failure or Refusal of Plaintiff to Obey Request or Order for Production of Documents or Other Objects*, 27 A.L.R. 4th 61 (2001); H.S. Shapiro, *The Collateral Bar Rule—Transparently Invalid: A Theoretical and Historical Perspective*, 24 COLUM. J.L. & SOC. PROBS. 561 (1991); State v. Cherryhomes, 114 N.M. 495, 890 P.2d 1261 (Ct. App. 1992), *cert. denied*, 114 N.M. 602, 856 P.2d 549 (1992).

24. *Piña* ¶ 17, 130 N.M. at 666, 29 P.3d at 1067.

25. *Id.*

confidentiality within certain protected relationships.[26] The court system has often struggled with the recognition and application of the evidence privileges that protect confidential communications from revelation in the courtroom.[27] The primary fear is that justice will be compromised if parties do not have access to all pertinent information needed to establish a sufficient claim or defense.

Opponents of evidentiary privileges argue that parties should be able to access all relevant information so that a fair and just determination of the case can be made. Those who support the privileges insist, however, that it is also important that individuals can speak confidentially within the context of certain special relationships. "In general, privileges are the legal system's attempt to balance the need for personal privacy in communications and the need for probative evidence at trials."[28] This balance is often struck by strictly construing privileges as applying "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[29]

The most widely accepted privileged relationships—attorney-client, marital, and priest-penitent—were first established in early English common law,[30] where it was recognized that the primary policy behind privilege was to ensure that individuals continued to disclose important and necessary information without the fear that these revelations would become public.[31] Most states have accepted these privileges and their underlying policies.[32]

The physician-patient privilege, however, was not recognized in common law England.[33] Thus, during the early development of evidentiary law in the United States, many jurisdictions were reluctant to adopt a physician-patient privilege.[34]

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26. *See* Laural C. Alexander, Note, *Should Alabama Adopt a Physician-Patient Privilege?*, 45 ALA. L. REV. 261, 261 (1993).

27. *Id.*

28. *Id.* at 262.

29. *Id.*; *see also* Trammel v. United States, 445 U.S. 40, 50-51 (1980).

30. The first evidentiary privilege to be recognized in common law England was the attorney-client privilege, followed shortly thereafter by the spousal privilege. Both privileges in their early stages were extremely broad but eventually became well established by the English courts in "both civil and criminal cases by the late 1600s." *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1455-56 (1985).

31. For a discussion of the privacy rationale behind the physician-patient privilege, see *id.* at 1480-86.

32. For a list of states that have adopted a physician-patient privilege, see 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2380, n.3 (1905).

33. An early English case, Duchess of Kingston's Trial in 1776, rejected the established rationale for the attorney-client privilege, which was that "gentlemen do not reveal secrets entrusted to them." This same argument was presented in the *Duchess* case in the physician-patient context but failed. When the courts rejected this "honor rationale," proponents of the physician-patient privilege argued that the privilege was necessary to encourage the confidential relationship between the physician and patient, thereby ensuring effective treatment. Nevertheless, the English courts reasoned that "even absent a privilege, a patient's self-interest would ensure that he or she would reveal all necessary information to his or her physician" and held that "while a physician must generally protect a patient's confidences, to reveal such information in court was not a breach of duty to the patient." *See* Alexander, *supra* note 26, at 264-65; WIGMORE, *supra* note 32, § 2380, at 819.

34. It was around this period that the American courts began to take notice of the emerging evidentiary law to help them decide their own privilege questions. The English treatises, most of which had previously dismissed the physician-patient privilege, served as the source for American law for a number of years. Soon, American editions of the treatises on evidentiary privileges were published that again acknowledged the attorney-client and spousal privileges. Due to a growing debate over recognizing other forms of privilege, the physician-patient privilege was recognized in at least one treatise, but was again, abruptly dismissed as unsupported. In essence, these

Despite this early rejection, the physician-patient privilege eventually gained some acceptance.

