

Representative Merrill F. Nelson proposes the following substitute bill:

UTAH MEDICAL CANDOR ACT

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Merrill F. Nelson

Senate Sponsor: Michael S. Kennedy

LONG TITLE

General Description:

This bill enacts the Utah Medical Candor Act.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ creates a medical candor process where a health care provider may investigate an injury, or suspected injury, associated with a health care process and may communicate information about the investigation to the patient and any representative of the patient;
- ▶ addresses written notice of the medical candor process;
- ▶ addresses an offer of compensation made as part of the medical candor process; and
- ▶ addresses confidentiality, disclosure, and effect of communications, materials, or information that is created for or during the medical candor process.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides revisor instructions.

Utah Code Sections Affected:



26 ENACTS:

27 [78B-3-450](#), Utah Code Annotated 1953

28 [78B-3-451](#), Utah Code Annotated 1953

29 [78B-3-452](#), Utah Code Annotated 1953

30 [78B-3-453](#), Utah Code Annotated 1953

31 [78B-3-454](#), Utah Code Annotated 1953

32

33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section [78B-3-450](#) is enacted to read:

35 **Part 4a. Utah Medical Candor Act**

36 **78B-3-450. Definitions.**

37 As used in this chapter:

38 (1) "Adverse event" means an injury or suspected injury that is associated with a health
39 care process rather than an underlying condition of a patient or a disease.

40 (2) "Affected party" means:

41 (a) a patient; and

42 (b) any representative of a patient.

43 (3) "Communication" means any written or oral communication made in preparation of
44 or during the medical candor process.

45 (4) "Governmental entity" means the same as that term is defined in Section
46 [63G-7-102](#).

47 (5) "Health care" means the same as that term is defined in Section [78B-3-403](#).

48 (6) "Health care provider" means the same as that term is defined in Section
49 [78B-3-403](#).

50 (7) "Malpractice action against a health provider" means the same as that term is
51 defined in Section [78B-3-403](#).

52 (8) "Medical candor process" means the process described in Section [78B-3-451](#).

53 (9) "Patient" means the same as that term is defined in Section [78B-3-403](#).

54 (10) "Public employee" means the same as the term "employee" as defined in Section
55 [63G-7-102](#).

56 (11) (a) Except as provided in Subsection (11)(c), "representative" means the same as

57 that term is defined in Section [78B-3-403](#).

58 (b) "Representative" includes:

59 (i) a parent of a child regardless of whether the parent is the custodial or noncustodial
60 parent;

61 (ii) a legal guardian of a child;

62 (iii) a person designated to make decisions on behalf of a patient under a power of
63 attorney, an advanced health care directive, or a similar legal document; ~~and~~ ←

64 (iv) a default surrogate as defined in Section [75-2a-108](#) ~~and~~ ←

64a (v) if the patient is deceased, the personal representative of the patient's estate or the patient's
64b heirs as defined in Sections [75-1-201](#) and [78B-3-105](#). ←

65 (c) "Representative" does not include a parent of a child if the parent's parental rights
66 have been terminated by a court.

67 (12) "State" means the same as that term is defined in Section [63G-7-102](#).

68 Section 2. Section **78B-3-451** is enacted to read:

69 **78B-3-451. Medical candor process.**

70 In accordance with this part, a health care provider may engage an affected party in a
71 process where the health care provider and any other health care provider notified in
72 Subsection [78B-3-452](#)(1)(b) that chooses to participate in the process:

73 (1) conducts an investigation into an adverse event involving a patient and the health
74 care provided to the patient;

75 (2) communicates information to the affected party regarding information gathered
76 during an investigation described in Subsection (1);

77 (3) communicates to the affected party the steps that the health care provider will take
78 to prevent future occurrences of the adverse event; and

79 (4) determines whether to make an offer of compensation to the affected party for the
80 adverse event.

