



# COPIC GUIDE FOR THE UTAH MEDICAL CANDOR ACT

MAY 2022



Nobody wants to see an adverse outcome in health care, yet despite best efforts, these types of incidents occur. How providers deal with them and address the needs of patients is important because the provider-patient relationship forms the foundation of health care. Now, medical providers and facilities in Utah have a new tool to utilize in these situations—the Utah Medical Candor Act.

## FAQs: Utah Medical Candor Act

### WHAT IS CANDOR?

Candor can be defined as “the quality of being open and honest.” This term has been adopted in health care to describe a framework for addressing adverse medical incidents in a way that preserves the provider-patient relationship, allows for open communication, and supports improvements in patient safety.

The focus on Candor emerged out of efforts by the Agency for Healthcare Research and Quality (AHRQ). AHRQ developed a toolkit that promoted a shift to an environment that encourages open, honest conversations with patients after adverse outcomes occur. The process is also designed to investigate and learn from what happened, to address the patients’ needs alongside providers’ needs, and to disseminate any lessons learned in order to improve future outcomes.

Since then, the Candor framework has been utilized in various health care systems and demonstrated positive results. In addition, Candor-related legislation has been passed in Massachusetts, Oregon, Iowa, and Colorado.

### WHAT ARE THE ORIGINS OF THE UTAH MEDICAL CANDOR ACT?

The Utah Medical Candor Act originated from discussions between the Utah Medical Association (UMA) and legislators at the beginning of the 2022 state legislative session. UMA served as a strong advocate for the health care community and its patients by highlighting the benefits of the medical candor process. They garnered support for this measure that eventually passed as H.B. 344.

### WHAT TYPES OF INCIDENTS QUALIFY UNDER THE ACT?

An “adverse event” means an injury or suspected injury that is associated with a health care process rather than an underlying condition of a patient or a disease.

### WHEN DID THE UTAH MEDICAL CANDOR ACT TAKE EFFECT?

The Act went into effect on May 4, 2022.

### WHAT TYPES OF MEDICAL PROVIDERS AND FACILITIES CAN UTILIZE THE UTAH MEDICAL CANDOR ACT?

“Health care providers” that can initiate the medical candor process include any person, partnership, association, corporation, or other facility or institution who renders health care or professional services as a hospital, health care facility, physician, PA, nurse, APRN, dentist, pharmacist, podiatrist, or other health care professionals rendering similar care and services relating to or arising out of the health needs of persons or groups of persons, and officers, employees, or agents of any of the above acting in the course and scope of their employment.

### HOW DOES THE CANDOR PROCESS BENEFIT PATIENTS?

Patients who have an adverse event, and their families, are able to engage in the medical candor process with the provider(s) involved. This helps them understand why the incident occurred and what is being done to prevent similar issues in the future. Patients become a part of the process by helping to identify and implement procedures designed to improve patient safety. The medical candor process is also designed to expedite the process of addressing an adverse outcome and offering patients compensation when warranted.

### HOW DOES THE CANDOR PROCESS BENEFIT PROVIDERS?

As with patients, the medical candor process allows providers to address concerns, offer their perspective on what happened and why, and work together to preserve the provider-patient relationship. The medical candor process is meant to be non-adversarial. It allows providers to participate in and learn from the process without creating undue burdens that take the provider away from patient care.

### HOW DOES THE MEDICAL CANDOR PROCESS START?

The process is initiated by the health care provider involved in the incident. The provider, which includes a health care facility, needs to provide the patient with written notice of the desire to enter into a medical candor process (under the Utah Medical Candor Act) with the patient or patient’s representative. The notice must include specific details about the patient’s rights and the nature of the communications and discussions under the Utah Medical Candor Act.

## WHAT SHOULD MEDICAL FACILITIES/HOSPITALS BE AWARE OF WITH THE MEDICAL CANDOR PROCESS?

The Utah Medical Candor Act does not change the process for health care facilities to review systems issues or the quality of care rendered by individual providers. The Act does not change the current process of reporting patient safety events to the Utah Department of Health. It does not change the ability of a state agency responsible for licensing the facility to investigate and access medical records and other information allowed under current law.

## WHY ARE THE CANDOR DISCUSSIONS CONFIDENTIAL AND PRIVILEGED?

To facilitate open communication between providers and patients in a way that is not hindered by the threat of these communications being used against the provider or facility in subsequent litigation.

