



New Mexico Medical Review Commission

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October 23, 2019

Hon. Judith K. Nakamura, Chief Justice
New Mexico Supreme Court
P. O. Box 848
Santa Fe NM 87504-0848

Re: New Mexico Medical Review Commission- 2018 Annual Report

There are three types of lies -- lies, damn lies, and statistics.

— Benjamin Disraeli

Facts are stubborn; but, statistics are more pliable. -- Mark Twain

Dear Chief Justice Nakamura:

The New Mexico Medical Review Commission was established effective July 1, 1976 by the New Mexico Medical Malpractice Act, NMSA 1978, §41-5-1ff (herein, "the Act"). I am pleased again to submit the annual report of the Commission for the period January 1, 2018 – May 17, 2019. References to the "Panel" mean the three lawyers and three health care providers who volunteer to screen these patient claims pursuant to NMSA 1978, §41-5-17 (D)–(F).

1. Justice Nakamura, the Commission is facing a crisis. My report to you of last year expressed the concerns that I had at that time. The fears have come to fruition. Here is what I stated in last-year's report:

This statutory system grew from a voluntary system that commenced in 1963 pursuant to an agreement between the New Mexico State Bar and the New Mexico Medical Society. I am told that by 1976 when the Act was passed less than a dozen cases per year were being heard. Likely, this comparatively low case load prompted enactment of the "60-day rule" (see NMSA 1978, §41 -5- 18). When I was appointed to this job in early 1988, I reported that in 1987 the Commission under my predecessor, David Gallagher, conducted a record 90 hearings. By 1994 the Commission was processing over 200 applications per year and commenced holding between 130 to 160 hearings each year. Accordingly, since 1988 the Commission has not been able to provide hearings on applications within that 60-day period. Each year, I have seen the cases become more and more complex with the consequent increase in medical records that the staff must handle. The recent influx of electronic records create a challenge because many are quite cryptic and all are quite redundant; and, therefore quite time-consuming to process. We have no subpoena power; and, we occasionally have a problem obtaining records from some providers. Prior to 2016, the Insurance Department listed approximately 1,300 qualified providers subject to the Act. Of most concern to this Commission is that recently in 2016-17 the following qualified providers were added to the Insurance Department list: 1,179 hospital-employed providers, 57 outpatient facilities, and 24 hospitals! The Commission contract with the N.M. Medical Society provides only two full-time employees plus the capable supervision of Randy Marshall to handle all of this.

Unless something happens that (a) decreases our case volume, and/or (b) creates more volunteers and chairpersons, and/or (c) gives us more money to increase our staff and physical resources, I cannot envision this Commission ever having the ability to comply with the 60-day rule.

Here is part of what has transpired since I made that statement:

a. In 2017, 129 applications were processed and 86 cases were heard. As stated, the administrative functions of the Commission are performed under a contract with the New Mexico Medical Society. In 2017, the Society provided its executive director, Randy Marshall, plus 1.8 employees. Last year, that staff was increased to 2 full-time employees. As you will see below, 167 applications were processed and 125 cases were heard in 2018. As of September 30th of this year, the Commission processed 163 applications and heard 126 cases. It has, therefore, been necessary to increase that staff to 3 full-time employees. They are still over-worked and under-loved.

b. The 1996 Legislature increased our budget to \$350,000 per year. That budget has worked until this year. In fact, the \$350,000 was never reached until now. The Society is billing the Patients' Compensation Fund at a rate in excess of \$30,000.00 monthly. This is before I submit my billings. I scrutinize each of those billings. All of the charges are fair and reasonable. I certainly hope that the Commission will receive fair treatment at the next N.M. Legislature.

