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MEMO TO: NEW MEXICO MEDICAL SOCIETY

FROM: JOHN ANDERSON, LEGISLATIVE COUNCIL

RE: 2015 LEGISLATIVE REPORT

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The 2015 60-day legislative session ended on Saturday, March 21. When all was said and done, the Legislature passed a $6.2 billion budget but failed to enact a $265 million public works package or a $4.8 million tax incentive bill. The fighting and finger-pointing contributed to the bitter end of the session in which gridlock was the order of the day.

This past session there were 695 bills introduced in the Senate and 590 in the House for a total of 1285. A total of 191 bills passed both chambers (102 Senate bills and 89 House bills). This was the fewest bills that have been approved by the Legislature during a 60-day session in decades. The Governor vetoed 33 of the 191 bills approved by the Legislature.

The Governor has said that if Democrat leaders in the Senate commit to working with her to pass a public works package similar to that which died in the last day of the session, she would consider calling a special session. That bill died in the Senate in large part due to partisan differences over how to fund transportation-related projects. The administration generally favored using long-term debt to pay for transportation projects, while many in the Senate favored increasing the gas tax to fund highway improvements. The failure to approve a public works bill marked the first time since 2011 that capital outlay was not funded. It is anticipated that the Legislature will be called back into a special session by the Governor in May to consider a compromise capital outlay bill.

Health Care Related Bills Enacted by the Legislature and Action Taken by the Governor:

Senate Bill 325: The bill provides that a non-compete provision in an employment agreement which restricts the right of a health care provider (physician, dentist, osteopath, podiatrist or CRNA) to provide clinical health care services is unenforceable. The Act does not limit the enforceability of:

- A provision in an employment agreement requiring a health care practitioner who has worked for an employer for an initial period of less than three years to repay all or a portion of:
  - -a loan;
  - -relocation expenses;

-a signing bonus or other renumeration to induce the health care practitioner to relocate or establish a health care practice in a specified geographic area; or
-recruiting, education and training expenses;

- A nondisclosure provision relating to confidential information and trade secrets;
- A nonsolicitation provision with respect to patients and employees of the party seeking to enforce the agreement for a period of one year or less after the last date of employment; or
- Any other provision of an agreement that is not in violation of law, including a provision for reasonable liquidated damages.

The act does not apply to agreements between health care practitioners who are shareholders, owners, partners or directors of a health care practice. The provisions of the act apply to agreements, or renewals or extensions of agreements, executed on or after July 1, 2015.

Covenants not to compete are restrictions in employment contracts used by employers to limit the ability of an employee to compete with the employer once the employee leaves that employer. Current law on this issue defers to the courts, on a case-by-case basis, to determine whether a non-compete clause is reasonable based on facts germane to a particular contract.

The bill was signed by the Governor.

Senate Bill 121: The bill establishes a statewide vaccine purchasing program under which the Department of Health (DOH) purchases vaccines for all New Mexico children. It creates a vaccine purchasing fund and requires reporting to the Office of the Superintendent of Insurance (OSI) of the number of insured children, which information is relayed by OSI to DOH as the basis for DOH invoicing each health insurer and group health plan for vaccines purchased by the State for their covered children. The bill provides penalties for failure to report the number of insured children or to timely reimburse, and provides an appeal process.

DOH currently spends approximately $2.5 million from the general fund for the purchase of vaccines for privately-insured children which remain unreimbursed. With the passage of this bill, there will be savings to the general fund in the amount of $2.5 million as health insurers and group health plans will be required to reimburse the state for costs of vaccines. Deposits to the Vaccine Purchasing Fund will consist of reimbursements paid by health insurers and group health plans. Money in the fund can be expended for the purpose of purchasing, storing, and distributing vaccines for children, and cannot be used for vaccines for children eligible for the federally-funded Vaccines for Children (VFC) program, for administrative expenses related to the vaccine purchasing program, or to pass through a federally negotiated discount.

The bill was signed by the Governor.

Senate Bill 220: The bill provides that a HMO has 45 days to make a determination of whether to accept or reject a physician's application to join the HMO's network. The bill also codifies in statute existing regulations that require a carrier to use a standardized provider application as established by the superintendent of insurance.

