



NEW MEXICO MEDICAL REVIEW COMMISSION

By USPS Certified Mail & Electronic Delivery

Honorable Shannon Bacon, Chief Justice
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RE: New Mexico Medical Review Commission – 2023 Annual Report

Chief Justice Bacon:

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”). This constitutes the annual report of the New Mexico Medical Review Commission (herein “the Commission”) for the period of January 1, 2023, through December 31, 2023.

I. Legislative Changes

In January 2021 the Legislature enacted sweeping changes to the Act that have had direct effect on the Commission and the data that will be contained within this report. The number of Applications since the new Act have dramatically dropped. This is due to hospitals, their outpatient clinics and employees no longer being eligible to participate in the panel process for care received after July 1, 2021. We are also seeing Stipulations by both counsels allowed under the new Act changes to not have panels despite the statutory right. Despite this, the Commission remains busy due to the need to carefully evaluate all Applications for jurisdiction and to research entities to ensure they are entitled to the panel process. Of the changes made, the following changes have had a major impact on the Commission’s operation and jurisdiction:

- i. Effective January 1, 2022, amendment to NMSA 1978 §41-5-3 (D) was amended changing the definition to:

“hospital” means a facility licensed as a hospital in this state that offers in-patient services, nursing or overnight care on a twenty-four-hour basis for diagnosing, treating and providing medical, psychological or surgical care for three or more separate persons who have a physical or mental illness, disease, injury or rehabilitative condition or are pregnant and may offer emergency services. "Hospital" includes a hospital's parent corporation, subsidiary corporations or affiliates if incorporated or registered in New Mexico; employees and locum tenens providing services at the hospital; and agency nurses providing services at the hospital;”

- ii. Effective January 1, 2022, amendment to NMSA §41-5-3 (E) was amended changing the definition to:

“independent provider” means a doctor of medicine, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist, physician's assistant, certified nurse practitioner, clinical nurse



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specialist or certified nurse-midwife who is not an employee of a hospital or outpatient health care facility. "Independent provider" includes a business entity that is not a hospital or outpatient health care facility that employs or consists of members who are licensed or certified as doctors of medicine, doctors of osteopathy, chiropractors, podiatrists, nurse anesthetists, physician's assistants, certified nurse practitioners, clinical nurse specialists or certified nurse-midwives and the business entity's employees"

- iii. Effective January 1, 2022, amendment to NMSA §41-5-3 (J) was amended changing to the definition to:

"outpatient health care facility" means an entity that is licensed pursuant to the Public Health Act as an outpatient facility, including ambulatory surgical centers, free-standing emergency rooms, urgent care clinics, acute care centers and intermediate care facilities and includes a facility's employees, locum tenens providers and agency nurses providing services at the facility. "Outpatient health care facility" does not include independent providers;"

- iv. Effective January 1, 2022, amendment to NMSA 1978 §41-5-14 (A) was amended as follows:

"The "New Mexico medical review commission" is created. The function of the New Mexico medical review commission is to provide panels to review all malpractice claims against independent providers who are natural persons covered by the Medical Malpractice Act."

- v. Effective July 1, 2021, amendment to NSMA 1978 §41-5-14 (C) was amended as follows:

"The only cases that a panel will consider are cases involving an alleged act of malpractice occurring in New Mexico by an independent provider qualified under the Medical Malpractice Act. Beginning July 1, 2021, cases involving an alleged act of malpractice by a hospital or outpatient health care facility shall not be considered and such claims shall not be filed with the New Mexico medical review commission."

- vi. Effective January 1, 2022, amendment to NSMA 1978 §41-5-15 (A) was amended as to include the following provision:

"No malpractice action may be filed in any court against a qualifying independent provider... before application is made to the New Mexico medical review commission and its decision is rendered; provided, however, that an independent provider and the patient may stipulate to forego the panel process."

- vii. Effective January 1, 2022, amendment to NSMA 1978 §41-5-17 (C) was amended as to include the following provision:

"In cases where there are multiple defendants, a single combined panel shall review the claims against all party defendants. At the discretion of the panel chair, a hearing involving multiple defendants may include fewer than three panelists from the independent provider's profession and fewer than three lawyer panel members per defendant."



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II. Director of Medical Review Commission

The previous Acting Director of the New Mexico Medical Review Commission, Michael Rueckhaus, submitted his resignation and served his final day as Acting Director of the Commission on September 28, 2022. Acting Director Rueckhaus was appointed following the retirement of the first Director, David Gallagher in 1984.

