SENATE BILL 239

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

INTRODUCED BY

Elizabeth "Liz" Stefanics

AN ACT

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

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

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

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

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

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

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commercial entity;

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

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

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

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

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

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

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

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[~~and~~]

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

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

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

"41-5-5. QUALIFICATIONS.--

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

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

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

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

B. For [~~hospitals or outpatient health care facilities electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital or outpatient health care facility, each hospital's or outpatient health care facility's base coverage or deposit and additional charges for the patient's compensation fund. The superintendent shall arrange for an actuarial study, as provided in Section 41-5-25 NMSA 1978~~] a hospital, outpatient health care facility or business entity electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on an annual risk assessment of the hospital, outpatient health care facility or business entity, each hospital, outpatient health care facility or business entity's deposit or additional charges for the patient's compensation fund. The superintendent shall arrange for an annual actuarial study, as provided in Section 41-5-25 NMSA 1978.

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

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against it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Applications for review shall be promptly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. All expenses of collecting, protecting and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"[NEW MATERIAL] PUNITIVE DAMAGES.--

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

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

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shall be limited to evidence that:

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

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

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

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

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

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

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

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

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

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

D. No later than one hundred twenty days from the

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

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

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

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

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

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

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

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

"[NEW MATERIAL] VENUE FOR MEDICAL MALPRACTICE CASES.-- Venue in a claim asserting medical malpractice shall be limited to:

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

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

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

SECTION 16. A new section of the Medical Malpractice Act

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is enacted to read:

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

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

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

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

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

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

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

C. The advisory committee shall:

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

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Mexico supreme court, the governor and the legislature;

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

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

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

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

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