

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR  
SENATE BILL 467

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

AN ACT

RELATING TO TORTS; ENACTING THE DENTAL-LEGAL REVIEW COMMISSION  
ACT; PROVIDING FOR DENTAL-LEGAL REVIEW PANELS; PROVIDING  
HEARING PROCEDURES.

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

**SECTION 1. SHORT TITLE.**--This act may be cited as the  
"Dental-Legal Review Commission Act".

**SECTION 2. DEFINITIONS.**--As used in the Dental-Legal  
Review Commission Act:

A. "commission" means the New Mexico dental-legal  
review commission;

B. "dental care provider" means a person,  
corporation, organization, facility or institution licensed or  
certified by this state to provide dental care or professional  
services as a doctor of dental medicine, doctor of dental

1 surgery or corporate entity owned by a New Mexico licensed  
2 dental professional, acting within the bounds of their scope of  
3 practice;

4 C. "dental professional liability claim" includes  
5 any cause of action arising in this state against a dental care  
6 provider for professional treatment, lack of professional  
7 treatment or other claimed departure from accepted standards of  
8 health care that proximately results in injury to the patient,  
9 whether the patient's claim or cause of action is based in tort  
10 or contract law, and includes, but is not limited to, actions  
11 based on battery or wrongful death;

12 D. "director" means the director of the commission;

13 E. "panel" means a dental-legal review panel; and

14 F. "patient" means a natural person who received or  
15 should have received dental professional care from a licensed  
16 dental care provider, under a contract, expressed or implied.

17 SECTION 3. NEW MEXICO DENTAL-LEGAL REVIEW COMMISSION.--

18 A. The "New Mexico dental-legal review commission"  
19 is created. The function of the commission is to provide  
20 panels to review all dental professional liability claims  
21 against dental care providers.

22 B. Those eligible to sit on a panel shall be  
23 dentists licensed pursuant to New Mexico law and residing in  
24 New Mexico or members of the state bar of New Mexico residing  
25 in New Mexico.

1 C. Cases to be considered by a panel include all  
2 cases involving an alleged act of malpractice occurring in New  
3 Mexico by dental care providers.

4 D. An attorney shall submit a case for the  
5 consideration of a panel prior to filing a complaint in any  
6 district court or other court sitting in New Mexico by  
7 addressing an application, in writing, signed by the patient or  
8 the patient's attorney, to the director.

9 E. The director shall be an attorney appointed by  
10 and serving at the pleasure of the director of the  
11 administrative office of the courts.

12 F. The director of the administrative office of the  
13 courts shall set the remuneration of the director of the  
14 commission.

15 SECTION 4. COMMISSION DECISION REQUIRED--APPLICATION.--

16 A. A dental professional liability claim shall not  
17 be filed in any court against a qualifying dental care provider  
18 before application is made to the commission and its decision  
19 is rendered.

20 B. The application shall contain the following:

21 (1) a brief statement of the facts of the  
22 case, naming the persons involved and the dates and  
23 circumstances, so far as they are known, of the alleged act or  
24 acts of malpractice; and

25 (2) a statement authorizing the panel to

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1 obtain access to all dental records and information pertaining  
2 to the matter giving rise to the application and, for the  
3 purposes of its consideration of the matter only, waiving any  
4 claim of privilege as to the contents of those records.

5 Nothing in that statement shall in any way be construed as  
6 waiving that privilege for any other purpose or in any other  
7 context, in or out of court.

8 SECTION 5. APPLICATION PROCEDURE.--

9 A. Upon receipt of an application for review, the  
10 director or the director's designee shall cause to be served a  
11 true copy of the application on the dental care provider  
12 involved. Service shall be effected pursuant to New Mexico  
13 law. If the dental care provider involved chooses to retain  
14 legal counsel, the dental care provider's attorney shall  
15 informally enter the dental care provider's appearance with the  
16 director.

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

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1           C. In instances where applications are received  
2 employing the theory of respondeat superior, or some other  
3 derivative theory of recovery, the director shall forward such  
4 applications to the state professional societies, associations  
5 or licensing boards of both the individual dental care provider  
6 whose alleged malpractice caused the application to be filed  
7 and the dental care provider named a respondent as employer,  
8 master or principal.

9           D. The party making application, by doing so,  
10 agrees to report to the director the final disposition of the  
11 claim upon its conclusion.

