

Senator Michael S. Kennedy 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 a medical candor process;
- ▶ addresses an offer of compensation made as part of a medical candor process;
- ▶ addresses confidentiality, disclosure, and effect of communications, materials, or information that is created for or during a medical candor process;
- ▶ addresses the confidentiality of information from a patient's medical record that is used or disclosed in a medical candor process;
- ▶ addresses the confidentiality of any communication, material, or information provided to a patient or a representative of a patient before participation in a medical candor process;



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

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

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

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

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

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

(b) "Representative" includes:

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

(ii) a legal guardian of a child;

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

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

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

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

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

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

[78B-3-451](#). Medical candor process.

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

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

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

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

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

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

93 **78B-3-452. Notice of medical candor process.**

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

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

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

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

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

105 (a) include an explanation of:

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

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

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

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

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

118 (e) notify the affected party that if the affected party chooses to participate in a medical

candor process with a health care provider:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) a professional liability claim or a settlement for purposes of Sections [58-67-302](#),

58-67-302.7, 58-68-302, and 58-71-302.

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

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

(1) Except as provided in Subsections (2), (3), and (4), all communications, materials, and information in any form specifically created for or during a medical candor process, including the findings or conclusions of the investigation and any offer of compensation, are confidential and privileged in any administrative, judicial, or arbitration proceeding.

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

(3) (a) Any information that is required to be documented in a patient's medical record under state or federal law is not privileged by the use or disclosure of the information during a medical candor process.

(b) Information described in Subsection (3)(a) does not include an individual's mental impressions, conclusions, or opinions that are formed outside the course and scope of the patient's care and treatment and are used or disclosed in a medical candor process.

(4) (a) Any communication, material, or information in any form that is provided to an affected party before the affected party's written agreement to participate in a medical candor process is not privileged by the use or disclosure of the communication, material, or information during a medical candor process.

(b) Any communication, material, or information described in Subsection (4)(a) does not include a written notice described in Section 78B-3-452.

(5) A communication or offer of compensation made in preparation for or during a medical candor process does not constitute an admission of liability.

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

(7) (a) Notwithstanding Section 77-23a-4, a party to a medical candor process may not

record any communication without the mutual consent of all parties to the medical candor process.

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

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

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

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

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

(c) This Subsection (8) does not release an individual or a health care provider from complying with a reporting requirement.

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

(b) Disclosure of deidentified information or data under Subsection (9)(a):

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

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

Section 6. Revisor instructions.

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