## CAN A PATIENT STILL FILE A LAWSUIT AFTER THE MEDICAL CANDOR PROCESS?

The Utah Medical Candor Act does not limit a patient's ability to use the legal system. Patients can choose to withdraw from the medical candor process at any time. However, the discussions and communications that occurred during the medical candor process, including any offers of compensation, remain privileged and confidential. Under the Act, an offer of compensation does not constitute an admission of liability. In addition, if a patient chooses to accept an offer of compensation, a provider or facility may require a patient to sign a release of liability, so he or she cannot bring a subsequent lawsuit.

## WHAT REPORTING REQUIREMENTS APPLY TO THE UTAH MEDICAL CANDOR ACT?

Because no payments are made as a result of a written complaint or claim demanding payment based on a practitioner's provision of health care services, incidents handled through the medical candor process are not required to be reported to the National Practitioner Data Bank.

Patients participating under the Utah Medical Candor Act do not waive their right to file a complaint with the relevant licensing board or the Department of Health, which oversees health care facilities. Where indicated, a provider's actions can also be addressed through the health care entity's peer review process.

States outside of Utah may require notification of incidents where there is compensation under the medical candor process for providers who are licensed in those states, including through the Interstate Medical Licensure Compact.

## WHAT ARE SOME OF THE OTHER BENEFITS OF THE UTAH MEDICAL CANDOR ACT?

A health care provider/health care facility that participates in a medical candor process under the Act 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. Such a disclosure does not constitute a waiver of the privilege for the medical candor process and is not a violation of the Act's confidentiality requirements.

## Overview of the Medical Candor Process

**1** The process is initiated by the health care provider.

A health care provider, including a health care facility, involved in the adverse event needs to provide the patient with written notice of the desire to enter into a medical candor process under the Utah Medical Candor Act.

**As with all incidents, COPIC insureds should call a COPIC occurrence specialist nurse during business hours, 8am–5pm (Mountain time), Monday through Friday, by calling (800) 421-1834. The occurrence specialist nurse will evaluate the incident with our internal team to determine if it is appropriate to utilize the Utah Medical Candor Act.**

**2** The written notice must be sent to the patient within 365 days of the incident.

This time period is defined as within 365 days after the day on which the health care provider knew of the adverse event involving a patient.

**3** The notice must include specific details about the patient's rights and the nature of the communications and discussions under the Utah Medical Candor Act.

The notice must include the following:

- The patient's right to receive a copy of the medical records related to the adverse event and to authorize the release of the records to any third party;
- The patient's right to seek legal counsel and have legal counsel present throughout a medical candor process;
- Notice that there are time limitations for a malpractice action against a health care provider and that a medical candor process does not alter or extend those time limitations;

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## CANDOR PROCESS (FROM PAGE 2)

- Notice that, if the health care provider is a public employee or a governmental entity, participation in a medical candor process does not alter or extend the deadline for filing the notice of claim required under the Governmental Immunity Act of Utah;
- Notice that if the patient chooses to engage in a medical candor process with the health care provider/health care facility, 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.
- An advisement that a party to the medical candor process may not record any communication without the mutual consent of all parties to the medical candor process;
- An advisement that the affected party (patient or patient representative), 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.

If the patient agrees to participate in a medical candor process, the patient and the health care provider(s) may include another person in the medical candor process if the person receives appropriate written notice in accordance with the Act and the person agrees, in writing, to the terms and conditions provided in the written notice.

#### 4 Under the Utah Medical Candor Act, health care providers and facilities may investigate and communicate about how the incident occurred and what steps are being taken to prevent a similar outcome in the future.

The health care provider/facility that agrees to engage an affected party (patient or patient representative) in the medical candor process may:

- Conduct an investigation into the adverse event involving the patient and the health care provided to the patient.
- Communicate to the affected party information gathered during the investigation.
- Communicate to the affected party the steps that the health care provider will take to prevent future occurrences of the adverse event.

#### 5 Health care providers and facilities can determine whether to make an offer of compensation for the adverse event.

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.

If a health care provider determines that an offer of compensation is warranted, the provider shall provide the affected party with a written offer of compensation.

