

NOTES

THE NEW MEXICO MEDICO-LEGAL MALPRACTICE PANEL—AN ANALYSIS

This paper is a study and evaluation of the New Mexico Medico-Legal Malpractice Panel. A number of such instrumentalities are described in medical and legal literature. Despite the volume of writing on the subject, however, the literature is confined to operational descriptions.

This paper attempts to do more. It first generally describes the key problem in litigation under the law of medical malpractice—the conspiracy of silence. It goes on to deal with some of the societal factors that seem to bear on malpractice controversies. It then describes a number of attempts to overcome the problems of malpractice and the conspiracy of silence. Some of these are legal developments. Others are extra-judicial. In dealing with the problems and with attempts to meet them, we identify some characteristics of desirable solutions to the malpractice problem.

The New Mexico panel is discussed from an operational standpoint. In a series of interviews, we attempted to discover personal and professional reactions to the panel, its method of operations, and its effect on those who utilize it. From this we attempt to evaluate the panel in terms of the needs of parties to controversies, the needs of their counsel, and the need of society to fairly resolve disputes. Finally, we suggest changes that might be considered in panel operations, and a few ideas about further research.

MEDICAL MALPRACTICE AND THE CONSPIRACY OF SILENCE

A. *The Malpractice Concept*

Malpractice is usually defined quite broadly. The term refers to any professional misconduct; it may relate to bad, wrong or injudicious treatment of a disease or injury. It is often said to proceed from ignorance, carelessness, want of professional skill, or disregard of established medical rules or principles. Sometimes it arises from malice or criminal intent.¹ Almost any wrongful act that a doctor may commit on a patient can be characterized as an act of malpractice. The usual case arises in negligence, and deals with the alleged failure of a physician to care for his patient with the required skill and care. But a significant minority of cases arises on different grounds, including breach of express agreement, assault and abandonment.²

1. Black's Law Dictionary 1110 (rev. 4th ed. 1968).

2. D. Louisell and H. Williams, *Trial of Medical Malpractice Cases* 187-188 (1960) (hereinafter cited as Louisell & Williams).

In New Mexico, as in most jurisdictions, the law of malpractice is judge-made.³ The New Mexico statutes are silent on the matter.⁴ New Mexico appellate cases on malpractice have been few—perhaps 11 have gone up on appeal in the past 20 years. The reported cases are sufficient to show quite clearly, however, that the state is in accord with most American jurisdictions on the requirement of expert testimony to prove standards of care, departures from those standards,⁵ and causation.⁶

The state's Uniform Jury Instructions—Civil permit an expert to state an opinion,⁷ which in malpractice is binding on the jury unless expertly controverted.⁸ The instructions require the physician "to possess and apply the knowledge and to use the skill and care that was ordinarily used by reasonably well qualified doctors of the same field of medicine . . . practicing under similar circumstances, giving due consideration to the locality involved."⁹ Where the physician is a specialist, he is to be judged by standards of his specialty, again giving "due consideration" to the locality.¹⁰ On these questions the instructions provide that only expert testimony is relevant.¹¹ Where the question is one of the patient's consent, the instructions permit experts to testify on the standards concerned, but their testimony is not conclusive.¹²

As a practical matter, a malpractice plaintiff in New Mexico, as elsewhere, cannot go far without expert testimony. Often, however, plaintiffs have found expertise difficult if not impossible to obtain.

B. *The Conspiracy of Silence*

"Clearly," says one authority, "there is a general reluctance of physicians to testify to facts or to give opinions which likely will involve their brethren in legal liability or professional embarrassment growing out of alleged malpractice."¹³ Moreover, courts and lawyers have seen this reluctance result in miscarriages of justice; they have

3. *Id.* at 188.

4. New Mexico has a Good Samaritan Law which exculpates persons from liability under certain emergency conditions. N.M. Stat. Ann. 12-12-3 (Repl. 1968). The state also has a statute exempting blood and its products from warranty provisions and from strict liability. N.M. Stat. Ann. 12-12-5 (Supp. 1971).

5. *Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964); *Los Alamos Medical Center v. Coe*, 58 N.M. 686, 275 P.2d 175 (1959).

6. *Schrib v. Seidenberg*, 80 N.M. 573, 458 P.2d 825 (1969).

7. N.M. Uniform Jury Instructions No. 15.1 (1966). (hereinafter cited as UJI No. ____).

8. UJI No. 8.0 (1966).

9. UJI No. 8.1 (1966).

10. UJI No. 8.2 (1966).

11. UJI No. 8.1 and 8.2 (1966).

12. UJI No. 8.4 (1966).

13. *Louisell & Williams*, *supra* note 2, at 419.

seen defense experts who "have blinded themselves to the realities, even to the point of willful misrepresentation or perjury."¹⁴

There are four reasons for the conspiracy. First, there is the fundamental difference between medicine's objective pursuit of truth, and the legal system's pursuit of justice through the adversary system. Second, many physicians think that if they enter a suit as a witness, they remain in it, somehow, as a party; their professional views and opinions are laid on the line and are subject to energetic impeachment. Third, many doctors simply do not understand the adversary method. And fourth, many medical people resent the demands that trials make on their time.¹⁵

In addition, many doctors feel highly defensive about the subject of malpractice. There but for the Grace of God, they think, go I. There is a very human unwillingness to injure others with whom one is in frequent contact. Testimony on local practice may threaten a colleague. Other doctors and insurance carriers may bring pressure to prevent a physician from providing expert testimony.¹⁶

Worse still, some doctors seem to believe that most malpractice claims are wholly without merit, brought by disgruntled patients seeking to enrich themselves at the doctor's expense. These physicians blame lawyers' contingent fees,¹⁷ and want legislation barring them in malpractice cases, if not barring the cause of action entirely.¹⁸ Others favor abolition of the doctrine of *res ipsa loquitur*.¹⁹

C. Magnitude of the Problem

Physicians' attitudes towards lawyers, courts and claimants have done nothing to reduce complaints. More and more patients arrive in lawyers' offices. The American Medical Association reports that malpractice claims rose tenfold from 1930 to 1940, tenfold again from 1940 to 1950, and that they continue to rise at a very rapid rate.²⁰ In

14. *Id.* at 420.

15. *Id.* at 422 *et seq.*; G. Hau, *Let's Understand Each Other*, 42 Ill. B.J. 690 (1954).

16. Louisell & Williams, *supra* note 2, at 423.

17. *Id.*; See also, Kelner, *The Conspiracy of Silence*, Trial, Feb./Mar. 1970, at 18; Pattison, *The Malpractice Dilemma*, 100 Archives of Surgery 325 (1970), in which the author asserts that 80 percent of malpractice claims are unjustified; Interview with Ralph Marshall, Executive Secretary, New Mexico Medical Society, in Albuquerque, April 18, 1972.

18. See, note 17, *supra*. See also Durant, *A Four Step Program*, Trial, Feb./Mar. 1970, at 26.

19. See, notes 17 and 18, *supra*. See also, Note, *Medical Malpractice Litigation: Some Suggested Improvements and a Possible Alternative*, 18 U. Fla. L. Rev. 623 (1966); Letourneau, *Medical Malpractice Patient Versus Physician: The Ribicoff Report*, Hospital Management, April 1970, at 18. See generally, A. Ribicoff, Senate Subcomm. on Executive Reorganization 91st Cong., — Sess., Report on Medical Malpractice: The Patient Versus the Physician (Comm. Print 1969) (hereinafter cited as Ribicoff Report).

