

1 SENATE BILL 239

2 **55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021**

3 INTRODUCED BY

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5 and Gregory A. Baca and Martin Hickey  
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10 AN ACT

11 RELATING TO MEDICAL MALPRACTICE; AMENDING THE MEDICAL  
12 MALPRACTICE ACT; CLARIFYING THE DEFINITION OF "HEALTH CARE  
13 PROVIDER"; RAISING RECOVERABLE LIMITS; PROHIBITING DISCLOSURE  
14 OF CERTAIN CONFIDENTIAL INFORMATION.  
15

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. Section 41-5-3 NMSA 1978 (being Laws 1976,  
18 Chapter 2, Section 3, as amended) is amended to read:

19 "41-5-3. DEFINITIONS.--As used in the Medical Malpractice  
20 Act:

21 A. "advisory committee" means the Medical  
22 Malpractice Act advisory committee created pursuant to Section  
23 16 of this 2021 act;

24 B. "business entity" means a corporation, limited  
25 liability company, association, joint venture or legal or

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1 commercial entity;

2 [A.] C. "health care provider" means a person  
3 [~~corporation, organization, facility or institution licensed or~~  
4 ~~certified by this state to provide health care or professional~~  
5 ~~services as a doctor of medicine, hospital, outpatient health~~  
6 ~~care facility, doctor of osteopathy, chiropractor, podiatrist,~~  
7 ~~nurse anesthetist or physician's assistant] as defined in  
8 Subsection E of Section 12-2A-3 NMSA 1978 licensed or certified  
9 by New Mexico to provide health care or professional services  
10 as a hospital or outpatient health care facility, including  
11 persons identified in Paragraphs (2) through (9) of Subsection  
12 B of Section 59A-22-32 NMSA 1978 or licensed pursuant to the  
13 Emergency Medical Services Act; provided that if a person  
14 identified in Paragraphs (2) through (9) of Subsection B of  
15 Section 59A-22-32 NMSA 1978 or licensed pursuant to the  
16 Emergency Medical Services Act is employed by a business entity  
17 that provides health care services primarily through persons  
18 identified in Paragraphs (2) through (9) of Subsection B of  
19 Section 59A-22-32 NMSA 1978, such business entity is a health  
20 care provider;~~

21 [B.] D. "insurer" means an insurance company  
22 engaged in writing health care provider malpractice liability  
23 insurance in this state;

24 [C.] E. "malpractice claim" includes any cause of  
25 action arising in [~~this state~~] New Mexico against a health care

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1 provider for medical treatment, lack of medical treatment or  
2 other claimed departure from accepted standards of health care  
3 [~~which~~] that proximately results in injury to the patient,  
4 whether the patient's claim or cause of action sounds in tort  
5 or contract, and includes [~~but is not limited to~~] actions based  
6 on battery or wrongful death; "malpractice claim" includes all  
7 claims for damages from all persons arising from all harm to a  
8 single patient, no matter how many qualified health care  
9 providers or errors or omissions contributed to the harm;  
10 "malpractice claim" does not include a cause of action arising  
11 out of the driving, flying or nonmedical acts involved in the  
12 operation, use or maintenance of a vehicular or aircraft  
13 ambulance;

14 [~~D.~~] F. "medical care and related benefits" means  
15 all reasonable medical, surgical, physical rehabilitation and  
16 custodial services and includes drugs, prosthetic devices and  
17 other similar materials reasonably necessary in the provision  
18 of such services;

19 G. "occurrence" means all claims for damages from  
20 all persons arising from all harm to a single patient, no  
21 matter how many qualified health care providers or errors or  
22 omissions contributed to the harm;

23 [~~E.~~] H. "patient" means a natural person who  
24 received or should have received health care from a licensed  
25 health care provider, under a contract, express or implied;

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1 [and]

2 I. "qualified health care provider" means a health  
3 care provider that has satisfied all applicable requirements  
4 set forth in Section 41-5-5 NMSA 1978; and

5 [~~F.~~] J. "superintendent" means the superintendent  
6 of insurance of this state."

7 **SECTION 2.** Section 41-5-5 NMSA 1978 (being Laws 1992,  
8 Chapter 33, Section 2) is amended to read:

9 "41-5-5. QUALIFICATIONS.--

10 A. To be qualified under the provisions of the  
11 Medical Malpractice Act, a health care provider shall:

12 (1) establish its financial responsibility by  
13 filing proof with the superintendent that the health care  
14 provider is insured by a policy of malpractice liability  
15 insurance issued by an authorized insurer in the amount of at  
16 least [~~two hundred thousand dollars (\$200,000)]~~ two hundred  
17 fifty thousand dollars (\$250,000) per occurrence [~~or for an~~  
18 ~~individual health care provider, excluding hospitals and~~  
19 ~~outpatient health care facilities, by having continuously on~~  
20 ~~deposit the sum of six hundred thousand dollars (\$600,000) in~~  
21 ~~cash with the superintendent or such other like deposit as the~~  
22 ~~superintendent may allow by rule or regulation; provided that~~  
23 ~~in the absence of an additional deposit or policy as required~~  
24 ~~by this subsection, the deposit or]~~ and for a health care  
25 provider other than a hospital, outpatient health care facility

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1 or business entity, the policy shall provide coverage for not  
2 more than three [~~separate~~] occurrences; and

3 (2) pay the surcharge assessed on health care  
4 providers by the superintendent pursuant to Section 41-5-25  
5 NMSA 1978.

