

Senator Michael S. Kennedy proposes the following substitute bill:

**JOINT RESOLUTION AMENDING COURT RULES OF
PROCEDURE AND EVIDENCE TO ADDRESS THE MEDICAL
CANDOR PROCESS**

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Merrill F. Nelson

Senate Sponsor: Michael S. Kennedy

LONG TITLE

General Description:

This joint resolution amends court rules of procedure and evidence to address the medical candor process.

Highlighted Provisions:

This resolution:

- ▶ amends Rule 26 of the Utah Rules of Civil Procedure to address communications, materials, and information created for or during a medical candor process;
- ▶ amends Rule 409 of the Utah Rules of Evidence to address evidence created for or during a medical candor process; and
- ▶ makes technical and conforming changes.

Special Clauses:

This resolution provides a contingent effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 26, Utah Rules of Civil Procedure

Utah Rules of Evidence Affected:



26 AMENDS:

27 **Rule 409**, Utah Rules of Evidence



29 *Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each*
30 *of the two houses voting in favor thereof:*

31 As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend
32 rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of
33 all members of both houses of the Legislature:

34 Section 1. **Rule 26**, Utah Rules of Civil Procedure is amended to read:

35 **Rule 26. General provisions governing disclosure of discovery.**

36 **(a) Disclosure.** This rule applies unless changed or supplemented by a rule governing
37 disclosure and discovery in a practice area.

38 **(1) Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party must,
39 without waiting for a discovery request, serve on the other parties:

40 (A) the name and, if known, the address and telephone number of:

41 (i) each individual likely to have discoverable information supporting its claims or
42 defenses, unless solely for impeachment, identifying the subjects of the information; and

43 (ii) each fact witness the party may call in its case-in-chief and, except for an adverse
44 party, a summary of the expected testimony;

45 (B) a copy of all documents, data compilations, electronically stored information, and
46 tangible things in the possession or control of the party that the party may offer in its
47 case-in-chief, except charts, summaries, and demonstrative exhibits that have not yet been
48 prepared and must be disclosed in accordance with paragraph (a)(5);

49 (C) a computation of any damages claimed and a copy of all discoverable documents or
50 evidentiary material on which such computation is based, including materials about the nature
51 and extent of injuries suffered;

52 (D) a copy of any agreement under which any person may be liable to satisfy part or all
53 of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

54 (E) a copy of all documents to which a party refers in its pleadings.

55 **(2) Timing of initial disclosures.** The disclosures required by paragraph (a)(1) must
56 be served on the other parties:

57 (A) by a plaintiff within 14 days after the filing of the first answer to that plaintiff's
58 complaint; and

59 (B) by a defendant within 42 days after the filing of that defendant's first answer to the
60 complaint.

61 **(3) Exemptions.**

62 (A) Unless otherwise ordered by the court or agreed to by the parties, the requirements
63 of paragraph (a)(1) do not apply to actions:

64 (i) for judicial review of adjudicative proceedings or rule making proceedings of an
65 administrative agency;

66 (ii) governed by Rule 65B or Rule 65C;

67 (iii) to enforce an arbitration award; or

68 (iv) for water rights general adjudication under Title 73, Chapter 4, Determination of
69 Water Rights.

70 (B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are
71 subject to discovery under paragraph (b).

72 **(4) Expert testimony.**

73 (A) Disclosure of retained expert testimony. A party must, without waiting for a
74 discovery request, serve on the other parties the following information regarding any person
75 who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and
76 who is retained or specially employed to provide expert testimony in the case or whose duties
77 as an employee of the party regularly involve giving expert testimony: (i) the expert's name and
78 qualifications, including a list of all publications authored within the preceding 10 years, and a
79 list of any other cases in which the expert has testified as an expert at trial or by deposition
80 within the preceding four years, (ii) a brief summary of the opinions to which the witness is
81 expected to testify, (iii) the facts, data, and other information specific to the case that will be
82 relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for
83 the witness's study and testimony.

84 **(B) Limits on expert discovery.** Further discovery may be obtained from an expert
85 witness either by deposition or by written report. A deposition must not exceed four hours and
86 the party taking the deposition must pay the expert's reasonable hourly fees for attendance at
87 the deposition. A report must be signed by the expert and must contain a complete statement of

88 all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may
89 not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report.
90 The party offering the expert must pay the costs for the report.

