CASE STUDY #2

Failure to Refer Patient for Colonoscopy Screening

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A 56-year-old married father of three had been a patient of his primary care physician for ten years. He was seen sporadically for a variety of medical conditions including hypertension, high cholesterol, and urological problems. Through the years, the physician would provide the patient with free samples of his anti-hypertension medication without requiring that the patient first see him. He also failed to require the patient to undergo an annual physical examination.

The only gastrointestinal examination the physician performed in that 10-year period was one digital rectal examination, which was normal. When the patient reached age 50, he was never advised to have a screening colonoscopy or a hemoccult test. Instead, when he did see the patient, the physician focused on his urological concerns and hypertension, appropriately referring the patient to a urologist.

At age 56, the patient had blood drawn prior to an office visit because he complained of fatigue. The results of these tests revealed a decreased hemoglobin and hematocrit. However, the physician did not address these abnormal results with the patient. One month later, the patient returned to the physician complaining of persistent GERD, cramping and bloody stools. The physician then referred the patient for a colonoscopy and endoscopy. The results of these examinations revealed Stage IV adenocarcinoma of the colon with metastasis to the liver. The patient underwent a colon resection and a liver and lymph node biopsy. He subsequently underwent radiation and chemotherapy, but was thereafter considered terminally ill and opted for only palliative treatment.

At his deposition, the plaintiff made an excellent witness. He stated simply and without anger that the physician had never offered a routine colonoscopy or other screening to him when he reached age 50, and had never performed an annual physical examination. At his deposition, the physician admitted that he never performed a complete physical examination, and that he had only seen the patient sporadically when he had complaints. In fact, the physician testified that he did not believe in performing annual complete physical examinations of his male patients. The physician was asked by plaintiff's counsel how he had documented a review of systems if he had never performed a physical examination. The physician responded that his nursing staff had completed that portion of the records because "they were bored and had nothing else to do." He further testified that he considered himself the patient's doctor only for the management of his hypertension and nothing else. Because of these responses at his deposition, the physician's counsel believed the physician would not make a good witness at trial and was particularly concerned that a jury would respond negatively to him.

Expert Reviews

The first expert who reviewed this case determined that the universal standard of care for patients age 50 and older, with no family history of colon cancer, is screening for colon cancer. This expert stated that the defendant clearly deviated from the standard of care and recommended settlement.

The second expert reviewer was an oncologist. This expert opined that if the patient had been screened in a timely manner after age 50, the diagnosis may well have been made when the mass was localized and a Stage 1 or 2 cancer. This expert estimated that the patient would have had a greater than 80% chance of survival if a colonoscopy had been performed at age 50. He concurred

that the case was indefensible and recommended settlement.

Medical Liability Mutual Insurance Company could not locate any experts to support the care of this defendant. Further, economic information obtained during discovery indicated that the patient had suffered economic losses in excess of $700,000. There would likely be additional damages for the plaintiff's significant pain and suffering, poor life expectancy, and continuing responsibility for the support of his children, who were still attending college. The physician's consent to settle the litigation was requested and obtained. Settlement negotiations were then commenced. Plaintiff's attorney initially demanded the physician's primary policy limits of $1.3 million, his excess coverage of $1 million, and $1 million from his corporate coverage, for a total of $3.3 million. Defendant's counsel declined this demand and countered with an offer of $1 million. Ultimately, this case was settled on the eve of trial for $1.8 million.

Legal & Risk Management Issues

This case was replete with many legal and risk management issues. The most obvious was the defendant's deviation from the standard of care by not referring the plaintiff for a screening colonoscopy and/or hemoccult test when he reached 50 years of age. His failure to perform an annual physical examination of a patient in his 50's with known medical conditions (hypertension and urological problems) was yet another deviation. Expert witnesses consulted by MLMIC all agreed that the physician deviated from the standard of care. Since no expert could be found to justify the defendant's multiple and serious deviations from the standard of care, a vigorous attempt had to be made to settle the case. Going to trial may well have resulted in a verdict beyond all of the defendant's available insurance policy limits.

In addition, providing a patient over a period of years with samples of hypertension medications without checking the patient's hypertension status is not a best risk management practice. Before prescribing a drug, a physician should make an informed medical judgment based on the circumstances of the situation. Ordinarily, this will require that the physician obtain an appropriate history, perform a physical examination, make a diagnosis, and form a therapeutic plan, part of which may be a prescription. Documentation is, of course, essential. Good medical practice requires that the patient be personally assessed by the physician on a periodic basis before dispensing samples, which should always be properly labeled, over a 10 year period. Failure to assess a patient before providing samples can also create serious potential liability if the patient either takes an overdose of the medications, or the sample medications are not effective and the patient suffers a stroke or dies. Further, it is highly unusual for a primary care physician to claim that he/she treats a patient for only one discreet problem to the exclusion of all other health conditions. As the primary care physician, he would be viewed as responsible for assessing the patient's overall state of health and for making appropriate referrals when necessary. By not requiring annual examinations, the plaintiff can argue that the defendant departed from the standard of care and deprived him of his last clear chance for survival.

Finally, there were serious issues regarding improper delegation of authority and the scope of practice of the nurses in the defendant's office. The physician testified that his nurses completed a review of systems for the physician and documented this in the plaintiff's record, yet no physical examination was actually performed. It is outside the scope of practice of an RN/LPN to perform any medical services. Not only were the nurses exposed to charges of professional misconduct for practicing medicine without a license and /or practicing outside the scope of their profession, the physician was exposed to potential charges of misconduct as well. Education Law § 6530(10) defines professional misconduct as "delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience or by licensure, to perform them." Education Law § 6530(32) additionally defines professional misconduct as "failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient." Therefore, if there were any falsifications in the medical record, that in and of itself could place the physician's license in jeopardy.