c. The Commission is struggling-for panelists. Each claim is screened by 3 lawyers and 3 members of each Respondent's medical discipline. Generous Continuing Medical Education credits are given to the provider-panelists. The lawyers receive nothing but *pro bono* consideration and free cokes. At the last Board of Bar Commissioners, Ellen Kelly (Chair of the Medical-Legal Committee of the State Bar) and I made a pitch for CLE credits. It appears that those efforts may be rewarded and some token CLE credits will be afforded to the Commission's lawyer-panelists. Additionally, when I saw you at the State Bar Convention, I was manning a table in the purveyors' section. Ellen, the deputy chairs, and I were making a pitch to get lawyers to sign-up to volunteer for panels. We got about 45. That has somewhat eased our struggle for panelists. It is not enough. We are still having to vacate scheduled cases for lack of lawyer-panelists. We are hoping that the Board will soon approve CLE credits.

d. What I cannot mention to you in any detail is the pending litigation that is facing yours truly and the Commission. The case may wind-up in your Court. At such time, unless you feel that it is appropriate to recuse, I do not want you to feel that, by being my boss, you have any conflict of interest or the appearance of any impropriety.

2. **Statistical Data.** You are likely familiar with these reports. However, some of those interested in the Commission may be seeing this report for the first time; so, please indulge me while I explain the details of the enclosed Tables I through IV. As you might have gathered, I am a skeptic when it comes to statistics; so, I urge anyone seeing this report to utilize the statistics in order to form their own conclusions.

a. **Table I- Historical.** 2019 begins our 43rd year and my 30th year as acting director. Thanks to the New Mexico Medical Society, we have had historical data available throughout the Commission's history which is published for the Society's annual meeting in September. Table I is a 42-year history of all applications filed with the Commission from its inception March 1, 1976, until December 31, 2018.

- i. From its inception, a total of 5,770 applications have been received.
- ii. Because many applications alleged claims against multiple providers, a total of 7,863 providers were involved in those 5,770 applications.

The claims against those 7,863 providers do not include 693 claims against individual providers that were withdrawn prior to hearing. Many of those withdrawn claims involved applications against multiple providers; accordingly, in those cases the Commission conducted a Panel screening for the remaining providers, because, for economy, and unless there is a potential for unfairness, it is the policy of the Commission to consolidate claims by a single claimant against multiple providers that involve the same or similar facts and circumstances. Further, many withdrawn claims were settled or otherwise dropped at the last minute after the Commission staff had done all of its work preparing the case for the scheduled Panel. In summation, whether or not a claim is withdrawn, a considerable amount of work by the Commission staff is usually involved.

- iii. 4,950 Panel hearings were conducted involving those 7,863 providers. As to those 7,863 providers, the Panels voted that:

1. 77% or 6,090 providers were found not negligent;
2. leaving 23% or 1,773 providers who were found negligent; and,
3. of those 1,773, the Panel further determined that the presumed negligence caused harm to the patient in claims against 1,293 providers.

In the last 25 or so years, the overall percentages regarding which party prevails have been virtually unchanged. When I started this job 30 years ago, the patients were prevailing on the issue of negligence in 19.5% of their claims.

- iv. The "Other" category consists of *respondeat superior* claims against 1,196 entities who (a) employ qualified (or qualifiable) health care providers (see NMSA 1978, §41-5-5); and, (b) contribute to the Patients' Compensation Fund (see NMSA 1978, §41-5-25). Since the ruling in *Baker v. Hedstrom*, 2013-NMSC-043, there has been a marked increase in claims made only against entities (that contribute to the Patients' Compensation Fund) for the conduct of their employee-providers that are qualify-able pursuant to NMSA 1978, §41-5-3.

- v. Some applications are rejected because they do not comply with the Act in some fashion. Those can be time-consuming to administer; however, rejected applications are not included in this data.

- vi. Kindly examine below, for some of the factors may further skew these statistics.