6 B. For [~~hospitals or outpatient health care~~  
7 ~~facilities electing to be covered under the Medical Malpractice~~  
8 ~~Act, the superintendent shall determine, based on a risk~~  
9 ~~assessment of each hospital or outpatient health care facility,~~  
10 ~~each hospital's or outpatient health care facility's base~~  
11 ~~coverage or deposit and additional charges for the patient's~~  
12 ~~compensation fund. The superintendent shall arrange for an~~  
13 ~~actuarial study, as provided in Section 41-5-25 NMSA 1978]~~ a  
14 hospital, outpatient health care facility or business entity  
15 electing to be covered under the Medical Malpractice Act, the  
16 superintendent shall determine, based on an annual risk  
17 assessment of the hospital, outpatient health care facility or  
18 business entity, each hospital, outpatient health care facility  
19 or business entity's deposit or additional charges for the  
20 patient's compensation fund. The superintendent shall arrange  
21 for an annual actuarial study, as provided in Section 41-5-25  
22 NMSA 1978.

23 C. A health care provider not qualifying under this  
24 section shall not have the benefit of any of the provisions of  
25 the Medical Malpractice Act in the event of a malpractice claim

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1 against it.

2 D. Hospitals and outpatient health care facilities  
3 may demonstrate financial responsibility in the amounts set  
4 forth in Subsection A of this section through use of a claims-  
5 made policy; provided that hospitals and outpatient health care  
6 facilities shall purchase prior acts coverage at any time there  
7 would be a gap in coverage without such prior acts coverage.

8 E. When a claims-made policy ends and another  
9 begins, prior acts coverage must be purchased dating back to  
10 the first date claims-made coverage was used to establish  
11 financial responsibility.

12 F. When a claims-made policy ends and another  
13 claims-made policy does not begin, coverage must be purchased  
14 to cover claims made subsequent to the end of the claims-made  
15 policy to establish financial responsibility.

16 G. A hospital or outpatient health care facility  
17 that does not comply with the requirements set forth in  
18 Subsections D through F of this section is not entitled to the  
19 protections of the Medical Malpractice Act."

20 SECTION 3. Section 41-5-6 NMSA 1978 (being Laws 1992,  
21 Chapter 33, Section 4) is amended to read:

22 "41-5-6. LIMITATION OF RECOVERY.--

23 A. Except for punitive damages and medical care and  
24 related benefits, the aggregate dollar amount recoverable by  
25 all persons for or arising from any injury or death to a

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1 patient as a result of malpractice shall not exceed [~~six~~  
2 ~~hundred thousand dollars (\$600,000)] seven hundred fifty  
3 thousand dollars (\$750,000) per occurrence. In jury cases, the  
4 jury shall not be given any instructions dealing with this  
5 limitation.~~

6 B. The value of accrued medical care and related  
7 benefits shall not be subject to the [~~six hundred thousand~~  
8 ~~dollar (\$600,000)] seven-hundred-fifty-thousand-dollar  
9 (\$750,000) limitation.~~

10 C. Monetary damages shall not be awarded for future  
11 medical expenses in malpractice claims.

12 D. A health care provider's personal liability is  
13 limited to [~~two hundred thousand dollars (\$200,000)] two  
14 hundred fifty thousand dollars (\$250,000) for monetary damages  
15 and medical care and related benefits as provided in Section  
16 41-5-7 NMSA 1978. Any amount due from a judgment or settlement  
17 in excess of [~~two hundred thousand dollars (\$200,000)] two  
18 hundred fifty thousand dollars (\$250,000) shall be paid from  
19 the patient's compensation fund, as provided in Section 41-5-25  
20 NMSA 1978.~~~~

21 E. For the purposes of Subsections A and B of this  
22 section, the [~~six hundred thousand dollar (\$600,000)] seven-  
23 hundred-fifty-thousand-dollar (\$750,000) aggregate amount  
24 recoverable by all persons for or arising from any injury or  
25 death to a patient as a result of malpractice shall apply only~~

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1 to malpractice occurring on or after ~~[April 1, 1995]~~ July 1,  
2 2021."

3 SECTION 4. A new section of the Medical Malpractice Act,  
4 Section 41-5-6.2 NMSA 1978, is enacted to read:

5 "41-5-6.2. [NEW MATERIAL] LIMITATION ON REMEDIES--  
6 APPLICABILITY OF MEDICAL MALPRACTICE ACT--VICARIOUS  
7 LIABILITY.--

8 A. If a patient is injured in the provision of  
9 health care by an employee or agent of a hospital, outpatient  
10 health care facility or business entity that has qualified in  
11 accordance with the provisions of Section 41-5-5 NMSA 1978, and  
12 the employee or agent does not meet the definition of "health  
13 care provider" set forth in Subsection C of Section 41-5-3 NMSA  
14 1978, any resulting malpractice claim may only be brought  
15 against the hospital, outpatient health care facility or  
16 business entity.