91 **(C) Timing for expert discovery.**

92 (i) The party who bears the burden of proof on the issue for which expert testimony is
93 offered must serve on the other parties the information required by paragraph (a)(4)(A) within
94 14 days after the close of fact discovery. Within 14 days thereafter, the party opposing the
95 expert may serve notice electing either a deposition of the expert pursuant to paragraph
96 (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must
97 occur, or the report must be served on the other parties, within 42 days after the election is
98 served on the other parties. If no election is served on the other parties, then no further
99 discovery of the expert must be permitted.

100 (ii) The party who does not bear the burden of proof on the issue for which expert
101 testimony is offered must serve on the other parties the information required by paragraph
102 (a)(4)(A) within 14 days after the later of (A) the date on which the disclosure under paragraph
103 (a)(4)(C)(i) is due, or (B) service of the written report or the taking of the expert's deposition
104 pursuant to paragraph (a)(4)(C)(i). Within 14 days thereafter, the party opposing the expert may
105 serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule
106 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the report
107 must be served on the other parties, within 42 days after the election is served on the other
108 parties. If no election is served on the other parties, then no further discovery of the expert must
109 be permitted.

110 (iii) If the party who bears the burden of proof on an issue wants to designate rebuttal
111 expert witnesses, it must serve on the other parties the information required by paragraph
112 (a)(4)(A) within 14 days after the later of (A) the date on which the election under paragraph
113 (a)(4)(C)(ii) is due or (B) service of the written report or the taking of the expert's deposition
114 pursuant to paragraph (a)(4)(C)(ii). Within 14 days thereafter, the party opposing the expert
115 may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and
116 Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition must occur, or the
117 report must be served on the other parties, within 42 days after the election is served on the
118 other parties. If no election is served on the other parties, then no further discovery of the

119 expert must be permitted. The court may preclude an expert disclosed only as a rebuttal expert
120 from testifying in the case in chief.

121 **(D) Multiparty actions.** In multiparty actions, all parties opposing the expert must
122 agree on either a report or a deposition. If all parties opposing the expert do not agree, then
123 further discovery of the expert may be obtained only by deposition pursuant to paragraph
124 (a)(4)(B) and Rule 30.

125 **(E) Summary of non-retained expert testimony.** If a party intends to present
126 evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an
127 expert witness who is retained or specially employed to provide testimony in the case or a
128 person whose duties as an employee of the party regularly involve giving expert testimony, that
129 party must serve on the other parties a written summary of the facts and opinions to which the
130 witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C).
131 Such a witness cannot be required to provide a report pursuant to paragraph (a)(4)(B). A
132 deposition of such a witness may not exceed four hours and, unless manifest injustice would
133 result, the party taking the deposition must pay the expert's reasonable hourly fees for
134 attendance at the deposition.

135 **(5) Pretrial disclosures.**

136 (A) A party must, without waiting for a discovery request, serve on the other parties:

137 (i) the name and, if not previously provided, the address and telephone number of each
138 witness, unless solely for impeachment, separately identifying witnesses the party will call and
139 witnesses the party may call;

140 (ii) the name of witnesses whose testimony is expected to be presented by transcript of
141 a deposition;

142 (iii) designations of the proposed deposition testimony; and

143 (iv) a copy of each exhibit, including charts, summaries, and demonstrative exhibits,
144 unless solely for impeachment, separately identifying those which the party will offer and those
145 which the party may offer.

146 (B) Disclosure required by paragraph (a)(5)(A) must be served on the other parties at
147 least 28 days before trial. Disclosures required by paragraph (a)(5)(A)(i) and (a)(5)(A)(ii) must
148 also be filed on the date that they are served. At least 14 days before trial, a party must serve
149 any counter designations of deposition testimony and any objections and grounds for the

150 objections to the use of any deposition, witness, or exhibit if the grounds for the objection are
151 apparent before trial. Other than objections under Rules 402 and 403 of the Utah Rules of
152 Evidence, other objections not listed are waived unless excused by the court for good cause.

153 **(6) Form of disclosure and discovery production.** Rule 34 governs the form in
154 which all documents, data compilations, electronically stored information, tangible things, and
155 evidentiary material should be produced under this Rule.

156 **(b) Discovery scope.**

157 **(1) In general.** Parties may discover any matter, not privileged, which is relevant to
158 the claim or defense of any party if the discovery satisfies the standards of proportionality set
159 forth below.

