

NEW MEXICO MEDICAL REVIEW COMMISSION
POLICIES AND PROCEDURES

The following Policies and Procedures are in place for the use of participants in the panel review process pursuant to the requirements of the Medical Malpractice Act (NMSA 1978, §§41-5-1 to 41-5-29). The Medical Malpractice Act should be reviewed and the Annotations, as well as these Policies and Procedures. These Policies and Procedures supplement the requirements of the Medical Malpractice Act pursuant to §41-5-21, which the Director of the New Mexico Medical Review Commission adopts and publishes as the rules of procedure necessary to implement and carry out the duties of the Commission. All dates set forth in these policies and procedures shall be construed in accordance with Rule 1-006 NMRA.

These Policies and Procedures were developed by the Director and an appointed Committee¹.

I. Application

- A. Section §41-5-14 (D) requires an attorney to submit an Application.
- B. There is no special or specific form for the Application except that it must comply with §41-5-15, which includes:
 - 1) Be brief.
 - 2) Describe the person(s) involved sufficiently to allow the Commission to identify the Provider(s), Provider(s)'s employer, Provider(s) address and telephone number of those subject to the inquiry.
 - 3) State the date(s) of the alleged act(s) of negligence.
 - 4) State the circumstances of the alleged act(s) of negligence.
 - 5) Include a sufficient HIPAA Compliant medical release, as a separate document, signed by the Patient or Patient's representative. Forms are provided by the Commission. In the event a Provider whose records are requested requires a form other than the form submitted by Patient's attorney or used by the Commission, the Patient or Patient's representative must execute said form and return it to the Commission.
- C. The Application and all communications should be hand delivered, mailed, faxed, or electronically delivered (e-mailed) to the New Mexico Medical Review Commission. Its current address, phone number, fax number, and e-mail address can be accessed on the Commission's website (www.nmmedicalreviewcommission.org). If faxed or e-mailed, the date for submission per §41-5-14 is the date noted as sent of the fax or e-mail. Mailed applications are submitted on the postmarked mailing date.
- D. Within (10) days of receipt of an application, the Commission must determine if the Application is complete. If the Commission determines the Application is incomplete,

¹ 2023 Policies Procedures Committee Members: Mary Behm, JD; Judith Durzo, JD; Neal Shadoff, MD; Larry Levy, MD; Andy Scholl, JD; Matthew Rappaport, JD; Kathy Love, JD; Director, Edward "Ned" Shepherd, JD

it will return the Application within those ten (10) days along with a brief explanation of the existing deficiencies.

- E. The Commission will respond to the Application within ten (10) days of receipt with written confirmation identifying those Providers who are qualified and those who are not.
- F. Applications without completed medical authorizations will not be assigned a Panel Hearing date until a completed authorization is provided by the Patient. Once that is provided, the rules for processing the Application in Section II below commence.
- G. The deadline to amend the Application is 15 days before the Panel Hearing unless opposing counsel does not object to a later amendment. The Executive Director will rule on any such objections.

II. Processing the Application

- A. Within five (5) days of receipt of the Application, the Commission must determine whether the Application complies with §41-5-15 (B) and must determine whether the named Health Care Providers are Qualified Health Care Providers as defined in the Medical Malpractice Act. The attorney who filed the Application will be informed about the qualified status of the listed Providers, within 10 days, as in § E above.
- B. The Applicant is advised to independently verify whether named Providers are qualified because the Superintendent of Insurance records are not always complete and accurate.
- C. Notice will be provided to all Parties, attorneys and insurance carriers for named Qualified Health Care Providers. Notice to insurance carriers will include the Application and all attachments, along with a Panel Hearing Notice. The Hearing Notice will include the date, time and whether the hearing will be in person or via Zoom. In-person hearings will only be scheduled upon request by one of the Parties within 10 days of the filing of the Answer by the Provider. In- person hearings are not encouraged due to the difficulty of finding panel volunteers for such hearings.
- D. For Providers who are no longer in New Mexico and have left no contact or forwarding information with the New Mexico Medical Board, notice will only be provided to their listed insurance carrier. The carrier is charged with the responsibility to provide notice to its insured.
- E. Panel Hearings will be scheduled regardless of whether the Provider's insurance carrier has responded to the Application or timely retained an attorney for the insured Provider. Failure to timely respond will rarely be a sufficient good cause reason to vacate a hearing.
- F. Once the Provider and insurance carrier are notified of an Application, the Provider is required to answer the Application pursuant to §41-5-16.
- G. Pursuant to NMSA §41- 5- 18, the Commission will set the Panel Hearing to occur within sixty (60) days of acceptance of the Application.
- H. Stipulations by Patient and Providers counsel to waive the panel process must be submitted jointly to the Commission within fourteen (14) days of the answer being filed for Provider or the waiver will not be allowed, and the panel process will be completed by the Commission.

