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SENATE BILL 333

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

INTRODUCED BY

Timothy Z. Jennings

AN ACT

RELATING TO MEDICAL MALPRACTICE; AMENDING THE MEDICAL
MALPRACTICE ACT TO CHANGE THE NAME OF THE ACT, TO CLARIFY THAT
BUSINESS ENTITIES PROVIDING HEALTH CARE SERVICES ARE HEALTH
CARE PROVIDERS UNDER THE ACT, TO RAISE THE RECOVERABLE LIMITS,
TO CREATE SPECIFIC LIABILITY AND RECOVERABLE LIMITS FOR
HOSPITALS, TO CREATE THE HOSPITAL PATIENT'S COMPENSATION FUND
AND TO PROHIBIT THE DISCLOSURE OF CERTAIN CONFIDENTIAL
INFORMATION; MAKING AN APPROPRIATION.

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

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

"41-5-1. SHORT TITLE.--Chapter 41, Article 5 NMSA 1978
may be cited as the [~~"Medical Malpractice Act"~~] "New Mexico
Medical Professional Liability Act"."

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

3 "41-5-2. PURPOSE OF ACT--PURPOSE OF AMENDMENT.--

4 A. The purpose of the [Medical Malpractice Act] New
5 Mexico Medical Professional Liability Act is to promote the
6 health and welfare of the people of New Mexico by making
7 available professional liability insurance for health care
8 providers in New Mexico.

9 B. The purpose of the 2011 amendment to the
10 definition of "health care provider" in Section 41-5-3 NMSA
11 1978 is not intended to expand or alter the definition but is
12 intended to clarify that "health care provider" includes
13 business entities that provide health care services."

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

16 "41-5-3. DEFINITIONS.--As used in the [Medical
17 Malpractice Act] New Mexico Medical Professional Liability Act:

18 A. "business entity" means a corporation,
19 including a professional corporation and a nonprofit
20 corporation, a limited liability company, a limited liability
21 partnership, a limited partnership or a general partnership
22 organized or formed under the laws of New Mexico or qualified
23 to conduct business in New Mexico as a foreign corporation,
24 limited liability company, limited liability partnership or
25 limited partnership;

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1 [A.] B. "health care provider" means:

2 (1) a natural person [~~corporation,~~
3 ~~organization, facility or institution licensed or certified by~~
4 ~~this state to provide health care or professional services as a~~
5 ~~doctor of medicine, hospital, outpatient health care facility,~~
6 ~~doctor of osteopathy, chiropractor, podiatrist, nurse~~
7 ~~anesthetist or physician's assistant~~] licensed to practice
8 medicine or otherwise provide health care services pursuant to
9 a professional or occupational license;

10 (2) a hospital;

11 (3) an outpatient health care facility;

12 (4) a business entity, other than a hospital
13 or an outpatient health care facility, that provides health
14 care services primarily through persons licensed to practice
15 medicine or that otherwise provide health care services in New
16 Mexico pursuant to a professional or occupational license; or

17 (5) an officer, employee or agent of a
18 hospital, hospital affiliate, outpatient health care facility
19 or business entity acting in the course and within the scope of
20 the individual's office, employment or agency;

21 C. "controlled" or "control" means:

22 (1) with respect to a corporation, ownership
23 of stock representing:

24 (a) more than fifty percent of the total
25 combined voting power of all classes of stock entitled to vote;

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1 and

2 (b) more than fifty percent of all other
3 classes of stock of the corporation; and

4 (2) with respect to another business entity,
5 ownership of equity representing:

6 (a) more than fifty percent of the total
7 combined voting power of all of the equity interests entitled
8 to vote; and

9 (b) more than fifty percent of all other
10 equity interests of the business entity;

11 D. "hospital" means a business entity licensed to
12 operate a hospital by the department of health;

13 E. "hospital affiliate" means an outpatient health
14 care facility or other business entity qualifying as a health
15 care provider that is controlled by, or under common control
16 with, a hospital;

17 ~~[B-]~~ F. "insurer" means an insurance company
18 engaged in writing health care provider malpractice liability
19 insurance in this state, except that "insurer" does not include
20 an insurance company that is not covered under the provisions
21 of the Property and Casualty Insurance Guaranty Law;

22 ~~[G-]~~ G. "malpractice claim" includes any cause of
23 action arising in this state against a health care provider for
24 medical treatment, lack of medical treatment, negligent hiring,
25 supervision, training or credentialing or other claimed

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1 departure from accepted standards of health care [~~which~~] that
2 proximately results in injury to the patient, whether the
3 patient's claim or cause of action sounds in tort or contract,
4 and includes but is not limited to actions based on battery or
5 wrongful death; "malpractice claim" does not include a cause of
6 action arising out of the driving, flying or nonmedical acts
7 involved in the operation, use or maintenance of a vehicular or
8 aircraft ambulance;

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

14 I. "outpatient health care facility" means a
15 business entity licensed to operate an outpatient health care
16 facility by the department of health;

17 ~~[E-]~~ J. "patient" means a natural person who
18 received or should have received health care from a licensed
19 health care provider, under a contract, express or implied;
20 [~~and~~]

21 K. "personal information" means information that
22 identifies an individual or a business entity, including the
23 individual or business entity's name, address or telephone
24 number;

25 L. "professional or occupational license" means a

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1 license to practice medicine or provide health care services
2 pursuant to the Optometry Act; the Nursing Practice Act; the
3 Chiropractic Physician Practice Act; the Medical Practice Act;
4 the Podiatry Act; the Professional Psychologist Act; Chapter
5 61, Article 10 NMSA 1978; the Osteopathic Physicians'
6 Assistants Act; the Occupational Therapy Act; the Physical
7 Therapy Act; or the Dental Health Care Act; and

8 [F-] M. "superintendent" means the superintendent
9 of insurance of this state."