17 B. If a patient is injured in the provision of  
18 health care by an employee or agent of a hospital, outpatient  
19 health care facility or business entity and the employee or  
20 agent meets the definition of "health care provider" set forth  
21 in Subsection C of Section 41-5-3 NMSA 1978, but the employee  
22 or agent has chosen not to qualify in accordance with the  
23 provisions of Section 41-5-5 NMSA 1978, the employee or agent  
24 is not entitled to the protections of the Medical Malpractice  
25 Act.

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1           C. If a qualified health care provider is sued  
2 under a theory of vicarious liability for the actions of an  
3 employee or agent of that qualified health care provider who  
4 meets the definition of "health care provider" set forth in  
5 Subsection C of Section 41-5-3 NMSA 1978, but the employee or  
6 agent has chosen not to qualify in accordance with the  
7 provisions of Section 41-5-5 NMSA 1978, the qualified health  
8 care provider is entitled to the protections of the Medical  
9 Malpractice Act for the claims of vicarious liability, as well  
10 as any direct liability claims."

11           **SECTION 5.** Section 41-5-7 NMSA 1978 (being Laws 1992,  
12 Chapter 33, Section 5, as amended by Laws 1992, Chapter 33,  
13 Section 6) is amended to read:

14           "41-5-7. FUTURE MEDICAL EXPENSES.--

15           A. In all malpractice claims where liability is  
16 established, the jury shall be given a special interrogatory  
17 asking if the patient is in need of future medical care and  
18 related benefits. No inquiry shall be made concerning the  
19 value of future medical care and related benefits, and evidence  
20 relating to the value of future medical care shall not be  
21 admissible. In actions upon malpractice claims tried to the  
22 court, where liability is found, the court's findings shall  
23 include a recitation that the patient is or is not in need of  
24 future medical care and related benefits.

25           B. Except as provided in Section 41-5-10 NMSA 1978,

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1 once a judgment is entered in favor of a patient who is found  
2 to be in need of future medical care and related benefits or a  
3 settlement is reached between a patient and health care  
4 provider in which the provision of medical care and related  
5 benefits is agreed upon, and continuing as long as medical or  
6 surgical attention is reasonably necessary, the patient shall  
7 be furnished with all medical care and related benefits  
8 directly or indirectly made necessary by the health care  
9 provider's malpractice, subject to a semi-private room  
10 limitation in the event of hospitalization, unless the patient  
11 refuses to allow them to be so furnished.

12 C. Awards of future medical care and related  
13 benefits shall not be subject to the [~~six hundred thousand~~  
14 ~~dollar (\$600,000)~~] seven-hundred-fifty-thousand-dollar  
15 (\$750,000) limitation imposed in Section 41-5-6 NMSA 1978.

16 D. Payment for medical care and related benefits  
17 shall be made as expenses are incurred. In the event that the  
18 patient accepts a settlement that includes a lump sum for  
19 future medical care and related benefits, the court must  
20 approve any such settlement, and the portion of settlement  
21 funds intended to be used for future medical care and related  
22 benefits must be identified and placed into an appropriate  
23 medical savings trust.

24 E. The health care provider shall be liable for all  
25 medical care and related benefit payments until the total

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1 payments made by or on behalf of [~~it~~] the health care provider  
2 for monetary damages and medical care and related benefits  
3 combined equals [~~two hundred thousand dollars (\$200,000)~~] two  
4 hundred fifty thousand dollars (\$250,000), after which the  
5 payments shall be made by the patient's compensation fund.

6 F. This section shall not be construed to prevent a  
7 patient and a health care provider from entering into a  
8 settlement agreement whereby medical care and related benefits  
9 shall be provided for a limited period of time only or to a  
10 limited degree.

11 G. The court in a supplemental proceeding shall  
12 estimate the value of the future medical care and related  
13 benefits reasonably due the patient on the basis of evidence  
14 presented to it. That figure shall not be included in any  
15 award or judgment but shall be included in the record as a  
16 separate court finding.

17 ~~[H. A judgment of punitive damages against a health~~  
18 ~~care provider shall be the personal liability of the health~~  
19 ~~care provider. Punitive damages shall not be paid from the~~  
20 ~~patient's compensation fund or from the proceeds of the health~~  
21 ~~care provider's insurance contract unless the contract~~  
22 ~~expressly provides coverage. Nothing in Section 41-5-6 NMSA~~  
23 ~~1978 precludes the award of punitive damages to a patient.~~  
24 ~~Nothing in this subsection authorizes the imposition of~~  
25 ~~liability for punitive damages on a derivative basis where that~~

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1 ~~imposition would not be otherwise authorized by law.]"~~

2 SECTION 6. Section 41-5-14 NMSA 1978 (being Laws 1976,  
3 Chapter 2, Section 14) is amended to read:

4 "41-5-14. MEDICAL REVIEW COMMISSION.--

5 A. The "New Mexico medical review commission" is  
6 created. The function of the New Mexico medical review  
7 commission is to provide panels to review all medical  
8 malpractice claims against health care providers [~~covered by~~  
9 ~~the Medical Malpractice Act~~] who are natural persons. The New  
10 Mexico medical review commission shall not review malpractice  
11 claims against unqualified health care providers, hospitals,  
12 outpatient health care facilities or business entities.