I was appointed and assumed my duties as Director on October 4, 2022.

III. New Mexico Medical Review Commission Administration & Staff

The Commission is currently located at the offices of the New Mexico Medical Society. There has been a longstanding relationship between the Commission and the Medical Society since the Act creating the panel process was passed and signed into law. The administrative functions of the Commission currently are fulfilled pursuant to a contract with the New Mexico Medical Society entered in 2023 after being selected by the committee evaluating a required Request For Proposal. The Request For Proposal was required by state law long ago and surprisingly one had never been issued since the Commission was created. Previously there were verbal agreements between the Medical Society and Mr. Rueckhaus. The Commission originally went to a public Request For Proposal in August 2022. However, that request was subsequently withdrawn due to there being only one responding entity. I evaluated the Request For Proposal issued and determined it was vague and confusing for entities considering a response, but not having significant experience working with the Commission. The Commission revised the Request to make it easier to respond for entities not entirely familiar with the operation of the Commission. We received two responses, but the New Mexico Medical Society's was significantly more detailed, responsive and less expensive.

The current contract was written to allow the Commission to maintain independence from the New Mexico Medical Society which was a concern raised by attorneys who represented Applicants. The agreement has resulted in a more efficient operation, I believe a more open and transparent process and reduced expenses to operate the Commission.

The Commission is currently staffed by two administrative employees, Jessica Lagoda, and Benjamin Maggard. Ben is employed by the New Mexico Medical Society as a full-time employee with employee benefits consistent with similar organizations. Jessica resigned as an employee with the Medical Society but continues working with the Commission as a contractor with the Medical Society. The New Mexico Medical Society also utilizes two employees who serve part time as oversight to Ben and Jessica and for accounting purposes. Ms. Lagoda and Mr. Maggard are utilized for the Commission to oversee the day-to-day operations and management of the Commission. Both are extremely helpful and competent in handling the day-to-day affairs of the Commission.

The goals for the Commission in 2023 were to create a visible separation from the Medical Society, to create a process that Applicants and Providers felt was fair and consistent regardless of Panel Chair presiding and more cost efficient. Although I was not charged with evaluating the cost efficiency of the Commission, I felt it my responsibility from my years doing this for my former law firm.

To achieve the goal of separation, the Commission created its own website in 2023. The website has public information as well as the Forms and Rules and Regulations for the panel process to allow counsel for the Applicants to easily navigate the process. Previously, Commission and panel information could only be



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found by accessing the Medical Society's web page and searching for the link. I felt this created the assumption that the Commission was an arm of the Medical Society, so the change was made. We also created email addresses for the Commission and those who assist the Commission. This again was to make it clear the Commission was not a part of Medical Society. Previously the email addresses were Medical Society addresses. We purchased a separate zoom account for the Commission rather than pay for zoom through the Medical Society. We purchased laptops for Ben and Jessica rather than use their Medical Society issued laptops to make sure the data was separate from the Medical Society. We are also finalizing installing up to date software to protect sensitive medical information as required by HIPPA. We will continue to utilize the Medical Society server to store data due to the enormous expense of maintaining that information ourselves, and because the RFP required that storage from the contracting party.

In order to achieve the goal of needed openness and fairness pursuant to the Ad Hoc Committee report, we made several changes to how the process works. First, I assembled an excellent panel to completely rewrite the Rules and Regulations for the Commission panel process. Two Applicant attorneys, two Provider attorneys, a Panel Chair and two Medical Providers worked with me to rewrite and approve new Rules and Regulations in 2023. These rules make the process clear and in my opinion fair to both sides. They make it clear the Review Commission is separate from the Medical Society. The Panel Chairs also now speak when necessary to discuss things that occur in panel hearings and how we should address unusual situations with the same approach so there is no feeling the process is different depending on who the Panel Chair might be. I also personally evaluate all applications and communications regarding Applications to make sure there are no unusual issues that require a consistent approach, meaning one person should make those decisions. When that occurs, I either make a decision which is then submitted to the parties in writing, or we hold informal telephone hearings to discuss and hopefully resolve the issue. This approach has eliminated issues surfacing at panel which requires the Chair to decide about the process. Panel Chairs roles are to conduct the hearing, not address process issues.