Table II- Calendar Year 2018, and Table III- Partial Current Year. The same Hon.

information compiled by the N.M. Medical Society in Table I is reflected in Table II for calendar year 2017, and in Table III for the first five months of the current year. A few comments:

vii. 232 (up from 129) applications were received in 2018. As of May 17, 2019, another 125 applications had been filed at the Commission. As stated in 1(a), above, only 86 cases were heard in 2017; however, 125 cases were heard last year.

viii. By May 17, 2019, there were 49 pending cases. "Pending" cases are a moving target – there is always a backlog and it fluctuates. Depending upon the participation of lawyer-panelists, cases filed now will be scheduled in February, 2020.

b. **Table IV- Other Data Sources.** Kindly examine Table IV which covers claims against The Doctors' Company insureds through February 28, 2019. The most common question that I receive is: what happens after a Panel screens an application? The Commission does not have the resources to follow those claims into the court system or the settlement arena. So, we cannot analyze such things as post-Panel settlement negotiations or reasons why claims are dropped. The Doctors' Company, the largest New Mexico medical malpractice insurer of independent practice M.D.'s, D.O.'s and their employing entities; and, is the only carrier kind enough to share this sort of data with the Commission. We appreciate The Doctors' Company and its predecessors' cooperation over the years in providing this meaningful information that traces the Commission cases into the court system. Table IV is The Doctors' Company (including its predecessors') statistics from approximately inception of the Commission on March 1, 1976, until February 28th of this year. Over the years this data has remained surprisingly consistent and is presumed rigorous. These statistics are of most interest to the lawyers, judges, others directly involved in the court system and other dispute resolution entities, as well as the general public. So, kindly examine The Doctors' Company figures; and, for what it's worth, some of my personal observations, below:

i. Medical malpractice claims are some of the most complex and time-consuming cases that are filed in court.

ii. Of the 7,863 providers (see Table I) appearing before the Commission since inception, The Doctors' Company and its predecessors covered 5,381; accordingly, 68% of all providers whose cases were screened by the Commission were insured by The Doctors' Company or its predecessors.

iii. Claims involving 3,779 providers were settled or dropped prior to filing suit. Lawsuits were filed against 1,594 (29.62%) of The Doctors' Company insureds. From the glass-half-full viewpoint around 70% of the claims were never filed as lawsuits in New Mexico State or Federal courts.

iii. Litigation commenced against 1,594 of The Doctors' Company insureds. After suit was filed, claims against 980 of those insureds were dismissed for

reasons other than summary judgment (e.g. due to settlement). 176 of those suits were dismissed on summary judgment. If you have not fallen asleep at this point, read on.

iv. Of the 1,594 lawsuits, 48 went to verdict. Interestingly, only 58.33% of the patients who prevailed at the Panel also prevailed at trial. We have no data; however, we do know there are a number of trials that involve multiple defendants; and, that the verdicts involving those defendants can vary.

The old saw is: the good cases settle and the bad ones go to trial.

4. At this point, as I rail-on about how statistics can be skewed in either direction, you may get some insight on some of the activities of the Commission:

First, during the low-caseload years in the late 1970's the Commission heard approximately 22 claims of excessive doses of radiation therapy against several radiologists. Patients prevailed in all of those claims during a period of very low caseload.

Next, the Commission has screened hundreds of cases that I term "mass tort" claims. You see lawyer advertisements for these on television and in the newspapers. Mass tort claims usually focus upon products liability issues. Since the Panel screening is a jurisdictional prerequisite to the filing of most malpractice lawsuits, many mass tort claims against individual New Mexico providers have found their way into the Commission, not necessarily because of any realistic expectation that they might prevail against the individual provider; but rather, as an example, because of the claimants' tactical desire to defeat diversity jurisdiction in Federal Court. So, in the 1990's the Commission received over 200 breast implant claims. While a large number of breast implant claims were pending before the Commission, the Federal courts consolidated most of their cases; so, Panel applications declined for a while. However, after the Dow-Corning bankruptcy, another flood of applications to the Commission ensued. Thanks to the cooperation of counsel, the Commission screened 182 of the breast implant claims against individual doctors on a stipulated consolidated basis before four separate panels. In addition, the Commission conducted separate panel hearings on each of approximately 40 additional breast implant cases in which the claimants chose not to stipulate to consolidation. Considering that the average Panel takes around two and half to three hours in presentation time alone, you can do the math and see the considerable savings in time and resources. All of the Panels in the breast implant cases found in favor of the health care providers.