During the early nineteenth century, "many states enacted privilege statutes in place of the judicially created common law of privileges." [35] In 1828, New York became the first state to enact a physician-patient statute.[36] The New York legislature acknowledged, with respect to litigation, that a full knowledge of the facts was necessary in order to advise correctly and to prepare for a proper defense or prosecution of a suit. The legislature found, however, that the "necessity of consulting a medical adviser, when life itself may be in jeopardy," was more substantial.[37] The legislature specifically noted that appropriate medical treatment was dependent upon the full disclosure of a medical condition by the patient to his treating physician.[38]

Eventually, several other states followed the New York legislature by adopting a physician-patient privilege. Today, most states recognize the privilege by statute and court rule, thereby making communications between physicians and patients confidential and privileged from disclosure in courts.[39] The policy behind the privilege is to ensure that patients feel secure in confiding any information to their physicians so that the physician may provide effective treatment. To claim the privilege, several elements must be met, and often there are several exceptions to the privilege that may deny a patient the right to protection. Generally, the patient holds the privilege, rather than the physician. Thus, a physician cannot claim the privilege even if the patient decides to waive it; any claim of privilege must be formally made, either by the patient or his attorney.[40]

As with the other evidentiary privileges, the physician-patient privilege may be waived either expressly or implicitly. A patient may expressly waive the privilege by signing an authorization for the release of his or her medical information,[41] or by

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early American treatises reflected the English common law, which had not recognized the physician-patient privilege. Furthermore, at this time, neither the United States Congress nor the states had enacted legislation that added anything of substance to the common law evidentiary privileges. As a result, American judges were forced to look to the English common law for authority in dealing with cases regarding privileges. The fact that the English courts did not recognize the physician-patient privilege at common law may explain why early American law did not recognize the privilege. *See Development in the Law: Privileged Communications*, *supra* note 30, at 1457-58.

35. *Id.* at 1458.

36. 2 N.Y. REV. STAT. 1828, 406 (pt. 3 c. 7, art. 9, § 73); WIGMORE, *supra* note 32, § 2380, at 819.

37. WIGMORE, *supra* note 32, § 2380a, at 828-29 (quoting *Commissioners on Revision of the Statutes of New York*, 3 N.Y. REV. STAT. 737 (1836)).

38. Alexander, *supra* note 26, at 265 ("[I]f the necessity for candor is sufficient to support an attorney-client privilege, then surely it is even more important when one's life and health are at stake."). It was argued, however, that "a physician's sense of professional honor is so strong that it is likely to win out over a legal duty to disclose confidential information to the court, resulting in 'a temptation to the perversion or concealment of the truth, too strong for human resistance.'" *See Developments in the Law—Privileged Communications*, *supra* note 30, at 1456. Even though the physician-patient privilege had been accepted in New York, legislators still feared that physicians would rather attempt to conceal information, and thus undermine the trier of fact and the justice of the court system, in order to protect both their patients' confidentiality and the medical profession.

39. Alexander, *supra* note 26, at 265-66; 81 AM JUR. 2D WITNESSES § 436 (1992); *see* WIGMORE, *supra* note 32, § 2380, at 820-27, for a complete list of states.

40. WIGMORE, *supra* note 32, § 2386, at 851; for a discussion of the requirements of New Mexico's physician-patient privilege *see infra* III.B.

41. The waiver does not have to be in express language; however, this element is conditioned by the requirements of the statute of the particular state. WIGMORE, *supra* note 32, § 2388, at 854.

a contract, such as an insurance policy.[42] Such authorizations must be carefully drafted to limit the scope of the waiver to ensure that disclosure will not violate the patient's privacy.[43]

A waiver of the privilege may also be implied or inferred by the patient's conduct. An implied waiver depends on two considerations—"the interpretation of the actual conduct and the fairness of the situation created by that conduct."[44] As a noted author explains, "A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position that it would be unfair and inconsistent to permit the retention of the privilege."[45]

B. The Physician-Patient Privilege in New Mexico

The basis for the physician-patient privilege in New Mexico has its roots in the state's territorial period.[46] The current version of the New Mexico physician-patient privilege, Rule 11-504, was adopted as part of the New Mexico Rules of Evidence in 1990.[47] This earlier statute, from which the Rule derived, limited the privilege to communications regarding only venereal diseases and workmen's compensation.[48]

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42. Wigmore believes that an insurance policy would be classified as an express waiver as it constitutes a voluntary transaction between the two parties; however, he classifies life and accident policies as an implied waiver as they "entitl[e] the promisee on certain facts of bodily condition to receive a monetary payment and otherwise it leaves the prospects of proof for both parties a mere gamble." *Id.*