10 SECTION 4. Section 41-5-5 NMSA 1978 (being Laws 1992,
11 Chapter 33, Section 2) is amended to read:

12 "41-5-5. QUALIFICATIONS.--

13 A. To be qualified under the provisions of the
14 [~~Medical Malpractice Act~~] New Mexico Medical Professional
15 Liability Act, a health care provider, other than a hospital or
16 hospital affiliate, shall:

17 (1) establish its financial responsibility by
18 filing proof with the superintendent that the health care
19 provider is insured by a policy of malpractice liability
20 insurance issued by an authorized insurer in the amount of at
21 least two hundred thousand dollars (\$200,000) per occurrence
22 [~~or for an individual health care provider, excluding hospitals~~
23 ~~and outpatient health care facilities, by having continuously~~
24 ~~on deposit the sum of six hundred thousand dollars (\$600,000)~~
25 ~~in cash with the superintendent or such other like deposit as~~

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1 ~~the superintendent may allow by rule or regulation; provided~~
2 ~~that in the absence of an additional deposit or policy as~~
3 ~~required by this subsection, the deposit or policy shall~~
4 ~~provide coverage for not more than three separate occurrences];~~
5 and

6 (2) pay the surcharge assessed on health care
7 providers by the superintendent pursuant to Section 41-5-25
8 NMSA 1978 for the patient's compensation fund.

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

17 B. To be qualified under the provisions of the New
18 Mexico Medical Professional Liability Act, a hospital affiliate
19 shall:

20 (1) establish its financial responsibility by
21 filing proof with the superintendent that the hospital
22 affiliate is insured by a policy of malpractice liability
23 insurance issued by an authorized insurer in the amount of at
24 least two hundred thousand dollars (\$200,000) per occurrence;
25 and

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1 (2) pay the surcharge assessed on health care
2 providers by the superintendent pursuant to Section 41-5-25.1
3 NMSA 1978 for the hospital patient's compensation fund.

4 C. To be qualified under the provisions of the New
5 Mexico Medical Professional Liability Act, a hospital shall:

6 (1) establish its financial responsibility by
7 filing proof with the superintendent that the hospital is
8 insured by a policy of malpractice liability insurance issued
9 by an authorized insurer in an amount equal to:

10 (a) at least two hundred thousand
11 dollars (\$200,000) per occurrence, in order to be qualified
12 through December 31, 2011; and

13 (b) at least six hundred thousand
14 dollars (\$600,000) per occurrence, in order to be qualified on
15 or after January 1, 2012; and

16 (2) pay the surcharge assessed on hospitals by
17 the superintendent pursuant to Section 41-5-25.1 NMSA 1978 for
18 the hospital patient's compensation fund.

19 [~~G.~~] D. A health care provider not qualifying under
20 this section shall not have the benefit of any of the
21 provisions of the [~~Medical Malpractice Act~~] New Mexico Medical
22 Professional Liability Act in the event of a malpractice claim
23 against [~~it~~] that provider."

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

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1 "41-5-6. LIMITATION OF RECOVERY--PROVIDERS OTHER THAN
2 HOSPITALS.--

3 A. Except for punitive damages and medical care and
4 related benefits, and except as provided for hospitals in
5 Subsection A of Section 41-5-6.1 NMSA 1978, the aggregate
6 dollar amount recoverable by all persons for or arising from
7 any injury or death to a patient as a result of malpractice
8 shall not exceed [~~six hundred thousand dollars (\$600,000) per~~
9 ~~occurrence~~] the following amounts:

10 (1) six hundred thousand dollars (\$600,000)
11 per occurrence for acts of malpractice occurring prior to
12 January 1, 2012; and

13 (2) seven hundred thousand dollars (\$700,000)
14 per occurrence for acts of malpractice occurring on or after
15 January 1, 2012.

16 B. In jury cases, the jury shall not be given any
17 instructions dealing with [~~this limitation~~] limitations
18 specified in Subsection A of this section.

19 [~~B.~~] C. The value of accrued medical care and
20 related benefits shall not be subject to the [~~six hundred~~
21 ~~thousand dollar (\$600,000) limitation~~] limitations specified in
22 Subsection A of this section.

23 [~~C.~~] D. Monetary damages shall not be awarded for
24 future medical expenses in malpractice claims.

25 [~~D. A health care provider's personal liability~~]

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1 E. Except as provided for hospitals pursuant to
2 Subsection D of Section 41-5-6.1 NMSA 1978, the personal
3 liability of a health care provider is limited to two hundred
4 thousand dollars (\$200,000) for monetary damages and medical
5 care and related benefits [~~as provided in Section 41-5-7 NMSA~~
6 ~~1978~~]. Any amount due from a judgment or settlement against a
7 health care provider, other than a hospital affiliate, in
8 excess of two hundred thousand dollars (\$200,000) shall be paid
9 from the patient's compensation fund, as provided in Section
10 41-5-25 NMSA 1978. Any amount due from a judgment or
11 settlement against a hospital affiliate in excess of two
12 hundred thousand dollars (\$200,000) shall be paid from the
13 hospital patient's compensation fund, as provided in Section
14 41-5-25.1 NMSA 1978.

