

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;
- ▶ addresses confidentiality, disclosure, and effect of communications, materials, or information that is created for or during the medical candor process;
- ▶ addresses the confidentiality of factual information from a patient's medical record that is used or disclosed in the medical candor process;
- ▶ addresses the recording of communications during the medical candor process;
- ▶ addresses reporting requirements in relation to the medical candor process; and
- ▶ allows for the disclosure of deidentified information or data of an adverse incident



26 for certain purposes.

27 **Money Appropriated in this Bill:**

28 None

29 **Other Special Clauses:**

30 This bill provides revisor instructions.

31 **Utah Code Sections Affected:**

32 ENACTS:

33 [78B-3-450](#), Utah Code Annotated 1953

34 [78B-3-451](#), Utah Code Annotated 1953

35 [78B-3-452](#), Utah Code Annotated 1953

36 [78B-3-453](#), Utah Code Annotated 1953

37 [78B-3-454](#), Utah Code Annotated 1953



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

40 Section 1. Section **78B-3-450** is enacted to read:

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

42 **78B-3-450. Definitions.**

43 As used in this chapter:

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

46 (2) "Affected party" means:

47 (a) a patient; and

48 (b) any representative of a patient.

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

51 (4) "Governmental entity" means the same as that term is defined in Section
52 [63G-7-102](#).

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

54 (6) "Health care provider" means the same as that term is defined in Section
55 [78B-3-403](#).

56 (7) "Malpractice action against a health provider" means the same as that term is

57 defined in Section 78B-3-403.

58 (8) "Medical candor process" means the process described in Section 78B-3-451.

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

60 (10) "Public employee" means the same as the term "employee" as defined in Section
61 63G-7-102.

62 (11) (a) Except as provided in Subsection (11)(c), "representative" means the same as
63 that term is defined in Section 78B-3-403.

64 (b) "Representative" includes:

65 (i) a parent of a child regardless of whether the parent is the custodial or noncustodial
66 parent;

67 (ii) a legal guardian of a child;

68 (iii) a person designated to make decisions on behalf of a patient under a power of
69 attorney, an advanced health care directive, or a similar legal document;

70 (iv) a default surrogate as defined in Section 75-2a-108; and

71 (v) if the patient is deceased, the personal representative of the patient's estate or the
72 patient's heirs as defined in Sections 75-1-201 and 78B-3-105.

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

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

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

77 **78B-3-451. Medical candor process.**

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

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

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

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

87 (4) determines whether to make an offer of compensation to the affected party for the

88 adverse event.

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

90 **78B-3-452. Notice of medical candor process.**

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

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

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

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

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

102 (a) include an explanation of:

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

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

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

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

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

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

118 (i) any communication, material, or information created for or during the medical

119 candor process, including a communication to participate in the medical candor process, is
120 confidential, not discoverable, and inadmissible as evidence in a judicial, administrative, or
121 arbitration proceeding arising out of the adverse event; and

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

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

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

130 (4) If an affected party agrees to participate in the medical candor process, the affected
131 party and the health care provider may include another person in the medical candor process if:

132 (a) the person receives written notice in accordance with this section; and

133 (b) the person agrees, in writing, to the terms and conditions provided in the written
134 notice described in Subsection (2).

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

136 **78B-3-453. Nonparticipating health care providers -- Offer of compensation --**

137 **Payment.**

138 (1) If any communications, materials, or information in any form during the medical
139 candor process involve a health care provider that was notified under Subsection
140 78B-3-451(1)(b) but the health care provider is not participating in the medical candor process,
141 a participating health care provider:

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

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

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

148 (d) shall inform the affected party of the limitations and requirements described in
149 Subsections (1)(a), (b), and (c) on any communications, materials, or information made or

150 provided by the participating health care provider in regards to a nonparticipating health care
151 provider.

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

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

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

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

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

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

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

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

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

174 (5) If an affected party did not present a written claim or demand for payment before
175 the affected party accepts and receives an offer of compensation as part of the medical candor
176 process, the payment of compensation to the affected party is not a payment resulting from:

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

178 (b) a professional liability claim or a settlement for purposes of Sections [58-67-302](#),
179 [58-67-302.7](#), [58-68-302](#), and [58-71-302](#).

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

181 **78B-3-454. Confidentiality and effect of medical candor process -- Recording of**
182 **medical candor process -- Exception for deidentified information or data.**

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

187 (2) Any communication, material, or information in any form that is made or provided
188 in the ordinary course of business, including a medical record or a business record, that is
189 otherwise discoverable or admissible and is not specifically created for or during a medical
190 candor process is not privileged by the use or disclosure of the communication, material, or
191 information during the medical candor process.

192 (3) (a) Any factual information that is required to be documented in a patient's medical
193 record under state or federal law regarding accidents, injuries, complications, hospital-acquired
194 infections, or reactions to medications, treatments, or anesthesia is not privileged by the use or
195 disclosure of the factual information during the medical candor process.

196 (b) Factual information described in Subsection (3)(a) does not include an individual's
197 mental impressions, conclusions, or opinions that are used or disclosed in a medical candor
198 process.

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

201 (5) Nothing in this part alters or limits the confidential, privileged, or protected nature
202 of communications, information, memoranda, work product, documents, and other materials
203 under other provisions of law.

204 (6) (a) Notwithstanding Section [77-23a-4](#), a party to a medical candor process may not
205 record any communication without the mutual consent of all parties to the medical candor
206 process.

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

209 (7) (a) Notwithstanding any other provision of law, any communication, material, or
210 information created for or during a medical candor process:

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

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

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

217 (c) This Subsection (7) does not release an individual or a health care provider from
218 complying with a reporting requirement.

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

223 (b) Disclosure of deidentified information or data under Subsection (8)(a):

224 (i) does not constitute a waiver of a privilege or protection of any communication,
225 material, or information created for or during a medical candor process as provided in this
226 section or any other provision of law; and

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

228 **Section 6. Revisor instructions.**

229 The Legislature intends that the Office of Legislative Research and General Counsel, in
230 preparing the Utah Code database for publication, not enroll this bill if H.J.R. 13, Joint
231 Resolution Amending Court Rules of Procedure and Evidence to Address the Medical Candor
232 Process, does not pass.