43. Alexander, *supra* note 26, at 266.

44. WIGMORE, *supra* note 32, § 2388, at 855.

45. *Id.*

46. The current privilege rule, now Rule 11-504, derives from N.M. STAT. ANN. § 20-1-12(d)(1953), which traces its roots back to territorial days. *See* 1880 N.M. Laws ch. 12, § 7. The statutory medical privilege was repealed in 1973; *see* 1973 N.M. Laws ch. 223, § 1. Although some privileges remain codified in the statutes, *see* N.M. STAT. ANN. § 38-6-6 (1973), the Supreme Court has made clear that as a matter of separation of powers, the creation of evidentiary privileges is the exclusive province of the judiciary. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), *cert. denied*, 436 U.S. 906 (1978). As a result, statutory privileges are treated as unconstitutional and invalid, *id.*, or enforced only to the extent they are not inconsistent with supreme court rules. *See e.g.*, Maestas v. Allen, 97 N.M. 230, 638 P.2d 1075 (1982) (stating that any conflict between rules of evidence and statutes that relate to procedure must be resolved in favor of the rules). In addition, the Supreme Court power to enact evidentiary privileges manifests the abrogation and inapplicability of common law evidentiary privileges. State v. ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330(1981). *See generally*, Michael B. Browde and M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407 (1985).

47. It is interesting to note that a psychotherapist-patient privilege was recognized in New Mexico for nearly twenty years before a physician-patient privilege was created. Rule 11-504, Psychotherapist-Patient Privilege, was codified as a New Mexico Rule of Evidence in 1973. *See* N.M. Laws 1973, ch. 223, § 1, *supra* note 46. In 1990, Rule 11-504 was amended to include the word "physician" throughout the Rule, thereby creating the Physician-Patient and Psychotherapist-Patient Privilege. *See* N.M. R. EVID. 11-504 (as amended July 1, 1990) (1991 Cum. Supp.).

48. N.M. STAT. ANN. § 20-1-12 (1953) recognized the following privileges: (a) spousal, (b) attorney-client, (c) clergymen, (d) physician-patient, (e) public accountants, (f) witnesses testifying as to any of the above contexts. Sections (d) and (f) recognized the physician-patient privilege:

> Section (d):
>
> A person duly authorized to practice physic or surgery, or a professional or registered nurse, cannot be examined without the consent of his patient as to any communication made by his patient with reference to any real or supposed venereal or loathsome disease or any knowledge concerning such disease obtained by personal examination of such patient; nor shall any doctor or nurse employed by a workmen's compensation claimant be examined relating to a workmen's compensation claim without the consent of his patient as to any communication made by his

The current version of the physician-patient privilege, Rule 11-504, expanded the scope of the previous statute to include "*[any] confidential communications*, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition."[49]

Rule 11-504 contains two major requirements. First, the statute only applies to persons who meet the definition of patient and physician.[50] Second, the communication must be confidential.[51] This requirement is essentially the same as the attorney-client privilege[52] and is determined by the intent of the patient. The general rule of the New Mexico privilege requires that these communications are confidential if they are "made for the purposes of diagnosis or treatment [of his] mental or emotional condition, including drug addiction."[53]

Rule 11-504 also contains several exceptions. In New Mexico, there is no privilege where the communications are relevant to an issue in the proceedings to hospitalize the patient for mental illness,[54] if the court orders an examination of the patient,[55] if the condition is an element of a claim or defense,[56] or if the physician or psychotherapist is required by statute to report to a public employee or state agency.[57]

Since the enactment of the privilege, New Mexico courts have examined Rule 11-504 in detail as to what constitutes a physician-patient relationship and what communications are considered privileged. A majority of cases in New Mexico address the various elements of the privilege in an attempt to determine in what context the privilege arises. Generally, New Mexico case law demonstrates that parties may invoke the privilege in a variety of contexts, including both civil and criminal cases.[58] Ultimately, New Mexico courts have continued to protect the

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patient with reference to any physical or supposed physical disease or injury or any knowledge obtained by personal examination of such patient except in instances where the doctor has examined or treated the patient at the expense of the employer, and such payment is consented to by the patient.

Section (f): "If a person offer himself as a witness and voluntarily testify with reference to the communications specified in this act [section], that is to be deemed a consent to examination of the person to whom the communications were made as above provided."

See also, WIGMORE, *supra* note 32, § 2380, at 824, n.5.

49. N.M. R. EVID. 11-504(B) (emphasis added).

50. N.M. R. EVID. 11-504(A)(1),(2),(3).

51. N.M. R. EVID. 11-504(A)(4).

52. The Lawyer-Client Privilege states, "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of facilitating the rendition of professional legal services to the client." N.M. R. EVID. 11-503(B).