15 ~~[E. For the purposes of Subsections A and B of this~~
16 ~~section, the six hundred thousand dollar (\$600,000) aggregate~~
17 ~~amount recoverable by all persons for or arising from any~~
18 ~~injury or death to a patient as a result of malpractice shall~~
19 ~~apply only to malpractice occurring on or after April 1, 1995.]~~

20 F. Nothing in this section shall be deemed to
21 create any new claims or causes of action of any kind or
22 character whatsoever against hospitals or other business
23 entities.

24 G. In the event of a judgment against a hospital, a
25 hospital affiliate, an outpatient health care facility or

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1 another business entity for any injury or death to a patient as
2 a result of the malpractice of an officer, agent or employee of
3 the hospital, hospital affiliate, outpatient health care
4 facility or other business entity acting in the course and
5 within the scope of the individual's office, employment or
6 agency:

7 (1) the total amount recoverable, excluding
8 punitive damages and medical care and related benefits, shall
9 not exceed the amount set forth in Subsection A of this
10 section; and

11 (2) the total personal liability of the
12 hospital, hospital affiliate, outpatient health care facility
13 or other business entity and the officer, agent or employee of
14 the hospital, hospital affiliate, outpatient health care
15 facility or other business entity for monetary damages and
16 medical care and related benefits shall not exceed the amount
17 set forth in Subsection E of this section."

18 SECTION 6. A new section of the New Mexico Medical
19 Professional Liability Act, Section 41-5-6.1 NMSA 1978, is
20 enacted to read:

21 "41-5-6.1. [NEW MATERIAL] LIMITATION OF RECOVERY--
22 HOSPITALS.--

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

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1 to a patient as a result of malpractice, other than malpractice
2 arising from the conduct of an officer, agent or employee of
3 the hospital acting in the course and within the scope of the
4 individual's office, employment or agency, shall not exceed one
5 million five hundred thousand dollars (\$1,500,000) per
6 occurrence. In jury cases, the jury shall not be given any
7 instructions dealing with this limitation.

8 B. The value of accrued medical care and related
9 benefits shall not be subject to the limitation set forth in
10 Subsection A of this section.

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

13 D. The personal liability of a hospital for
14 monetary damages and medical care and related benefits for acts
15 of malpractice, other than malpractice arising from the conduct
16 of an officer, agent or employee of the hospital acting in the
17 course and within the scope of the individual's office,
18 employment or agency, is limited to six hundred thousand
19 dollars (\$600,000). Any amount due from a judgment or
20 settlement in excess of six hundred thousand dollars (\$600,000)
21 for acts of malpractice, other than malpractice arising from
22 the conduct of an officer, agent or employee of the hospital
23 acting in the course and within the scope of the individual's
24 office, employment or agency, shall be paid from the hospital
25 patient's compensation fund, as provided in Section 41-5-25.1

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1 NMSA 1978.

2 E. Nothing in this section shall be deemed to
3 create any new claims or causes of action of any kind or
4 character whatsoever against hospitals.

5 F. The limitations of this section shall apply only
6 to an act of malpractice occurring on or after January 1, 2012.
7 The limitations of Section 41-5-6 NMSA 1978 shall apply to an
8 act of malpractice occurring prior to January 1, 2012."

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

11 "41-5-7. FUTURE MEDICAL EXPENSES--PUNITIVE DAMAGES---

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

22 B. Except as provided in Section 41-5-10 NMSA 1978,
23 once a judgment is entered in favor of a patient who is found
24 to be in need of future medical care and related benefits or a
25 settlement is reached between a patient and health care

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

9 C. Awards of future medical care and related
10 benefits shall not be subject to the [~~six hundred thousand~~
11 ~~dollar (\$600,000) limitation imposed in Section 41-5-6 NMSA~~
12 ~~1978]~~ applicable limitation imposed in Subsection A of Section
13 41-5-6 NMSA 1978 or in Subsection A of Section 41-5-6.1 NMSA
14 1978.

15 D. Payment for medical care and related benefits
16 shall be made as expenses are incurred.

17 E. The health care provider shall be liable for all
18 medical care and related benefit payments until the total
19 payments made by or on behalf of [~~the health care provider~~
20 for monetary damages and medical care and related benefits
21 combined equals [~~two hundred thousand dollars (\$200,000), after~~
22 ~~which the payments shall be made by the patient's compensation~~
23 ~~fund]~~ the applicable maximum liability amount of Subsection E
24 of Section 41-5-6 NMSA 1978 or Subsection D of Section 41-5-6.1
25 NMSA 1978. Amounts due for medical care and related benefits

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1 in excess of the maximum liability amount shall be paid from
2 the patient's compensation fund or the hospital patient's
3 compensation fund, as applicable.

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

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

15 H. In an action against a health care provider
16 seeking recovery of punitive damages, the plaintiff must prove,
17 by clear and convincing evidence, fraudulent, malicious or
18 outrageous conduct by the health care provider. No award of
19 punitive damages against a health care provider shall exceed
20 the lesser of the following amounts, and, in jury cases, the
21 jury shall not be given any instructions relating to the
22 limitations of this subsection:

23 (1) an amount equal to twice the amount of any
24 judgment against the health care provider for compensatory
25 damages, excluding any award for medical care and related

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1 benefits; or

2 (2) an amount equal to twice the applicable
3 limitation on recovery against the health care provider, as
4 provided in Subsection E of Section 41-5-6 or Subsection D of
5 Section 41-5-6.1 NMSA 1978.