81 Section 3. Section **78B-3-452** is enacted to read:

82 **78B-3-452. Notice of medical candor process.**

83 (1) If a health care provider wishes to engage an affected party in the medical candor
84 process, the health care provider shall:

85 (a) provide a written notice described in Subsection (2) to the affected party within 365
86 days after the day on which the health care provider knew of the adverse event involving the
87 patient;

88 (b) provide a written notice, in a timely manner, to any other health care provider
89 involved in the adverse event that invites the health care provider to participate in the medical
90 candor process; and

91 (c) inform, in a timely manner, any health care provider described in Subsection (1)(b)
92 of an affected party's decision of whether to participate in the medical candor process.

93 (2) A written notice under Subsection (1)(a) shall:

94 (a) include an explanation of:

95 (i) the patient's right to receive a copy of the patient's medical records related to the
96 adverse event; and

97 (ii) the patient's right to authorize the release of the patient's medical records related to
98 the adverse event to any third party;

99 (b) include a statement regarding the affected party's right to seek legal counsel at the
100 affected party's expense and to have legal counsel present throughout the medical candor
101 process;

102 (c) notify the affected party that there are time limitations for a malpractice action
103 against a health care provider and that the medical candor process does not alter or extend the
104 time limitations for a malpractice action against a health care provider;

105 (d) if the health care provider is a public employee or a governmental entity, notify the
106 affected party that participation in the medical candor process does not alter or extend the
107 deadline for filing the notice of claim required under Section [63G-7-401](#);

108 (e) notify the affected party that if the affected party chooses to participate in the
109 medical candor process with a health care provider:

110 (i) any communication, material, or information created for or during the medical
111 candor process, including a communication to participate in the medical candor process, is
112 confidential, not discoverable, and inadmissible as evidence in a judicial, administrative, or
113 arbitration proceeding arising out of the adverse event; and

114 (ii) a party to the medical candor process may not record any communication without
115 the mutual consent of all parties to the medical candor process; and

116 (f) advise the affected party that the affected party, the health care provider, and any
117 other person that participates in the medical candor process must agree, in writing, to the terms
118 and conditions of the medical candor process in order to participate.

119 (3) If, after receiving a written notice, an affected party wishes to participate in the
120 medical candor process, the affected party must agree, in writing, to the terms and conditions
121 provided in the written notice described in Subsection (2).

122 (4) If an affected party agrees to participate in the medical candor process, the affected
123 party and the health care provider may include another person in the medical candor process if:
124 (a) the person receives written notice in accordance with this section; and
125 (b) the person agrees, in writing, to the terms and conditions provided in the written
126 notice described in Subsection (2).

127 Section 4. Section **78B-3-453** is enacted to read:

128 **78B-3-453. Nonparticipating health care providers -- Offer of compensation --**
129 **Payment.**

130 (1) If any communications, materials, or information in any form during the medical
131 candor process involve a health care provider that was notified under Subsection
132 [78B-3-451](#)(1)(b) but the health care provider is not participating in the medical candor process,
133 a participating health care provider:

134 (a) may provide only materials or information from the medical record to the affected
135 party regarding any health care provided by the nonparticipating health care provider;

136 (b) may not characterize, describe, or evaluate health care provided or not provided by
137 the nonparticipating health care provider;

138 (c) may not attribute fault, blame, or responsibility for the adverse event to the
139 nonparticipating health care provider; and

140 (d) shall inform the affected party of the limitations and requirements described in
141 Subsections (1)(a), (b), and (c) on any communications, materials, or information made or
142 provided by the participating health care provider in regards to a nonparticipating health care
143 provider.

144 (2) (a) If a health care provider determines that no offer of compensation is warranted
145 during the medical candor process, the health care provider may orally communicate that
146 decision to the affected party.

147 (b) If a health care provider determines that an offer of compensation is warranted
148 during the medical candor process, the health care provider shall provide the affected party
149 with a written offer of compensation.