The way I developed the Request For Proposal allowed the awarded party to devote resources as needed for the panel, rather than have resources they paid for that might not be utilized. This was my goal since the volume of business the panel conducts is so variable. The Medical Society can charge as resources are utilized, and the Commission is only required to pay for resources provided at any given time. This has resulted in cost savings thereby allowing the Commission to operate despite fluctuating work requirements. The statutory budget for the Commission will not be required to be increased for the foreseeable future.

IV. The New Mexico Medical Review Commission Expenses To Operate

The biggest expense charged to the Commission is for one full-time administrative employee (Ben) and one who works under contract (Jessica). Both individuals bill their actual time incurred to the Commission. I decided it would be easier for those wanting to respond to the RFP and for the party awarded the contract to determine a billing rate for employees needed to serve the Commission, rather than a set fee for the work. This was due to changing needs that the Act has created. In addition to Ms. Lagoda and Mr. Maggard, there is a roughly ¼ salary and benefit expense for a Medical Society employee who handles the accounting for the Medical Society. That person handles and process the invoices and expenses attributable to the Commission's business, and forwards them to the Office of the Superintendent for Insurance for reimbursement. Under the contract that person bills their time as utilized for Commission business. The total expense for 2023 for these three individuals which includes their benefits, and the contract expense



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for space, technology and other assistance the NMMS provides was approximately \$275,000 (we have one invoice for December Panel Chair time outstanding and not included).

It would be difficult if not impossible for the Commission to hire and supervise its own employees. I assume the Commission would need to follow State personnel rules and requirements. There is no staff with the Commission who can negotiate and understand the rules and regulations to do this. Furthermore, I don't think it is feasible for a contracted Director to hire and supervise State employees. The current arrangement of contracting with an outside entity for administrative help has worked well, and I feel that should continue.

I learned there was no document management system in place. I won't go into why. The staff wanted such a system, as did the Medical Society to keep Commission records separate and to have a software management system to keep better records and statistics. We did an evaluation and determined what we believe to be the best system for the Commission. I purchased that software. It has been installed and we are still in the learning phase to fully utilize what this software can do for the Commission. The goal is to have a system wherein all information for each Application is consistently organized. And easily accessed by staff and the Panel Chairs.

V. Current Panel Operation Under The New Act

Pursuant to NMSA 1978 §41-5-17(E), two attorneys act as delegates and serve as "chairs" for hearings in addition to me. Those attorneys continue to be Judith Durzo, JD, and William Herring, JD. Both have extensive experience as chairs and with the Commission.

Howard Thomas, JD, was appointed as the State Bar Chair. Mr. Thomas assists with JD panelists for the panels and works with Commission staff to recruit new attorney volunteers. Obtaining volunteers remains a challenge. Mr. Thomas is exploring additional advertisement in the Bar Bulletin and emphasizing the MCLE credit that can be earned as well as the valuable lessons to be learned for practicing attorneys. He is also going to work with the Law School Dean to involve law students as observers for their benefit as well as to hope they will then want to volunteer once they are licensed lawyers.

Larry Levy, MD, and Neal Shadoff, MD, serve as co-chairs for the New Mexico Medical Society. Both Dr. Shadoff and Dr. Levy have extensive experience as volunteers for the Commission prior to their appointment as co-chairs. They assist with MD and DO panelists for panels involving those specialties and assist in working with presenting parties who prevail in locating expert witnesses per statute. Both expressed at our Annual Meeting the difficulty getting volunteers. The hospitals are no longer involved in panels, and therefore the administrations for these entities don't seem to be terribly interested in submitting information and our needs to their employed providers. Despite zoom hearings making attendance as a volunteer very easy and convenient, the co-chairs are struggling.

There are other professionals who are not MDs or DOs who are entitled to panel hearings. Each group has a Chair to assist with panelists. We struggle to obtain volunteers from these groups as well. These groups don't have the long history with the panel process and their members need more education about the process and the need for panelists.

The Commission continues to rely upon the volunteer professional panelists who serve on the Panel. The medical volunteers have and continue to receive continuing medical education credits for service on the



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Panels. Attorney volunteers were finally awarded the ability to earn continuing legal education last year, and can earn one (1) general CLE credit per panel hearing for total of four (4) each calendar year. I recommend the State Bar routinely publish the need for volunteers and the fact after serving a CLE credit is earned.