In a like manner, and on a smaller scale, the Commission was able to obtain stipulations to consolidate other mass tort claims such as the Fen-Phen cases, the Vioxx cases, spinal hardware claims, and some steroid injection cases.

Case Load. I have covered most of this in Item 1, above. I must take time to mention that the Commission is fortunate to have at its disposal the most efficient staff you can imagine. As was somewhat described above, their job of administering the details of each Panel hearing is very work-intensive. I do have statutory discretion to extend the

60-day period for "good cause" pursuant to NMSA 1978, §41-5-18; however, that is not the real issue. If anyone's case is prejudiced by any delay, we will expedite the matter to hearing. Without a true urgency, most parties are quite understanding and are decent enough to wait their turn.

5. **Finances.** [kindly see Item 1(b), above] In 2018 the Patients' Compensation Fund paid \$287,476 for the Commission expenses. That amount will be far exceeded this year.

6. **Litigation.** In the past 30 years the Commission (and me as Acting Director) have been sued approximately 37 times. Last year we were peripherally involved in a suit in which we were not a party. As stated, there is one case pending against us in a New Mexico district court.

8. **Other Matters.** I supervise the Commission. The day-to-day administrative functions of the Commission are done pursuant to a contract with the New Mexico Medical Society of which Randy Marshall is the Executive Director. That arrangement is subject to the approval of the Superintendent of Insurance who is the custodian of the funds. As stated, each hearing lasts an average of 2½ to 3 hours. By the time the case is heard by a Panel, the staff has spent considerable time obtaining medical records, assembling a packet of selected records germane to the issues, arranging for panelists to serve, and doing all of the administrative work necessary to make the hearings go as smoothly as possible. Our contract with the Medical Society provides hearing rooms that are up-to-date with electronic equipment necessary for adequate presentation of the cases. Specifically, Jessica Christ, Lisa Duran, and Jessica Lagoda comprise the staff that really makes this system work. I cannot give the two Jessicas and Lisa enough praise.

a. There is no way I could administer this system by myself. For many years Judy Durzo and Bill Herring have been serving as substitute chairs of our Panels. I always receive very good reports regarding each of them.

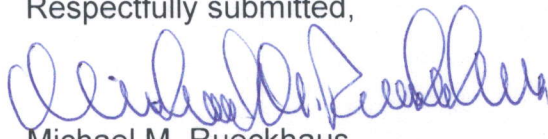
c. We also give our thanks to the chairs of the professional societies who were kind enough to take the time to provide the Commission with volunteer panelists over the past year: Ellen M Kelly, J.D. for New Mexico State Bar Association and Ulton M. Hodgin, M.D. for the New Mexico Medical Society. Dr. Hodgin and Ellen Kelly spend considerable time selecting panelists and coping with a frustrating number of last-minute cancellations. For a nominal fee, Dr. Hodgin also performs the very difficult task of locating and coaxing both M.D. and D.O. expert witnesses to serve pursuant to NMSA 1978, §41-5-23. This is becoming an increasingly difficult job.

d. The volunteer professional panelists who constitute the "Commissioners" at each of our Panels are the real stars of the show and to whom we owe the greatest gratitude. These volunteer lawyers, M.D.'s, D.O.'s P.A.'s hospital administrators, and rarely CRNAs keep this system going; and, consequently do their part to ease the load on the court system. The Commission has jurisdiction of hospitals that qualify under the Act. As more hospitals qualify for Panel screenings, the Commission and its staff will have an even larger challenge in dealing with these relatively new qualifying providers.