13 B. Those eligible to sit on a panel shall consist  
14 of health care providers licensed pursuant to New Mexico law  
15 and residing in New Mexico and [~~the~~] members of the state bar.

16 C. Cases [~~which~~] that a panel will consider include  
17 all cases involving any alleged act of malpractice occurring in  
18 New Mexico by [~~health care providers qualified under the~~  
19 ~~Medical Malpractice Act~~] a natural person who is a qualified  
20 health care provider.

21 D. Except where the parties have stipulated to opt  
22 out of the panel review process, an attorney shall submit a  
23 case for the consideration of a panel, prior to filing a  
24 complaint in any district court or other court sitting in New  
25 Mexico, by addressing an application, in writing, signed by the

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1 patient or [~~his~~] the patient's attorney, to the director of the  
2 New Mexico medical review commission.

3 E. The director of the New Mexico medical review  
4 commission [~~will~~] shall be an attorney appointed by and serving  
5 at the pleasure of the chief justice of the New Mexico supreme  
6 court.

7 F. The chief justice shall set the director's  
8 salary and report the [~~same~~] salary to the superintendent in  
9 [~~his~~] the superintendent's capacity as custodian of the  
10 patient's compensation fund."

11 SECTION 7. Section 41-5-15 NMSA 1978 (being Laws 1976,  
12 Chapter 2, Section 15) is amended to read:

13 "41-5-15. COMMISSION DECISION REQUIRED--APPLICATION.--

14 A. No malpractice action may be filed in any court  
15 against a qualifying health care provider who is a natural  
16 person or the qualifying health care provider's employer,  
17 master or principal based on the theory of respondeat superior  
18 or any other derivative theory of recovery before application  
19 is made to the New Mexico medical review commission and its  
20 decision is rendered, unless all parties have stipulated to opt  
21 out of the New Mexico medical review commission review process.

22 B. [~~This~~] The application for review by the New  
23 Mexico medical review commission shall contain the following:

24 (1) [~~a brief statement of the facts of the~~  
25 ~~case, naming the persons involved, the dates and the~~

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1 ~~circumstances, so far as they are known, of the alleged act or~~  
2 ~~acts of malpractice]~~ the name of the health care provider  
3 against which the claims are asserted, a short and plain  
4 statement of the grounds as to why the New Mexico medical  
5 review commission has jurisdiction over the claims being  
6 asserted, the specific date or date range when the malpractice  
7 allegedly occurred and, so far as they are known, a brief  
8 statement of the facts supporting the patient's malpractice  
9 claim; and

10 (2) a statement authorizing the panel to  
11 obtain access to all medical and hospital records and  
12 information pertaining to the matter giving rise to the  
13 application and, for the purposes of its consideration of the  
14 matter only, waiving any claim of privilege as to the contents  
15 of those records. Nothing in that statement shall in any way  
16 be construed as waiving that privilege for any other purpose or  
17 in any other context, in or out of court."

18 SECTION 8. Section 41-5-16 NMSA 1978 (being Laws 1976,  
19 Chapter 2, Section 16) is amended to read:

20 "41-5-16. APPLICATION PROCEDURE.--

21 A. Upon receipt of an application for review, the  
22 New Mexico medical review commission's director or [~~his~~] the  
23 director's delegate shall cause to be served a true copy of the  
24 application on the health care providers involved. Service  
25 shall be effected pursuant to New Mexico law. If the health

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1 care provider involved chooses to retain legal counsel, [his]  
2 the health care provider's attorney shall informally enter  
3 [his] an appearance with the director.

4 B. The health care provider shall answer the  
5 application for review and in addition shall submit a statement  
6 authorizing the panel to obtain access to all medical and  
7 hospital records and information pertaining to the matter  
8 giving rise to the application and, for the purposes of its  
9 consideration of the matter only, waiving any claim of  
10 privilege as to the contents of those records. Nothing in that  
11 statement shall in any way be construed as waiving that  
12 privilege for any other purpose or in any other context, in or  
13 out of court.

14 ~~[C. In instances where applications are received~~  
15 ~~employing the theory of respondeat superior or some other~~  
16 ~~derivative theory of recovery, the director shall forward such~~  
17 ~~applications to the state professional societies, associations~~  
18 ~~or licensing boards of both the individual health care provider~~  
19 ~~whose alleged malpractice caused the application to be filed~~  
20 ~~and the health care provider named a respondent as employer,~~  
21 ~~master or principal.]"~~

22 SECTION 9. Section 41-5-17 NMSA 1978 (being Laws 1976,  
23 Chapter 2, Section 17) is amended to read:

24 "41-5-17. PANEL SELECTION.--

25 A. Applications for review shall be promptly

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1 transmitted by the director of the New Mexico medical review  
2 commission to the directors of the health care provider's state  
3 professional society or association and the state bar  
4 association, who shall each select three panelists within  
5 thirty days from the date of transmittal of the application.