- If an offer is made and the affected party is not represented by legal counsel, the provider/facility is required to:
  - Advise the affected party of the party's right to seek legal counsel regarding the offer of compensation; and
  - Notify the affected party that the 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.
- A health care provider/facility may require the patient/representative, as a condition of an offer for compensation, to execute any documents necessary to carry out an agreement between the parties regarding the offer of compensation; and obtain any necessary court approval for the offer of compensation (e.g., where the patient is a minor).

#### 6 To facilitate the medical candor process under the Utah Medical Candor Act, discussions and offers of compensation are privileged and confidential.

- All communications, materials, and information specifically created for or during a medical candor process, including the findings or conclusions of the investigation and any offer of compensation:
  - Do not constitute an admission of liability;
  - Are confidential and privileged in any administrative, judicial, or arbitration proceeding.
- 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. This information, however, 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.
- The Act does not alter or limit the confidential, privileged, or protected nature of communications, information, memoranda, work product, documents, and other materials under other provisions of law.



## Considerations for Health Care Facilities/Hospitals

Health care facilities and hospitals follow the same medical candor process as individual health care providers. However, they should examine internal systems and what adjustments should be made to integrate the process. This may include the following considerations and/or “best practices”:

- **Establish a Situation Management Team (SMT) to ensure a timely and effective response:**
  - An SMT is responsible for managing how a facility responds to an adverse outcome in a coordinated approach among various stakeholders within a facility.
  - The key responsibilities of an SMT are to conduct an analysis, notify the involved providers (if they are not already aware) and provide support to them, determine what type of communication with the patient is appropriate, and evaluate if compensation is warranted.
  - Members of the SMT can include risk managers, patient safety specialists, patient representatives, and medical and nursing staff leadership.

**For COPIC insureds, the SMT should include members of COPIC’s team. Our 20+ years of experience in dealing with communication after an adverse outcome provides expertise to guide facilities through every step of the medical candor process.**

- **Recognize the key exclusions that make an incident ineligible for the medical candor process.**
  - A summons or complaint was received.
  - There is a written demand for compensation.
  - There is no injury or suspected injury to the patient.

- **Remember that physicians are not the only providers who can participate in the medical candor process.**
  - Besides physicians, eligible providers include PAs, nurses, APRNs, dentists, pharmacists, podiatrists, and other health care professionals.
- **Be conscious of the 365-day timeframe in which the initial written notice to the patient must be sent.**
- **Because Candor is “provider initiated,” the facility/hospital should work with the involved provider(s) to discuss how to speak with the patient and walk through the medical candor process.**
  - The medical candor framework recognizes that patients want to hear from the provider(s) who were involved with their care as opposed to an administrative representative from the facility.
- **Establish a clear contact who will work directly with the patient or patient representative throughout the entire medical candor process.**
- **Develop patient communication pieces designed to help them understand the Utah Medical Candor Act.**

**COPIC has developed a Patient FAQs and Program Overview, which is available for insured facilities/hospitals to use.**

**The Utah Medical Candor Act framework shares underlying principles with Seven Pillars<sup>1</sup>, another recognized approach to addressing adverse events in health care facilities and systems. The components of Seven Pillars are:**

- 1) Patient safety incident reporting**— Reinforce a culture that encourages timely reporting.
- 2) Investigation**—Conduct a preliminary review of the incident to determine if patient harm occurred and if a root cause analysis should be performed; the investigation should examine the system as well as provider performance.
- 3) Communication and disclosure**— Maintain ongoing communication with the patient and family throughout the process; providers involved should be trained in

communication skills required in these situations such as empathy, sincerity, active listening, patience, and tact.

- 4) Apology and remediation (if appropriate)**—Ensure that when patient harm did occur, saying “we’re sorry” includes subsequent action such as explaining what is being done to prevent similar outcomes and offers of compensation, if warranted.

- 5) System improvement**—Identify and implement system improvements aimed at preventing a recurrence;

patients and families may be invited to participate in this aspect of the process.

- 6) Data tracking and performance evaluation**—Collect data associated with the incident and utilize this for internal quality assurance, research, and dissemination to relevant stakeholders.

- 7) Education and training**—Build a robust education platform based on analysis of adverse events, and utilize case-based, interactive education for all members of the health care team.

<sup>1</sup> <https://www.ncbi.nlm.nih.gov/pubmed/20194217>