20. Committee Report, *Professional Liability of the Physician*, 183 J.A.M.A. 695 (1963).

southern California, 350 physicians are said to have left practice because of rising malpractice insurance rates.²¹

A recent Congressional investigation concluded that more Americans are receiving more medical care now than ever before. The number of physicians in practice, however, has not increased in proportion to the demand.²² Two reasons are given for increased demand for medical services. First, there are Medicaid and Medicare, which between them have brought millions of Americans into the market for health-care services of all kinds.²³ Many medical writers report great increases in demand in the last five or six years.²⁴ Second, today's physician commands an imposing array of machinery, manpower, drugs and techniques with which to bring about a cure. But operation of the entire array calls for great precision and complex coordination. The more complex the operation, the greater the number of patients and the greater the pressure of time on physicians, the more opportunities there are for something to go wrong.²⁵

One recent study concluded that malpractice suits are rising sharply, especially in metropolitan areas where quality of care is said to be best, and most notable in California, New York, and Washington, D.C. The study found awards and settlements increasing in amount. Insurance premiums were said to be rising "geometrically," with many insurers unwilling to accept the risks at any price. Insurance costs are necessarily passed on to the consumer.²⁶

The study agreed that the situation may be forcing some physicians out of practice. It found that problems of obtaining insurance may discourage some young doctors from entering higher risk fields of medicine or practicing in higher risk parts of the country. "The situation," concluded the study, "threatens to become a national crisis."²⁷

ATTEMPTS TO IMPROVE MALPRACTICE LITIGATION

A. General

A fundamental problem in malpractice cases arises because one side sustains the injury, and the other controls the evidence. Two types of approaches have been taken to ease the problem.

First, the developing common law in some jurisdictions has adopted any one of several tools that, in effect, permit the plaintiff to get to

21. Letourneau, *supra* note 19 at 18.

22. Ribicoff Report, *supra* note 19.

23. *Id.*

24. Pattison, *supra* note 17.

25. Ribicoff Report, *supra* note 19.

26. *Id.*

27. *Id.*

the jury without local expert testimony on standards of care, breach of those standards, or causation. The most commonly used is probably the doctrine of *res ipsa loquitur*. Other such tools include the use of medical books or brochures by the plaintiff and admission of testimony of experts from outside the jurisdiction. Because these concepts are discussed elsewhere in this issue, we will omit discussion of them except to say that, by themselves, they have been inadequate to solve the inherent problems in medical malpractice litigation.²⁸

Second, many extrajudicial plans have been devised to act on malpractice cases before they get to court. Some plans are in effect mutual protective associations—they protect physicians against claims. Others, in almost every state, respond to patients complaints by controlling a physician's license to practice, or by attempting to adjust disputes over fees. Some plans involve arbitration. Others are at the disposal of the courts, rather than of the parties. Some, like New Mexico's, are screening panels intended to eliminate cases without merit, and to support meritorious claims. Still others amount to little more than lists of physicians willing to examine persons complaining of malpractice, and to give testimony if in their judgment the claim is well founded.

B. *Extrajudicial Plans*

1. *Medical Professional Activities.*

Several state medical societies operate panels composed wholly of physicians whose purpose is to advise a doctor charged with malpractice whether to defend.²⁹ Normally, only the defendant and his attorney appear before these panels. Their usefulness to plaintiffs is limited to those occasions in which they advise the doctor to settle.

New Mexico's medical society, like most, maintains a grievance committee to adjudicate, on a voluntary basis, patient complaints of overcharges. The committee also adjusts disputes between doctors. These committees exist primarily to enforce professional discipline. Insofar, however, as they may mitigate patient ill-will arising from fees or collection practices, they may forestall malpractice complaints.³⁰

2. *Interprofessional Codes and Panels.*

A few states have promulgated codes to govern relations between lawyers and doctors. Because they tend to facilitate communications

28. Roehl, *The Law of Medical Malpractice in New Mexico*, 3 N.M.L. Rev. 294 (1973).

29. Holder, *Joint Screening Panels*, 215 J.A.M.A. 10, 1715 (1971).

30. Interview with Ralph Marshall, Executive Secretary New Mexico Medical Society, in Albuquerque, April 18, 1972 (hereinafter cited as Marshall interview).

between the two professions, they probably also aid the lawyer's evaluation of a malpractice claim as well as his negotiations in and trial of the case.

The Vermont Interprofessional Code,³¹ declares that the physician is to provide the attorney with requested information in a reasonable time, and to report changes in patient status. The lawyer has the duty to pay the doctor promptly, and to provide him with appropriate releases. The code authorizes conferences and places on the lawyer the duty of scheduling medical testimony as conveniently as possible for the physician. It bars use of subpoenas unless the doctor refuses to attend court. It emphasizes the obligations of the physician to testify, and to give depositions when requested to do so. The code is enforced by a joint committee empowered to recommend disciplinary action to either professional society.

Oregon bar and medical societies have a similar code.³² It is concerned with resolving interprofessional disputes on expert testimony, examinations, compensation and the like. Though there has been some interest in establishing a screening panel, the Oregon State Bar has not done so.³³ Where the Vermont Code encourages informal consultation between attorneys and physicians, the Oregon Code requires a high degree of formality, especially in releases.

By delineating ground rules for contact between the two professions, the interprofessional codes probably benefit the plaintiff by making it more difficult for physicians to refuse cooperation. The codes, however, seem to do little if anything more than most doctors and lawyers are capable of doing for themselves.

3. *Medical Screening—the Los Angeles Plan.*

The Los Angeles County Bar Association and the community's medical society maintain a roster of local physicians willing to serve as plaintiff's experts in malpractice cases. Counsel for the plaintiff contacts the bar association's office. The request for referral is sent to a participating physician who may refuse the assignment. A subsequent referral will be made. If, however, the plaintiff's attorney is dissatisfied with the physician's conclusions and the testimony he is willing to offer, the attorney has no right to ask a second referral. Though the plan has encountered problems over physicians' fees, the

31. Committee Report, *Interprofessional Codes*, 1971 Vt. Bar J. 131.

32. Oregon State Bar and Oregon State Medical Society, Statement of Principles Governing Certain Lawyer-Physician Relationships, approved and adopted in 1954 with amendments through 1961 (1962).

33. Letter from John H. Holloway, Secretary of the Oregon State Bar, to Earl R. Cooper, Executive Director, State Bar of New Mexico, February 22, 1971.

bar association apparently believes the plan is working well.³⁴ In 1970, a total of 64 referrals were made on 43 requests, including five for additional information and, evidently, 16 second referrals where the first referred physician declined the case.³⁵

The Los Angeles County Bar has found that the County Medical Association has not kept the panel up to date; there has been difficulty in finding doctors willing to accept referrals in some specialties. The bar association has found that its referral service is used most often by attorneys handling occasional malpractice claims. Those who handle such claims frequently maintain their own panels.³⁶

4. *Arbitration Plans.*

The Southern California Joint Demonstration Project united the American Arbitration Association, the California Hospital Association and the State Medical Association in a two-year venture in which patients were asked to sign a consent to arbitration when entering a hospital.³⁷ Claims totaling less than \$20,000 were heard by one lawyer arbitrator. Those of \$20,000 or more were arbitrated by a panel consisting of an attorney, a doctor and a businessman.