6 ~~[H.]~~ I. A judgment of punitive damages against a
7 health care provider shall be the personal liability of the
8 health care provider. Punitive damages shall not be paid from
9 the patient's compensation fund or the hospital patient's
10 compensation fund or from the proceeds of the health care
11 provider's insurance contract unless the contract expressly
12 provides coverage. Nothing in Section 41-5-6 or 41-5-6.1 NMSA
13 1978 precludes the award of punitive damages to a patient.
14 Nothing in this subsection authorizes the imposition of
15 liability for punitive damages on a derivative basis where that
16 imposition would not be otherwise authorized by law."

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

19 "41-5-8. **MEDICAL BENEFITS PRIOR TO JUDGMENT.**--A health
20 care provider named as a defendant in a malpractice claim or
21 named as a respondent in a proceeding before the New Mexico
22 medical review commission ~~[created in the Medical Malpractice~~
23 ~~Act]~~ shall have the option of paying for the patient's medical
24 care and related benefits at any time prior to the entry of a
25 judgment. Except as provided in Section ~~[11 of the Medical~~

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1 ~~Malpractice Act]~~ 41-5-11 NMSA 1978, evidence of a health care
2 provider's payment for such benefits shall not be admissible in
3 the trial of the malpractice claim brought against ~~[it]~~ the
4 health care provider."

5 SECTION 9. Section 41-5-10 NMSA 1978 (being Laws 1976,
6 Chapter 2, Section 10) is amended to read:

7 "41-5-10. PATIENT--FUTURE EXAMINATIONS AND HEARINGS.--

8 A. Any health care provider shall be entitled to
9 have a physical examination of the patient by a physician of
10 the health care provider's choice from time to time for the
11 purpose of determining the patient's continued need of medical
12 care and related benefits, subject to the following
13 requirements:

14 (1) notice in writing shall be delivered to or
15 served upon the patient specifying the time and place where it
16 is intended to conduct the examination. Such notice ~~[must]~~
17 shall be given at least ten days prior to the time stated in
18 the notice. Delivery by certified mail is permitted;

19 (2) ~~[such]~~ the examination shall be by a
20 physician qualified to practice medicine under the law of this
21 state or of the state or county ~~[wherein]~~ in which the patient
22 resides;

23 (3) the place at which ~~[such]~~ the examination
24 is to be conducted shall not involve an unreasonable amount of
25 travel for the patient considering all the circumstances. It

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1 shall not be necessary for a patient who resides outside this
2 state to come into this state for [~~such~~] an examination unless
3 so ordered by the court;

4 (4) within thirty days after the examination,
5 the patient shall be compensated by the party requesting the
6 examination for all necessary and reasonable expenses
7 incidental to submitting to the examination, including the
8 reasonable cost of travel, meals, lodging, loss of pay or other
9 like direct expense;

10 (5) examinations [~~may~~] shall not be required
11 more frequently than at six-month intervals; except that upon
12 application to the court having jurisdiction of the claim and
13 after reasonable cause shown [~~therefor~~], an examination within
14 a shorter interval may be ordered. In considering [~~such~~] the
15 application, the court should exercise care to prevent
16 harassment to the patient;

17 (6) the patient shall be entitled to have a
18 physician or an attorney of [~~his own~~] choice, or both, present
19 at [~~such~~] the examination. The patient shall pay such
20 physician or attorney [~~himself~~]; and

21 (7) the patient shall be promptly furnished
22 with a copy of the report of the physical examination made by
23 the physician making the examination on behalf of the health
24 care provider.

25 B. If a patient fails or refuses to submit to

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1 examination in accordance with the notice and if the
2 requirements of Subsection A of this section have been
3 satisfied, the court may forfeit all medical care and related
4 benefits [~~which~~] that would accrue or become due to [~~him~~] the
5 patient except for such failure or refusal to submit to
6 examination during the period that [~~he~~] the patient willfully
7 persists in such failure or refusal.

8 C. If any patient [~~shall persist~~] persists in any
9 injurious practice [~~which~~] that imperils, retards or impairs
10 [~~his~~] recovery or increases [~~his~~] injury or refuses to submit
11 to such medical or surgical treatment as is reasonably
12 essential to promote [~~his~~] recovery, the court may in its
13 discretion reduce or suspend [~~his~~] medical care and related
14 benefits until the injurious practice is discontinued.

15 D. Any physician selected by the health care provider
16 and paid by the health care provider who [~~shall make or be~~]
17 makes or is present at an examination of the patient conducted
18 [~~in pursuance of~~] pursuant to this section may be required to
19 testify as to the conduct [~~thereof~~] of the examination and the
20 findings made. Communications made by the patient upon such
21 examination to [~~such~~] the physician [~~or physicians~~] shall not
22 be considered privileged.

23 E. The health care provider or the custodian of the
24 patient's compensation fund or the hospital patient's
25 compensation fund, as applicable, shall pay all reasonable

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1 legal fees, cost of medical examinations and the cost of the
2 fees of medical expert witnesses in any proceeding in which the
3 patient succeeds in raising ~~[his]~~ medical care and related
4 benefits or in any unsuccessful proceeding brought by the
5 health care provider or the ~~[patient's compensation fund]~~
6 custodian of the patient's compensation fund or the hospital
7 patient's compensation fund to reduce medical care and related
8 benefits."