150 (3) If a health care provider makes an offer of compensation to an affected party during
151 the medical candor process and the affected party is not represented by legal counsel, the health
152 care provider shall:

153 (a) advise the affected party of the affected party's right to seek legal counsel, at the
154 affected party's expense, regarding the offer of compensation; and

155 (b) notify the affected party that the affected party may be legally required to repay
156 medical and other expenses that were paid by a third party, including private health insurance,
157 Medicare, or Medicaid.

158 (4) (a) All parties to an offer of compensation shall negotiate the form of the relevant
159 documents.

160 (b) As a condition of an offer of compensation under this section, a health care
161 provider may require an affected party to:

162 (i) execute any document that is necessary to carry out an agreement between the
163 parties regarding the offer of compensation; and

164 (ii) if court approval is required for compensation to a minor, obtain court approval for
165 the offer of compensation.

166 (5) If an affected party accepts and receives an offer of compensation as part of the
167 medical candor process and the affected party did not present a written claim or demand for
168 payment before the written notice under Subsection 78B-3-452(1) was sent to the affected
169 party, the payment of compensation to the affected party is not a payment resulting from:

170 (a) a written claim or demand for payment; or

171 (b) a professional liability claim or a settlement for purposes of Sections 58-67-302,
172 58-67-302.7, 58-68-302, and 58-71-302.

173 Section 5. Section **78B-3-454** is enacted to read:

174 **78B-3-454. Confidentiality and effect of medical candor process -- Recording of**
175 **medical candor process -- Exception for deidentified information or data.**

176 (1) All communications, materials, and information in any form specifically created for
177 or during a medical candor process, including the findings or conclusions of the investigation
178 and any offer of compensation, are confidential and privileged in any administrative, judicial,
179 or arbitration proceeding.

180 (2) Any communication, material, or information in any form that is made or provided

181 in the ordinary course of business, including a medical record or a business record, that is
182 otherwise discoverable or admissible and is not specifically created for or during a medical
183 candor process is not privileged by the use or disclosure of the communication, material, or
184 information during the medical candor process.

185 (3) A communication or offer of compensation made in preparation for or during the
186 medical candor process does not constitute an admission of liability.

187 (4) Nothing in this part alters or limits the confidential, privileged, or protected nature
188 of communications, information, memoranda, work product, documents, and other materials
189 under other provisions of law.

190 (5) (a) Notwithstanding Section [77-23a-4](#), a party to a medical candor process may not
191 record any communication without the mutual consent of all parties to the medical candor
192 process.

193 (b) A recording made without mutual consent of all parties to the medical candor
194 process may not be used for any purpose.

195 (6) (a) Notwithstanding any other provision of law, any communication, material, or
196 information created for or during a medical candor process:

197 (i) is not subject to reporting requirements by a health care provider; and

198 (ii) does not create a reporting requirement for a health care provider.

199 (b) If there are reporting requirements independent of, and supported by, information or
200 evidence other than any communication, material, or information created for or during a
201 medical candor process, the reporting shall proceed as if there were no communication,
202 material, or information created for or during the medical candor process.

203 (c) This Subsection (6) does not release an individual or a health care provider from
204 complying with a reporting requirement.

205 (7) (a) A health care provider that participates in the medical candor process may
206 provide deidentified information or data about an adverse incident to an agency, company, or
207 organization for the purpose of research, education, patient safety, quality of care, or
208 performance improvement.

209 (b) Disclosure of deidentified information or data under Subsection (7)(a):

210 (i) does not constitute a waiver of a privilege or protection of any communication,
211 material, or information created for or during a medical candor process as provided in this

212 section or any other provision of law; and

213 (ii) is not a violation of the confidentiality requirements of this section.

214 **Section 6. Revisor instructions.**

215 The Legislature intends that the Office of Legislative Research and General Counsel, in

216 preparing the Utah Code database for publication, not enroll this bill if H.J.R. 13, Joint

217 Resolution Amending Court Rules of Procedure and Evidence to Address the Medical Candor

218 Process, does not pass.