At about the same time, a Los Angeles group of about 150 physicians, serving about 90,000 patients, set up an arbitration plan of its own. It is reported to have achieved "surprisingly low" malpractice insurance rates.³⁸ In both the demonstration project and the private plan, participants believed they had achieved important benefits of speed, privacy, informality and elimination of any need to apply *res ipsa loquitur*.³⁹

One commentator writes that the Demonstration Project was "basically sound" but "never got off the ground."⁴⁰ Certainly, however, arbitration is capable of producing important benefits. It is quick, saves the time of all the professionals involved, and tends to reduce costs on both sides of the case. If it is true that malpractice is very expensive to defend, then this savings alone should be substantial for insured physicians and their patients. It is important that the southern California experience with arbitration has apparently won

34. Los Angeles County Bar Association, Professional Liability Medical Panel—procedure, and accompanying letter (undated, files of Irwin Moise, Albuquerque, New Mexico).

35. Letter from Donald O. Hagler, Assistant to the Executive Director, Los Angeles County Bar Association, to Earl R. Cooper, Executive Director, State Bar of New Mexico, February 23, 1971.

36. *Id.*

37. Pattison, *The Malpractice Dilemma*, 100 *Archives of Surgery* 325 (1970).

38. *Id.* at 328.

39. *Id.*

40. Letourneau, *supra* note 19, at 20.

favorable response from insurance carriers who direct the defense of malpractice suits. Without their cooperation, no plan can succeed for long.

5. *Independent Expert Testimony—The New York Plan.*

By special rule of the State Supreme Court,⁴¹ a trial judge is authorized to obtain impartial expert testimony wherever the court believes it will aid materially in determination of the case. Such testimony is obtained without cost to the parties. Physicians are appointed in accordance with an agreement between medical and legal societies.⁴² Evaluating the plan's early experience, one commentator said it discourages exaggerated claims, promotes honesty in medical testimony, encourages quicker and more frequent settlements, and improves the competence and impartiality of medical evidence.⁴³

In personal injury trials where expert testimony varies widely, impartial testimony may do much to clarify facts for the jury.⁴⁴ But in malpractice cases, where the conspiracy of silence arises from considerations of professional reputation not present in other personal injury actions, such testimony may not be readily available or fully objective.

6. *Malpractice Screening Panels.*

Screening panels composed of physicians alone or combined with lawyers have been established in a number of areas. A recent article in the *Journal of the American Medical Association* refers to those in Phoenix (Pima County), Arizona; Denver, Colorado; Reno, Nevada; New Mexico; Milwaukee, Wisconsin; New Jersey; and Nassau County, New York.⁴⁵ A survey conducted in early 1971 by the State Bar of New Mexico indicated that screening panels are also operative in Davenport (Scott County), Iowa;⁴⁶ Reading (Berks County), Pennsylvania;⁴⁷ the state of Virginia;⁴⁸ Seattle (King County),

41. Actually the state's court of original and general jurisdiction.

42. G. Winters, *Independent Medical Experts to Testify in New York Injury Cases Under New Plan*, in *Selected Writings on Evidence and Trial* 605 (1957).

43. *New York Medical Expert Testimony Project*, in *Selected Writings on Evidence and Trial* 607 (ed. note) (1957).

44. *Id.*

45. Holder, *Joint Screening Panels*, 215 J.A.M.A. 3 at 1715 (1971).

46. Letter from John E. Nagle, Chairman, Legal Subcommittee, Scott County Bar Association, to Earl R. Cooper, Executive Director, State Bar of New Mexico, March 16, 1971. (hereinafter Earl R. Cooper, Executive Director, State Bar of New Mexico, cited as Mr. Cooper).

47. Letter from LeRoy Hyman of Liever, Hyman and Potter, attorneys at law, Reading, Penn. to Mr. Cooper, February 26, 1971.

48. Letter from N. Samuel Clifton, Executive Director Virginia State Bar, to Mr. Cooper, February 26, 1971.

Washington;⁴⁹ Columbus (Franklin County), Ohio;⁵⁰ and Philadelphia, Pennsylvania.⁵¹ All told, at least 13 malpractice screening panels are functioning in the United States. All are voluntary; only one, the New Jersey plan, offers the option of binding arbitration.⁵²

All these plans have three common objectives. First they attempt to discourage claimants whose cases lack merit from proceeding in court. Second, they attempt to encourage settlement of meritorious claims. And third, where settlement is not possible, all make some provision for expert testimony for the plaintiff.

All panels address themselves to two preliminary questions: Whether there is a "reasonable inference" or "substantial evidence" that the acts complained of constitute professional negligence; and whether there is a medical probability that the claimant was injured by those acts. Beyond this point the plans show considerable variety.⁵³

For example, where the New Jersey plan finds for the claimant, it will go no further than to recommend settlement unless the claimant, prior to panel proceedings and prior to filing suit, has agreed to binding arbitration.⁵⁴ The New Jersey plan is the only screening panel embodied in the rules of court or statute. But while the plan provides for oral or written evidence, sworn or unsworn, and for cross examination of the defendant, procedure seems quite informal.⁵⁵ In the opinion of one attorney, "the plan has had very limited usefulness, as the extremely informal nature of the same and the composition of the panels does not, in my opinion, provide for a satisfactory forum."⁵⁶ The state's courts have upheld the binding nature of the agreement,⁵⁷ except in one case where the plaintiff changed counsel prior to hearing.⁵⁸

The Columbus, Ohio plan is only slightly more formal than New Jersey's—its panel operates informally but in accordance with the rules of commercial arbitration of the American Arbitration

49. Letters from Helen M. Geisness, Executive Director, Seattle-King County Bar Association, to Mr. Cooper, February 23, 1971; letter from Harry Margolis, bar association representative to the panel, to Mr. Cooper, February 25, 1971.

50. Letter from Bill Webb, Executive Secretary, Academy of Medicine of Columbus and Franklin County, to Mr. Cooper, February 22, 1971.

51. Letter from Joseph Neff Ewing, Jr., Chairman, Medico-Legal Committee, Philadelphia Bar Association, to Mr. Cooper, March 5, 1971.

52. Holder, *supra* note 29.

53. Berks County Bar Association, Medico-Legal Plan for Screening Malpractice Cases (rev. June, 1964).

54. N.J. Civ. Prac. R. 4:21-7.

55. *Id.*, Rule 4:21-5.

56. Letter from Myron J. Bromberg, attorney and chairman, Joint Conference Committee on Relations with the Medical Profession, New Jersey State Bar Association, to Mr. Cooper, March 1, 1971.

57. *Grove v. Seltzer*, 56 N.J. 577, 266 A.2d 301 (1970).

58. *Marssello v. Barnett*, 50 N.J. 321, 236 A.2d 869 (1967).

Association.⁵⁹ In its first year, the Columbus plan heard three cases, of which one was decided for the claimant. Though a medical society spokesman considered it too early to draw conclusions, he said the first three cases were "handled in a highly satisfactory manner."⁶⁰

Other panels appear to provide for a much higher degree of formality, including notice and proof thereof, and submission to the panel of nearly all the plaintiff's case.⁶¹ In the Denver plan, for example, the formal rules of evidence do not apply but the panel's legal chairman may rule on motions to exclude evidence.⁶²

All screening panels appear to provide, at a minimum, that both parties to a case will be notified of the decision on the two central questions of negligence and causation. A minority also provide for subsequent consultation between the parties and panel members or between the parties and a designated physician on the reasons supporting the decision.⁶³ Where this consultation involves a physician, the doctor is authorized to make a charge for his time.

