

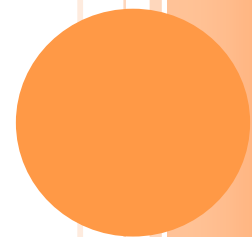
THE DISCLOSURE-AND-OFFER MODEL

Understanding the Basics

Developed by

Michelle Mello, JD, PhD

Harvard School of Public Health



Several healthcare systems and liability insurers across the country have implemented programs to expedite resolution of incidents of medical injury. The basic approach of these institutional programs, known as the “Disclosure-and-Offer” (D&O) approach, is that healthcare systems and liability insurers should:

- ❖ disclose to patients and families when unanticipated adverse outcomes of care occur;
- ❖ investigate and explain what happened;
- ❖ implement systems to avoid recurrence of incidents and improve patient safety; and
- ❖ where appropriate, apologize and offer financial compensation without the patient having to file a lawsuit.

D&O programs have **several objectives**:

- ❖ To increase transparency about adverse outcomes.
- ❖ To support physicians in disclosing adverse outcomes to patients.
- ❖ To improve patient safety by using information from cases of medical injury to learn about opportunities for safety-enhancing interventions and working with hospital staff to implement the interventions.
- ❖ To avoid lawsuits and reduce liability costs by meeting the financial needs of injured patients and their families quickly in the aftermath of an injury, without recourse to litigation, and offering clear explanations of why an adverse event occurred.

Existing programs follow one of 2 models.

- In the **Reimbursement Model**, the institution offers a modest amount of money to reimburse out-of-pocket expenses related to the injury (up to \$25,000) and the patient’s “loss of time” (up to \$5,000) without regard to whether the standard of care was violated. Only certain kinds of injuries are eligible for the program, and patients need not waive their right to sue in order to accept the money.
- In the **Early Settlement model**, the institution compensates patients and families at a level it deems reasonable given their past and future economic losses and “pain and suffering” in cases where a rapid investigation determines the standard of care was not met. All cases are eligible for consideration by the program, and patients must release legal claims against the institution in order to take the money.

This description focuses on the more comprehensive of the two models, Early Settlement, which was pioneered by the University of Michigan Health System and has been adopted by the hospital systems at the University of Illinois at Chicago and Stanford University.

HOW DOES IT WORK?

The D&O process involves 4 steps: **Communication, Investigation, Negotiation, and Resolution.**

COMMUNICATION

When a health care provider believes that an adverse event has occurred, he or she is expected to do 2 things: report it to the institution and disclose it to the patient. The report is typically submitted electronically, although a phone call to the risk management office is another option. Depending on the circumstances, including the nature of the adverse event and the physician's comfort level, an initial disclosure conversation with the patient and/or family may take place immediately, or may take place after the physician has had a chance to call a disclosure coach, which is provided by the hospital or liability insurer. The physician may ask the disclosure coach to be present at the disclosure conversation. The institution also prepares physicians for disclosure conversations by offering formal communication training on a periodic, voluntary basis, perhaps providing a discount on liability insurance premiums for those who attend.

The initial disclosure conversation focuses on conveying that an unexpected care outcome occurred and providing any known information about its cause, along with an apology of sympathy or responsibility, as appropriate. The disclosure process is ongoing, with additional conversations held as more information about the causes of the injury and the institution's response become known.

Families are permitted to have legal counsel present at these meetings. In some cases, the institution may encourage them to seek an attorney's opinion about the incident.

INVESTIGATION

As soon as an incident is reported, D&O program staff begin a rapid investigation of what happened. The investigation team may consist of personnel from the insurer only, or may also include hospital-based risk managers or patient safety office representatives. Some institutions have a "first responder" on call 24/7. The investigation begins with conversations with the involved clinicians and review of the medical record. Depending on the complexity of the case, the investigators may call in clinical experts to review the case. The experts help answer the question, "Was the standard of care met?" Some institutions obtain consults from in-house experts who have agreed to provide these services for the program. Others utilize a standing committee of in-house clinicians, who hear the facts of a case and provide an advisory opinion as to whether the care was appropriate. There is also, in some cases, recourse to a panel of external experts.

Investigation timelines vary from institution to institution and case to case. Some institutions have target timelines, on the order of days to weeks, while others try to move rapidly but not to hit specific targets. Even in those programs, the investigation is typically concluded within a few weeks or, in very complex cases, a few months.

NEGOTIATION

If the outcome of the investigation is a judgment that the standard of care was not violated, program representatives and the involved clinician(s) meet with the family to explain what they learned and, as clearly as possible, why they believe that the care provided was appropriate. Generally, no offer of compensation is made in such cases, and the institution conveys its intention to defend the

involved clinicians vigorously in the event of a lawsuit. Discussions may be extensive, taking place on a number of different occasions as needed to allow the family time to absorb the information, generate questions, seek legal counsel if they wish, and have their questions answered.

If the investigation indicates that the standard of care was not met, the institution puts together an offer of compensation that it judges reasonable to redress the family's loss. All elements of loss that would be eligible for compensation in a lawsuit are considered, including "pain and suffering" and lost quality of life, along with future wage loss and care expenses. Compensation offers are typically arrived at by considering what the case would likely be worth in court. The objective is not to get families to settle for less than they would receive in a lawsuit, but to reduce the legal expenses associated with defending claims in court. The offer of compensation follows an apology of responsibility from the institutional representative and/or an involved clinician. The institution also explains what it will do to ensure that systemic problems are addressed and the injury will not happen again.

There may be some back-and-forth as the family and the institution negotiate the compensation package. The package may include some innovative remedies, like offering opportunities for the family to contribute input to patient safety activities at the hospital or creating something to memorialize a deceased patient. If the family is represented by an attorney, the attorney will attend these meetings and give advice. Families can also seek a legal opinion about compensation offers outside of the meetings, and attorneys may be willing to provide this using hourly billing rather than a contingent-fee arrangement. Although attorney involvement can sometimes push families away from settlement, often, institutions find that it encourages settlement by managing the family's expectations about the value of a case.

RESOLUTION

The family may decide to reject the institution's final offer and file a lawsuit. The institution may offer mediation before the lawsuit goes to trial. If the family decides to accept the offer, they sign a release of claims, waiving their right to seek additional compensation through a lawsuit.

There is often ongoing contact between the D&O program representative and the family, or between the involved clinician(s) and the family. Phone calls to "check in" and see how the family is doing help convey the institution's ongoing interest and concern. The involved clinician(s) may continue to care for the patient or may arrange for a transfer to another clinician or institution, as the patient wishes.

Risk managers at the liability insurer then think about what can be learned from the case. Does the injury signal a problem with the system of care? A quality or competence problem with a particular clinician? What, if anything, is needed to ensure that it doesn't happen again? Personnel from the liability insurer typically work with hospital-based quality and safety officers to address these questions. The insurer also looks across cases to try to detect patterns of loss and possible interventions to improve care in those areas.

FOR MORE INFORMATION:

Mello MM, Gallagher TH. Malpractice reform—opportunities for leadership by health care institutions and liability insurers. *New England Journal of Medicine* 2010;362:1353-1356. Full text available at <http://www.nejm.org/doi/full/10.1056/NEJMp1001603>.

Kachalia A, Kaufman SR, Boothman R, et al. Liability claims and costs before and after implementation of a medical error disclosure program. *Annals of Internal Medicine* 2010;153:213-221. Abstract available at <http://www.annals.org/content/153/4/213.abstract>.