160 **(2) Privileged matters.**

161 **(A)** Privileged matters that are not discoverable or admissible in any proceeding of any
162 kind or character include:

163 **(i)** all information in any form provided during and created specifically as part of a
164 request for an investigation, the investigation, findings, or conclusions of peer review, care
165 review, or quality assurance processes of any organization of health care providers as defined
166 in [the] Utah Code Title 78B, Chapter 3, Part 4, Utah Health Care Malpractice Act, for the
167 purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality
168 of medical care, or for the purpose of peer review of the ethics, competence, or professional
169 conduct of any health care provider[-]; and

170 **(ii)** except as provided in paragraph (b)(2)(C), (D), or (E), all communications,
171 materials, and information in any form specifically created for or during a medical candor
172 process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, including
173 any findings or conclusions from the investigation and any offer of compensation.

174 **(B)** Disclosure or use in a medical candor process of any communication, material, or
175 information in any form that contains any information described in paragraph (b)(2)(A)(i) does
176 not waive any privilege or protection against admissibility or discovery of the information
177 under paragraph (b)(2)(A)(i).

178 **(C)** Any communication, material, or information in any form that is made or provided
179 in the ordinary course of business, including a medical record or a business record, that is
180 otherwise discoverable or admissible and is not created for or during a medical candor process

181 is not privileged by the use or disclosure of the communication, material, or information during
182 a medical candor process.

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

186 (ii) Information described in paragraph (b)(2)(D)(i) does not include an individual's
187 mental impressions, conclusions, or opinions that are formed outside the course and scope of
188 the patient's care and treatment and are used or disclosed in a medical candor process.

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

193 (ii) Any communication, material, or information described in paragraph (b)(2)(E)(i)
194 does not include a written notice described in Utah Code section [78B-3-452](#).

195 (F) The terms defined in Utah Code section [78B-3-450](#) apply to paragraphs
196 (b)(2)(A)(ii), (B), (C), (D), and (E).

197 (G) Nothing in this paragraph (b)(2) shall prevent a party from raising any other
198 privileges provided by law or rule as to the admissibility or discovery of any communication,
199 information, or material described in paragraph (b)(2)(A), (B), (C), (D), or (E).

200 **[~~2~~] (3) Proportionality.** Discovery and discovery requests are proportional if:

201 (A) the discovery is reasonable, considering the needs of the case, the amount in
202 controversy, the complexity of the case, the parties' resources, the importance of the issues, and
203 the importance of the discovery in resolving the issues;

204 (B) the likely benefits of the proposed discovery outweigh the burden or expense;

205 (C) the discovery is consistent with the overall case management and will further the
206 just, speedy, and inexpensive determination of the case;

207 (D) the discovery is not unreasonably cumulative or duplicative;

208 (E) the information cannot be obtained from another source that is more convenient,
209 less burdensome, or less expensive; and

210 (F) the party seeking discovery has not had sufficient opportunity to obtain the
211 information by discovery or otherwise, taking into account the parties' relative access to the

212 information.

213 **~~[(3)] (4) Burden.~~** The party seeking discovery always has the burden of showing
214 proportionality and relevance. To ensure proportionality, the court may enter orders under Rule
215 37.

216 **~~[(4)] (5) Electronically stored information.~~** A party claiming that electronically
217 stored information is not reasonably accessible because of undue burden or cost must describe
218 the source of the electronically stored information, the nature and extent of the burden, the
219 nature of the information not provided, and any other information that will enable other parties
220 to evaluate the claim.

221 **~~[(5)] (6) Trial preparation materials.~~** A party may obtain otherwise discoverable
222 documents and tangible things prepared in anticipation of litigation or for trial by or for another
223 party or by or for that other party's representative (including the party's attorney, consultant,
224 surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
225 substantial need of the materials and that the party is unable without undue hardship to obtain
226 substantially equivalent materials by other means. In ordering discovery of such materials, the
227 court must protect against disclosure of the mental impressions, conclusions, opinions, or legal
228 theories of an attorney or other representative of a party.

229 **~~[(6)] (7) Statement previously made about the action.~~** A party may obtain without
230 the showing required in paragraph ~~[(b)(5)] (b)(6)~~ a statement concerning the action or its
231 subject matter previously made by that party. Upon request, a person not a party may obtain
232 without the required showing a statement about the action or its subject matter previously made
233 by that person. If the request is refused, the person may move for a court order under Rule 37.
234 A statement previously made is (A) a written statement signed or approved by the person
235 making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription
236 thereof, which is a substantially verbatim recital of an oral statement by the person making it
237 and contemporaneously recorded.