7. *Screening Panels and Insurance Carriers.*

Any extrajudicial mechanism to deal with problems of malpractice must have at least the tacit acceptance of insurance carriers if it is to function. In at least one instance, in Nassau County, New York, plans to reorganize a screening panel ran afoul of a major malpractice carrier, that threatened to cancel the insurance policies of physicians who engaged in arbitration under the plan.⁶⁴ Evidently, at least in Nassau County, the insurance carrier wanted binding arbitration.⁶⁵ The role of malpractice insurers will be discussed in more detail in the next chapter of this paper. At this point, however, it should be made clear that any solution to problems of malpractice litigation must have the acquiescence of the insurance industry.

THE MEDICO-LEGAL MALPRACTICE PANEL OF NEW MEXICO: OPERATIONS AND PROCEDURES

A. *General*

The Medico-Legal Malpractice Panel of New Mexico was ap-

59. Franklin County Medical Arbitration Plan and Accompanying letter from Bill Webb, note 50 *supra*.

60. Letter from Bill Webb, *supra* note 50.

61. See, e.g., Colorado Bar Association and Colorado Medical Society: Interprofessional Code (1970).

62. *Id.*

63. See, e.g., the Berks County plan, cited note 53, *supra*.

64. Letter from Mark Kenyon, Executive Director, Nassau County Medical Society Inc., to Mr. Cooper, January 22, 1971.

65. *Id.*

proved by the State Medical Society's House of Delegates on November 16, 1961.⁶⁶ After approval by the State Bar, the plan was sanctioned by the State Board of Bar Commissioners and became effective November 23, 1963.⁶⁷ The panel has operated continuously since 1963. It has heard (to April, 1972) approximately 100 claims against physicians.⁶⁸

The stated purposes of the panel are to prevent actions in court on ill-founded malpractice claims, and, where claims are meritorious, to encourage quick and fair disposition. The plaintiff is encouraged to come before the panel by a promise of expert testimony if he prevails. The physician is protected by the confidentiality of the proceedings.⁶⁹

The panel consists of 25 lawyer members including a lawyer-chairman, and 15 doctor members, including a medical chairman.⁷⁰ As amended in 1971, the plan provides for a permanent chairman of the panel who will act as presiding officer at hearings.⁷¹

B. Procedure

The panel's Rules of Procedure⁷² require that the claimant's attorney describe in detail the doctor's conduct believed to be negligent.⁷³ The complaint also lists other medical personnel who have had contact with the claimant. It may be amended at any time up to 15 days prior to hearing. The panel is authorized to hear complaints where the statute of limitations has been waived or where suit has been filed previously. On filing, the parties agree that no attempt will be made to use matter presented to the panel as direct or impeachment evidence.⁷⁴

On receiving a complaint, the executive secretary of the State Medical Society chooses a date for hearing and notifies all panel members of the date and the parties involved. He determines the availability of members for service. He also contacts all physicians named in the complaint, including the defendant and the hospital if appropriate, to obtain all medical records. Where economically feasible, the records are reproduced and sent to panelists selected to

66. 10 State Bar of N.M. Bull. 205 *et seq.*, (August 19, 1971).

67. *Id.*

68. Marshall interview, *supra* note 30.

69. 10 State Bar of N.M. Bull. 205 *et seq.*, (August 19, 1971).

70. *Id.*

71. Interviews with Irwin Moise, incumbent chairman of the lawyers' panel, in Albuquerque, March 8 and March 22, 1972. Former State Supreme Court Justices Moise and Paul Tackett are panel members and share duties as presiding officers at hearings.

72. New Mexico Medical Society and State Bar: Rules of Procedure of the Medico-Legal Malpractice Panel (January 1, 1968) (hereinafter cited as Rules of Procedure).

73. *Id.*, Rule 1.

74. *Id.*

serve. Otherwise, the records are made available to panelists and counsel at the medical society's office for at least a week prior to the hearing.⁷⁵

The rules give counsel the right to confer with any physician who is to testify at the hearing or who has had professional contact with the plaintiff.⁷⁶ Counsel may, where they agree, be present during presentation of the opposing party's case; all other persons are excluded unless their presence is authorized by the panel.⁷⁷ Cross-examination is not permitted; only voting panelists may ask questions. However, counsel for either party may submit questions in writing to the panel chairman, who has discretion whether to put them to the witness.⁷⁸ Any medical consultants called by the panel may also submit written questions to the chairman.⁷⁹ The panel may refuse to hear the testimony of independent physicians having no connection with the case.⁸⁰

Where the claimant prevails and wants a medical witness to testify in subsequent litigation, the medical society takes responsibility for providing such a witness.⁸¹ Where the plaintiff's case fails, there is no provision for rehearing.⁸² The panel announces its decision on the issues of negligence and causation in a memorandum to counsel.⁸³ No one, however, has access to the panel's reasoning: not the attorneys, not the parties, and not the expert who is selected to testify for the plaintiff.⁸⁴

Panels sit only on call, and always in the offices of the medical society in Albuquerque. Panelists make it a practice to convene privately, often with their specialized consultant, prior to the hearings. At these meetings, they, and especially lawyer members, try to familiarize themselves with the general nature of the medical problems in the case.⁸⁵ In the panel's early years, the medical society's executive secretary routinely attended the pre-hearing meetings and the hearing itself. He no longer does so.⁸⁶

After hearing the case and examining whatever documents are submitted, the panel deliberates. Accounts of these deliberations

75. Marshall interview, *supra* note 30.

76. Rules of Procedure, *supra* note 72, Rule 5.

77. Rules of Procedure, *supra* note 72, Rule 7.

78. Rules of Procedure, *supra* note 72, Rule 8.

79. Marshall interview, *supra* note 30.

80. Rules of Procedure, *supra* note 72, Rule 9.

81. Rules of Procedure, *supra* note 72, Rule 10.

82. Rules of Procedure, *supra* note 72, Rule 11.

83. Marshall interview, *supra*, note 30.

84. *Id.*

85. *Id.*

86. *Id.*

indicate that panelists are quite frank and that no attempts are made to minimize the character or the consequence of physicians' conduct.⁸⁷ The panel then proceeds to vote on the negligence and causation issues.

C. Panel Operations

From its inception through 1971, the New Mexico Medico-Legal Panel reviewed 82 cases involving a total of 100 physicians.⁸⁸ The panel found 31 doctors negligent. There was one tie vote, which went for the defendant. The remaining 68 claims were decided for the defendant physician. The data are summarized in Table I.

TABLE I
Medico-Legal Panel Reviews⁸⁹

Year	Cases	Doctors	For Plntf.	For Def.
1964	1	1	-	1
1965	4	4	2	2
1966	10	11	4	7
1967	9	10	4	6
1968	12	15	3	12
1969	16	25	8	17
1970	19	22	5	16
1971	11	12	5	7
Totals	82	100	31	68 (plus 1 tie)

In terms of volume, Table I indicates that the panel's workload peaked in 1969 and 1970, falling off significantly in 1971. The falloff has continued: the only two cases scheduled for review in the first quarter of 1972 were cancelled.⁹⁰

From 1964 through 1970 the screening panel found negligence in 26 cases, and no negligence in 61. But a medical society survey covering the same years indicates that a total of 52 claims—just twice the number found by the panel—were closed with awards to the plaintiff by settlement or judgment.⁹¹ Data, as accumulated from 720 of 722 physicians in practice or retiring from practice during the period shown, are tabulated in Table II.

87. Interview with Marshall, *supra* note 30; Interview with Moise, *supra* note 71; Interview with Chiffelle, *infra* note 106.