9 SECTION 10. Section 41-5-11 NMSA 1978 (being Laws 1976,
10 Chapter 2, Section 11) is amended to read:

11 "41-5-11. SET-OFF OF ADVANCE PAYMENTS.--

12 A. Evidence of an advance payment is not admissible
13 until there is a final judgment in favor of the patient, in
14 which event the court shall reduce the judgment to the patient
15 to the extent of the advance payment. In jury cases where
16 there is a factual dispute concerning an alleged advance
17 payment, all questions of fact relating to such an advance
18 payment shall be resolved by the jury after it has reached its
19 verdict. The advance payment shall inure to the exclusive
20 benefit of the health care provider or a party making the
21 payment in its behalf. In the event the advance payment
22 exceeds the liability of the defendant or the insurer making
23 it, the court shall order any adjustment necessary to equitably
24 apportion the amount ~~[which]~~ that each defendant is obligated
25 to pay, exclusive of costs. In no case shall an advance

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1 payment in excess of an award be repayable by the person
2 receiving it.

3 B. If a health care provider should elect to pay for
4 medical care and related benefits at any time prior to the
5 entry of a judgment, as provided in Section [~~8 of the Medical~~
6 ~~Malpractice Act~~] 41-5-8 NMSA 1978, and subsequently is found
7 not to be liable, its legal and equitable right of recovery for
8 all such payments shall not be foreclosed or prejudiced in any
9 way."

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

12 "41-5-12. CLAIMS FOR COMPENSATION NOT ASSIGNABLE.--A
13 patient's claim for compensation under the [~~Medical Malpractice~~
14 ~~Act~~] New Mexico Medical Professional Liability Act is not
15 assignable."

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

18 "41-5-13. LIMITATIONS.--No claim for malpractice arising
19 out of an act of malpractice [~~which occurred subsequent to the~~
20 ~~effective date of the Medical Malpractice Act~~] may be brought
21 against a health care provider unless filed within three years
22 after the date that the act of malpractice occurred, except
23 that a minor under the full age of six years shall have until
24 [~~his~~] the minor's ninth birthday in which to file. This
25 [~~subsection~~] section applies to all persons regardless of

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1 minority or other legal disability."

2 SECTION 13. Section 41-5-14 NMSA 1978 (being Laws 1976,
3 Chapter 2, Section 14) is amended to read:

4 "41-5-14. NEW MEXICO 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 malpractice
8 claims against health care providers covered by the [~~Medical~~
9 ~~Malpractice Act~~] New Mexico Medical Professional Liability Act.

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

13 C. Cases [~~which~~] that a panel will consider include
14 all cases involving any alleged act of malpractice occurring in
15 New Mexico by health care providers qualified under the
16 [~~Medical Malpractice Act~~] New Mexico Medical Professional
17 Liability Act.

18 D. An attorney shall submit a case for the
19 consideration of a panel, prior to filing a complaint in any
20 district court or other court sitting in New Mexico, by
21 addressing an application, in writing, signed by the patient or
22 [~~his~~] the patient's attorney, to the director of the New Mexico
23 medical review commission.

24 E. The director of the New Mexico medical review
25 commission [~~will~~] shall be an attorney appointed by and serving

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1 at the pleasure of the chief justice of the New Mexico supreme
2 court.

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

8 SECTION 14. Section 41-5-20 NMSA 1978 (being Laws 1976,
9 Chapter 2, Section 20) is amended to read:

10 "41-5-20. PANEL DELIBERATIONS AND DECISION.--

11 A. The deliberations of the panel shall be and remain
12 confidential. Upon consideration of all the relevant material,
13 the panel shall decide only two questions:

14 (1) whether there is substantial evidence that
15 the acts complained of occurred and that they constitute
16 malpractice; and

17 (2) whether there is a reasonable medical
18 probability that the patient was injured [~~thereby~~] by the acts.

19 B. All votes of the panel on the two questions for
20 decision shall be by secret ballot. The decision shall be by a
21 majority vote of those voting members of the panel who have sat
22 on the entire case. The decision shall be communicated in
23 writing to the parties and attorneys concerned, and a copy
24 [~~thereof~~] shall be retained in the permanent files of the New
25 Mexico medical review commission.

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1 C. The decision shall in every case be signed for the
2 panel by the [~~chairman~~] chair, who shall vote only in the event
3 the other members of the panel are evenly divided, and shall
4 contain only the conclusions reached by a majority of its
5 members and the number of members, if any, dissenting
6 [~~therefrom~~]; provided, however, that if the vote is not
7 unanimous, the majority may briefly explain the reasoning and
8 basis for their conclusion, and the dissenters may likewise
9 explain the reasons for disagreement.

10 D. The report of the medical review panel shall not
11 be admissible as evidence in any action subsequently brought in
12 a court of law. A copy of the report shall be sent to the
13 health care provider's professional licensing board.

14 E. Panelists and witnesses shall have absolute
15 immunity from civil liability for all communications, findings,
16 opinions and conclusions made in the course and scope of duties
17 prescribed by the [~~Medical Malpractice Act~~] New Mexico Medical
18 Professional Liability Act.

19 F. The panel's decisions shall be without
20 administrative or judicial authority and shall not be binding
21 on any party. The panel shall make no effort to settle or
22 compromise any claim [~~nor~~] or express any opinion on the
23 monetary value of any claim."

