

NEW MEXICO MEDICAL REVIEW COMMISSION
Policies and Procedures

Editor's Note: The following is the complete approved text of the Policies and Procedures Handbook of the New Mexico Medical Review Commission. All changes from the version published June 6, 1996, are underlined.

This is a brief summary of the policies and procedures that may assist you in understanding the panel process. The Medical Malpractice Act, NMSA 1978, §41-5-1ff. (1993) is the pertinent statute that governs all matters before the New Mexico Medical Review Commission.

1. The Application.

- a. §41-5-14(D) requires *an attorney* to submit the Application (likewise, §41-5-19(A) requires the patient's attorney to present the case to the panelists).
- b. There is no special form for the Application except that it must:
 - (1) be brief;
 - (2) state the persons involved (i.e. names, addresses and phone numbers of all providers whose care may be germane to the issues and not merely the providers subject to the inquiry);
 - (3) state the date/s of the alleged acts;
 - (4) state the circumstances of the alleged acts;
 - (5) include a sufficient medical release, as a separate document, signed by the patient or patient's representative. Attached are printable forms of HIPAA-compliant medical releases that we have found most providers will accept in most circumstances (though some insist upon their own forms).
- c. The Application and all communications should be delivered, mailed, or faxed and mailed to:

New Mexico Medical Review Commission
316 Osuna NE #501
Albuquerque NM 87107
Telephone (505) 828-0237
Facsimile (505) 828-0336

If faxed and mailed, the date of receipt of the earliest communication is the effective date. In the event of a fax failure, kindly call the Commission to obtain our Email address.

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- d. In the event the Commission determines that an inadequate Application is received, it is the policy of the Commission to notify counsel to correct the Application within ten (10) days or the application will be returned. ***Because a claimant's rights could be prejudiced, we urge counsel not to ignore this policy!***
- e. Upon receipt of an Application that is in conformity with the Act, the names of providers, whose conduct is under scrutiny, are submitted to the New Mexico Department of Insurance for (a) certification that the provider is, or is not, a qualified provider pursuant to NMSA 1978, §41-5-3; and (b) the name of the provider's carrier. Rarely, the Commission has encountered problems with the accuracy of the Department of Insurance certifications. ***Accordingly, counsel should be cautious of the accuracy of Insurance Department certifications, as well; and should make an independent inquiry – especially if there is a statute of limitations problem.***
- f. As the case proceeds, counsel are urged to communicate with one another regarding the narrowing of issues and/or any complications of the issues that become apparent.
 - (1) The Commission needs to be notified as soon as it is apparent that parties need to be added or deleted or that provider records need to be obtained.
 - (2) It is the policy of the Commission to avoid multiple hearings of the same factual circumstances whenever possible. Cases involving several providers will likely be consolidated.
 - (3) It is also the policy of the Commission (and it is the attitude of most panelists) to look with disfavor upon any unfair surprise (e.g. raising new issues or dumping a load of medical records and literature on the panelists at the hearing, while making matters difficult for your opponent, will likely also make the understanding of your case difficult for the panelists).
 - (4) As long as counsel keep each other and the Commission advised regarding amendments to the Application, it is really not necessary to submit an amended Application or an amended Answer.

2. Answer to the Application. Once the Insurance Department certification is received, the Commission notifies the qualified provider and the provider's carrier of the claim. Pursuant to §41-5-16 the health-care provider subject to the inquiry is required to answer the application and to also submit a release. While a recitation of affirmative defenses is not required by the Commission, in order to encourage full disclosure by all parties and to avoid unfair surprise, counsel are urged to submit a meaningful response to the Application.

3. Voluntary Panel. In the event a medical doctor is not qualified under the Act pursuant to §41-5-5 because of lack of contribution to the Patients' Compensation Fund, it is the policy of the Commission, the New Mexico State Bar, and the New Mexico Medical Society to afford a panel hearing. The conditions upon which such a voluntary panel can take place are that all parties stipulate to the Voluntary Panel and the patient pay a \$25.00 application fee.

