



## LEAVING COURTS IN THE DUST: THE CANDOR ACT SEEKS TO RESOLVE MEDICAL MALPRACTICE CLAIMS WITHOUT COURT INTERVENTION

Effective July 1, 2019, the Colorado legislature enacted C.R.S. § 25-51-101, also known as the Colorado Candor Act ("Candor"). Candor allows families, health care providers, and facilities to engage in discussions about adverse health care incidents, with the goal of reaching an agreeable solution without the lengthy and costly process of litigation. Under Candor, all communications made in the course of such discussions are privileged and confidential, with the exception of any documents not specifically prepared for Candor discussions.

Physicians, physician assistants, podiatrists, licensed practical and registered nurses, advanced practice nurses, pharmacists, and others who are licensed, certified, registered or otherwise permitted to provide health care services in Colorado are qualified to initiate Candor. Additionally, clinics, community health centers, community mental health centers, surgical centers, and residential care or nursing homes are eligible to participate jointly with a health care provider involved in the adverse health care incident.

The process to invoke Candor is lengthy and strict; therefore, providers and facilities should be fully advised by legal counsel before engaging in any discussions. To invoke Candor, health care providers and facilities **MUST**:

- (1) Provide the patient with written notice to enter into an open discussion within 180 days after the date on which the health care provider knew, or should have known, of the adverse health care incident.
- (2) Within the notice, provide:
  - a. An explanation of the patient's right to receive a copy of the medical records related to the incident, and right to authorize the release of the records to any third party;
  - b. A statement with the patient's right to seek legal counsel, and to have legal counsel present through the entirety of the process;
  - c. A copy of C.R.S. § 13-80-102.5 and 13-80-112, with notice that statute of limitations is not extended by engaging in open discussion under Candor;
  - d. If the health care provider or health facility is a public entity or a public employee, a copy of C.R.S. § 24-10-109 (Governmental Immunity Act), and a statement, indicating that the filing deadline will not be extended by engaging in open discussion under Candor;
  - e. An explanation that all communications under Candor are:
    - i. Privileged;
    - ii. Not subject to discovery, subpoena, or other means of legal compulsion for release; and
    - iii. Not admissible as evidence in a proceeding arising directly from the incident in question – including judicial, administrative, or arbitration proceedings.

f. An advisement that communications, memoranda, work product, documents, and other materials that are otherwise subject to discovery and not prepared specifically for use in an open discussion are not confidential.

- (3) If the patient agrees in writing to engage in an open discussion, the patient may include additional parties in the discussion.

### Incidents are ineligible for Candor if:

- A summons or complaint are received.
- A written demand for compensation exists.
- There is no physical injury to the patient.

If any demand or threat of suit is made, Candor no longer applies, and all communications should cease immediately.

Once Candor is invoked, health care providers or facilities can investigate the incident, disclose the results, and discuss with the patient how the provider or facility intends to prevent further occurrences. Providers and facilities may offer compensation if they find it appropriate. Any compensation accepted under Candor is not a payment resulting from (a) a written claim or demand for payment, (b) a final judgment, settlement or arbitration, or (c) a malpractice claim that is reported to the licensing board or insurance commissioner. Offers of compensation must be in writing. If an offer is made, patients must be advised of the right to seek legal counsel and that patients may still be responsible for additional expenses paid by third parties. Providers can require patients to sign release and lien waivers as a condition of compensation. A patient may withdraw from Candor at any time before it is concluded and bring a lawsuit.

Although payments made to a patient pursuant to Candor need not be reported to the National Practitioner Data Bank, Candor does not prevent filing of a complaint with a licensing board or with the Colorado Department of Public Health and Environment. Additionally, if an involved practitioner is licensed in another state, that state's licensing agency may require reporting or notification of incidents and/or payments made under Candor.

Other states that have adopted statutory procedures similar to Candor report a decrease in malpractice claims being filed in the courts, and a decrease in litigation costs. Hopefully, practitioners in Colorado can use Candor to their benefit. However, it is important that any practitioner or facility that is considering initiating a Candor discussion obtain legal counsel to ensure that the statute's requirements are met and that the protections of the statute will apply. Our team of experienced professionals is ready to advise and assist you in the process.

**To learn more about Candor, please contact a member of our Healthcare/Medical Malpractice group.**