III. Rescheduling Hearings

- A. The Commission will endeavor to complete Panel Hearings within the statutory requirements. Panel Hearings will not be vacated absent good cause. Good cause may be but is not limited to:
 - 1) inability of the Commission to timely obtain necessary medical records for the hearing date,
 - 2) unforeseen court settings that conflict with the Panel Hearing date,
 - 3) illness preventing a party or lawyer from appearance,
 - 4) such other good cause as determined by the Executive Director.
- B. Vacated Panel Hearings will be rescheduled as soon as possible. The parties and lawyers will be required to cooperate with the Commission on setting a new date. Failure to cooperate will result in a setting without the parties' or their lawyers' input. A vacated hearing will be rescheduled within the statutory requirements or as soon as possible thereafter.

IV. Panel Hearing Deadlines

- A. Parties and attorneys are required to notify the Commission of any stipulation that impacts the panel process not later than ten (10) days prior to the Panel hearing date, ABSENT GOOD CAUSE as determined by the Executive Director in a preliminary hearing.
- B. Not later than fourteen (14) days before the Panel Hearing, the Commission will provide the parties and lawyers a list of proposed panelists. (For the process of Panelist selection, please refer to the Medical Malpractice Act.)
- C. Pursuant to §41-5-17 (H), each party has three (3) peremptory challenges of Panelists. All peremptory challenges must be received by the Commission at least seven (7) business days before the scheduled Panel Hearing. There are no exceptions to this requirement.
- D. The Commission will replace Panelists removed by peremptory challenge, challenge for cause, cancellation by a Panelist, or for unforeseen reasons. No challenges of replacement Panelists will be allowed absent exceptional circumstances.

V. Medical Records

- A. Within fifteen (15) days of receipt of an Application that meets the requirements of §41-5-15(B) and contains all necessary Provider information and medical releases, the Commission will:
 - 1) Request all medical records identified in the Application.
 - 2) The Commission requires a list of Medical Providers from whom medical records are requested in the Application.
 - 3) Within fifteen (15) days of filing the Answer, the Provider must furnish the Commission and Patient's counsel with the identity of any additional Providers whose records are needed, along with specific information so the Commission can request such records.
 - 4) Patients' objections to record requests made by the Providers' attorney must be made timely to allow time to schedule a hearing with the Executive Director to determine and rule upon said objections.

- 5) The Commission will maintain records of those Providers whose records were requested, when such records are received and the names of those Providers who have not responded to the request. The Commission will document all attempts made to obtain those records and will notify the Parties of any issues the Commission has had obtaining requested records.
- 6) The Commission will make all reasonable efforts to obtain the records requested. In the event records are not obtained timely to allow the parties to prepare for the Panel Hearing, a continuance will be issued, and the Panel Hearing will be rescheduled.
- 7) Records received by the Commission will be sent to the Parties within five (5) days of receipt of those records.
- 8) Medical records attached to the Application or Answer will be considered relevant absent objection and will be allowed in the Panel Pack submitted by counsel.
- 9) Medical records not obtained by the Commission or previously exchanged by the Parties will not be allowed in the Parties' Panel Packs if there are objections by counsel.