238 **~~[(7)] (8) Trial preparation; experts.~~**

239 **(A) Trial-preparation protection for draft reports or disclosures.** Paragraph
240 ~~[(b)(5)] (b)(6)~~ protects drafts of any report or disclosure required under paragraph (a)(4),
241 regardless of the form in which the draft is recorded.

242 **(B) Trial-preparation protection for communications between a party's attorney**

243 **and expert witnesses.** Paragraph [(b)(5)] (b)(6) protects communications between the party's
244 attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of
245 the form of the communications, except to the extent that the communications:

- 246 (i) relate to compensation for the expert's study or testimony;
247 (ii) identify facts or data that the party's attorney provided and that the expert
248 considered in forming the opinions to be expressed; or
249 (iii) identify assumptions that the party's attorney provided and that the expert relied on
250 in forming the opinions to be expressed.

251 **(C) Expert employed only for trial preparation.** Ordinarily, a party may not, by
252 interrogatories or otherwise, discover facts known or opinions held by an expert who has been
253 retained or specially employed by another party in anticipation of litigation or to prepare for
254 trial and who is not expected to be called as a witness at trial. A party may do so only:

- 255 (i) as provided in Rule 35(b); or
256 (ii) on showing exceptional circumstances under which it is impracticable for the party
257 to obtain facts or opinions on the same subject by other means.

258 **(8) Claims of privilege or protection of trial preparation materials.**

259 **(A) Information withheld.** If a party withholds discoverable information by claiming
260 that it is privileged or prepared in anticipation of litigation or for trial, the party must make the
261 claim expressly and must describe the nature of the documents, communications, or things not
262 produced in a manner that, without revealing the information itself, will enable other parties to
263 evaluate the claim.

264 **(B) Information produced.** If a party produces information that the party claims is
265 privileged or prepared in anticipation of litigation or for trial, the producing party may notify
266 any receiving party of the claim and the basis for it. After being notified, a receiving party must
267 promptly return, sequester, or destroy the specified information and any copies it has and may
268 not use or disclose the information until the claim is resolved. A receiving party may promptly
269 present the information to the court under seal for a determination of the claim. If the receiving
270 party disclosed the information before being notified, it must take reasonable steps to retrieve
271 it. The producing party must preserve the information until the claim is resolved.

272 **(c) Methods, sequence, and timing of discovery; tiers; limits on standard**
273 **discovery; extraordinary discovery.**

274 (1) **Methods of discovery.** Parties may obtain discovery by one or more of the
 275 following methods: depositions upon oral examination or written questions; written
 276 interrogatories; production of documents or things or permission to enter upon land or other
 277 property, for inspection and other purposes; physical and mental examinations; requests for
 278 admission; and subpoenas other than for a court hearing or trial.

279 (2) **Sequence and timing of discovery.** Methods of discovery may be used in any
 280 sequence, and the fact that a party is conducting discovery must not delay any other party's
 281 discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery
 282 from any source before that party's initial disclosure obligations are satisfied.

283 (3) **Definition of tiers for standard discovery.** Actions claiming \$50,000 or less in
 284 damages are permitted standard discovery as described for Tier 1. Actions claiming more than
 285 \$50,000 and less than \$300,000 in damages are permitted standard discovery as described for
 286 Tier 2. Actions claiming \$300,000 or more in damages are permitted standard discovery as
 287 described for Tier 3. Absent an accompanying damage claim for more than \$300,000, actions
 288 claiming non-monetary relief are permitted standard discovery as described for Tier 2.
 289 Domestic relations actions are permitted standard discovery as described for Tier 4.

290 (4) **Definition of damages.** For purposes of determining standard discovery, the
 291 amount of damages includes the total of all monetary damages sought (without duplication for
 292 alternative theories) by all parties in all claims for relief in the original pleadings.