12           **SECTION 6. PANEL SELECTION.--**

13           A. Applications for review shall be promptly  
14 transmitted by the director to the directors of the New Mexico  
15 dental association and the state bar of New Mexico, who shall  
16 each select three panelists within thirty days from the date of  
17 transmittal of the application.

18           B. If the dental care provider does not belong to  
19 the New Mexico dental association, the director shall transmit  
20 the application to the board, which shall in turn select three  
21 dentists and, where applicable, two persons in the same  
22 recognized specialty as the dental care provider.

23           C. In cases where there are multiple dental care  
24 provider defendants, the case against each dental care provider  
25 may be reviewed by a separate panel, or a single combined panel

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1 may review the claim against all defendants, at the discretion  
2 of the director.

3 D. Three panel members from the dental care  
4 provider's profession and three panel members from the state  
5 bar of New Mexico shall sit in review in each case.

6 E. In those cases where the theory of respondeat  
7 superior or some other derivative theory of recovery is  
8 employed, two of the panel members shall be chosen from the  
9 individual dental care provider's profession and one panel  
10 member shall be chosen from the profession of the dental care  
11 provider named as a principal under the theory of respondeat  
12 superior or some other derivative theory of recovery.

13 F. The director or the director's designee, who  
14 shall be an attorney, shall sit on each panel and serve as  
15 chair.

16 G. A member shall disqualify the member's self from  
17 consideration of any case in which, by virtue of the member's  
18 circumstances, the member feels the member's presence on the  
19 panel would be inappropriate, considering the purpose of the  
20 panel. The director may excuse a proposed panelist from  
21 serving.

22 H. When a party makes and files an affidavit that a  
23 panel member selected pursuant to this section cannot,  
24 according to the belief of the party making the affidavit, sit  
25 in review of the application with impartiality, that panel

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1 member shall proceed no further. Another panel member shall be  
2 selected by the New Mexico dental association, the board or the  
3 state bar of New Mexico, as the case may be. A party shall not  
4 disqualify more than three proposed panel members in this  
5 manner in any single malpractice claim.

6 SECTION 7. TIME AND PLACE OF HEARING.--A date, time and  
7 place for hearing shall be fixed by the director, and prompt  
8 notice thereof shall be given to the parties involved, their  
9 attorneys and the members of the panel. In no instance shall  
10 the date set be more than sixty days after the transmittal by  
11 the director of the application for review, unless good cause  
12 exists for extending the period. Hearings may be held anywhere  
13 in the state of New Mexico, and the director shall give due  
14 regard to the convenience of the parties in determining the  
15 place of hearing.

16 SECTION 8. HEARING PROCEDURES.--

17 A. At the time set for hearing, the attorney  
18 submitting the case for review shall be present and shall make  
19 a brief introduction of the attorney's client's case, including  
20 a resume of the facts constituting alleged professional  
21 malpractice that the attorney is prepared to prove. The dental  
22 care provider against whom the claim is brought and its  
23 attorney may be present and may make an introductory statement  
24 of its case.

25 B. Both parties may call witnesses to testify

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1 before the panel, which witnesses shall be sworn. Dental  
2 texts, journals, studies and other documentary evidence relied  
3 upon by either party may be offered and admitted if relevant.  
4 Written statements of fact of other treating dental care  
5 providers may be reviewed. The monetary damages in any case  
6 shall not be a subject of inquiry or discussion.

7 C. The hearing is informal and no official  
8 transcript shall be made. Nothing contained in this subsection  
9 shall preclude the taking of the testimony by the parties at  
10 their own expense.

11 D. At the conclusion of the hearing, the panel may  
12 take the case under advisement, or it may request that  
13 additional facts, records, witnesses or other information be  
14 obtained and presented to it at a supplemental hearing, which  
15 shall be set for a date and time, not longer than thirty days  
16 from the date of the original hearing unless the attorney  
17 bringing the matter for review consents in writing to a longer  
18 period.

19 E. A supplemental hearing shall be held in the same  
20 manner as the original hearing, and the parties concerned and  
21 their attorneys may be present.

22 **SECTION 9. PANEL DELIBERATIONS AND DECISION.--**

23 A. The deliberations of the panel shall be and  
24 remain confidential. Upon consideration of all relevant  
25 material, the panel shall decide only two questions:

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1 (1) whether there is substantial evidence that  
2 the acts complained of occurred and that they constitute  
3 malpractice; and

4 (2) whether there is a reasonable probability  
5 that the patient was injured thereby.