6 B. If no state professional society or association  
7 exists or if the health care provider does not belong to ~~[such]~~  
8 a society or association, the director shall transmit the  
9 application to the health care provider's state licensing  
10 board, which shall in turn select three persons from the health  
11 care provider's profession and, where applicable, ~~[to]~~ two  
12 persons specializing in the same field or discipline as the  
13 health care provider.

14 C. In cases where there are multiple defendants,  
15 the case against each health care provider may be reviewed by a  
16 separate panel, or a single combined panel may review the claim  
17 against all parties defendant, at the discretion of the  
18 director.

19 D. Three panel members from the health care  
20 provider's profession and three panel members from the state  
21 bar association shall sit in review in each case.

22 ~~[E. In those cases where the theory of respondeat~~  
23 ~~superior or some other derivative theory of recovery is~~  
24 ~~employed, two of the panel members shall be chosen from the~~  
25 ~~individual health care provider's profession and one panel~~

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1 ~~member shall be chosen from the profession of the health care~~  
2 ~~provider named a respondent employer, master or principal.~~

3 ~~F.]~~ E. The director of the New Mexico medical  
4 review commission or ~~[his]~~ the director's delegate, who shall  
5 be an attorney, shall sit on each panel and serve as ~~[chairman]~~  
6 chair.

7 ~~[G. Any]~~ F. A member shall ~~[disqualify himself]~~ be  
8 disqualified from consideration of ~~[any]~~ a case in which, by  
9 virtue of ~~[his]~~ circumstances, ~~[he]~~ the member feels ~~[his]~~ the  
10 member's presence on the panel would be inappropriate,  
11 considering the purpose of the panel. The director may excuse  
12 a proposed panelist from serving.

13 ~~[H.]~~ G. Whenever a party ~~[shall make and file]~~  
14 makes and files an affidavit that a panel member selected  
15 pursuant to this section cannot, according to the belief of the  
16 party making the affidavit, sit in review of the application  
17 with impartiality, that panel member shall proceed no further.  
18 Another panel member shall be selected by the health care  
19 provider's professional association, state licensing board or  
20 the state bar association, as the case may be. A party may not  
21 disqualify more than three proposed panel members in this  
22 manner in any single malpractice claim.

23 H. Panel members shall not receive compensation for  
24 their services; provided, however, that panel members shall  
25 receive mileage for attendance at panel meetings at the rate

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1 set forth in the Per Diem and Mileage Act, and a panel member  
2 who is a health care provider shall receive a discount on the  
3 amount of the panel member's patient's compensation fund  
4 surcharge due pursuant to Section 41-5-25 NMSA 1978 of not less  
5 than five percent, nor more than ten percent, of the surcharge  
6 as determined by the superintendent if the panel member has  
7 served on at least two panels during the one-year period  
8 immediately preceding the date of renewal of the panel member's  
9 policy of malpractice insurance. The superintendent shall  
10 determine the amount of the surcharge discount simultaneously  
11 with the determination of the surcharge."

12 SECTION 10. Section 41-5-18 NMSA 1978 (being Laws 1976,  
13 Chapter 2, Section 18) is amended to read:

14 "41-5-18. TIME AND PLACE OF HEARING.--A date, time and  
15 place for hearing shall be fixed by the director of the New  
16 Mexico medical review commission and prompt notice [~~thereof~~] of  
17 the hearing shall be given to the parties involved, their  
18 attorneys and the members of the panel. In no instance shall  
19 the date set be more than [~~sixty~~] one hundred twenty days after  
20 the transmittal by the director of the application for review,  
21 unless good cause exists for extending the period. Hearings  
22 may be held anywhere in [~~the state of~~] New Mexico, and the  
23 director shall give due regard to the convenience of the  
24 parties in determining the place of hearing."

25 SECTION 11. Section 41-5-25 NMSA 1978 (being Laws 1992,

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1 Chapter 33, Section 9, as amended) is amended to read:

2 "41-5-25. PATIENT'S COMPENSATION FUND.--

3 A. There is created in the state treasury a  
4 "patient's compensation fund" to be collected and received by  
5 the superintendent for exclusive use for the purposes stated in  
6 the Medical Malpractice Act. The fund and any income from it  
7 shall be held in trust, deposited in a segregated account and  
8 invested and reinvested by the superintendent with the prior  
9 approval of the state board of finance and shall not become a  
10 part of or revert to the general fund of this state. The fund  
11 and any income from the fund shall only be expended for the  
12 purposes of and to the extent provided in the Medical  
13 Malpractice Act. The superintendent shall have the authority  
14 to use fund money to purchase insurance for the fund and its  
15 obligations. The superintendent, as custodian of the patient's  
16 compensation fund, shall be notified by the health care  
17 provider or ~~[his]~~ the health care provider's insurer within  
18 thirty days of service on the health care provider of a  
19 complaint asserting a malpractice claim brought in a court in  
20 this state against the health care provider. Any settlement of  
21 the complaint for an amount in excess of two hundred fifty  
22 thousand dollars (\$250,000) must be approved by the  
23 superintendent, who shall evaluate and approve all proposed  
24 settlements that include payment from the patient's  
25 compensation fund.