53. N.M. R. EVID. 11-504(B).

54. N.M. R. EVID. 11-504(D)(1).

55. N.M. R. EVID. 11-504(D)(2).

56. N.M. R. EVID. 11-504(D)(3).

57. N.M. R. EVID. 11-504(D)(4).

58. The privilege applies to communications made to a non-physician only when the non-physician is "participating in the diagnosis or treatment under the direction of a physician." State v. Franks, 119 N.M. 174, 889 P.2d 209 (Ct. App. 1994) (holding that the privilege applied to communications between an injured person and 911 dispatcher; blood alcohol tests are included within the meaning of "confidential communication"); State v. Roper, 122 N.M. 126, 921 P.2d 322 (Ct. App. 1996). Physician-patient privilege may also be applicable in medical malpractice suits but is dependent upon the facts of the individual case. Reaves v. Bergsrud, 127 N.M. 446, 982 P.2d 497 (Ct. App. 1999) (holding that physician's mental history was not discoverable by the defendant who was suing him for damages resulting from exploratory surgery of her hand).

privilege's underlying policy of ensuring patient confidentiality with regard to the disclosure of necessary medical information to their doctors.

IV. RATIONALE

This case is one of first impression, raising the question of the scope of the 11-504(D)(3) exception for medical conditions that are "an element of the patient's claim or defense."[59] Because the court held that medical records could be privileged when a claim is made for personal injury, it recognized that a new procedure should be implemented so that courts could evaluate assertions of the physician-patient privilege. By doing so, the court directly altered the discovery process in New Mexico whenever there is an assertion of this privilege by eliminating the use of blanket authorizations of medical records, thereby creating an avenue for parties to make an assertion of the privilege.

A. The Relevancy Standard of New Mexico Rules 1-026 and 11-504

The primary argument that the parties presented to the court was which standard of relevance should apply to Ms. Piña's OB/GYN records. In essence, the plaintiff's argument was that the OB/GYN records were privileged and irrelevant to the litigation; they were confidential medical communications between Ms. Piña and her gynecologist that were protected under the physician-patient privilege, Rule 11-504. The plaintiff argued that Rule 11-504 was a narrow standard, which provides that medical communications are privileged unless they are used as an element of a claim or defense, regardless of whether they are relevant to the subject matter of the litigation under Rule 1-026.[60] The defendant, however, argued that Ms. Piña had placed her medical condition at issue, which denied her the right to the privilege, and, additionally, that the scope of Rule 1-026 encompassed the OB/GYN records as they were relevant to the litigation.[61]

The court of appeals, however, disagreed with the defendant and instead paid special attention to both Rule 11-504(B)[62] and Rule 11-504 (D)(3).[63] The court specifically determined that Rule 11-504(D)(3) in particular could be read as

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59. N.M. R. EVID. 11-504(D)(3).

60. *See* Plaintiff-Appellant's Brief-in-Chief at 7-12, *Piña* (No. 20,738).

61. *Piña v. Espinoza*, 2001-NMCA-55 ¶ 5, 130 N.M. 661, 663, 29 P.3d 1062, 1064. *cert. denied*, 130 N.M. 558, 28 P.3d 1099 (2001).

62. The rule provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

N.M. R. EVID. 11-504(B).

63. Rule 11-504(D)(3) provides:

> There is no privilege under this rule as to communications relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

N.M. R. EVID. 11-504(D)(3).

imposing two limitations "over and above" Rule 1-026(B)(1)'s requirement of relevance to the subject matter of the action.[64] First, as part of New Mexico's Rules of Evidence, 11-504(D)(3) "incorporates the standard of relevance that governs admissibility at trial."[65] Second, the court recognized that Rule 1-026(1) was a much broader standard: to be discoverable, "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[66] The court reasoned that Rule 1-026 could be read as pertaining to information that might lead to the discovery of additional information that could later be admissible at trial. The Rule essentially provides that any information is discoverable, so long as it is "reasonably calculated to lead to the discovery of admissible evidence."[67] On the other hand, the court found that Rule 11-504 (D)(3) was a more narrow standard that requires that the information "be relevant to an issue of a medical condition that the patient will be able to rely on to establish an element of the patient's claim or defense."[68] Therefore, the 11-504 standard applies specifically to medical communications that a plaintiff is relying upon as an element of a claim or defense. The court of appeals concluded that it was likely that the Plaintiff's physicians, including her gynecologist, may have some medical records that would be relevant to the case at hand, such as past medical conditions or medications. The court found, however, that it would be equally as likely that her records would contain information regarding family planning that would have little or no relevance to the claims or defenses.[69]

The court went on to discuss the applicability of the blanket authorization to this case. Blanket authorizations allow defendants to view a plaintiff's complete medical history. The purpose of obtaining such a release, at least from the defendant's point of view, is to ensure that the injuries or conditions that a plaintiff may be claiming in a suit are indeed a result of the defendant's negligence and not related to a previous medical condition. Thus, blanket releases have the potential to be extremely important to defendants in terms of proving causation.