The bill was signed by the Governor.

House Bill 274: The bill amends sections of the Health Care Purchasing Act, the Public Assistance Act, and the New Mexico Insurance Code to allow synchronization of prescriptions. Individuals insured in group and individual health plans and medical assistance recipients will be allowed to fill or refill a prescription for less than a thirty-day supply of the prescription drug, and pay a prorated daily copayment or coinsurance.

The bill was signed by the Governor.

Senate Bill 323: The bill allows for the dissemination of hospital-specific aggregate data by the Department of Health. Currently, the department is precluded from providing data collected under the Health Information System Act. This bill allows that New Mexicans to compare hospitals based on publicly available aggregate hospitalization data from each hospital.

The bill was signed by the Governor.

Senate Bill 367: The bill provides optometrists increased authority to prescribe pharmaceutical agents for the diagnosis and treatment of disease of the eye or adnexa including hydrocodone, hydrocodone combination medications, and epinephrine auto-injections. However, optometrists may not prescribe any other controlled substance classified in schedule I and II pursuant to the Controlled Substance Act.

Under prior law, optometrists could only prescribe analgesic medications in Schedule III through V. Hydrocodone products were reclassified as schedule II pursuant to the Controlled Substance Act in 2014.

The amended version of the bill provides the Board of Optometry authority to determine what constitutes the practice of optometry in accordance with the provisions of the Optometry Act and has jurisdiction to exercise any other powers and duties pursuant to that act. The original bill would have granted the board sole authority to determine what constituted the practice of optometry.

The bill was signed by the Governor.

Senate Bill 571: The bill allows a physical therapist to accept patients without an existing medical diagnosis made by a licensed primary care provider. However, a physical therapist must refer a patient to the patient's licensed health care provider if:

- After thirty days of initiating physical therapy intervention, the patient has not made measurable or functional improvement with respect to the primary complaints of the patient; or
- At any time, the physical therapist has reason to believe the patient has symptoms or conditions requiring treatment that is beyond the scope of practice of the physical therapist.

Eighteen states, including Arizona, Colorado, Idaho, Montana, Nevada and Utah have no restrictions on direct access to physical therapists.

The bill was signed by the Governor.

House Bill 53: The bill enacts a new section to the Public School Code to prohibit school personnel from compelling students to use psychotropic medications. The bill also provides that a child may not be taken into protective custody solely on the basis of the child's parent, guardian or custodian's refusal to allow the child be given psychotropic drugs.

It requires each local school board or governing body of a charter school to develop and promulgate policies that prohibit school personnel from denying any student access to programs or services because of refusal to place the student on psychotropic medications. It also provides that school personnel shall not require a student to undergo psychological screening without the parent, guardian or custodian's written consent prior to each instance of psychological screening.

The bill was signed by the Governor.

House Bill 54: The bill amends the Anesthesiologist's Assistant Act to remove the provision which requires that a anesthesis assistant (AA) may practice only if employed by the University of New Mexico. The bill would permit the employment of AA's at any university with a medical school in the state or in a health care facility licensed by the department of health, located in a class A county, with a minimum of 3 board-certified anesthesiologists on staff.

The bill was signed by the Governor.

House Bill 122: The bill would have enacted the Scope of Practice Act. The bill proposed new procedures for amending statutes and rules related to the scope of practice of health care professionals. The bill provides that a written request to change the scope of practice of health professional could be made by members or licensees of the respective licensing board. Once the board received the request, it was required to notify the Legislative Council Service within 10 days of such request. The Legislative Council would assign a legislative committee to review the proposed change to the scope of practice. The committee would collect data, including information from the proponent and all other appropriate persons, necessary to review the proposed change;

ensure appropriate public notice of the committee's proceedings; invite testimony from persons with special knowledge in the field; assess the potential harm or benefit to consumers, assess the impact on overall health care costs, assess the impact on access and quality of health care, and summarize the committee's assessment, analysis, and recommendation in a final report to the Legislature.

The bill was vetoed by the Governor.

