

2023 MNASCA Annual Education Conference

Minnesota Candor Act Primer

CANDOR =
Communication and Optimal Resolution

Minnesota Candor Act Resources

- Agency for Healthcare Research and Quality (AHRQ) Candor Toolkit
- COPIC Guide for the Minnesota Candor Act
- COPIC Minnesota Candor Act Resource Toolkit
 - Overview of Candor Process
 - Minnesota Candor Act FAQs
 - Patient FAQs and Program Overview
 - Patient Consent Forms used during the Candor process



Scan for link to resources

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COPIC GUIDE FOR THE MINNESOTA CANDOR ACT

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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 Minnesota have a new tool to utilize in these situations—the Minnesota Candor Act.

FAQs: Minnesota 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 Iowa, Colorado, and Utah.

WHAT ARE THE ORIGINS OF THE MINNESOTA CANDOR ACT?

The Minnesota Candor Act originated from discussions between the Minnesota Medical Association (MMA) and legislators at the beginning of the 2022 state legislative session that continued into the 2023 session. MMA served as a strong advocate for the health care community and its patients by highlighting the benefits of Candor. MMA worked closely with other stakeholders, including the Minnesota Association for Justice and patient safety advocates, to garner support for this bipartisan measure that eventually passed as part of a public safety omnibus bill (SF 2909).

WHAT TYPES OF INCIDENTS QUALIFY UNDER THE ACT?

Health care adverse incidents arising from or related to patient care that result in the death or physical injury of a patient.

WHEN DID THE MINNESOTA CANDOR ACT TAKE EFFECT?

The Act applies to health care adverse incidents that occur on or after August 1, 2023.

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

The Act applies to a “health care provider,” which means a person who is licensed, certified, or registered, or otherwise permitted by state law to administer health care in the ordinary course of business or in the practice of a profession and practices at a health facility.

It also applies to a “health facility,” which includes a hospital or outpatient surgical center; a medical, dental, or health care clinic; a diagnostic laboratory; or a birthing center. The definition of health facility includes any corporation, professional corporation, partnership, limited liability company, limited liability partnership, or other entity comprised of health facilities or health care providers.

HOW DOES THE CANDOR PROCESS BENEFIT PATIENTS?

Patients who have a health care adverse incident, and their families, are able to engage in open discussions 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 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 open discussions allow for providers to address concerns, offer their perspective on what happened and why, and work together to preserve the provider-patient relationship. The 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?

A patient may provide oral notice to a health care provider, health facility, or both of the patient’s desire to enter into an open discussion with them to discuss potential outcomes following a health care adverse incident in accordance with the Act. Under the Act, however, the Candor process is initiated by the health care provider or health facility involved in the incident.

COPIC Guide to Minnesota Candor Act

CANDOR FAQs (FROM PAGE 1)

The provider, the facility, or both jointly may provide the patient with written notice of their desire to enter into an open discussion with the patient to discuss potential outcomes following a health care adverse incident in accordance with the Act. The notice must include specific details about the patient's rights and the nature of the communications and discussions under the Minnesota Candor Act.

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

The Minnesota 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 required reporting of certain adverse health care events by facilities to the Department of Health or the health department's ability 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. However, a statement made during the open discussion may not be protected in a subsequent proceeding if the court or other decision-maker finds that statement contradicts a statement made in the later proceeding and is material to the claims made in the subsequent proceeding.

CAN A PATIENT STILL FILE A LAWSUIT AFTER THE CANDOR DISCUSSION?

The Minnesota Candor Act does not limit a patient's ability to use the legal system. Patients can choose to withdraw from the Candor process at any time. However, the discussions and communications that occurred during the 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 MINNESOTA 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 Candor process are not required to be reported to the National Practitioner Data Bank.

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

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

Overview of the Candor Process

1 The process is initiated by the health care provider or health facility.

A health care provider or health facility involved in the health care adverse incident, or both jointly, may provide the patient with written notice of their desire to enter into an open discussion under the Minnesota 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 (720) 858-6395. The occurrence specialist nurse will evaluate the incident with our internal team to determine if it is appropriate to utilize the Minnesota 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 from the date the health care provider or health facility knew, or should have known, of the health care adverse incident.