24 SECTION 15. Section 41-5-25 NMSA 1978 (being Laws 1992,
25 Chapter 33, Section 9, as amended) is amended to read:

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1 "41-5-25. PATIENT'S COMPENSATION FUND.--

2 A. There is created in the state treasury a
3 "patient's compensation fund" to be ~~[collected and received]~~
4 administered by the superintendent for exclusive use for the
5 purposes stated in the ~~[Medical Malpractice Act]~~ New Mexico
6 Medical Professional Liability Act. The fund and any income
7 from it shall be held in trust, deposited in a segregated
8 account and invested and reinvested by the superintendent with
9 the prior approval of the state board of finance and shall not
10 become a part of or revert to the general fund of this state.
11 The fund and any income from the fund shall only be expended
12 for the purposes of and to the extent provided in the ~~[Medical~~
13 ~~Malpractice Act]~~ New Mexico Medical Professional Liability Act.
14 The superintendent shall have the authority to use fund money
15 to purchase insurance for the fund and its obligations. The
16 superintendent, as custodian of the patient's compensation
17 fund, shall be notified by the health care provider or ~~[his]~~
18 the health care provider's insurer within thirty days of
19 service on the health care provider of a complaint asserting a
20 malpractice claim brought in a court in this state against the
21 health care provider. The superintendent shall have the sole
22 authority for making a determination to settle any claim
23 against the patient's compensation fund.

24 B. To ~~[create]~~ finance the patient's compensation
25 fund, an annual surcharge shall be levied on all health care

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1 providers qualifying under [~~Paragraph (1) of~~] Subsection A of
2 Section 41-5-5 NMSA 1978 [~~in New Mexico~~]. The surcharge shall
3 be determined by the superintendent based upon sound actuarial
4 principles, using data obtained from New Mexico experience if
5 available. The surcharge shall be collected on the same basis
6 as premiums by each insurer from the health care provider.

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

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

15 E. All expenses of collecting, protecting and
16 administering the patient's compensation fund or of purchasing
17 insurance for the fund shall be paid from the fund.

18 F. Claims payable pursuant to Laws 1976, Chapter 2,
19 Section 30 shall be paid in accordance with the payment
20 schedule constructed by the court. If the patient's
21 compensation fund would be exhausted by payment of all claims
22 allowed during a particular calendar year, then the amounts
23 paid to each patient and other parties obtaining judgments
24 shall be prorated, with each such party receiving an amount
25 equal to the percentage [~~his~~] the party's own payment schedule

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1 bears to the total of payment schedules outstanding and payable
2 by the fund. Any amounts due and unpaid as a result of such
3 proration shall be paid in the following calendar years.
4 However, payments for medical care and related benefits shall
5 be made before any payment made under Laws 1976, Chapter 2,
6 Section 30.

7 G. Upon receipt of one of the proofs of authenticity
8 listed in this subsection, reflecting a judgment for damages
9 rendered [~~pursuant to the Medical Malpractice Act~~] against a
10 health care provider, other than a hospital or hospital
11 affiliate, pursuant to the New Mexico Medical Professional
12 Liability Act, the superintendent shall issue or have issued
13 warrants in accordance with the payment schedule constructed by
14 the court and made a part of its final judgment. The only
15 claim against the patient's compensation fund shall be a
16 voucher or other appropriate request by the superintendent
17 after [~~he~~] the superintendent receives:

18 (1) a certified copy of a final judgment in
19 excess of two hundred thousand dollars (\$200,000) against [~~a~~]
20 the health care provider;

21 (2) a certified copy of a court-approved
22 settlement or certification of settlement made prior to
23 initiating suit, signed by [~~both~~] all parties, including the
24 superintendent, in excess of two hundred thousand dollars
25 (\$200,000) against [~~a~~] the health care provider; or

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

7 H. The superintendent shall contract for an
8 independent actuarial study of the patient's compensation fund
9 to be performed not less than once every two years."

10 SECTION 16. A new section of the New Mexico Medical
11 Professional Liability Act, Section 41-5-25.1 NMSA 1978, is
12 enacted to read:

13 "41-5-25.1. [NEW MATERIAL] HOSPITAL PATIENT'S
14 COMPENSATION FUND.--

15 A. There is created in the state treasury the
16 "hospital patient's compensation fund" to be administered by
17 the superintendent for exclusive use for the purposes stated in
18 the New Mexico Medical Professional Liability Act. The fund
19 and any income from it shall be held in trust, deposited in a
20 segregated account and invested and reinvested by the
21 superintendent with the prior approval of the state board of
22 finance and shall not become a part of or revert to the general
23 fund of this state. The fund and any income from the fund
24 shall only be expended for the purposes of and to the extent
25 provided in the New Mexico Medical Professional Liability Act.

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1 The superintendent shall have the authority to use fund money
2 to purchase insurance for the fund and its obligations. The
3 superintendent, as custodian of the hospital patient's
4 compensation fund, shall be notified by the hospital or its
5 insurer or the hospital affiliate or its insurer within thirty
6 days of service on the hospital or hospital affiliate of a
7 complaint asserting a malpractice claim brought in a court in
8 this state against the hospital or hospital affiliate. The
9 superintendent shall have the sole authority for making a
10 determination to settle any claim against the hospital
11 patient's compensation fund.

12 B. To finance the hospital patient's compensation
13 fund, an annual surcharge shall be levied on all hospitals and
14 hospital affiliates qualifying under Subsection B or C of
15 Section 41-5-5 NMSA 1978. The surcharge shall be determined by
16 the superintendent based upon sound actuarial principles that
17 take into account the different classifications of the
18 physicians and other health care providers of the hospital or
19 hospital affiliate and that use data obtained from New Mexico
20 experience if available. The surcharge shall be collected on
21 the same basis as premiums by each insurer from the hospital.

22 C. The surcharge with accrued interest shall be due
23 and payable within thirty days after the premiums for
24 malpractice liability insurance have been received by the
25 insurer from the hospital or hospital affiliate in New Mexico.