88. New Mexico Medical Society, Report of the Medical-Legal Panel to the House of Delegates (1972).

89. *Id.*

90. *Id.*

91. Insurance Committee, New Mexico Medical Society, Report (undated, but presenting figures from 1964-70) (hereinafter cited as Insurance Report).

TABLE II
Claims Settled and Paid, 1964-1970⁹²

Year	No. of Claims	Amount Paid
1964	8	\$ 19,472
1965	1	15,000
1966	7	307,700
1967	10	195,772
1968	12	784,000
1969	12	185,500
1970	2	14,000
Totals	52	\$1,431,444

The 1968 figure is skewed. It includes settlement of a judgment of more than \$1 million in favor of a single plaintiff.⁹³ But the figures show that as cases coming before the panel increased in number, so generally, did the number of claims paid to plaintiffs. The two reports summarized in Tables I and II do not, of course, establish a causal relation by themselves. Since spokesmen indicate that very few cases bypass the panel completely to go on to court,⁹⁴ the data suggest that a good many claims may be settled before reaching the panel—perhaps almost as many as are settled after a panel hearing.

The data collected in New Mexico confirm that malpractice claims have been on the rise. From eight claims filed against physicians in 1964, and one filed in 1965, the totals rose to 27 in 1969 and 18 in 1970.⁹⁵ The available data do not indicate how many of the 87 claims filed in the seven years studied were against the same defendant physicians, but in addition to actual claims reported, 117 physicians reported that they had been threatened but that no claims were filed against them. It is clear from these figures that malpractice is not an abstract threat for the New Mexico medical profession. About one-eighth of all the state's physicians actually had claims brought against them between 1964 and 1970, while almost one doctor in four was either claimed against or threatened during that period.⁹⁶

In the light of these figures, there is no obvious explanation for the sudden and dramatic drop in claims paid in 1970 or in the similarly impressive decline in the number of claims filed in 1971. Two problems have developed, however, both of which threaten the continued usefulness of the panel. One of these problems has its roots in the fundamental conflict between legal and medical professional values which the panel was intended to ameliorate. The second

92. *Id.*

93. *Id.*

94. Marshall interview, *supra* note 30; Moise interviews, *supra* note 71.

95. Insurance Report, *supra* note 91.

96. *Id.*

problem arises from insurance company attitudes toward screening panels, particularly in New Mexico.

D. Operational Problems

1. The Problem of Substantial Evidence.

The rules governing the panel provide that, if it finds the plaintiff's case supported by "substantial evidence" of negligence and the injury caused by the negligence, it is to decide for the plaintiff and thus commit itself to furnish expert testimony on the questions involved in a judicial determination of liability.⁹⁷ "Substantial evidence" is a term of art. Lawyers often think of it as the quantum of evidence required to resist defendant's motion for a directed verdict. Physicians may think it means weighing the evidence and deciding who has a preponderance.

In the minds of many attorneys, substantial evidence is what is required to take a case to jury.⁹⁸ In some jurisdictions, motions for a directed verdict are decided by the court in light of all evidence presented—a method that frequently involves passing the credibility of witnesses. Most American jurisdictions consider only evidence favorable to the proponent and decide whether a reasonable jury can find every fact required to prove the plaintiff's case.⁹⁹ However defined in detail, the concept of substantial evidence is a familiar one to lawyers.

It is not familiar to physicians who may consider it a preponderance. "As long as substantial evidence is the rule, the panel is doomed," says an Albuquerque plaintiff's attorney. "Lawyers see it as enough to get a case to a jury. Doctors see the evidence in terms of what the jury will do. That's the difference between substantial evidence, and a preponderance."¹⁰⁰

This is no small problem. It goes to one of the essential questions to be determined by the panel: when is the claimant entitled to expert testimony to help prove his case? If the quantum of evidence required to persuade the panel to provide testimony is the same as or greater than the quantum required to persuade the jury, then theoretically the panel is of little help to a plaintiff in establishing his case.

In practice, we do not know if this is the case. Almost one-third of all claimants coming before the panel win in that forum (Table I). "I'll take in a good case or a poor one," says one Albuquerque

97. Joint Medical-Legal Plan for Screening Medical Negligence Cases (December 4, 1971).

98. R. Field & B. Kaplan, *Civil Procedure* 478-79 (temp. ed. 1968).

99. McBaine, *Trial Practice: Directed Verdicts: Federal Rule*, 31 *Calif. L. Rev.* 454, 460 (1943).

100. Interviews with Richard Ransom, attorney at law, in Albuquerque, April 3 and April 24, 1972.

attorney. "If a case can go either way, taking it to the panel is foolhardy."¹⁰¹ In part, says this lawyer, the panel provides a convenient and satisfactory method for dispatching the weak claim, while at the same time assuring the claimant that a hearing has taken place, and that the claim has been thoroughly considered. And in part, he adds, the panel is a means of efficiently handling the strong case, of moving it expeditiously onward to settlement or trial. But he believes that the panel is not proving useful to the most necessitous plaintiff, the one whose case is difficult, who most needs expertise in court, and who in the United States can expect to have his cause decided, not by a panel of experts, but by a jury.

The available data do nothing to prove or disprove this attorney's views on the panel, for the outcome statistics reflect the operation of the panel not on all cases, but only on cases presented. If knowledgeable attorneys are not taking the close cases to the panel, then the data will not reflect close decisions.

The differential understanding of the meaning of substantial evidence seems capable of jeopardizing the panel's continued worth to both medical and legal professions. In light of the preference of physician members of the panel for a clear and convincing showing of malpractice,¹⁰² plaintiff's attorneys have made it a practice to bring their cases to a state of trial readiness, complete with experts' affidavits, prior to panel appearances. This has proved highly offensive to medical panelists, who consider they have been called to pass upon a matter already established, and thus to perform a meaningless task. At a recent hearing, a plaintiff's attorney reports he was thoroughly chastised for the extent of his preparation by a medical member of the panel; in the ensuing argument, a lawyer panel member resigned on the spot, vowing never to bring in a malpractice case of his own.¹⁰³ Clearly, unless the misunderstanding surrounding the concept of substantial evidence can be cleared up, the panel stands to lose all credibility and thus all attraction to the legal profession.

2. *Insurance Industry Attitudes.*

The attitudes of the insurance industry toward malpractice panels and similar remedial devices seem to vary from company to company and, perhaps, from place to place. It seems clear, however, that some major insurance firms have viewed malpractice panels with mixed feelings at best. Certainly the stakes are high. Table II indicates that payments to claimants averaged about \$200,000 annually during the

101. *Id.*

102. *Id.*

103. *Id.*

seven years studied. If it is true that costs are almost equal to payouts in the malpractice insurance field,¹⁰⁴ then total charges against New Mexico malpractice insurance policies averaged close to \$400,000 yearly, or more than \$500 per year for each of the approximately 780 physicians practicing in New Mexico.

"Until about a year ago," says a medical society spokesman, "St. Paul Fire and Marine Insurance Cos., St. Paul, Minn. covered 50 percent of the physicians in the state. Last fall the company refused to permit its cases to go to the panel. A January, 1972, hearing was cancelled because St. Paul was the insurer. By itself, St. Paul can cause a huge decline in the panel's work load."¹⁰⁵

THE MEDICO-LEGAL MALPRACTICE PANEL EVALUATION AND RECOMMENDATIONS

A. *General*

This chapter considers the New Mexico program in light of problems and practices elsewhere. It evaluates the program in terms of fairness to the parties to malpractice litigation. The preceding chapters have suggested the following factors which should be taken into account when evaluating and suggesting improvements in any system of malpractice litigation:

1. *Provision of Evidence for the Plaintiff.*

The law of malpractice requires expert testimony throughout the plaintiff's case. That testimony should be readily available for without it, the plaintiff has a right without a remedy.