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

The notice must include the following:

- The patient's right to receive a copy of the medical records related to the incident 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 the open discussion process;
- A copy of the relevant statute of limitations with notice that the time for a patient to bring a lawsuit is limited and will not be extended by engaging in an open discussion under the Act unless all parties agree in writing to an extension;

CONTINUED ON PAGE 3

CANDOR PROCESS (FROM PAGE 2)

- Notice that if the patient chooses to engage in an open discussion with the health care provider, health facility, or jointly with both, all communications made in the course of the discussion under the Act, including communications regarding the initiation of an open discussion, are:
 - Privileged and confidential,
 - Not subject to discovery, subpoena, or other means of legal compulsion for release, and
 - Not admissible as evidence in a judicial, administrative, or arbitration proceeding arising directly out of the health care adverse incident.
- An advisement that any communications, memoranda, work product, documents, or other material that are otherwise subject to discovery and not prepared specifically for use in a Candor open discussion are not confidential.

If the patient agrees in writing to engage in an open discussion, the patient, health care provider, or health facility may include other persons in the open discussion process, who must be advised of the privileged and confidential nature of the communications.

4 Under the Minnesota Candor Act, health care providers and facilities may investigate, disclose, 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 in an open discussion may:

- Investigate how the incident occurred and gather information regarding the medical care or treatment.
- Disclose the results of the investigation to the patient.
- Communicate to the patient the steps that the health care provider or health facility will take place to prevent future occurrences of the incident.

5 As part of their assessment, health care providers and facilities can determine whether or not an offer of compensation is warranted.

If no offer of compensation is warranted, the provider/facility shall orally communicate that decision to the patient.

If the provider or facility determines that an offer of compensation is warranted, the provider or facility shall provide the patient with a written offer of compensation.

- If an offer of compensation is made and the patient is not represented by legal counsel, the provider/facility is required to:
 - Advise the patient of the patient's right to seek legal counsel regarding the offer of compensation and encourage the patient to seek legal counsel; and

- Provide notice that the patient may be legally required to repay medical and other expenses that were paid by a third party on the patient's behalf, including private health insurance, Medicare, or Medicaid, along with an itemized statement from the health provider showing all charges and third-party payments.
- A health care provider/facility may require the patient, as a condition of an offer of compensation, to execute all documents and obtain any necessary court approval to resolve a health care adverse incident.

6 To facilitate open communication under the Minnesota Candor Act, discussions and offers of compensation under the Act are privileged and confidential.

- Open discussion communications and offers of compensation made under the Act:
 - Do not constitute an admission of liability;
 - Are privileged and confidential and shall not be disclosed;
 - Are not admissible as evidence in any subsequent judicial, administrative, or arbitration proceeding arising directly out of the health care adverse incident;
 - Are not subject to discovery, subpoena, or other means of legal compulsion for release; and
 - Shall not be disclosed by any party in any subsequent judicial, administrative, or arbitration proceeding arising directly out of the incident.
- Communications, memoranda, work product, documents, and other materials that are otherwise subject to discovery and were not prepared specifically for use in an open discussion under the Act are not confidential.
- The limitation on disclosure includes disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and a court or other adjudicatory body shall not compel any person who engages in an open discussion under the Act to disclose confidential communications or agreements made as part of the open discussion.
- The Act does not affect any other law, rule, or requirement with respect to confidentiality. However, a statement made during the open discussion may not be protected in a subsequent proceeding if the court or other decision-maker finds that statement contradicts a statement made in the later proceeding and is material to the claims made in the subsequent proceeding.

Considerations for Health Care Facilities/Hospitals

Hospitals and other health facilities follow the same Candor process as individual health care providers. However, they should examine internal systems and what adjustments should be made to integrate the Candor 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 Candor process.**
 - A summons or complaint was received.
 - There is a written demand for compensation.
 - There is no physical injury to the patient.

- **Remember that physicians are not the only providers who can participate in the Candor process.**
 - Besides physicians, eligible providers include physician assistants, podiatrists, licensed practical and registered nurses, advanced practice registered nurses, pharmacists, and any other person who is licensed, certified, registered or otherwise permitted by Minnesota law to administer health care in the ordinary course of business or in the practice of a profession and practices at a health facility.
- **Be conscious of the 365-day timeframe in which the initial written notice to the patient must be sent.**
- **Because Candor is meant to be “provider initiated,” the hospital/facility should work with the involved provider(s) to discuss how to speak with the patient and walk through the Candor process.**
 - The Candor framework recognizes that patients want to hear from the providers 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 throughout the entire Candor process.**
- **Develop patient communication pieces designed to help them understand the Minnesota Candor Act.**

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

- **Ensure the proper documentation is used at every step of the process.**
- **Educate medical staff about the Minnesota Candor Act, and how it can be initiated and utilized.**

The Minnesota Candor Act framework shares underlying principles with Seven Pillars¹, 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.