VI. Panel Pack

- A. Attorneys for the Patient and Provider are responsible for assembling the medical records and any applicable medical literature that will be used as in their proposed records for the Panel Pack for Panel Hearing and submitting them to the NMMRC. Counsel shall exchange complete medical literature. The Parties should collaborate with each other to assure there are no duplicative records in the Final Panel Packs.
- B. Counsel for the Patient shall provide medical records and medical articles and textbooks (or medical literature) for the Patient's portion of the Panel Pack to the Commission and to opposing counsel not later than fifteen (15) days prior to the Panel Hearing. The Panelists and Chair are not required to review medical literature in advance of the Panel Hearing. Counsel should consider highlighting pertinent and relevant portions of the literature and be prepared to point out those portions to Panelists and Chair at the Panel Hearing.
- C. Counsel for the Provider shall provide any additions to the Panel Pack, including medical literature, to the Commission and opposing counsel no later than ten (10) days prior to the Panel Hearing.
- D. Medical records not obtained by the Commission and not timely provided to the Commission and opposing counsel will not be provided to the panelists unless stipulated to by counsel. Medical literature not provided as required above will not be provided to Panelists unless stipulated by counsel. Objections to medical literature made prior to the Panel Hearing will be ruled upon by the Executive Director or the Director's designee. Objections made at the time of the Panel Hearing will be ruled upon by the Panel Chair.
- E. Each party's proposed Pack of Records should not exceed fifty (50) pages in most instances. However, the Commission will not disallow more records if a Party feels such records are necessary for a proper presentation to the Panel.
- F. The final Panel Pack will be provided to the Panelists no later than three (3) days prior to the Panel Hearing absent extraordinary circumstances.

VII. Cooperation by Attorneys Before & During Panel Hearings

- A. The panel process is to be conducted in an atmosphere free of intimidations that may accompany a court setting. *see: Salazare v St. Vincent Hosp.*, 96 NM 409.

VIII. Applications Involving Multiple Providers From Different Disciplines

- A. The Commission will avoid multiple hearings of the same factual evidence whenever possible. Therefore, cases involving multiple Providers will normally be consolidated.
- B. If any Party contends a separate hearing is required for their client, they must advise the Commission and opposing counsel at least fifteen (15) days before the Panel Hearing. Notice must include the reasons why the request is being made. Opposing counsel must either concur or object within twelve (12) days of the Panel Hearing. Whether concurrence or objection is made, the Executive Director will rule upon such a request with or without a hearing.
- C. Applications against Providers of different disciplines will be scheduled in a single Panel Hearing absent extraordinary reasons. Any objection to a single hearing must be made within ten (10) days after the filing of the Answer. Objections will be ruled upon by the Executive Director.
- D. The Commission will endeavor to have medical professionals from each discipline as Panelists on any hearing involving multiple different disciplines. The Commission considers MD and DO to embrace the same standards of care and therefore makes no distinction between the two. For disciplines other than MD and DO, Panelists will be solicited from the respective disciplines.

IX. Unavoidable Circumstances Where Less Than Six (6) Panelists Are Present for Hearings

- A. On rare occasion, the Panel Hearing may have less than six (6) panelists due to a last-minute cancellation or no show. The Parties are encouraged to participate in the Panel Hearing if they determine that to do so would not unfairly prejudice their client. If either Party will not stipulate to less than six (6) panelists, the Panel Hearing will be vacated and rescheduled.

X. Panelist Selection

- A. Panelists will be selected pursuant to the Medical Malpractice Act. All efforts will be made to find a medical provider practicing in the same specialty as the Provider(s) named in the Application. However, a Panel Hearing will take place if after these efforts, no similar specialist can be located who is willing to serve.