2. *Protection of the Physician.*

The law does not hold the doctor as a guarantor of cures. It holds him merely to the standards of his profession. Because these standards cannot be fully appreciated by laymen, the law requires expert testimony to prove them, and any departures from them. But the doctor fears that complexities of the situation will render the case incomprehensible to those who decide it. He also fears that the very existence of cases, perhaps not meritorious, will blacken his profession's reputation. For these reasons, the physician often chooses silence. If the physician is to be expected to speak, his professional needs should be recognized. The facts of the case should at some point be subject to professional scrutiny. The threat of publicity, which is a punishment not contemplated by law, should not mature until after it has been established that the claim has some factual ground.

104. Interview with an attorney who has frequently represented doctors, in Albuquerque, April 11, 1972.

105. Marshall interview, *supra* note 30.

3. *Improvements in Education and Communication.*

Doctors are often said to fail to understand or appreciate the adversary process. Less often said but perhaps as truly so, lawyers may have too little appreciation of medical attitudes. Laymen may have no ideas at all, or misguided ones, about what constitutes medical malpractice. Neither medicine nor the law have been active in educating each other, or in educating the public, on the malpractice problem. For that reason, any plan to improve the existing situation in malpractice litigation should provide for improved inter-professional education and, hopefully, should make provision for improved relations with the public as well.¹⁰⁶

4. *Prompt Settlement.*

It seems clear that defense costs impose a heavy burden on physicians in the form of insurance charges, and upon the public that pays doctors' bills. The more quickly and frequently settlement can be brought about, the more significantly the defense-cost component of malpractice will be reduced.

5. *Rules Sufficient to Guide Professional Relations.*

Rules and procedures should prevent misunderstandings among doctors, lawyers and patients. Where an attorney has a right to ask questions, or a physician or hospital not to answer them, that should be specified. Where formalities are called for, as with releases, that should be apparent. Where a professional group has particular dislikes, as physicians seem to dislike the use of subpoenas to compel attendance as witnesses, there should be agreement on alternative procedures to avoid unnecessary offense.

6. *Supervision and Administration.*

Where lists of participating lawyers and doctors must be kept up to date, and where a professional society takes responsibility for such tasks as gathering records prior to hearings, there should be vigorous supervision to assure satisfactory administration.

7. *Conclusiveness.*

It is to the advantage of all concerned to bring malpractice claims to a speedy end. Any mechanism dealing with malpractice problems should, therefore, provide a clear answer, supported by reasons stated in sufficient detail to convince the claimant that his case has been

106. Interview with Dr. T. L. Chiffelle, incumbent New Mexico medical-legal panel chairman, in Albuquerque, New Mexico, March 21, 1972. Dr. Chiffelle felt that the educational and communications problems in New Mexico were being solved and that such efforts may have in fact reduced the number of malpractice suits significantly.

fully considered, and to convince the plaintiff's attorney that the findings provide a proper basis for further advice to the client.

B. Plaintiff's Evidence—Physician's Protection

Almost one-third of the cases heard by the medico-legal panel in New Mexico are decided for the claimant.¹⁰⁷ Such a decision clearly enhances the value of the plaintiff's case. However, the value of the expert testimony guaranteed by the Medical Society cannot be determined with any degree of accuracy. It is clear that beginning in the panel's third operational year, payments to claimants whether by settlement or judgment increased markedly over the two prior years.¹⁰⁸ Thus, the available evidence shows a coincidence in *time* between panel operations and increased awards to claimants. But the available data do not show a *causal* relationship between panel activities and plaintiffs' recoveries. Though the available evidence is incomplete, there is some indication that the panel's existence does not account for increased payments to claimants. In the years 1964 to 1970 inclusive, 52 plaintiffs won damages, while only 26 won in the forum provided by the panel.¹⁰⁹

Why the disparity, and how can it exist where physicians and lawyers generally agree that few cases are processed in the courts once they have been heard by the panel? Two answers suggest themselves.

First, there are anecdotes concerning cases in which the panel found no malpractice liability, but where defense attorneys recommended settlement. They feared heavy damages because the plaintiff was believed to be an object for strong juror sympathy.¹¹⁰ However often this may happen, there is nothing in the panel's procedure that binds a claimant to its decision; certainly a plaintiff's attorney who believes he can take his case to the jury has an affirmative duty to advise his client of his views, whether or not the panel has found medical negligence in the case.

Second, a number of malpractice claims are indefensible. Foreign objects left in a patient's body after surgery have been held to raise a conclusive presumption of negligence.¹¹¹ There are other occurrences, such as explosions of anesthetic gases and failure to use X-rays in diagnosis of fractures, that are very difficult to defend.¹¹² And in

107. See, Table I, *supra*.

108. See, Table II, *supra*.

109. See, Tables I and II, *supra*.

110. A defense attorney interviewed in connection with this project reported one such instance where, he said, the claimant's recovery amounted to more than \$300,000. If this occurred, it is not reflected in the data summarized in Table II.

111. Louisell & Williams, *supra* note 2, at 441-42.

112. *Id.*

some instances, the defense is in a difficult position because the doctor's records are inadequate.¹¹³ In cases such as these, there may be little for lawyers to do but negotiate the terms of settlement.

Neither of these two possibilities suggests deficiencies in the panel. The plaintiff's attorney who believes he can take his case forward without panel support has a duty to do so. Nor is there any reason for the panel to decide cases where there is no controversy.

There is, however, a question whether the panel, by its very existence, tends to shut off evidence that might otherwise be available to plaintiffs. Attorneys for claimants report that, prior to the panel's formation, many lawyers established sound working relationships with a number of physicians who would be willing to testify in a proper case. Since the panel was organized, these informal working relationships have deteriorated because of physicians' reluctance to involve themselves in a claim unless and until it has gone before the panel.¹¹⁴ For this reason, informal communications between the two professions may be less adequate now than they were a decade ago.

In one respect there seems to be very little question that the panel has accomplished its objective. The number of malpractice suits actually filed has showed a drastic decline. The panel's formation was triggered by the filing of 42 malpractice suits in New Mexico with much attendant publicity in the year preceding its establishment. In the first year of the panel's operation, the number of suits filed fell almost to zero. Because suits and their publicity are feared by individual practitioners as dangers to professional reputation, and by the medical profession as a whole as a stimulus to more suits, the reduction in the number of suits filed represents a major gain in protection of the profession.¹¹⁵

Several observers believe that the reduction in number of suits filed is a result of the panel's educational function.¹¹⁶ The attorney who rarely handles a malpractice case, or even the lawyer well versed in medical matters, may in the course of a panel proceeding, learn that what appears negligent is in fact a problem or risk well understood by physicians.¹¹⁷ But the panel performs this function only rarely, and never by design.¹¹⁸

113. Interview with an attorney who frequently has represented doctors, *supra* note 104.

114. Ransom Interview, *supra* note 100.

115. Marshall interview, *supra* note 30.

116. Chiffelle interview, *supra* note 106. Dr. Chiffelle reports that one major factor in reducing suits might be that doctors are becoming aware of the need to keep accurate records, to increase communication with their patients and to not ignore their complaints, and to bring in specialists when they are required instead of proceeding without advice.