The court concluded, however, that a blanket authorization, although it had been accepted discovery practice, did not adequately protect the privileged portions of the plaintiff's records in two ways. First, the blanket release "does not address the applicability of Rule 11-504 (D)(3) on a communication by communication basis."[70] Here it was recognized that both the general rule of privilege in 11-504(B) and the exception, 11-504(D)(3), apply to single communications contained within medical

64. *Piña* ¶ 15, 130 N.M. at 665, 29 P.3d at 1066.
65. *Id.*
66. *Id.* ¶ 15, 130 N.M. at 665, 29 P.3d at 1066-67.
67. N.M. R. CIV. P. 1-026(B).
68. *Piña* ¶ 15, 130 N.M. at 665, 29 P.3d at 1066-67.
69. *Id.* ¶ 16, 130 N.M. at 666, 29 P.3d at 1067.
70. *Id.* ¶ 17, 130 N.M. at 666, 29 P.3d at 1067. Parties should be especially aware of what the meaning of "confidential communications" might encompass as the court does not clearly define "communications." It can be argued that by making a distinction between "communications" and "medical documents," the court may be acknowledging that many different forms of communications may be protected by the privilege. Examples may include, verbal communications, inferences and conclusions, and information or knowledge gained from examination. "This new discovery procedure will undoubtedly raise issues of first impression in New Mexico regarding what qualifies as a confidential communication." Nelse T. Schreck, *Physician-Patient Privilege: To Claim or Not to Claim*, NEW MEXICO DLA—NEWS, Winter 2001, at 6.

documents. Second, the blanket release "treats [the] Plaintiff's entire medical history as [a single] unit of analysis."[71] The court indicated that Rule 11-504(D)(3) was more subtle and narrow by requiring a court to "determine relevance in terms of an issue of the physical, mental, or emotional condition of the patient."[72] Thus, the Rule itself is specifically formulated to protect a single communication between physician and patient contained within medical documents.

Because Rule 11-504 is applicable to a single medical communication or issue, the policy of this rule directly conflicts with the goals behind the blanket release, which does not discriminate between types or forms of communications, but rather allows discovery of medical records in their entirety. Patients would be more reluctant to confide information to their physicians if they knew that someday that information could become public knowledge. The blanket authorization does not protect the confidential relationship between physician and patient. Therefore, the decision to eliminate it was warranted. With the dissolution of blanket authorizations, the court turned to a discussion of what new methods might be implemented in its place.

B. The New Procedure[73]

The basis for the new procedure adopted in *Piña* is a reflection of federal practice and the Federal Rules of Civil Procedure. In her appeal, the plaintiff argued that the proper procedure for determining the scope of the privilege was en masse submission of a plaintiff's medical records for in camera review by the trial court.[74] The court, however, recognized that "*in camera* inspection has its place in the scheme established by Rule 1-026(B)" but found that "immediate resort to *in camera* inspection would unduly burden the trial court and would deny the opponent of the privilege the opportunity to test the claims of privilege through an adversarial process."[75] The court recognized the importance of the in camera review, but found that it should "be reserved as the final stage of discovery litigation."[76]

Instead, the court turned to the procedure used by the federal courts, which in the court's view had "identified a procedure that is workable and fair to both the party claiming the privilege and to the party seeking discovery."[77] This method, found in the Federal Rules of Civil Procedure 26(b)(5), recognizes that if the normal discovery process cannot solve the problems raised, the trial court must be able to review the documents in camera. In order to maintain judicial efficiency, however, and ensure that the opposing party has an opportunity to refute the privileges

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71. *Piña* ¶ 17, 130 N.M. at 666, 29 P.3d at 1067.

72. *Id.*

73. Neither party in their briefs addressed what resolution the court might employ for the assertion of a claim of privilege. Instead, the parties' argument focused upon which Rule was most applicable to Ms. Piña's OB/GYN records. As the court was presented with these arguments, they were rightfully addressed. The appeals court quickly identified Rule 11-504 as a more applicable standard, and balanced Rule 11-504 against Rule 1-026. The court did point out, however, that the new procedure took both rules into consideration and did attempt to harmonize the Rules into an acceptable method that would satisfy the parties in this case. *Id.* ¶ 22, 130 N.M. at 667, 29 P.3d at 1068.

74. *Id.* ¶ 20, 130 N.M. at 667, 29 P.3d at 1068.