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1           B. To ~~create~~ finance the patient's compensation  
2 fund, an annual surcharge shall be levied on all health care  
3 providers qualifying under Paragraph (1) of Subsection A of  
4 Section 41-5-5 NMSA 1978 in New Mexico. The surcharge shall be  
5 determined by the superintendent based upon sound actuarial  
6 principles, using data obtained from New Mexico experience if  
7 available. At least sixty days prior to a determination of the  
8 surcharge, the superintendent or the superintendent's designee  
9 shall provide to the advisory committee the amount proposed for  
10 the surcharge, together with non-confidential data, including  
11 all computations, reports, studies and other related  
12 information used to determine the proposed surcharge. The  
13 advisory committee shall have thirty days to provide written  
14 comments on the proposed surcharge to the superintendent. The  
15 surcharge shall be collected on the same basis as premiums by  
16 each insurer from the health care provider.

17           C. The surcharge with accrued interest shall be due  
18 and payable within thirty days after the premiums for  
19 malpractice liability insurance have been received by the  
20 insurer from the health care provider in New Mexico.

21           D. If the annual premium surcharge is collected but  
22 not paid within the time limit specified in Subsection C of  
23 this section, the certificate of authority of the insurer may  
24 be suspended until the annual premium surcharge is paid.

25           E. All expenses of collecting, protecting and

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1 administering the patient's compensation fund or of purchasing  
2 insurance for the fund shall be paid from the fund.

3 F. Claims payable pursuant to Laws 1976, Chapter 2,  
4 Section 30 shall be paid in accordance with the payment  
5 schedule constructed by the court. If the patient's  
6 compensation fund would be exhausted by payment of all claims  
7 allowed during a particular calendar year, then the amounts  
8 paid to each patient and other parties obtaining judgments  
9 shall be prorated, with each such party receiving an amount  
10 equal to the percentage [~~his~~] of the party's own payment  
11 schedule bears to the total of payment schedules outstanding  
12 and payable by the fund. Any amounts due and unpaid as a  
13 result of such proration shall be paid in the following  
14 calendar years. However, payments for medical care and related  
15 benefits shall be made before any payment made under Laws 1976,  
16 Chapter 2, Section 30.

17 G. Upon receipt of one of the proofs of  
18 authenticity listed in this subsection, reflecting a judgment  
19 for damages rendered pursuant to the Medical Malpractice Act,  
20 the superintendent shall issue or have issued warrants in  
21 accordance with the payment schedule constructed by the court  
22 and made a part of its final judgment. The only claim against  
23 the patient's compensation fund shall be a voucher or other  
24 appropriate request by the superintendent after [~~he~~] the  
25 superintendent receives:

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1 (1) a certified copy of a final judgment in  
2 excess of [~~two hundred thousand dollars (\$200,000)~~] two hundred  
3 fifty thousand dollars (\$250,000) against a health care  
4 provider;

5 (2) a certified copy of a court-approved  
6 settlement or certification of settlement made prior to  
7 initiating suit, signed by both parties and subject to the  
8 evaluation and approval of the superintendent, in excess of  
9 [~~two hundred thousand dollars (\$200,000)~~] two hundred fifty  
10 thousand dollars (\$250,000) against a health care provider or  
11 including a provision that future medical and related expenses  
12 shall be paid by the patient's compensation fund; or

13 (3) a certified copy of a final judgment less  
14 than [~~two hundred thousand dollars (\$200,000)~~] two hundred  
15 fifty thousand dollars (\$250,000) and an affidavit of a health  
16 care provider or its insurer attesting that payments made  
17 pursuant to Subsection E of Section 41-5-7 NMSA 1978, combined  
18 with the monetary recovery, exceed [~~two hundred thousand~~  
19 ~~dollars (\$200,000)~~] two hundred fifty thousand dollars  
20 (\$250,000).

21 H. The superintendent shall contract for an  
22 independent actuarial study of the patient's compensation fund  
23 to be performed [~~not less than once every two years~~] annually  
24 and shall provide a copy of the study, together with all  
25 supporting aggregated data, to the advisory committee within

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1 thirty days of completion. The superintendent shall have the  
2 authority to classify information submitted to the  
3 superintendent by a health care provider for use in an  
4 independent actuarial study as confidential. Any unaggregated  
5 information or data that is provided by a health care provider  
6 to the superintendent shall be deemed confidential. Any  
7 information that could be used to identify an individual health  
8 care provider or patient shall also be deemed confidential.  
9 Information classified as confidential shall not be available  
10 to the public nor provided to the advisory committee."