VI. Data

The Commission has historically kept a record of various details of the Commission's operations including the number of applications filed, hearings held, etc. Previous reports also contained data that was maintained outside the Commission. The data previously maintained outside the Commission is no longer available to the Commission for use in this report.

The Commission maintains detailed records of all hearings, votes, applications, and all other work completed by the Commission, but for the purposes of this report, only general overviews are provided.

For calendar year 2023, the Commission tracked the following data (also seen below in Figures., 1.2, 2.1, 2.2). The data is for 2023 only. Therefore, it includes Applications filed in 2023, but the hearing and other data may be from Applications filed in 2022 and some Applications filed in 2023 will not have data concerning hearings in 2024.

Applications	
Total Number of Applications Received	135
Total Number of Applications Returned – No Jurisdiction/Not Qualified	42
Total Number of Applications Withdrawn After Acceptance	13
Hearings	
Total Number of Hearings Waived by Parties (<i>Bypass Stipulation on File with Commission</i>)	32
Total Number of Hearings Held	85
Hearings With No Negligence Found	59
Hearings With Negligence Found	26
Hearings with Injury Found	23
Hearings with No Injury Found	3

VII. Efforts To Improve the Commission And It's Mission

There was a backlog of work to handle when I assumed this role. The Medical Society staff was left in limbo as to certain items that needed to be addressed. Therefore, staff and I focused initially on handling the backlog. Everything was up to date in 2023. There are no outstanding issues.

In the 2022 report I discussed the many Pro Se Applications that had never been fully handled. A Pro Se under the Act does not appear to be entitled to file an Application or proceed to panel. As a private attorney I felt there was no prohibition to a Pro Se filing a Complaint in Court against a Qualified Healthcare Provider, even if the provider would otherwise be entitled to a panel hearing. However, I don't believe that



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issue has ever been decided by our appellate courts. I do feel District Court Judges who aren't terribly familiar with the Act struggle with that issue. I learned that Mr. Rueckhaus would receive Pro Se Applications and appropriately advise the Pro Se applicant in writing the reason the Application could not be accepted. However, I also learned Mr. Rueckhaus would advise he would extend the timeframe for a Pro Se to amend their Application to be filed by an attorney. For some he would issue several extensions. We found there were several Applications in which extensions were granted with no follow up action by the Commission. My concern was the Commission possibly misleading a Pro Se that the statute was being tolled, or that they had some amount of time to get an attorney and their claim for medical negligence would not be waived. I felt a Pro Se applicant needed to be clearly advised of the Act, the fact the Commission determined they could not proceed as a Pro Se, and that the Commission was not advising them whether they needed to proceed with the Commission in order to present their claim in court. We advised any such determinations should be resolved by a Judge. The goal was to make sure no party who felt aggrieved by the medical community was misled and waived their rights. Therefore, we developed a new letter and made sure any Applications still possibly pending were addressed, and any new Applications were well informed. This also occurred in 2023 and I am unaware of any legal issues or concerns as a result.

We instituted guidelines to ensure panel applications were received and promptly evaluated for independent provider and QHP status, that records were promptly requested and received, and hearings were set within 60 days as required. The only exceptions were case continuance requests that both sides agreed to due to conflicts with trials or issues with the Commission being able to obtain necessary medical records. Obtaining records has and continues to be a challenge. Ideally the Commission could use subpoena power, but that change to the Act is unlikely. We also continue to notify carriers that are late assigning cases to defense lawyers thereby causing delay that this will no longer be allowed, and cases will be set with or without a defense lawyer. The problem appears to have been solved. The vast majority of Applications are set within the 60 days, and when not, counsel for both sides has agreed a new setting is appropriate. When that agreement occurs, I require both attorneys to immediately get with staff and a new setting occurs as soon as we have an open date.

VIII. Commission 2024 Goals

In 2023 I had wanted to improve a video used for CLE years ago that explained the panel process for those new to the panel. The video needed to be geared more to the professional providers than the lawyers. The lawyers tend to understand the process and the rules. The providers in the past wanted to ask expert questions and make speeches about the facts and medicine as opposed to asking questions. I felt if providers were given a video to view before their first panel, and even given initially to those who have sat on panels, we could improve the process and avoid antagonizing providers by disallowing certain questions, or avoid embarrassing them. However, the push to do this has stalled because the new Rules and Regulations which are directed to this problem seem to have stopped the problem. The panelists now tend to be very experienced panelists and they read the Rules and Regulations.