75. *Id.*

76. *Id.*

77. *Id.* ¶ 21, 130 N.M. at 667, 29 P.3d at 1068.

asserted, the plaintiff must first compile a privilege log or list "that describes the documents without disclosing the allegedly privileged communications it contains."[78] After this privilege log is completed, the parties might be better able to resolve some of the assertions raised. With respect to the issues not resolved, it may be necessary to request the trial court review the privilege log in camera.

Although the New Mexico Supreme Court had not amended New Mexico Rule 1-026 to include a provision similar to Fededral Rules of Civil Procedure 26(b)(5), the court of appeals determined that the adoption of the Rule 26(b)(5) procedure was justified.[79] The court cited *Painewebber Group, Inc. v. Zinsmeyer Trusts Partnership*,[80] an Eighth Circuit decision in which that court applied Rule 26 (b)(5) in the context of the attorney-client privilege.[81]

The court of appeals noted that since the application of the Federal Civil Procedure Rule had already been successfully applied in the context of privileged communications, and because Rule 26(b)(5) appeared to be a codification of pre-1993 discovery principles of the federal rules, which were "substantially similar" to New Mexico's current discovery rules, it was reasonable to adhere to Federal Rules of Civil Procedure 26(b)(5) in New Mexico with respect to colorable claims of the physician-patient privilege. The court based this view on several recent cases from other jurisdictions in which those courts had found that no abuse of discretion existed at the trial court level for assimilating the federal procedure where no state rule had been enacted.[82]

With justification for the adoption of the federal procedure, the court discussed the particulars that would form the basis of the new procedure in New Mexico: "As the party asserting the privilege, the Plaintiff bears the burden of establishing that

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78. *Id.* Federal Rule of Civil Procedure 26(b)(5) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

FED. R. CIV. P. 26(b)(5).

79. *Piña* ¶ 21, 130 N.M. at 667, 29 P.3d at 1068.

80. 187 F.3d 988 (8th Cir. 1999).

81. The *Painewebber* Court determined,

> Whether a document is in fact privileged can be a difficult question, and if the parties engaging in discovery cannot resolve the issue informally, it must be decided by the tribunal conducting the proceeding in which the privilege has been asserted. The party seeking discovery cannot see the allegedly privileged documents—that might waive the privilege—so the dispute is usually resolved by submitting them to the tribunal in camera. This is an awkward, time-consuming process. To make the process work, and to encourage the parties to minimize the number of documents that must be reviewed in camera, most tribunals require the party asserting the privilege to provide the party seeking discovery with a list or log that describes the document without disclosing the allegedly privileged communications it contains.

Painewebber, 187 F.3d at 992; *see also Piña* ¶ 21, 130 N.M. at 667, 29 P.3d at 1068.

82. *Piña* ¶ 22, 130 N.M. at 667, 29 P.3d at 1068; *see also* Cypress Media Inc. v. City of Overland Park, 997 P.2d 681, 694 (Kan. 2000) (finding no abuse of discretion in lower court's reliance on federal practice in ordering line by line assertion of privilege not withstanding absence in Kansas rules of procedure of provision similar to Fed. R. Civ. P. 26 (b)(5)); State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley, 898 S.W. 2d 550, 554 (Mo. 1999) ("Although as of yet there is no subsection in the Missouri Rules equivalent to the Federal Rule 26(b)(5), the justifications for the subsection are equally valid in Missouri's courts.").

the privilege applies."[83] The plaintiff then is responsible for compiling each privileged communication into a privilege log for in camera review by the trial court.

The court noted that the privilege log must be compiled not only with respect to documents that may contain privileged communications, but also to each asserted communication. In turn, these communications must be asserted with significant detail so that the trier of fact and opposing counsel can adequately assess each claim of privilege.[84] Finally, the plaintiff's privilege log "together with any supplemental affidavits must affirmatively demonstrate an objectively reasonable basis for each assertion of privilege."[85] The court states that failure to adequately support a claim of privilege "thwarts both the adversarial process and meaningful independent judicial review and justifies [the] denial of the privilege."[86] It is clear by this language that the log must contain enough information so that the court and the opposing counsel may make an informed decision with regard to the plaintiff's assertion of privilege. The court incorporated this statement in order to ensure fairness to opposing counsel and in the hope of maintaining judicial efficiency.[87]

V. ANALYSIS AND IMPLICATIONS

Because the court held that medical records could be considered privileged even in the personal injury context, the court recognized that a new procedure should be employed so that courts could effectively evaluate assertions of the privilege. The resolution of this case raises several interesting questions that practitioners will have to struggle with whenever an assertion of this privilege arises.