House Bill 139: The bill requires hospitals to provide each patient or the patient's legal guardian the opportunity to designate one lay caregiver. The hospital must give a copy of the patient's discharge plan and provide aftercare information and training to the designated caregiver on how to provide care for the patient after discharge.

The bill does not obligate the designated lay caregiver to take any action on behalf of the patient. The bill does not create a private right of action against the hospital or remove the obligation of a third-party payer to cover any item or service specific to the lay caregiver. The hospital is not liable for an act or omission of the lay caregiver.

The bill was signed by the Governor.

House Bill 258: The bill would have extended to mental health counselors and therapists the existing protections of the freedom of choice of provider law as related to health insurance. Current law provides individuals, within the area and limits of health insurance coverage selected by the insured, the freedom to select the hospital and certain practitioners who provide care. The bill would have added mental health counselors and therapists to the list of providers covered by the law.

The bill was vetoed by the Governor.

House Bill 369: The bill amends the Genetic Information Privacy Act which prohibited any person from obtaining genetic information or samples for genetic analysis from an individual without first obtaining informed and written consent from that individual or the individual's authorized representative. The bill permits the collection of genetic information or sample for genetic analysis by a laboratory conducting an analysis or test of a specified individual pursuant to a written order to the laboratory from a health care practitioner or the health care practitioner's agent. The bill also notes that the order can be sent by electronic transmission.

The bill was signed by the Governor.

Senate Bill 42: The bill provides that a person's incarceration cannot be a basis on which to deny or terminate enrollment in Medicaid. After release from incarceration, a previously incarcerated person will remain enrolled in Medicaid unless determined ineligible for reasons other than incarceration.

The bill provides that a person who was not enrolled in Medicaid when he or she became incarcerated would be permitted to submit an application for Medicaid enrollment while incarcerated. Additionally, the Human Services Department is required to create of a process for assisting incarcerated individuals with the Medicaid application process in compliance with federal requirements. The department is not permitted to refuse to process a Medicaid application on the grounds the individual is incarcerated.

The bill was signed by the Governor.

House Bill 212: The bill adds a new section to the Public Assistance Act and requires the Human Services Department to adopt and promulgate rules to establish a reimbursement rate for services provided to recipients of state medical assistance at a crisis triage center (CTC) where a CTC is defined as a health facility that is 1) licensed by Department of Health, 2) not physically part of an inpatient hospital or included in a hospital's license, and 3) provides stabilization of behavioral health crisis, including short-term residential stabilization.

The bill was signed by the Governor. The General Appropriations Act (HB2) contains $2.25 million for crisis stabilization triage centers.

House Bill 188: The bill would have required the behavioral health purchasing collaborative to divide the state into zones based on criteria such as mortality related to alcohol use, drug overdose and suicide, and give priority in non-Medicaid funding for behavioral health services to zones identified as high-risk and high-need. The General Appropriations Act (HB2) appropriated $1 million for targeted funding for high-needs communities (behavioral health investment zones).

The bill was vetoed by the Governor. However, $1 million in HB2 appropriations were approved by the Governor.

Health Care Related Bills Not Approved by the Legislature:

House Bill 259: The bill proposed to would amend the Gross Receipts and Compensating Tax Act to expand the types of receipts that may be deducted from gross receipts for commercial contract and Medicare part C services provided by a physician, osteopathic physician or podiatrist. Specifically, the bill made deductible receipts from deductibles paid by an insured or enrollee for commercial contract services pursuant to the terms of the insured's health insurance plan or the enrollee's managed care health plan to a health care provider deducted from gross receipts by physicians, osteopaths and podiatrists. A deductible is defines as the amount of covered charges an insured or enrollee is required to pay I n a plan year for commercial contract services before the insured's health insurance plan or enrollee's managed care health plan begins to pay for applicable charges. The bill states the purpose of the deductions is to retain health care practitioners currently providing commercial contract and Medicare part C services

in the state and to attract additional health care practitioners to provide such services. The bill's fiscal impact to the state general fund was estimated to be $9 million.

The bill did not pass.

House Bill 395: This would have limited venue for medical malpractice actions to the county in which the patient received the medical treatment, the county that is the principal place of business of the health care provider (or any of the health care providers if there is more than one location at the time the lawsuit is filed); or the county in which the patient resided at the time the patient received the medical treatment. In a claim for wrongful death asserted by a personal representative or a third person acting in any representative capacity, the residence of the representative bringing the claim would not be considered in determining venue.