117. Moise interviews, *supra* note 71.

118. Interview with attorney who frequently has represented doctors, *supra* note 104. One plaintiff's attorney reportedly was informed, for example, that he had misread his case because

It is clear that a significant number of plaintiffs and their attorneys regard the panel as a satisfactory means of seeking to forward their case. Claims against 100 physicians have been presented. The panel appears to have been attractive and useful to a good many of those who consider themselves injured by medical negligence. It has been successful in warding off many suits, and in reducing the volume of publicity unfavorable to the medical profession. To that extent, it has protected the state's physicians. But it is not clear that the panel has succeeded in reducing either the number of malpractice claims, or the dollar volume paid out by insurance companies on claims arising from medical negligence.

C. Speed and Conclusiveness

The best available information indicates that only 30 to 40 cents of the malpractice insurance premium dollar reaches injured claimants. The balance goes to attorneys.¹¹⁹ It would seem apparent, then, that any method of shortening and simplifying the claimant's recovery process will reduce legal fees, which comprise 60 to 70 per cent of malpractice costs. If attorneys' fees associated with malpractice cases were to be reduced by one-third, that would yield a total cost reduction on the order of 20 per cent.

The New Mexico Medico-Legal Panel presents no problems of undue delay. Under the rules, cases are to be heard within 90 days of filing.¹²⁰ Continuances are to be granted sparingly.¹²¹ State court dockets are not so crowded that they present problems of delay. Most personal injury cases filed in New Mexico's district courts are said to be capable of trial to a jury within 18 months of filing.¹²²

A panel decision for the claimant increases the value of the plaintiff's case and, from the standpoint of the defense, makes settlement more desirable. A decision for the defendant may diminish the value of the case somewhat; certainly it will make the claim less costly to settle. There is a feeling on the part of attorneys that case handling toward settlement of trial would be expedited considerably by relatively slight procedural additions.

"I wish the judgment of the panel were articulated in such a way as to permit the parties to settle," says a plaintiff's lawyer who has made many panel appearances.¹²³ And a defense attorney agrees: "I have

he misunderstood the capabilities of a suction device for performing abortions. The device had failed to extract the fetus. Moise interview, *supra* note 71.

119. The Ribicoff Report, *supra* note 19.

120. Joint Medical-Legal Plan for Screening Medical Negligence cases, *supra* note 99.

121. Rules of Procedure, *supra* note 72. Rule 1.

122. Interview with an attorney who frequently has represented doctors, *supra* note 104; Ransom interview, *supra* note 100.

123. Ransom interview, *supra* note 100.

always felt that panel decisions should be on a qualitative rather than a yes-no basis. The plaintiff's lawyer ought to know if he's got a case, and if so, what kind."¹²⁴ Under present procedures, however, a claimant seeking recovery on multiple counts of negligence does not know on which count the panel approved his case. And a plaintiff losing before the panel may not know the reasons for his failure.

No screening panel makes provision for written opinions. Several, however, do provide for consultation between a panelist and a party or between a panel member and a physician selected to provide expert testimony.¹²⁵ Such a process should tend to make the panel's decision more conclusive. And as a result, the process of disposing of malpractice claims should be shortened.

At present, the New Mexico panel deliberates in secret and issues no report, beyond its findings. Such secrecy is apparently essential to the medical profession's support of the panel.¹²⁶ Because the panel does not publicize its decisions, much less its reasons for them, it is not developing a body of "case law" to aid attorneys in counseling their clients. This is not, however, seen as a defect. "Fact patterns just do not repeat themselves," says a panel member. "And everybody involved is a volunteer—we don't have the time to get out written opinions."¹²⁷ But there does not appear to be anything in the physicians' preference for secrecy that would prevent appropriate consultations, on a paid basis if necessary, among claimants, their lawyers, and appropriate panel members. Such consultations, in fact, might add a great deal to the conclusive quality of the panel's decisions, and thus speed disposition of malpractice claims.

D. Interprofessional Relations

The text writers repeatedly refer to the disparity between the professional values of doctors and lawyers. This disparity rests on wholly different attitudes in the search for truth. The physician is said to pursue a species of truth that is scientifically knowable and can be arrived at by methods combining scientific objectivity and a kind of intuition founded in long years of training and experience. Lawyers are trained to participate in an adversary system that is held to be as effective a means of disclosing "truth" in human affairs as any system can be.¹²⁸ Greatly simplified, there is an antagonism, perhaps

124. Interview with attorney who frequently has represented doctors, *supra* note 104.

125. See, e.g., the Berks County plan, *supra* note 53.

126. Moise interview, *supra* note 71.

127. *Id.*

128. W. Curran & E. Shapiro, *Law, Medicine and Forensic Science* 3 (2d ed. 1970); Louisell & Williams, *supra* note 2, at 5.

necessary and natural, between medicine's objective inquiry and law's adversary method.

Neither party to this misunderstanding is likely to change its professional values. Both sets of values are essential to professional conduct, but what can come about is a greater appreciation of the disparity and the reasons for it. Ideally, the medical profession, or at least the panel's medical members, should be instructed on the lawyer's duties to his client and on the manner in which those duties fit into the conduct of a system intended to elicit the truth of a controversy. Such instruction would help forestall future unpleasantness that could very well end the panel's usefulness.

There is also a feeling, however well or ill founded, that the panel has become increasingly conservative—that it has become gradually harder for the plaintiff to prevail.¹²⁹ This view arises from the belief that the panel is deciding the ultimate question of negligence-in-fact rather than whether there is substantial evidence of it.

Whether the panel's standard for decision is to be based upon a scintilla of evidence or upon moral certainty, that standard should be clearly understood by all persons in the forum, and it should be consistently administered from one case to the next. Understanding the standard is a matter of education, perhaps not best carried out in the heat of controversy. Administering the standard calls for some degree of continuity in panel membership.

The latter has been achieved. Rule changes accepted in 1971 provide that the panel have a permanent chairman, a lawyer, who in fact is a retired member of the State Supreme Court.¹³⁰ Hopefully, the presence on the panel of a prestigious and continuing presiding officer will eliminate some of the past problems of inconsistent administration of decisional standards.

To improve the regulation of proceedings and perhaps to achieve some degree of interprofessional education, it might be appropriate to amend the panel's rules to include a prefatory discussion outlining the duties of a lawyer to his client and the manner in which he can be expected to discharge those duties in proceedings before the panel. It might be equally valuable to state in the same way the physician's duties as a panel member.

E. Administration of the Panel

One of the strengths of the New Mexico Medico-Legal Panel seems to be its supporting administration. The State Medical Society takes

129. Ransom interview, *supra* note 100.

130. The complete rules, including 1971 changes, are given in 10 State Bar of N.M. Bull. 205 (August 19, 1971).

the responsibility for accumulating and making available to the parties all relevant records. Choice of panelists from among those who have agreed to serve and the physical tasks required to hold meetings are handled efficiently and quietly.