XI. Hearing Procedures

- A. §41-5-19 (C) permits either Party at its own expense to have a court reporter or recording device at the Panel Hearing to record the testimony of the Parties. The Commission does not allow video recording. Any type of allowed recording must include the testimony of all who testified. Any recording done by counsel and not a Court Reporter must be provided to opposing counsel upon request. If a Court Reporter is retained by one party, the other party will be allowed to purchase a copy of the transcript.
- B. §45-5-19 (B) describes what is allowed during the Panel Hearing. This includes medical records in the accepted Panel Pack, medical literature in the accepted Panel Pack,

arguments of counsel and fact witness testimony under oath or sworn written statements of fact. This includes treating Providers who can testify as fact witnesses only. No expert testimony is allowed. Parties are allowed to do an Opening and examine the witnesses called. At the conclusion of the presentations the parties may make a brief Closing Statement Argument.

- C. Hearings are not open to the public. Only the Parties and their counsel, witnesses and court reporters are allowed to attend. Legal staff of the parties' counsel may attend if they are participating in the presentation or logistics of the presentation. Any person desiring to attend to monitor or observe the Panel Hearing must be identified in advance of the hearing. If there is no objection, attendance will be allowed. If there is an objection, they will not be allowed to attend.
- D. Appearance by the parties at the Panel Hearing is encouraged. If the Applicant and Provider(s) can testify and can provide relevant information to Panelists, they should attend and be available for questions. Panelists are frustrated when asked to make decisions at the conclusion of the Panel Hearing if their questions remain unanswered.
- E. Examination of the opposing party(s)' witnesses shall be conducted by written questions submitted to the Panel Chair. The Panel Chair will read the questions as written without editorializing unless the Panel Chair deems the question objectionable or vague and confusing. In such instances, the Panel Chair will attempt to clarify the question. If counsel objects to the rephrasing, Panel Chair will join the attorneys in a breakout room to discuss and resolve the objection.
- F. To avoid confrontation between Parties and lawyers, the Parties and witnesses who attend will not be allowed in the room with the lawyers and panelists. The Parties may attend with the lawyers and panelists while their counsel is presenting the case. Witnesses who are not Parties may only attend (when called as a witness and) only while they are testifying.
- G. The Commission will follow the New Mexico Rules of Evidence in ruling on objections with reasonable flexibility to allow case facts to be fully presented to the Panel. The Panel Chair can allow hearsay upon determination that to do so is not unduly prejudicial.
- H. The lawyers should try to refrain from leading questions to their witnesses except to establish background information.
- I. Questions requesting expert opinion will not be allowed by the lawyers or Panelists.

XII. Panel Deliberations

- A. At the conclusion of the presentations, the Panelists will meet outside the presence of the Parties and their counsel. Panelist deliberations are governed by §41-5-20 and are confidential.
- B. §41-5-23 describes the process in the event the Patient prevails on both questions asked of the Panelists.

XIII. Data Compilation

- A. By January 31 of each year the Commission shall submit a report to the Supreme Court that consists of the following data:
 - 1) The number of submitted Applications.
 - 2) Applications rejected and reasons therefore.
 - 3) Providers named and deemed qualified as to discipline.
 - 4) Applications accepted, and then withdrawn and the reason(s) therefore.

- 5) Applications accepted and then withdrawn by stipulation of the lawyers.
- 6) Pro se Application numbers
- 7) Information reflecting the compliance by the Commission concerning statutory guidelines and guidelines reflected in these Policies and Procedures, including reasons for any non-compliance.
- 8) Commission expenditures for the year
- 9) Panelists selected, recruitment of Panelists and the comments by Panelists concerning the Panel and needed change(s).
- 10) Insurance carriers for Qualified Health Care Providers must comply with the requirements of the Medical Malpractice Act. As such the carriers for the Providers are required to advise the Commission of the outcome of any Application after the Commission has completed its duties with the Application, whether due to the withdrawal of the Application, due to Stipulation of the Parties or otherwise. This includes whether a lawsuit was filed, whether a settlement occurred before the filing of a lawsuit, any settlement that occurs after the filing of a lawsuit, trials, and trial outcomes. The settlement amount or verdict amount is not required to be reported.