

State Bar of New Mexico
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HOW TO FILE A MEDICAL MALPRACTICE CLAIM

by David Gallagher

A NEWS AND VIEWS HOW TO SUPPLEMENT

Assuredly a medical malpractice case is inherently one of the most difficult, expensive, and time consuming a practitioner may experience. Most cases are medically complex. Quite a gulf exists between a "bad result" following medical treatment and professional negligence.

Suggestion: If this article is of any interest to you because you have a medical malpractice claim you want to file, consider an association with an attorney experienced in this area before proceeding. The New Mexico Trial Lawyers Association has a bunch you might consult.

A brief history of the manner by which New Mexico has handled medical malpractice cases over the past 20 years may be of interest and possibly explain what success the present "panel procedure" enjoys. Around 1963 the State Bar of New Mexico and the New Mexico Medical Society cooperated in establishing what came to be known as the "voluntary panel". This panel consisted of three physicians

and three lawyers, with an additional lawyer who served as the presiding officer. Before they filed a case in court, lawyers were encouraged to submit their cases for review to this panel whose membership varied for each hearing. Actually the State Bar maintained a statutory committee of lawyers who volunteered to serve on a panel when called. Membership on the committee was considered something of a plum. I believe it was in 1968 that the New Mexico panel was selected to put on a demonstration at the annual joint meeting of the American Bar Association-American Medical Society in Las Vegas, Nevada. It was quite a show. Jackson Akin got married, and a distinguished New Mexico obstetrician conquered the crap table.

After wandering about in various sites, the voluntary panel found its home in the early 1970s at the office of the state medical society, whose staff handled the paperwork. Honorable Irwin Moise became its permanent chairman. In 1976 the panel procedure was built into the Medical Malpractice Act (N.M. Stat. Ann. Section 45-5-1 et seq. (1978)), and what had been voluntary became

mandatory. No medical malpractice case against a QUALIFIED health care provider could be filed in court without first being presented to the panel. "Qualified" has no relation to professional qualifications, as such. Section 5 of the Act specifies what a qualified health care provider is. Essentially it is one who contributes to the Patient's Compensation Fund established by the Act. To determine if your potential defendant is "qualified," telephone Nat Sanchez at the Department of Insurance in Santa Fe (827-4563). If your health care provider is NOT qualified, you may still use a voluntary panel, if he is a physician, or you can file a suit. Presbyterian Hospital and St. Joseph's Hospital in Albuquerque are examples of "non-qualified" health care providers, for which no panel is available. (The courts are still there, you bet.) The act also provides for a director, appointed by the Chief Justice, who administers the panel and presides at the hearings. Currently Judge Franchini acts as a co-director along with the writer because business got so good one presiding "director" wore out.

Last year the panel considered more than 118 cases. It meets at the medical society's office at 303 San Mateo N. E. in Albuquerque 87108 (and elsewhere an occasion about the state) ordinarily on Monday and Wednesday evenings at 7:00 and on Saturday morning at 9:30. The hearings generally last from three to four hours. After the hearing the panel deliberates and decides, and the parties are notified in writing the next day. Some hearings have lasted as little as 40 minutes, others more than eight hours. The lawyer panel members are selected by the director from a pool of those who have volunteered to serve on a particular date. The physicians are selected by a physician given the job by the president of the medical society. The paperwork, and it has become substantial, is handled by the staff of the medical society. That makes some bushy-haired plaintiffs' lawyers nervous until they have occasion to communicate with Randy Marshall, or his secretary Becky Stavrou, at that office. They discover that both are the most pleasant, helpful and efficient persons alive. (Telephone 266-7868.)

The Act does refer to the New Mexico Medical Review Commission – a fine name, but whose membership consist of the Director – period. He tries to: administer the panel; absorb complaints and keep the docket current. After listening to the somewhat seamy side of medicine over a period of some 16 years he does know a good vet.

The procedure before the panel is largely governed by the Medical Malpractice Act and those "rules" that were stolen from the voluntary panel and used for some 15 years prior to the Act. These "rules" may be obtained from the office mentioned.

Suggestion: Read the statute, particularly Sections 41-5-5, 15 and 19.

The New Mexico Trial Lawyers Association held a seminar some years ago and, as is its custom, drafted an excellent "form" for an "Application" to the panel. No more than a letter is required but make it complete, with facts. The director welcomes any questions any attorney may have (243-7848; 766-3221).

Suggestion: Telephone the director, if in doubt. (He seldom admits being in doubt.)

Once your application is filed the commission does all the work (except your case preparation.) It notifies the defendant and sets the hearing date. The director reviews every application and often will write you "suggestions" which are occasionally followed. Your "jury" is selected for you. The act affords a right of disqualification. Please exercise it sparingly. On several occasions it has required 30-40 telephone calls to secure a "volunteer" replacement.