11 SECTION 12. Section 41-5-28 NMSA 1978 (being Laws 1976,  
12 Chapter 2, Section 29, as amended) is amended to read:

13 "41-5-28. PAYMENT OF MEDICAL REVIEW COMMISSION  
14 EXPENSES.--

15 A. Unless otherwise provided by law, expenses  
16 incurred in carrying out the powers, duties and functions of  
17 the New Mexico medical review commission, including the salary  
18 of the director of the commission, shall be paid by the  
19 patient's compensation fund. The superintendent, in [~~his~~] the  
20 superintendent's capacity as custodian of the fund, shall  
21 disburse fund money to the director upon receipt of vouchers  
22 itemizing expenses incurred by the [~~New Mexico medical review~~]  
23 commission.

24 B. The director shall [~~supply~~] submit the following  
25 to the chief justice of the New Mexico supreme court [~~with~~]:

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1                   (1) duplicates of all vouchers submitted to  
2 the superintendent; [~~Expenses paid by the fund shall not exceed~~  
3 ~~three hundred fifty thousand dollars (\$350,000) in any single~~  
4 ~~calendar year; provided, however, that expenses incurred in~~  
5 ~~defending the commission shall not be subject to that maximum~~  
6 ~~amount]~~ and

7                   (2) an annual budget for the New Mexico  
8 medical review commission for review and approval."

9                   SECTION 13. A new section of the Medical Malpractice Act  
10 is enacted to read:

11                   "[NEW MATERIAL] PUNITIVE DAMAGES.--

12                   A. No claim for punitive damages may be included in  
13 a malpractice claim without first obtaining leave of court  
14 based on a submission of prima facie evidence of a reckless and  
15 wanton indifference to the value of human life. In an action  
16 seeking punitive damages against a health care provider that is  
17 a hospital, outpatient health care facility or business entity,  
18 punitive damages may not be awarded based on evidence that the  
19 conduct of employees or agents, taken as a whole, was  
20 malicious, willful, reckless, wanton or in bad faith, and  
21 evidence of such cumulative conduct shall not be permitted or  
22 allowed.

23                   B. Evidence of punitive damages against a hospital,  
24 outpatient health care facility or business entity, where the  
25 court has permitted the addition of a punitive damages claim,

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1 shall be limited to evidence that:

2 (1) the agent or employee alleged to have  
3 caused harm to the patient was acting in the course and scope  
4 of employment and had sufficient discretionary or policymaking  
5 authority to speak and act for the hospital, outpatient health  
6 care facility or business entity, without regard to the conduct  
7 at issue, independent of higher authority; or

8 (2) the hospital, outpatient health care  
9 facility or business entity in some way authorized,  
10 participated in or ratified the conduct of the employee or  
11 agent alleged to have caused harm to the patient.

12 C. No judgment for punitive damages shall be  
13 entered unless there is clear and convincing evidence of a  
14 reckless and wanton indifference to the value of human life.

15 D. A judgment of punitive damages against a health  
16 care provider shall be the personal liability of the health  
17 care provider. Punitive damages shall not be paid from the  
18 patient's compensation fund or from the proceeds of the health  
19 care provider's insurance contract unless the contract  
20 expressly provides coverage.

21 E. Nothing in Section 41-5-6 NMSA 1978 precludes  
22 the award of punitive damages to a patient. Nothing in this  
23 subsection authorizes the imposition of liability for punitive  
24 damages on a derivative basis where that imposition would not  
25 be otherwise authorized by law."

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1           SECTION 14. A new section of the Medical Malpractice Act  
2 is enacted to read:

3           "[NEW MATERIAL] ALTERNATIVE DISPUTE RESOLUTION PROCESS FOR  
4 MEDICAL MALPRACTICE CLAIMS.--

5           A. Except when all parties have stipulated to opt  
6 out of the alternative dispute resolution process, all medical  
7 malpractice claims against a qualified hospital, outpatient  
8 health care facility or business entity that are based on  
9 health care services provided by an unqualifiable employee or  
10 agent of the qualified hospital, outpatient health care  
11 facility or business entity shall undergo alternative dispute  
12 resolution pursuant to this section. If the alleged injury  
13 that gave rise to the medical malpractice claim involving an  
14 unqualifiable employee or agent was also allegedly caused by a  
15 qualified health care provider who is a natural person, all  
16 claims arising from the alleged injury shall be submitted to  
17 the alternative dispute resolution set forth in this section  
18 and shall not be submitted for review by the New Mexico medical  
19 review commission. If a plaintiff's medical malpractice claim  
20 against a qualified health care provider has been heard by or  
21 submitted to the New Mexico medical review commission, the  
22 plaintiff shall be responsible for any and all reasonable fees  
23 and costs associated with the qualified health care provider's  
24 involvement in the alternative dispute resolution process  
25 described in this section.

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1           B. Prior to filing or initiating a civil action  
2 alleging injury or death as a result of medical malpractice,  
3 the plaintiff shall contemporaneously file a notice of intent  
4 to file suit and an affidavit in a county in which venue would  
5 be proper for filing or initiating the civil action. The  
6 notice shall name all adverse parties as defendants, shall  
7 contain a short and plain statement of the facts showing that  
8 the party filing the notice is entitled to relief and shall be  
9 signed by the plaintiff or by the plaintiff's attorney. Filing  
10 the notice of intent to file suit tolls all applicable statutes  
11 of limitations.