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For these 30-plus years I have constantly marveled-at the willingness of the lawyers and health care providers to volunteer their time and make the Commission a national model. This is a fragile system which garners its respect from the integrity of the professionals who serve as panelists to consider each case presented and to render their decision (albeit unbinding, but yet successful in keeping just under 80% of our claims out of the court system). I wish I had the time to sit down and thank each of health care providers and the lawyers who gave up one or more evenings last year.

Respectfully submitted,



Michael M. Rueckhaus
Acting Director

cc: [all interested parties]

TABLE I
History of the New Mexico Medical Review Commission
Since Inception: March 1975 - May 17, 2019

PROVIDER	NUMBER	NO NEGLIGENCE	YES NEGLIGENCE	NEGLIGENCE WITH INJURY
MD's	5,935	4,647	1,288	937
DO's	355	282	73	53
CRNA's	14	12	2	2
DC's	1	1	0	0
DPM's	12	6	6	5
PA's	78	57	21	14
Hospitals	272	211	61	53
Other	1,196	874	322	229
Totals	7863	6090	1773	1293

% Voted No	77%
% Voted Yes	23%
% Yes with Injury	16%
Cases Received to Date	5770
Cases Settled or Withdrawn	693
Cases Heard	4950
Cases Pending	127

TABLE II
New Mexico Medical Review Commission
January 2018- December 2018

PROVIDER	NUMBER	NO NEGLIGENCE	YES NEGLECTENCE	NEGLECTENCE WITH INJURY
MD's	122	90	32	26
DO's	6	5	1	1
CRNA's	2	1	1	1
DC's	0	0	0	0
DPM's	0	0	0	0
PA's	5	3	2	1
Hospitals	40	28	12	9
Other	57	31	26	17
Totals	232	158	74	55

% voted No Negligence	68%
% Voted Yes Negligence	32%
% Yes With Injury	24%
Cases Received	167
Cases settled or withdrawn	16
Carrier Bankrupt	4
Cases Heard	125
Cases Pending	22

TABLE III
New Mexico Medical Review Commission
January 1, 2019 to May 17, 2019

PROVIDER	NUMBER	NO NEGLIGENCE	YES NEGLIGENCE	NEGLIGENCE WITH INJURY
MD's	63	48	15	11
DO's	2	1	1	0
CRNA's	1	0	1	1
DC's	0	0	0	0
DPM's	1	0	1	1
PA's	1	1	0	0
Hospitals	33	20	13	11
Other	24	17	7	5
Totals	125	87	38	29

% Voted No	70%
% Voted Yes	30%
% Yes with Injury	23%
Cases Received to Date	89
Cases Settled or Withdrawn	7
Cases Heard	67
Cases Pending (total)	49

Table 4
Data Current As Of: 2019/03
Distribution of cases found NOT NEGLIGENT

<u>Percent</u>	<u>Count</u>	<u>Percent</u>	<u>Count</u>	<u>Percent</u>	<u>Count</u>
5,381	Cases resolved following hearing	4,276	Cases resolved following hearing	1,105	Cases resolved following hearing
31.09%	1,673 Cases settled	21.38%	914 Cases settled	68.69%	759 Cases settled
39.14%	2,106 Cases dropped	45.23%	1,934 Cases dropped	15.57%	172 Cases dropped
29.62%	1,594 Cases in suit-tried in court	33.23%	1,421 Cases in suit-tried in court	15.66%	173 Cases in suit-tried in court
	Dismissed		Dismissed		Dismissed
	Summary Judgement		Summary Judgement		Summary Judgement
	Defense Verdicts		Defense Verdicts		Defense Verdicts
	1,546		1,393		153
	Total Defendant Decisions:		Total Defendant Decisions:		Total Defendant Decisions:
	48		28		20
	Plaintiff Verdicts		Plaintiff Verdicts		Plaintiff Verdicts
	Total		Total		Total
	1,594		1,421		173

Hearing Dates From/To: 1/1/1976 12:00:00 AM - 2/28/2019 12:00:00 AM