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- 4. Health-care Provider Records.** The Commission has no subpoena power. As soon as the New Mexico Department of Insurance certifies that a health-care provider is qualified under the Act, the Commission staff begins its task to independently obtain medical records utilizing HIPAA-compliant releases from the patient (see examples attached). This is in furtherance of the spirit of the Act to provide an inexpensive forum to the parties and to give some assurance that the records are genuine. It is incumbent upon all counsel to promptly notify the Commission just as soon as the need for further records becomes reasonably apparent.
- 5. Hearing Date.** After the provider and its carrier are notified, the Commission staff sets a hearing date and interested parties are notified. §41-5-18 requires that the hearing be held within 60 days of receipt of the Application, except when extended by the Director for good cause. "Good cause" is inversely proportionate to the proximity of the hearing date at the time such a request is made to the Director.
- 6. The "Panel Pack" and Designation of Records.** At least seven (7) business days prior to the hearing date, the Commission is required by its rules (see attached) to mail to counsel a proposed package of those medical records, germane to the issues, that are to be distributed to the panelists in advance of the hearing (i.e. the "Panel Pack"). The initial panel pack selected by the Commission staff is designed to start medical records selection procedure and to encourage counsel to (a) designate further medical records, and/or (b) delete unnecessary ones, and/or (c) place the medical records into a logical order.

 - a. As a courtesy to the panelists, any designation of records that results in a Panel Pack in excess of 100 pages is scrutinized by the Director (i.e. be prepared to justify why you want so many records).
 - b. The Commission does not choose the records that are presented to the panelists; the counsel for the parties do. If counsel does not take the time to timely designate records, the efforts of the Commission staff become the Panel Pack presented at hearing.
 - c. The Commission adheres to the *Medical-Legal Guidelines for Cooperation by the New Mexico Medical Society and State Bar of New Mexico*, copy of which is available from the Commission office. See 1(c), above, for address, fax and phone for your request.
- 7. Panels.** At the same time the notice of hearing is sent to counsel, the Commission also mails a form containing a summary of the allegations with the names of counsel and date of hearing to those professionals who have expressed a willingness to serve as panelists. We term this the "Panel Poll". To preserve the confidential nature of the proceeding, the names of the parties are omitted at this point. If the recipient is willing to serve, he or she completes the stamped return card. Pursuant to §41-5-14 (B) and §41-5-17(A)-(E), the panelists are chosen by the chairpersons of the professional societies involved; and, the following administrative procedures are followed by the Commission:

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- a. The director of the professional society of the health-care provider chooses three panelists and three alternates. The Director of the New Mexico Bar Association Medical Review Committee also chooses three panelists and three alternates.
- b. At least 13 business days prior to the hearing date the list of panelists, alternates and others willing to serve is mailed to counsel. A notice is also mailed to the panelists and alternates containing the names of the parties and their counsel. At this point those panelists know the names of the parties and are instructed to advise the Commission of any conflicts of interest. Counsel are immediately notified should a panelist advise of unavailability.
- c. Pursuant to §41-5-17(H) each side has three peremptory challenges of panelists. Pursuant to the Commission rules all peremptory challenges must be *received* at the Commission office by noon at least six (6) business days before the hearing date (copy of the rule is attached). **The party submitted the challenge assumes the risk of the means utilized to notify the Commission.**
- d. After the peremptory challenge period expires there may be replacement of panelists for various reasons (e.g. peremptory challenge, challenge for cause, cancellation by a panelist, etc.). In such cases, the Commission staff follows a system of replacing the panelist that is dictated by the respective chairs of the panel selecting committees. No peremptory challenges are available for such replaced panelists. Unfortunately this consequence falls into the "life just isn't fair" category.
- e. If a party desires a disqualification for cause pursuant to §41-5-17(G), counsel must contact the Director (with copy to all counsel) as soon as the need to disqualify for cause becomes apparent.
- f. In the event several disciplines of provider are involved in a multi-party claim (e.g. medical doctor and doctor of osteopathy) every effort is made to conduct a single hearing. As a result, there will be a 12 person panel (i.e. six lawyers plus three from each health-care discipline).
- g. Occasionally, a need will arise to either cancel a panel at the last minute; or, for the sake of economy and convenience, to encourage counsel stipulate to less than a 6 person panel.