293 (5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs
 294 collectively, defendants collectively, and third-party defendants collectively) in each tier is as
 295 follows. The days to complete standard fact discovery are calculated from the date the first
 296 defendant's first disclosure is due and do not include expert discovery under paragraphs
 297 (a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	\$50,000 or less	3	0	5	5	120

300	2	More than \$50,000 and less than \$300,000 or non-monetary relief	15	10	10	10	180
301	3	\$300,000 or more	30	20	20	20	210
302	4	Domestic relations actions	4	10	10	10	90

303 **(6) Extraordinary discovery.** To obtain discovery beyond the limits established in
304 paragraph (c)(5), a party must:

305 (A) before the close of standard discovery and after reaching the limits of standard
306 discovery imposed by these rules, file a stipulated statement that extraordinary discovery is
307 necessary and proportional under paragraph (b)(2) and, for each party represented by an
308 attorney, a statement that the attorney consulted with the client about the request for
309 extraordinary discovery;

310 (B) before the close of standard discovery and after reaching the limits of standard
311 discovery imposed by these rules, file a request for extraordinary discovery under Rule 37(a);
312 or

313 (C) obtain an expanded discovery schedule under Rule 100A.

314 **(d) Requirements for disclosure or response; disclosure or response by an**
315 **organization; failure to disclose; initial and supplemental disclosures and responses.**

316 (1) A party must make disclosures and responses to discovery based on the information
317 then known or reasonably available to the party.

318 (2) If the party providing disclosure or responding to discovery is a corporation,
319 partnership, association, or governmental agency, the party must act through one or more
320 officers, directors, managing agents, or other persons, who must make disclosures and
321 responses to discovery based on the information then known or reasonably available to the
322 party.

323 (3) A party is not excused from making disclosures or responses because the party has
324 not completed investigating the case, the party challenges the sufficiency of another party's

325 disclosures or responses, or another party has not made disclosures or responses.

326 (4) If a party fails to disclose or to supplement timely a disclosure or response to
327 discovery, that party may not use the undisclosed witness, document, or material at any hearing
328 or trial unless the failure is harmless or the party shows good cause for the failure.

329 (5) If a party learns that a disclosure or response is incomplete or incorrect in some
330 important way, the party must timely serve on the other parties the additional or correct
331 information if it has not been made known to the other parties. The supplemental disclosure or
332 response must state why the additional or correct information was not previously provided.

333 (e) **Signing discovery requests, responses, and objections.** Every disclosure, request
334 for discovery, response to a request for discovery, and objection to a request for discovery must
335 be in writing and signed by at least one attorney of record or by the party if the party is not
336 represented. The signature of the attorney or party is a certification under Rule 11. If a request
337 or response is not signed, the receiving party does not need to take any action with respect to it.
338 If a certification is made in violation of the rule, the court, upon motion or upon its own
339 initiative, may take any action authorized by Rule 11 or Rule 37(b).

340 (f) **Filing.** Except as required by these rules or ordered by the court, a party must not
341 file with the court a disclosure, a request for discovery, or a response to a request for discovery,
342 but must file only the certificate of service stating that the disclosure, request for discovery, or
343 response has been served on the other parties and the date of service.

344 Section 2. **Rule 409**, Utah Rules of Evidence is amended to read:

345 **Rule 409. Payment of Medical and Similar Expenses; Expressions of Apology;**
346 **Medical Candor Process.**

347 (a) Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or
348 similar expenses resulting from an injury is not admissible to prove liability for the injury.

349 (b) Evidence of unsworn statements, affirmations, gestures, or conduct made to a
350 patient or a person associated with the patient by a defendant that expresses the following is not
351 admissible in a malpractice action against a health care provider or an employee of a health
352 care provider to prove liability for an injury[-]:

353 (b) (1) apology, sympathy, commiseration, condolence, compassion, or general sense
354 of benevolence; or

355 (b) (2) a description of the sequence of events relating to the unanticipated outcome of

356 medical care or the significance of events.

357 (c) Evidence of any communication, information, material, or conduct created for or
358 during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical
359 Candor Act, is not admissible in a malpractice action against a health care provider or an
360 employee of a health care provider to prove liability for an injury, including:

361 (c) (1) any findings or conclusions of an investigation under Utah Code section
362 78B-3-451 that are shared with a patient or a representative of a patient; or

363 (c) (2) any offer of compensation made to the patient or a representative of a patient
364 during or as part of the medical candor process.

365 (d) The terms defined in Utah Code section 78B-3-450 apply to paragraph (c).

366 Section 3. **Effective date.**

367 This resolution takes effect upon approval by a constitutional two-thirds vote of all
368 members elected to each house, only if H.B. 344, Utah Medical Candor Act (2022 General
369 Session), passes the Legislature and becomes law on May 4, 2022.