The commission's staff tries to collect all essential medical records. It has no subpoena power. Help it and keep in touch with it as the hearing date approaches. Know your relevant medicine, either by consulting with a physician before the hearing, or by hours in the medical library. It is disconcerting to have your advocacy interrupted by a medical member of the panel: "You don't know what you are talking about." Lawyers are trained to assimilate foreign knowledge rather quickly – and then forget it. Know your medical records, however difficult they may be to read, and know how to bring the important ones to the attention of the panel. Panel members rely heavily on medical records in reaching their decision. Have solid medical literature with you (xeroxed) for the panel, but make sure it applies to your facts and is acceptable in New Mexico. However persuasive an Australian journal may be in Sydney, it did not carry much weight recently in Albuquerque. Too, just because the New England Journal of Medicine details a procedure your fish failed to follow, don't smirk – yet. Panel members are pragmatic and often make a distinction, however fine, between text book medicine and the firing line.

The more experienced, skillful – and successful – attorneys before the panel obviously have spent the most time in preparing their cases. Several present each panel member (and defense) a binder containing FACTS, copies of the important medical records, extracts from relevant literature; and copies of the whole article to prove you haven't cheated.

All medical records are distributed to panel members several days before the hearing. A physician member once complained to me about a last-minute postponement of a hearing for the reason HE had spent eight hours reviewing the records. The "volume" is often more than two inches thick. Zero in where you contend there has been a departure from care. A blarney opening, such as "I am a lawyer and I don't know any medicine..." will get you nowhere and put the panel to sleep. Most of the panel members have heard at least 30 cases, and there are some members with experience extending over 10 years. They recognize a good job. Welcome constant interrupting questions. Attention is being paid. A question will sometimes expose an area of liability that you have overlooked. Skimming the PDR, or a package inset, is NOT adequate research. Have your cross-examination questions for the defendant-physician written out before the hearing. No oral cross-examination is permitted. One of the best presentations the panel has ever heard was from a Texas lawyer who had some 70-odd questions typed out. The panel members asked about 75% of them. He omitted them. He won his case.

Suggestion: Attend a panel hearing as a spectator 30 days or so before your case. You may be lucky and witness an experienced plaintiff's attorney. You will note the defense is highly experienced, and you will note how one is seduced into an abyss by the low key technique.

As the plaintiff's attorney you will begin by reciting most of the facts. Have your client present for your hearing -- if he is alive. Please don't waste time. The six panel members volunteer their time. An average hearing represents some \$2,000.00 of professional time. Bring a court reporter. If you feel your case does not justify the expense of a reporter, consider trashing your file. If the panel decision is adverse, don't rush to the courthouse. Treating the panel as mere inconvenience on the way to litigation is a dandy way to throw away your money. About 30% of panel decisions are in favor of the plaintiff. (Some experienced attorneys have scored around 75%; some attorneys I doubt could replevy a dog.) A decision in your favor will get you an expert -- it will also get you a settlement offer. If the decision is against you, particularly if it is unanimous, take some hard looks. The panel exists not to decide cases but to screen out those that have no merit. It is not infallible. I believe two plaintiff's attorneys have "beat" it in court (and three defendants have !!) in the last five years.

A highly experienced trial attorney was incensed at an adverse panel ruling -- and wrote me in detail. I persuaded a most cooperative physician who had heard his case to write HIS explanation (the deliberations are confidential, but I never considered such applied to individual views). The nut was the lawyer had not completely understood the post mortem -- and the death had resulted -- in all probability -- from a cause quite unrelated to what the lawyer had urged, after many, many hours of preparation. Graciously he replied with thanks.

We are a consumer society, but the practice of medicine is largely an art, and not the dispensing of a product, as a brake pad. Malpractice cases are caused by poor communication, inflated expectations, excessive billings, and negligence. If you can establish the last, the recovery for your client, or his heirs, can be substantial. A variety of these panels exist in various states about the country. New Mexico's is one of the oldest, most experienced, current in its docket, and, praise the Lord, impartial in its consideration. It exists to be of service to the state. Use it, but recognize the work required of you. Possibly no more legal malpractice occurs before it than in any other forum, but in a few short hours it becomes more obvious, if it exists. It is at least as embarrassing to witness an ill-prepared attorney try to tar a physician. The pot calling the kettle...? To avoid this is the purpose of this committee -- and this article. The panel is not a court; it will not, and should not, decide legal questions. In the current air, along with New Mexico dust, is some sort of "mediation" movement -- in the continuing effort to unclog the courts. An experienced judge remarked to me he NEVER saw a malpractice case; but, would to God, he would never see another divorce case. The panel is often damned, but it presages the future. □

About the Author

David Gallagher, who is of counsel with Gallagher and Casados and a part-time U. S. Magistrate, has been active on the Medical-Legal Panel since its inception and chairman of the panel since it became statutory. □