8. Hearing Procedure.

- a. **Transcript.** §41-5-19(C) permits either side at its expense to have a court reporter or a recording device at the hearing (by Commission rule, copy attached, no videotape record is permitted). The Commission is not involved in any such informal record desired by counsel except to provide its cooperation to facilitate the taking of such a record.

- b. Technical Facilities.** With advance notice, the Commission will arrange to have videotape equipment, speaker phone (e.g. for long distance to an unavailable fact witness), overhead projector, X-ray viewer, or projector screen.
- c. Scope of the Inquiry.** Pursuant to §41-5-19(B) only the following matters are permitted to be presented at the hearing:
- (1) medical records;
 - (2) medical literature;
 - (3) arguments of counsel;
 - (4) fact witnesses who testify under oath and written statements of fact from treating providers *may* be introduced. This means that ***no expert opinions are permitted*** from any party. The policy of the Commission is to provide an inexpensive forum that does not involve the need for expert testimony. Medical literature should suffice. The panelists are the experts;
 - (5) On a case by case basis, the chair will consider other relevant matters to be presented (e.g. brief "day in the life" films, relevant instructional films, and so forth).
 - (6) ***The hearing is not open to the public*** (See "Confidentiality" at 9(a), below. Any person desiring to attend (other than the parties and their counsel and witnesses, the panelists, and a court reporter), must notify the Commission in advance so that permission of counsel for the parties can be obtained.
- d. Opening.** §41-5-19(A) provides that counsel for each side shall make an opening. Be brief. It is the practice of the Commission to minimize the formality of the opening statements because all the volunteer professionals on the panel are presumed to have already read the application and the Panel Pack.
- e. Examination of Witnesses.**
- (1) To avoid possible confrontations, it is the policy of the Commission to exclude from the hearing room the parties and witnesses of one side while the other side is presenting its case.
 - (2) It is also the policy of the Commission not to permit cross-examination by opposing counsel except by legible written questions read to the witness by the chairperson. Therefore, it is preferable to have questions of a party opponent or its witnesses prepared in advance of hearing. The chairperson has the discretion to reasonably edit the questions.

f. Informal Hearing.

- (1) Try to promptly get to the heart of the issues when examining your own witnesses and when presenting written questions to the witnesses for the opponent.
- (2) Hearsay is permitted in the discretion of the chairperson (bear in mind that the non-lawyer panelists understand the untrustworthy nature of hearsay as well as the lawyers).

g. Supplemental Hearing. It is the usual policy of the Panelists to decide the case on the day of presentation. When this is not possible, §41-5-19(D) is utilized. The case is taken under advisement and the panel seeks additional facts, records, witnesses or other information to be presented at a supplemental hearing to be held within 30 days.

h. Immunity. Pursuant to §41-5-20(C) the panelists and witnesses have statutory immunity from civil liability for all communications, findings, opinions and conclusions made by them in the course of participating in the proceedings.

9. Panel Deliberations.

a. Confidentiality. Pursuant to §41-5-20(A) the deliberations of the panel are confidential. Everyone involved in the Commission system is urged to respect the confidential nature of these proceedings and the patient records presented.

b. Standards of Proof. A panelist should not volunteer unless he or she is prepared to fairly consider all of the evidence and the issues. Serving as a panelist is not a forum to advocate for one side or the other. Likewise, "maybe" or "abstain" votes should not be submitted. §41-5-20(A) establishes the specific questions that the panelists must address:

(1) ***" . . .whether there is substantial evidence that the acts complained-of occurred and that they constitute malpractice. . ."***

(a) **"malpractice"** is defined in Uniform Jury Instruction (Civil) 13-1101. Examination of pertinent case law would give a more complete understanding of the meaning of malpractice.

(b) **"substantial evidence"** is defined in the New Mexico case law which should also be examined by counsel. In the context of the Commission system, one of the reasonable person tests that is often used to determine substantial evidence is: *Whether, among all of the likelihoods, is it likely that the provider departed from the standards of medical practice? -or- Would a reasonable person accept the evidence presented at the hearing to support a conclusion that malpractice occurred?*