A. The Narrowed Relevancy Standard of the Federal Rules of Civil Procedure 26(b)(1)

As Judge Alarid acknowledged in *Piña*, it was appropriate to look to federal practice to help form the basis for the new procedure.[88] Recently, however, the relevance standard for discovery in Federal Rule 26(b)(1) has been amended and is now substantially similar to the privilege standard of New Mexico Evidence Rule 11-504. Federal Rule 26(b)(1) now provides that for the purposes of discovery, "parties may obtain discovery regarding any matter, *not* privileged, that is relevant to the claim or defense of any party...."[89] This language is much more akin to the narrow New Mexico Rule 11-504(D)(3) standard, which provides confidential medical records are privileged unless they are "relevant to an issue of the physical, mental, or emotional condition...in which the patient...relies upon the condition as

83. *Piña* ¶ 24, 130 N.M. at 668, 29 P.3d at 1069.
84. *See id.*
85. *Id.*
86. *Id.* These consequences are severe for the misapplication of the privilege. The court, however, does not provide guidelines as to what components are necessary to establish an "adequate claim of privilege" so that practicing attorneys would be sure to incorporate the appropriate elements in the privilege log.
87. *Id.*
88. *See id.* ¶ 21-22, 130 N.M. at 667, 29 P.3d at 1068.
89. FED. R. CIV. P. 26(b)(1) (emphasis added).

an element of a claim or defense."[90] The new Federal Rule 26(b)(1) is therefore different than the old Federal Rule 26(b)(1) and the current New Mexico 1-026(B)(1) standard, which allows for discovery of information that is relevant to the subject matter.[91] The reason behind this change is "to guard against the redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."[92] The change in the scope of Rule 26(b)(1) is intended to "encourage judges to be more aggressive in identifying and discouraging discovery overuse."[93]

New Mexico has often followed changes in the federal rules and therefore it is likely that in the near future there may be a closer connection between New Mexico Evidence Rule 11-504 and Discovery Rule 1-026. It is interesting to contemplate the interplay between *Piña* with regard to a more narrow scope of the relevance standard of Rule 26(b)(1). The "element of a claim or defense" in New Mexico Rule 11-504 may still be narrower than the "relevant to the claim or defense" in the new Federal Rule 26(b)(1). If the standards were the same, however, information that is privileged would not, by definition, be relevant; while information that is not privileged would, by definition, be relevant. If the new Rule 26 applied, the defendant in this case would then be correct in saying that the relevance standards of Rules 1-026 and 11-504 are the same, but her claim would still fail as the standard would admit to some medical data being covered by the privilege.

B. Burden on the Plaintiff and the Additional Costs of Discovery

Piña makes the discovery procedure concerning medical records more complex and may create a substantial burden on the plaintiff.[94] In order to claim the privilege, the plaintiff's attorney will have to go to each of the client's doctors and thoroughly examine the medical records in order to identify issues and communications that might necessitate protection from discovery. The plaintiff will then have to request all of these medical records. Following a review of the records, they will then compile the privilege log identifying each privileged communication with significant detail so that the trier of fact and opposing counsel may adequately evaluate each communication as to whether a privilege exists. While it appears that plaintiffs now have the authority to select and control which documents defendants may discover, this places a burden upon the plaintiff, as the compilation of the privilege log will have to be completed within thirty days of the service of the defendant's discovery.[95] With the amount of time it will take to obtain and review the documents, it has been suggested that plaintiff's attorneys begin to assemble the

90. N.M. R. EVID. 11-504(D)(3).

91. If, however, good cause can be shown, the federal rule still provides for "discovery of matters relevant to the subject matter involved in the action." FED. R. CIV. P. 26(b)(1).

92. United States Code, Federal Rules of Civil Procedure Rule 26(b)(1), Notes of Advisory Committee on 1983 Amendments to Rules (Supp. 2001).

93. *Id.*

94. Schreck, *supra* note 70, at 4.

95. *Id.*

privilege log and request the necessary documents even before serving the complaint.[96]

This new procedure might also substantially increase the cost of discovery.[97] Previously, plaintiffs would usually comply with the request for a blanket release provided that the defendants paid to obtain the medical records. After the decision in *Piña*, it is unclear which party is now responsible for the costs of obtaining and reproducing the medical documents. The most obvious answer is that it is now the plaintiff's responsibility to pay for the documents, as they are the party that asserts the claim of privilege. Depending on the number of documents to be reproduced, the "shift in the financial burden of medical records discovery will probably result in some plaintiffs deciding not to claim the privilege after all and allowing the blanket release as was the previous practice."[98]

There is also a concern that compilation of the privilege log may extend the discovery period and thus impede upon the efficiency of the trial process and the expediency of the result. The Court appears to have anticipated this problem by incorporating a time frame that follows the normal period for discovery.[99] If the plaintiff has not asserted the privilege within the time frame, it appears that the privilege has been lost. No doubt, defendants are concerned with being surprised with the assertion of privilege with regard to a new, recently discovered document, but it appears that if the plaintiff has not incorporated it originally into the privilege log, then new communications are not admitted late.