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

5 E. All expenses of collecting, protecting and
6 administering the hospital patient's compensation fund or of
7 purchasing insurance for the fund shall be paid from the fund.

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

21 G. Upon receipt of one of the proofs of authenticity
22 listed in this subsection, reflecting a judgment for damages
23 rendered against a hospital or hospital affiliate pursuant to
24 the New Mexico Medical Professional Liability Act, the
25 superintendent shall issue or have issued warrants in

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1 accordance with the payment schedule constructed by the court
2 and made a part of its final judgment. The only claim against
3 the hospital patient's compensation fund shall be a voucher or
4 other appropriate request by the superintendent after the
5 superintendent receives:

6 (1) in the case of a judgment against or
7 settlement with a hospital or hospital affiliate for injury or
8 death to a patient arising from or as a result of the
9 malpractice of an officer, employee or agent of the hospital or
10 hospital affiliate acting in the course and within the scope of
11 the individual's office, employment or agency:

12 (a) a certified copy of a final judgment in
13 excess of two hundred thousand dollars (\$200,000) against the
14 hospital or hospital affiliate;

15 (b) a certified copy of a court-approved
16 settlement or certification of settlement made prior to
17 initiating suit, signed by all parties, including the
18 superintendent, under which the hospital or hospital affiliate
19 is required to pay an amount in excess of two hundred thousand
20 dollars (\$200,000); or

21 (c) a certified copy of a final judgment
22 against the hospital or hospital affiliate less than two
23 hundred thousand dollars (\$200,000) and an affidavit of the
24 hospital or its insurer or the hospital affiliate or its
25 insurer attesting that payments made pursuant to Subsection E

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1 of Section 41-5-7 NMSA 1978, combined with the monetary
2 recovery, exceed two hundred thousand dollars (\$200,000);

3 (2) in the case of a judgment against or
4 settlement with a hospital affiliate, other than a judgment or
5 settlement arising from or as a result of the malpractice of an
6 officer, employee or agent of the hospital affiliate acting in
7 the course and within the scope of the individual's office,
8 employment or agency:

9 (a) a certified copy of a final judgment in
10 excess of two hundred thousand dollars (\$200,000) against the
11 hospital affiliate;

12 (b) a certified copy of a court-approved
13 settlement or certification of settlement made prior to
14 initiating suit, signed by all parties, including the
15 superintendent, under which the hospital affiliate is required
16 to pay an amount in excess of two hundred thousand dollars
17 (\$200,000); or

18 (c) a certified copy of a final judgment
19 against the hospital affiliate less than two hundred thousand
20 dollars (\$200,000) and an affidavit of the hospital affiliate
21 or its insurer attesting that payments made pursuant to
22 Subsection E of Section 41-5-7 NMSA 1978, combined with the
23 monetary recovery, exceed two hundred thousand dollars
24 (\$200,000); or

25 (3) in the case of a judgment against or

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1 settlement with a hospital, other than a judgment or settlement
2 arising from or as a result of the malpractice of an officer,
3 employee or agent of the hospital acting in the course and
4 within the scope of the individual's office, employment or
5 agency:

6 (a) a certified copy of a final judgment
7 against the hospital in excess of: 1) two hundred thousand
8 dollars (\$200,000) if the malpractice occurred prior to January
9 1, 2012; or 2) six hundred thousand dollars (\$600,000) if the
10 malpractice occurred on or after January 1, 2012;

11 (b) a certified copy of a court-approved
12 settlement or certification of settlement made prior to
13 initiating suit, signed by all parties, including the
14 superintendent, under which the hospital is required to pay an
15 amount in excess of: 1) two hundred thousand dollars
16 (\$200,000) if the malpractice occurred prior to January 1,
17 2012; or 2) six hundred thousand dollars (\$600,000) if the
18 malpractice occurred on or after January 1, 2012; or

19 (c) a certified copy of a final judgment
20 less than the following amount and an affidavit of the hospital
21 or its insurer attesting that payments made pursuant to
22 Subsection E of Section 41-5-7 NMSA 1978, combined with the
23 monetary recovery, exceed the following amount: 1) two hundred
24 thousand dollars (\$200,000) if the malpractice occurred prior
25 to January 1, 2012; or 2) six hundred thousand dollars

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1 (\$600,000) if the malpractice occurred on or after January 1,
2 2012.

3 H. The superintendent shall contract for an
4 independent actuarial study of the hospital patient's
5 compensation fund to be performed not less than once every two
6 years."

7 SECTION 17. Section 41-5-26 NMSA 1978 (being Laws 1976,
8 Chapter 2, Section 26, as amended) is amended to read:

9 "41-5-26. MALPRACTICE COVERAGE.--

10 A. The filing of proof of financial responsibility
11 with the superintendent, as provided in Section [~~58-33-5 NMSA~~
12 ~~1953~~] 41-5-5 NMSA 1978, shall constitute a conclusive and
13 unqualified acceptance of the provisions of the [~~Medical~~
14 ~~Malpractice Act~~] New Mexico Medical Professional Liability Act.

15 B. Any provision in a policy attempting to limit or
16 modify the liability of the insurer contrary to the provisions
17 of the [~~Medical Malpractice Act~~] New Mexico Medical
18 Professional Liability Act is void.