- (2) If a majority of the panelists vote "yes" on the malpractice issue, the entire panel must then consider the second statutory question: ***". . .whether there is a reasonable medical probability that the patient was injured thereby."***
 - (a) The standard of proof to establish "a reasonable medical probability" is a higher standard than the proof needed to establish "substantial evidence". Uniform Jury Instruction (Civil) 13-304 as well as the case law should be consulted by counsel regarding the definition of "the greater weight of the evidence" or "preponderance of the evidence". Again, one of the tests that is often used to determine a reasonable medical probability is: *Is it more likely, than not, that the patient was damaged on account of the malpractice?*
 - (b) Uniform Jury Instruction (Civil) 13-305 and the pertinent case law should also be consulted regarding "proximate cause". In determining damage the panelists must find that the act or acts of malpractice of the particular provider before them caused damage to the patient.
 - (c) It is truly a difficult task for a panelist, who voted in the minority (i.e. that no malpractice occurred), to then presume that malpractice *did* occur and then consider damage. Regardless, in order to complete his/her duties, such a panelist is required to consider the damage issue.
 - (d) In the context of a Commission hearing, all that the patient needs to demonstrate is the fact that damage occurred (e.g. a moment of pain and suffering, a farthing in wages lost or medical expenses incurred, etc.). Demonstrating the quantum of damage is not necessary.

c. The Panel Decision.

- (1) Pursuant to §41-5-20(F) the decision of the panel is without any administrative or judicial authority; and, it is not binding upon any party.
- (2) Pursuant to §41-5-20(C) when a vote is not unanimous, the panelists may issue a majority and/ or minority opinion to briefly explain the rationale behind the decision.
- (3) Pursuant to §41-5-22 the three-year statute of limitations that is tolled (see §41-5-13) commences to run again 30 days after the first attempted delivery of the Commission's certified mailing to counsel of the panel's decision.

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- (4) Pursuant to §41-5-23 when a patient prevails on the issue of malpractice *and* on the issue of causation of damage, the professional association that oversees the health-care provider is required to cooperate with the patient to find a physician, qualified in the field of medicine involved, to consult with the patient, to assist in trial preparation and to testify for the patient. The fees of the expert witness are the responsibility of the patient.
- (5) The Commission maintains statistical information that includes panel decisions. Anyone desiring, may request a copy of the *Annual Report of the Director of the Medical Review Commission* which contains statistical information that may shed some light on the practical effects of the Commission function. See 1(c), above, for address and phone for your request.

10. Rules of Procedure. §41-5-21 authorizes the Director to adopt and publish rules of procedure. Since its inception in 1976, only two rules (copies attached) have ever been adopted.

This is not a court proceeding. Because volunteers are the lifeblood of the Commission system, out of respect to the panelists, the philosophy of the Commission is to get to the heart of the matter as efficiently and as fairly as possible. To this end the policies, illustrated above, have developed. Policies are not, and should not be, cast in stone nor utilized as a substitute for good sense.

[As approved by the Medical-Legal Liaison Committee 04/02/96 and the State Bar of New Mexico 05/01/96; Revised 12/01/05].

New Mexico Medical Review Commission
Rules of Procedure

1. Video-Taping of Hearings.

Directors David Gallagher and Gene Franchini have met in reference to the Supreme Court refusing to hear the Writ to video-tape panel hearings. The Directors have ruled that video-taping will not be permitted at the New Mexico Medical Review Commission hearings.

[December 12, 1983]

2. Peremptory Disqualification.

- a. No disqualification of a panel member, as provided in §41-5-17(H), N.M.S.A. (1978) will be honored by the Commission unless:
- (1) It complies with the Act.
 - (2) It is filed in the office of the Commission by noon not later than six (6) business days prior to the day set for the panel hearing.
 - (3) The Commission is required to comply with the following deadlines:
 - (a) A list of all panelists responding to the panel poll, which designates (1) the panelists chosen by the committee chair and (2) the alternate panelists, will be mailed or sent by facsimile to counsel thirteen (13) business days prior to the day set for the panel hearing.
 - (b) The Commission will mail the "panel pack" to counsel seven (7) business days prior to the day set for the panel hearing.

Example: The panel hearing is set for Monday, May 2:

- * The list of panelists must be mailed or faxed by Wednesday, April 13;
- * The "Panel Pack" must be mailed by Thursday, April 21; and
- * Peremptory disqualifications are due by noon Friday, April 22.

[Effective April 15, 1994. Amends rule dated February 17, 1984.]