C. Role of the Defendant

Although the opinion is quite complete as to what is expected of the plaintiffs in assertions of the privilege, there is little discussion as to what is now expected of defendants. For example, if when reviewing the completed privilege log, the defendant has a question or concern regarding an asserted communication, it is unclear as to how an objection might be raised. The defendant may have to retain a medical expert once the privilege log is received to help determine the privileges that are asserted and the relevant claims to bring.[100]

Defendants must wait for plaintiffs to compile the log before they have an opportunity to view and attempt to refute the privilege. If plaintiffs are not punctual with the compilation of the log, or allow defendants insufficient time in which to review the log, this might cause delay or alter the discovery process. The parties may also have to request additional time for discovery.

Another possible downside to this process is that the party seeking discovery must rely on the party asserting the privilege to be honest and diligent in their preparation of the privilege log. While notions of good faith and having respect may account for much, there may still be a fear that not all the information has been

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96. *Id.*

97. *See id.* at 4-5.

98. *See id.* at 4.

99. "The Court of Appeals did not make special provisions for additional time within which a plaintiff must produce a privilege log. The party advocating the privilege must fully set forth the basis of the claim of privilege by the same deadlines as any other interrogatory." *Id.*

100. *Id.*

disclosed. However, if there is a claim that the plaintiff has not been acting in good faith and diligence, or if a "blanket privilege" is being asserted, these issues may be raised with the trial court.

The court admits that this procedure is flexible. It may be changed or modified as required by the circumstances of a particular case and "should be administered 'to secure the just, speedy and inexpensive determination of every action.'"[101] The court has implemented this new procedure but has incorporated it in such a way that it remains open to interpretation and further amendment. Although the Court outlines the procedure fairly extensively, it is unclear how this process will actually work.

D. The Increased Need for Medical Experts

The court recognized that once the privilege log has been submitted to the trial court for in camera review judges may still not be able to decide which communications are indeed privileged.[102] In order to correct this potential problem, the court of appeals reasoned that it may be necessary to require additional expert affidavits to explain why various communications would (or would not) be relevant to a claim.[103] The court also determined that "where the relationship between the physician-patient communications to an element of a claim or defense was not immediately apparent,"[104] the trial court may consider the appointment of an expert. This procedure is a clear attempt to ensure that plaintiffs are not merely asserting a "blanket privilege" over any and all medical records. Expert affidavits will help trial courts determine whether certain disputed documents really need protection of the privilege.

There is an additional concern that the attorneys themselves may also need medical experts to help decipher the issues and documents that are being claimed as privileged.[105] Depending upon the elements and claims in the particular case, a medical expert may be needed from the outset. The medical expert would have to review the privilege log and submit an affidavit to the court on behalf of the party explaining why a particular communication should be considered privileged.[106] One New Mexico attorney notes, "in jurisdictions which require motions to compel to be filed within twenty days after the receipt of a objection, it may be imperative to have an expert retained and familiar with the medical issues at the time the privilege log is received."[107]

Thus, this additional need for an expert may also drive up the cost of litigation for both sides of a case as well as expose the privileged documents to inspection by third parties.[108]

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101. *Piña* ¶ 28, 130 N.M. at 669, 29 P.3d at 1069 (quoting Rule 1-001 NMRA 2001).
102. *Id.* ¶ 26, 130 N.M. at 668, 29 P.3d at 1069.
103. *Id.*
104. *Id.*
105. Schreck, *supra* note 70, at 4.
106. *Id.*
107. *Id.*
108. *Id.*

VII. CONCLUSION

Piña v. Espinoza is New Mexico's first attempt to define a standard by which assertions of the physician-patient privilege will be evaluated in personal injury cases. In its decision, the court clearly announced that these assertions are analyzed according to the narrow relevance standard of Rule 11-504. Additionally, the adoption of the new procedure in *Piña* will ensure that courts will be able to effectively evaluate assertions of the privilege in relation to this standard to ascertain whether protection of a particular medical communication from discovery is necessary.