There is currently no venue statute in New Mexico under either the Wrongful Death Act or the Medical Malpractice Act.

The bill did not pass.

House Bill 542: This would have enacted the Health Care Liability Act, which limited aggregate noneconomic damages for claims against health care providers that are not participants in the Medical Malpractice Act to $300,000 and limited punitive damages to three times the amount of compensatory damages. In the act aggregate amount means the sum of damages arising from a single occurrence regardless of the number of claimants, claims, or the number of parties against whom malpractice claims have been made. Also, noneconomic damages are defined as all recoverable damages except, past and future medical expenses, funeral expenses, past or future necessary nonmedical expenses, loss of earnings and earning capacity, loss of monetary benefits and financial support, loss of services, and punitive damages.

Interestingly, the states listed below have determined considering the guarantee, that a limit on medical malpractice awards is prohibited by their state constitution or by state court decision:

- Alabama, unconstitutional by state courts.
- Arizona, unconstitutional by state constitution.
- Arkansas, unconstitutional by state constitution.
- Georgia, unconstitutional by state courts.
- Illinois, unconstitutional by state courts.
- Kentucky, unconstitutional by state constitution.
- New Hampshire, unconstitutional by state courts.
- Missouri, unconstitutional by state courts.
- Ohio, unconstitutional for wrongful death cases by state constitution.
- Pennsylvania, unconstitutional by state constitution. Exception for employees injured during the course of employment.
- Washington, unconstitutional by state courts.

- Wyoming, unconstitutional by state constitution.

Many states have upheld the constitutionality of caps on non-economic damages, including Alaska, Wisconsin, Colorado, Kansas, Idaho, Maryland, Minnesota, California, Virginia, Missouri, West Virginia, and Louisiana. Many states have struck down caps on non-economic damages based on various constitutional challenges, including separation of powers, restrictions on "special litigation," equal protection, and right to jury trial, including Ohio, Illinois, Oregon, Alabama, New Hampshire, Florida, Washington, and Texas.

The bill did not pass.

House Bill 416: This would have exempted the employers of health care practitioners, health care workers, and certain nonprofit corporations from the provisions of the Employee Privacy Act which prohibits employers from refusing to hire or to discharge an individual, or otherwise disadvantage any individual because the individual is a smoker or a nonsmoker.

The bill did not pass.

Senate Bill 422: The bill would have amend the Pain Relief Act to require health practitioners with prescriptive authority to consent to peer review of their opioid prescribing practices. Practitioners who are authorized to prescribe controlled substances would be required to register with the Board or Pharmacy and regularly participate in the Prescription Monitoring Program (PMP), check the PMP before prescribing Schedule II-IV drugs for a period exceeding 10 days for new patients, and check the PMP at least every 6 months during continuous use by an established patient.

The bill required the licensing boards of health practitioners to adopt rules by July 1, 2015 to determine whether the prescribing practices of of its licensees who prescribe controlled substances are consistent with the appropriate treatment of pain and address pain management for patients with substance abuse issues. The bill required the licensing boards to evaluate a health care practitioner's quality of care based on diagnosis, evaluation, medical indication, documented change or persistence of condition, and follow-up evaluation. The board would judge the validity of pain management based on treatment, not quantity or frequency of prescribing.

The bill provided that a health care practitioner who followed the requirements of the bill would not be subject to discipline by the health care practitioner's board for violation of the Pain Relief Act.

The bill did not pass.

Senate Bill 55: The bill would have made changes to the Medicaid Provider Act, including a definition of credible allegation of fraud and establishing certain procedures

that Human Services Department must follow regarding determinations of credible allegations of fraud as to Medicaid providers, such as requiring notice and an opportunity for a hearing for an impacted provider. The bill also:

- Granted a provider or subcontractor the right to appeal any final determination of overpayment.
- Prohibited HSD from suspending payment before a final determination of overpayment and exhaustion of all administrative and civil remedies
- Amended the definition of Medicaid fraud in the Medicaid Fraud Act to provide that these matters do not constitute Medicaid fraud:

  -Mere errors found in the course of an audit;
  -Billing errors attributable to human error;
  -Inadvertent billing and processing errors;
  -Inadvertent failure to maintain complete licensing and other credentialing records; and
  -Failure to comply with regulatory standards that are not a condition of payment.