19 C. Every policy issued under the [~~Medical Malpractice~~
20 ~~Act~~] New Mexico Medical Professional Liability Act is deemed to
21 include the following provisions:

22 (1) the insurer assumes all obligations to pay
23 an award imposed against its insured under the provisions of
24 the [~~Medical Malpractice Act~~] New Mexico Medical Professional
25 Liability Act; and

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1 (2) any termination of a policy by an insurer
2 shall not be effective unless written notice of [~~such~~]
3 termination has been mailed by certified mail to both the
4 insured and the superintendent at least ninety days prior to
5 the date the cancellation is to become effective, except that
6 an insurer may terminate a policy if a billed premium payment
7 is thirty days past due upon ten days' prior written notice
8 mailed by certified mail to the insured of the failure of the
9 insured to pay premiums, and an insured may terminate [~~his~~] the
10 insured's policy by written request to the insurer, but the
11 effective date of termination shall be not sooner than ten days
12 after the receipt by the insurer of the written request to
13 terminate. In all cases when a policy is terminated for
14 failure of the insured to pay premiums or at the request of the
15 insured, the insurer shall notify the superintendent in writing
16 immediately of the effective date of termination of the policy.
17 The insurer shall remain liable for all causes of action
18 accruing prior to the effective date of the termination unless
19 otherwise barred by the provisions of the [~~Medical Malpractice~~
20 ~~Act~~] New Mexico Medical Professional Liability Act."

21 **SECTION 18.** Section 41-5-27 NMSA 1978 (being Laws 1976,
22 Chapter 2, Section 27) is amended to read:

23 "41-5-27. REPORT BY DISTRICT COURT CLERKS.--Within thirty
24 days of entry of judgment, the clerk of the district court from
25 which judgment issues shall forward the name of every health

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1 care provider against whom a judgment is rendered under the
2 [~~Medical Malpractice Act~~] New Mexico Medical Professional
3 Liability Act to the appropriate board of professional
4 registration and examination for review of the fitness of the
5 health care provider to practice [~~his~~] the health care
6 provider's profession. In cases where judgments are entered
7 against hospitals or other institutional health care providers
8 on the basis of respondeat superior or some other derivative
9 theory of recovery, the clerk of the district court shall
10 forward the name of the individual health care provider whose
11 negligence caused the injury to that health care provider's
12 board of professional registration and examination for such
13 review. Review of the health care provider's fitness to
14 practice shall be conducted in accordance with law."

15 SECTION 19. Section 41-5-28 NMSA 1978 (being Laws 1976,
16 Chapter 2, Section 29, as amended) is amended to read:

17 "41-5-28. PAYMENT OF MEDICAL REVIEW COMMISSION
18 EXPENSES.--Unless otherwise provided by law, expenses incurred
19 in carrying out the powers, duties and functions of the New
20 Mexico medical review commission, including the salary of the
21 director of the commission, shall be allocated equally between
22 and paid by the patient's compensation fund and the hospital
23 patient's compensation fund. The superintendent, in [~~his~~] the
24 superintendent's capacity as custodian of the [~~fund~~] funds,
25 shall disburse fund money to the director upon receipt of

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1 vouchers itemizing expenses incurred by the [~~New Mexico medical~~
2 ~~review~~] commission. The director shall supply the chief
3 justice of the New Mexico supreme court with duplicates of all
4 vouchers submitted to the superintendent. Expenses paid by the
5 [~~fund~~] funds shall not exceed [~~three hundred fifty thousand~~
6 ~~dollars (\$350,000)~~] five hundred thousand dollars (\$500,000) in
7 any single calendar year; provided, however, that expenses
8 incurred in defending the commission shall not be subject to
9 that maximum amount."

10 SECTION 20. Section 41-5-29 NMSA 1978 (being Laws 1992,
11 Chapter 33, Section 10) is amended to read:

12 "41-5-29. REPORTS.--On January 31 of each year, the
13 superintendent shall, upon request, provide a written report to
14 all interested persons of the following information:

15 A. the beginning and ending calendar year balances in
16 the patient's compensation fund and the hospital patient's
17 compensation fund;

18 B. the total amount of contributions to the patient's
19 compensation fund and the hospital patient's compensation fund;
20 and

21 C. any other information regarding the patient's
22 compensation fund or the hospital patient's compensation fund
23 that the superintendent considers to be important."

24 SECTION 21. A new section of the New Mexico Medical
25 Professional Liability Act is enacted to read:

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1 "[NEW MATERIAL] DISCLOSURE OF PERSONAL INFORMATION

2 PROHIBITED.--It is unlawful for any employee or former employee
3 of the state to disclose to any other person, other than an
4 employee of the state in connection with that employee's
5 official duties, any personal information about a health care
6 provider that has settled a claim for malpractice covered by
7 the New Mexico Medical Professional Liability Act."

8 SECTION 22. TEMPORARY PROVISION--TRANSFER--OBLIGATIONS--
9 SAVING CLAUSE.--

10 A. On July 1, 2011, all money in the patient's
11 compensation fund that, as determined by the superintendent of
12 insurance, is attributable to or derived from surcharges paid
13 by hospitals or hospital affiliates shall be transferred to the
14 hospital patient's compensation fund.

15 B. On and after July 1, 2011, claims of hospitals or
16 hospital affiliates that, prior to July 1, 2011, were or would
17 be claims against the patient's compensation fund, shall be
18 claims against, and paid from, the hospital patient's
19 compensation fund.

20 C. The "New Mexico Medical Professional Liability
21 Act" is merely a new name for the "Medical Malpractice Act" and
22 is not a new act enacted by the legislature. All rights,
23 obligations, qualifications, funds, payments, claims and
24 protections arising under the Medical Malpractice Act shall
25 continue under the New Mexico Medical Professional Liability

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SECTION 23. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2011.

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