

Failure to Screen: The Legal Issues

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The Problem:

Reports that indicate a poor level of compliance in colorectal screening seem to appear on a regular basis. The Medicare program has reported that only 9% of Medicare fee for service patients receive annual fecal occult blood tests. Only 2% of Medicare fee for service beneficiaries receive flexible sigmoidoscopies. Unfortunately, the malpractice risks under a series of theories--failure to screen, failure to diagnose, and failure to refer for specialty care--are palpable and growing.

The Risk:

Malpractice insurers try to look at a variety of risk factors in trying to get a handle on the malpractice risk associated with an issue. Factors that are typically considered include:

- the incidence of the issue or problem;
- its potential for serious consequences (i.e., capacity to lead to damages);
- whether those consequences are preventable;
- the ease or difficulty of prevention;
- the clarity of the applicable standard of care;
- public conceptions or misconceptions about the issue (i.e., what pre-conceived notions will a jury bring to a case); and
- the degree of media attention (which will tell us not only about juror biases but also about how much plaintiff's attorneys may be focused on the issue or problem).

When you look at these factors in connection with colorectal screening, the conclusion that emerges is that there is a very significant risk that comes with failing to provide or offer colorectal screening.

The potential for serious consequences is pretty readily apparent. But are these consequences preventable? The literature seems clear on this point. At the recent Congressional hearings on colorectal screening, the Chair of the relevant committee stated that "if detected and treated early, colorectal cancer is curable in up to 90 percent of diagnosed cases." With clinical evidence indicating that benign polyps can exist for up to 10 years before becoming cancerous, it will often be the case that a failure to screen will have "caused" the patient's damages as a legal

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matter.

The literature also indicates that prevention is not difficult. In most areas, the services are readily available and, with respect at least to fecal occult blood testing, there is no co-insurance for Medicare beneficiaries.

The relevant standard of care appears clear as well. With the GI Consortium Guidelines and American Cancer Guidelines (both published in 1997*) being so similar and reflecting the input and approval of so many relevant societies, defense lawyers will be hard-pressed to argue that the standard of due care was met where a failure to screen or to offer screening to a patient within the recommended service guidelines occurred.

It is also interesting to consider public conceptions (or misconceptions, as the case may be) regarding the low compliance rate for screening. Common rationales for the problem include that the services are "too embarrassing," that patients do not receive "enough information," that reimbursement rates are "too low" to encourage physicians to make a point of screening in patient education, and that the services are "too invasive." It wouldn't be hard for a plaintiff's lawyer to turn each of these to a physician's disadvantage.

Reimbursement "too low"?

If this is a defendant's rationale for not having provided or offered a screening service, the chances of a terrible malpractice case outcome will skyrocket. Plaintiff's lawyers will have a field day with this kind of "defense." Can you see the plaintiff's lawyer at the deposition? "Let me see if I have this right, Doctor," he will say, "My client's husband and sole source of support is dead because you did not receive enough money to provide a basic screening service?" You can count on punitive damages (and lots of them) in a case like that.

Putting all this together, it seems as though a failure to provide or to offer screening services is a huge potential area of risk. If analogous situations, such as mammography, are a guide, there is every reason to be concerned about that risk.

Risk Management:

How do you manage the risk effectively? The same way that you would in dealing with any malpractice risk associated with a preventative health service. You must establish that :
You recommended and offered to provide or recommended the screening (or arrange for someone else to provide it).

You did so on the schedule indicated by the Guidelines.

You reasonably educated the patient.

The patient declined.

Documentation:

Remember the old truism: if you don't document it, it never happened.

* *Gastroenterology* 1997;112:594-642

* *CA 47: 154-160, 1997*