The bill did not pass.

Senate Bill 376: This would amend the Chiropractic Physicians Practice Act to expand the scope of practice outside the realm of traditional chiropractic, by permitting chiropractors to diagnose and treat any condition for which the chiropractic physician has been educated and trained. The current law limits such practice primarily by, but not limited to, adjustment and manipulation of the human structure. The bill also added "light" and "oxygen" to the list of natural agents that may be used for healing. The bill excluded from oversight and approval by the Medical Board (MB) and New Mexico Board of Pharmacy (NMBOP): surgery acupuncture and prescription or administrations, injection or dispensing of dangerous drugs unless by a level-one or level two certified advanced practice chiropractic physician. The bill created level-one and more advanced level-two certified advanced practice chiropractic physicians. It allows the new level-one and level-two advanced practitioners to prescribe, administer, inject and dispense dangerous drugs in accordance with board rules. For level-two practitioners this would include any dangerous drugs except Schedule I and II.

The bill did not pass.

House Bill 222: The bill would have enacted the Community Engagement Act to provide for the establishment of community engagement teams (CET) to engage and link persons with serious mental disorders or illness, who are unlikely to live safely in the community, with voluntary treatment and services. The availability of CETs was expected to reduce the rate of involvement with law enforcement, reduce involuntary hospitalization, and lessen mental deterioration for such individuals.

CETs could be public, private, or public-private partnerships, CETs must have had at least one member who is a licensed mental health professional. CETs will not be treatment providers but rather function as a link to treatment or service by: 1) determining whether a person is unlikely to live safely; and if not, 2) encourage voluntary consent to assessment for treatment or support services; and 3) assist with helping the individual access appropriate treatment or services.

The bill required that the Human Services Department establishes a five-year CET pilot project by January 1, 2016. HSD estimated that the five-year pilot would cost $7.6 million over 5 years.

The bill did not pass.

Senate Bill 53: The bill enacted the Assisted Outpatient Treatment Act which is modeled after Kendra's Law in New York. The bill created the authority for a district court judge to order persons diagnosed with mental illness who meet certain criteria into mandatory assisted outpatient treatment programs for up to one year.

Assisted outpatient treatment is defined as categories of outpatient treatment ordered by a district court which include: case management or assertive community treatment services; medication; periodic blood tests or urinalysis to determine compliance with prescribed medication; individual or group therapy; day or partial day programming activities; education and vocational training and activities; alcohol and substance abuse treatment and counseling; periodic blood tests or urinalysis to check for the presence of alcohol or illegal drugs in a patient with a history of substance abuse; supervision of living arrangements; and any other services prescribed to treat the patient's mental illness and assist the patient in living and functioning in the community. The court may order assertive community treatment services. Assertive community treatment services are defined as team treatment designed to provide comprehensive community-based psychiatric treatment, rehabilitation and support to a person with a serious and persistent mental illness. The requirements for a patient to be entered into assisted outpatient treatment were as follows:

- Is an adult with a primary diagnosis of mental illness;
- Has demonstrated a history of lack of compliance with treatment for a mental disorder that has:

  -at least twice within the last 48 months, been a significant factor in necessitating hospitalization or receipt of services in a forensic or other mental health unit of a correctional facility;
  -resulted in one or more acts of serious violent behavior toward self or others or threats of, attempts at, serious physical harm to self or others within the last 48 months; or
  -resulted in the person being hospitalized or incarcerated for six months or more and the person is to be discharged with the next thirty days or was discharged or released within the past 60 days.

- Is unwilling or unlikely as a result of mental illness to participate voluntarily in outpatient treatment;
- Is in need of assisted outpatient treatment as least restrictive appropriate alternative to prevent relapse or deterioration that would likely result in serious harm to the person or another person;
- Will likely benefit from treatment.

The bill did not pass.