Availability of records is especially valuable. By themselves, they may prove or disprove the plaintiff's case. And it is evidently far easier for the medical group to collect the records than it would be for plaintiff's attorneys, even under the federal discovery rules, which, by and large, are in effect in New Mexico.¹³¹

A plan similar to New Mexico's and somewhat older, operates in Tucson (Pima County), Arizona. Though long regarded as a highly successful venture, the Arizona plan's usefulness is said to have declined recently because of lax administration.¹³² And, the usefulness of the Los Angeles medical screening panel has been impaired by failure to keep lists of the doctors willing to participate up to date.¹³³

F. *Some Other Considerations*

New Mexico has a relatively small population. All told, the state contains about 1,030,000 people, of whom about one-third live in the Albuquerque area.¹³⁴ Excluding physicians in the Public Health Service and the armed services, the state is served by about 780 medical doctors. Most physicians are at least acquainted with a majority of their colleagues.¹³⁵

This widespread professional acquaintanceship is generally seen as a strength in the panel's process. The panel questions physician-defendants who appear before it; its knowledge of individuals and of community practices and facilities reportedly lends insight to much of this questioning.¹³⁶

All panel proceedings are conducted in Albuquerque. About 43 per cent of the state's physicians practice in Albuquerque, but only an estimated one-fifth of malpractice claims originate there.¹³⁷ Attorneys and panel members, however, do not identify the necessity of travel for most of the parties as a problem. Ordinarily, only the parties, their attorneys, and sometimes a claimant's spouse, appear.¹³⁸

131. Marshall interview, *supra* note 30; Ransom interview, *supra* note 100. The discovery rules are Fed. R. Civ. P. 26-37; N.M. Stat. Ann. §§21-1-1 (33) to (37) (Repl. 1968). New Mexico and federal rules differ chiefly in that the state does not permit discovery of insurance coverage, which may be discovered under the federal rules.

132. Marshall interview, *supra* note 30.

133. Letter from Donald O. Hagler, *supra* note 35.

134. 25 New Mexico Business 1, 7 *et seq.* (January, 1972).

135. Marshall interview, *supra* note 30.

136. *Id.*; Moise interview, *supra* note 71.

137. Marshall interview, *supra* note 30.

138. *Id.*; Moise interview, *supra* note 71.

There is a widespread feeling among doctors that many malpractice claims are wholly without merit—that they are pressed as blackmail, in the hope that the defendant physician will settle rather than risk the publicity of a suit.¹³⁹ Recently, the State Medical Society polled doctors who had served on the panel. These physicians expressed the belief that most cases heard by the panel were sufficiently well founded to warrant a hearing. Only one doctor-panelist said that as many as three cases he had heard did not seem to have sufficient merit to justify the proceeding.¹⁴⁰

G. *The Panel and Malpractice Insurers*

Uncertainty seems to characterize the relationship between the New Mexico Medico-Legal Panel and the insurance companies that write malpractice coverage in the state. As a practical matter, the companies seem able to determine whether the panel will serve any useful purpose at all. They may refuse to represent insured defendants in its proceedings—one company has evidently done so. They may also prevent the appearance before the panel of insured physicians by invoking the standard cooperation clause contained in liability insurance contracts.¹⁴¹

At the outset, New Mexico doctors hoped the panel would significantly reduce amounts paid out to malpractice claimants. This, evidently, has not occurred.¹⁴² Nor should it. The panel does not consider the damages question; it confines itself entirely to consideration of the liability issue.¹⁴³ There is not necessarily a relationship between the number of cases heard and the total dollar volume of claim payments. In the years 1964-1970 inclusive, as shown in Table II, almost 40 percent of the total payments shown were damages in only one case.

The State Medical Society hopes that about 80 per cent of the state's physicians will be covered by its group within the next three years. That will place the society in a position to learn how the company determines premiums, payouts, and profit and loss on malpractice coverage.¹⁴⁴

It would seem that there are two points on which malpractice insurance carriers might object to panel operations. First, the

139. See notes 19 and 20, *supra*.

140. Marshall interview, *supra* note 30.

141. *Id.* The cooperation clause was discussed at length and applied as a policy condition by Cardozo in *Coleman v. New Amsterdam Casualty Co.*, 247 N.Y. 271, 160 N.E. 367 (1927). *Farley v. Farmers Insurance Exchange*, 415 P.2d 680 (1966), is a more liberal interpretation of the clause.

142. See Table II, *supra*.

143. Joint Medical-Legal Plan for Screening Medical Negligence Cases, *supra* note 99.

144. Marshall interview, *supra* note 30.

relatively quick operation of the panel lessens to some extent the ability of the defense to delay final settlement. This makes it harder to starve a claimant into settlement. Second, the available data indicate that, whether or not there is a causal relationship, payments to claimants have gone up very markedly during the years of the panel's operation.¹⁴⁵ Whatever the reasons, the recent decline in cases coming to the panel may be attributed to the attitude of one insurance carrier.

G. *Recommendations*

This survey of the New Mexico Medico-Legal Malpractice Panel is by no means complete. Several suggestions emerge from the study, however, that may prove useful to doctors and lawyers as they attempt to deal professionally with malpractice litigation. Also, several avenues for further research seem apparent.

1. *Interprofessional Education.*

At least to the extent required for harmonious conduct of panel business and ideally to the extent required to expedite interprofessional relations generally, the State Bar Association and the New Mexico Medical Society should undertake whatever programs seem appropriate to inform physicians of lawyers' duties to clients, and to advise them of the standard of decision to be applied in malpractice cases.

2. *The Views of the Insurance Industry.*

There are strong indications that malpractice insurers view extra-judicial forums with misgivings. These misgivings should be specified and detailed so that future development of the panel concept can take into account to the greatest extent possible the perceived interests of the insurance carriers.

3. *Articulation of Decisions.*

To promote the usefulness and conclusiveness of their decisions and educate plaintiffs and their attorneys, the panel should advise the claimant and his counsel, or the physician appointed to serve as an expert witness, or both, of the reasons for its decision.

4. *Review of the Rules.*

The rules governing the panel should be reviewed to assure that they describe the rights and duties of the parties and the obligations of panelists with clarity and sufficient detail. It should be stated that

145. See Table III and discussion, *supra*.

panelists have responsibility for maintenance of decorum and of judicial attitudes. Whatever their origins, incidents wherein counsel are abused by the panel should be avoided. Given the fact that relatively few attorneys handle a relatively large proportion of panel cases, the alienation of even one such lawyer can seriously undercut the usefulness of the entire panel concept.

5. *Further Research.*

The correlation between panel operations, filing of malpractice claims, and payouts on claims is not at all understood. A survey now in progress under State Bar auspices goes to the heart of this matter. Its interpretation should cast a great deal of light on the internal dynamics of the malpractice problem.

It is the unanimous opinion of all concerned that the medico-legal panel performs a variety of useful functions. It may provide a forum in which a survivor is assured that a loved one's loss was not caused by carelessness or negligence.¹⁴⁶ There is a widespread feeling that the panel has been instrumental in holding back publicity unfavorable to the medical profession. But what would have happened had the panel not existed? How does the panel compare, in terms of effects, with other extra-judicial methods of resolving malpractice controversies? The literature on malpractice, as oceanic as it seems to be, contains no answers to these questions. To develop these answers, comparative studies are required. Such comparisons should deal with the fundamental question: whether extra-judicial means, or special legal developments, are useful and should be used in malpractice claims.

Thoughtful comparisons, however, may do far more than prove the usefulness of a particular panel in a particular place. The panel, in essence, is a mode of dealing with controversies arising from the vast complexity of scientific and technological achievement that distinguishes the modern world. Such controversies are often complex, and solutions may require extraordinary expertise and sophistication. Perhaps, as studies proceed, the experiences of New Mexico and other communities attempting to deal with the difficulties of malpractice claims will illuminate the paths toward solutions of similar problems.

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146. Ransom interview, *supra* note 100.