The Commission needs to determine why certain attorneys chose not to go before the panel despite the fact their clients are entitled to this process. The revisions to the Act allow attorneys to stipulate not to have a



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panel. This makes little sense to me, but I was not involved in that change in the Act. Over one fourth of filings which were accepted resulted in these waivers. We also see Providers testify in perhaps twenty five percent of panels. This is frustrating to the panelists. They want to hear from the Provider and be able to ask questions about care not evident in the records. In my opinion having the Provider testify is critical to the evaluation of the claim by the defense attorney. Counsel needs to prepare the client and then see how they do in a setting less stressful than a deposition or trial. If they perform poorly at panel, counsel knows what work is necessary to improve things in deposition and trial. Counsel also might see that the client will not be able to do well in a stressful deposition and trial and that resolution might be best. It also is an opportunity to have your client learn perhaps their care wasn't up to par if three similar providers suggest there was negligent care. Finally, if your client testifies and does an excellent job and explains things clearly, it is an opportunity to perhaps avoid a lawsuit assuming a competent and experienced malpractice lawyer filed the Application to further evaluate their claim. It also is in the best interest of the Provider to testify if they want to prevail. I chaired several panels where it was clear to me the reason the Provider did not prevail was due to the inability of the panel to hear from and question the Provider. If the Act is in existence and panel screening was negotiated between all parties in the 80s as a necessary component of the Act, I don't understand why the legislature agreed panels could be waived. My goal is to preserve the panel process, and therefore I am requesting any party who elects to forgo the panel to advise me why. This will provide useful information to hopefully improve the process, and others will have information as to the need for panel screening in the Act.

To secure more provider panelists our MD Chairs will meet with Presbyterian, Lovelace and UNMH, all of whom aren't entitled to the panel hearings, to expand the list of willing panelists. The hospitals have not had many volunteers and we understand part of that may be due to the fact they aren't entitled to hearings as employees.

The Rules was asked to determine what would be an incentive to go to panel for both plaintiff and defense lawyers. The primary carrot for the plaintiff was the assistance in getting an expert if the plaintiff prevailed. However, I have learned it is very difficult to find a NM expert even with the assistance of our MD Committee members. If found, plaintiff counsel notes they aren't always well qualified or good experts. The Commission Committee MDs can look outside the state with plaintiff counsel, but plaintiff counsel can easily do that on their own. I also know from experience that most attorneys who do this work have obtained an expert for screening before filing the Application. Therefore, that provision of the Act from the 80s was well intentioned, but really is no longer helpful.

On the defense side, a win really gets the defense nothing. On rare occasions, the plaintiff may decide not to sue, but the belief among the defense is that rarely happens. The plaintiff often does a limited presentation with no client, which doesn't help the defense with theories and how to defend. If the defendant loses, they might be surcharged by their insurance. My goal is to continue to develop ideas that might make this process have merit to both sides. My best suggestion to date is if the Applicant has their client present (if applicable) and prevails, the Provider and carrier must agree to mediate within 60 days of the panel with an experienced malpractice mediator. I believe this would encourage the Applicant's counsel to better prepare and take the panel hearing more seriously. If the Applicant's counsel takes things seriously, my hope is the Provider's counsel will as well. For the Provider to have more incentive, that is more difficult. If defense counsel doesn't see the benefit of a Panel hearing and being able to spend considerable time with their client preparing and seeing the strengths and weaknesses in the case in preparation and during the Panel Hearing,



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I am not sure what else can be offered. I handled significant numbers of Panel hearings and found them extremely beneficial.

Another goal is to continue to improve the data collection of the Commission. In part this will be done with the Case Management Program. Currently we have data on the number of filings with the Commission. We will report on: 1. the number filed 2. the number determined to not be entitled to a hearing (both no panel hearing needed or some providers get a hearing and others named do not) 3. claims that are filed, but before filing are stipulated to not go to panel 4. results of claims that were stipulated to not have a panel (was the claim filed in court, settlement, trial, result) 6. the panel results by vote (6-0, 5-1 etc.) 7. correlation of panel results with ultimate outcomes of cases (was the case filed, settlement, trial, result). Some of this will require cooperation by lawyers and insurance carriers, as well as the OSI PCF folks.

Respectfully,

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/s/ Ned Shepherd, JD _____

Ned Shepherd
Director