6 B. All votes of the panel on the two questions for  
7 decision shall be by secret ballot. The decision shall be by a  
8 majority vote of those voting members of the panel who have sat  
9 on the entire case. The decision shall be communicated in  
10 writing to the parties and attorneys concerned and a copy  
11 thereof shall be retained in the permanent files of the  
12 commission.

13 C. The decision shall in every case be signed for  
14 the panel by the chair, who shall vote only in the event the  
15 other members of the panel are evenly divided, and shall  
16 contain only the conclusions reached by a majority of the panel  
17 members and the number of members, if any, dissenting  
18 therefrom; provided, however, that if the vote is not  
19 unanimous, the majority may briefly explain the reasoning and  
20 basis for its conclusion, and the dissenters may likewise  
21 explain the reasons for disagreement.

22 D. The report of the panel shall not be admissible  
23 as evidence in any action subsequently brought in a court of  
24 law. A copy of the report shall be sent to the dental care  
25 provider's professional licensing board.

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1           E. Panelists and witnesses shall have absolute  
2 immunity from civil liability for all communications, findings,  
3 opinions and conclusions made in the course and scope of duties  
4 prescribed by the Dental-Legal Review Commission Act.

5           F. The panel's decisions shall be without  
6 administrative or judicial authority and shall not be binding  
7 on any party. The panel shall make no effort to settle or  
8 compromise any claim, nor shall it express any opinion on the  
9 monetary value of any claim.

10           **SECTION 10. DIRECTOR--RULES OF PROCEDURE.--**The director  
11 is authorized to adopt and publish rules of procedure necessary  
12 to implement and carry out the duties of the commission. No  
13 rule shall be adopted, however, that requires a party to make a  
14 monetary payment as a condition to bringing a malpractice claim  
15 before the panel.

16           **SECTION 11. TOLLING OF STATUTE OF LIMITATION.--**The  
17 running of the applicable limitation period in a malpractice  
18 claim shall be tolled upon submission of the case for the  
19 consideration of the panel and shall not commence to run again  
20 until thirty days after the panel's final decision is entered  
21 in the permanent files of the commission and a copy is served  
22 upon the claimant and the claimant's attorney by certified  
23 mail.

24           **SECTION 12. PROVISION OF EXPERT WITNESS.--**In a  
25 malpractice claim where the panel has determined that the acts

1 complained of were or reasonably might constitute malpractice  
 2 and that the patient was or may have been injured by the act,  
 3 the panel, commission members, the director and the  
 4 professional association concerned shall cooperate fully with  
 5 the patient in retaining a dentist, qualified in the field of  
 6 dentistry involved and licensed to practice in the state of New  
 7 Mexico, who shall consult with, assist in trial preparation for  
 8 and testify on behalf of the patient, upon the patient's  
 9 payment of a reasonable fee to the same effect as if the  
 10 dentist had been engaged originally by the patient.

11       **SECTION 13. MAINTENANCE OF RECORDS.**--The director shall  
 12 maintain records of all proceedings before a panel, which  
 13 records shall include the nature of the acts or omissions  
 14 complained of, a brief summary of the evidence presented, the  
 15 decision of the panel, any majority or dissenting opinions  
 16 filed and the final dispositions of claims as reported by  
 17 plaintiffs. The records shall not be made public and shall not  
 18 be subject to subpoena but shall be used solely for the purpose  
 19 of compiling statistical data and facilitating ongoing studies  
 20 of dental malpractice in New Mexico.

21       **SECTION 14. PAYMENT OF COMMISSION EXPENSES.**--Unless  
 22 otherwise provided by law, expenses incurred in carrying out  
 23 the powers, duties and functions of the commission, including  
 24 the salary of the director, shall be paid by the New Mexico  
 25 board of dental health care from funds collected as licensing

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1 fees. The board shall disburse fund money to the director upon  
2 receipt of vouchers itemizing expenses incurred by the  
3 commission. The director shall supply the director of the  
4 administrative office of the courts with duplicates of all  
5 vouchers submitted to the board. Expenses paid by the fund  
6 shall not exceed one hundred fifty thousand dollars (\$150,000)  
7 in any single calendar year; provided, however, that expenses  
8 incurred in defending the commission shall not be subject to  
9 that maximum amount.