12           C. The notice of intent to file suit shall be  
13 served upon all named defendants in accordance with the service  
14 rules for a summons and complaint outlined in the New Mexico  
15 rules of civil procedure. The notice of intent to file suit  
16 shall be accompanied by a signed federal Health Insurance  
17 Portability and Accountability Act of 1996 release authorizing  
18 all adverse parties to obtain access to all medical records  
19 pertaining to the matter giving rise to the notice of intent to  
20 file suit and, for the consideration of the matter only,  
21 waiving any claim of privilege as to the contents of those  
22 records. Nothing in the signed authorization shall in any way  
23 be construed as waiving plaintiff's claim of privilege for any  
24 other purpose or in any other context, in or out of court.

25           D. No later than one hundred twenty days from the

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1 service of the notice of intent to file suit, the parties shall  
2 participate in a mediation conference, or other alternative  
3 dispute resolution process agreed upon by all parties, unless  
4 an extension for no more than sixty days is granted by the  
5 court based upon a finding of good cause. Unless inconsistent  
6 with this section, any local court alternative dispute  
7 resolution rules in effect at the time of the mediation  
8 conference or other alternative dispute resolution process  
9 shall govern the mediation process, including compensation of  
10 the mediator and payment of the fees and expenses of the  
11 mediation conference. Subject to the provisions of this  
12 section, the parties otherwise are responsible for their own  
13 expenses related to mediation or other alternative dispute  
14 resolution pursuant to this section.

15 E. The court in which the notice of intent to sue  
16 was filed has jurisdiction to enforce the provisions of this  
17 section.

18 F. If the matter cannot be resolved through  
19 mediation or other alternative dispute resolution process, the  
20 plaintiff may initiate the civil action by filing a summons and  
21 complaint pursuant to the New Mexico rules of civil procedure.  
22 The action must be filed:

23 (1) within sixty days after the mediator  
24 notifies all parties in writing that the mediation or other  
25 alternative dispute resolution process is not viable, that an

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1 impasse exists or that the mediation or other alternative  
2 dispute resolution process should end; or

3 (2) prior to the expiration of the statute of  
4 limitations, whichever is later.

5 G. Participation in the prelitigation mediation or  
6 other alternative dispute resolution process pursuant to this  
7 section does not alter or eliminate any obligation of the  
8 parties to participate in alternative dispute resolution that  
9 may exist after the civil action is initiated."

10 SECTION 15. A new section of the Medical Malpractice Act  
11 is enacted to read:

12 "[NEW MATERIAL] VENUE FOR MEDICAL MALPRACTICE CASES.--

13 Venue in a claim asserting medical malpractice shall be limited  
14 to:

15 A. the county in which the patient received the  
16 medical treatment that is the basis for the medical malpractice  
17 suit;

18 B. the county that is the principal place of  
19 business of the health care provider or of any of the health  
20 care providers if there is more than one named in the  
21 complaint; or

22 C. the county in which the patient resided at the  
23 time the patient received medical treatment that is the basis  
24 for the medical malpractice lawsuit."

25 SECTION 16. A new section of the Medical Malpractice Act

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1 is enacted to read:

2 "[NEW MATERIAL] ADVISORY COMMITTEE--MEMBERS--DUTIES.--

3 A. The "Medical Malpractice Act advisory committee"  
4 is created. The advisory committee consists of seven members  
5 as follows:

6 (1) two attorneys licensed to practice law in  
7 New Mexico, appointed by the New Mexico trial lawyers  
8 association;

9 (2) two physicians or other representatives of  
10 the medical profession appointed by the New Mexico medical  
11 society;

12 (3) two hospital administrators, employees or  
13 other representatives of hospitals and outpatient health care  
14 facilities appointed by the New Mexico hospital association;  
15 and

16 (4) the superintendent, who shall serve as the  
17 chair of the committee.

18 B. The advisory committee shall meet at the call of  
19 the chair, but no less than semiannually.

20 C. The advisory committee shall:

21 (1) review policies, administrative actions,  
22 statutes, court decisions, court opinions and all other matters  
23 relating to the Medical Malpractice Act and other applicable  
24 laws, and no later than December 1 of each year, report its  
25 findings and recommendations to the chief justice of the New

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1 Mexico supreme court, the governor and the legislature;

2 (2) no later than January 31, 2022, develop  
3 and recommend to the chief justice of the New Mexico supreme  
4 court and the director of the New Mexico medical review  
5 commission policies and procedures for evaluation of the  
6 performance of the panel chair's preparation, participation,  
7 professionalism, impartiality and other factors determined by  
8 the advisory committee to be appropriate to the discharge of  
9 the panel chair's duties and periodically review and revise  
10 such procedures upon the request of the chief justice; and

11 (3) review and provide written comments on the  
12 proposed patient's compensation fund surcharge to the  
13 superintendent as provided in Subsection B of Section 41-5-25  
14 NMSA 1978.

15 D. Members of the advisory committee shall receive  
16 per diem and mileage in the amount provided for non-salaried  
17 public officers in the Per Diem and Mileage Act."

18 SECTION 17. EFFECTIVE DATE.--The effective date of the  
19 provisions of this act is July 1, 2021.