COPIC Tip:

Photography, Recording, and Privacy

Phone cameras and technology for sharing images and video have complicated the issues of privacy in health care settings. Different rules and laws apply to photography by patients, visitors, families, and health care workers. But, they share the common theme of balancing the value of pictures against privacy.

Some common scenarios include:

- A proud mom and dad want a picture of their newborn in the nursery.
- A nurse wants a consult about a patient’s skin condition.
- A dissatisfied patient wants to identify care team members for a lawsuit.
- A parent wants a record of a child’s treatment for a divorce action.
- A police officer wants to collect evidence of a patient’s injuries.

Images have long been used in health care. Fetal monitor strips, endoscopy videos and stills, pathology slides, and x-rays are common tools used by providers. The difference is that personal photos and videos are not always controlled by providers. Yet, despite these challenges, facilities and medical practices cannot escape the obligation to implement reasonable safeguards to protect patient privacy. Some have tried to resolve these complex issues with “photography is forbidden” policies. But as the examples illustrate, zero tolerance may be difficult or impossible to fully enforce.

HIPAA considerations apply to photography

In a resolution agreement with New York Presbyterian Hospital\(^1\), the Office of Civil Rights (OCR) strongly suggests that health care providers must have a photography policy that contains among other elements:

- A specific prohibition on the use or disclosure of photography, video recording or audio recording containing protected health information (PHI) by workforce members, agents and business associates for purposes not related to providing medical care, without the prior authorization of the patient who is the subject of the image.

- A requirement that all photography, video recording and audio recording be actively monitored by appropriate representatives for compliance with the Privacy Rule and HIPAA policies.

Standards from The Joint Commission also require a facility to have a written policy stating that consent is required before any film or videotape of a patient’s medical care can be used for any purpose. However, while The Joint Commission standards would permit filming first and obtaining consent later, the OCR has taken the position that the disclosure of PHI to the camera person, without prior patient authorization, is itself a violation of HIPAA and the patient’s right of privacy. Patient consent should be obtained before any photograph, video or audio recording occurs by the facility or with its permission.
HIPAA, however, only governs the conduct of covered entities and their business associates. Hospital personnel have reported that while attempting to enforce a hospital photo policy, visitors occasionally refuse to comply, asserting that HIPAA does not apply to them. They are correct. HIPAA does not directly apply to patients, family and visitors. Nevertheless, the hospital has the duty to “actively monitor” all photography, video and audio recordings to safeguard the privacy of its patients and the hospital may prohibit images that will compromise the privacy of other patients. Patients and visitors should not automatically be expected to understand the legal implications of photography in health care settings, and it makes sense to explain this to them or provide some educational material.

**Photographer rights**

Generally, in the United States anybody can legally take a picture of anything or anyone, without their consent, when in a public place, unless the subjects of the picture have secluded themselves in a place where they would have a reasonable expectation of privacy, such as in a medical facility (restrooms, locker rooms and dressing rooms are other examples). Property owners have the right to restrict or prohibit photographs on their property, and when asked to do so, the photographer is legally obligated to comply. See the Photographer’s Right at [http://www.krages.com/phoright.htm](http://www.krages.com/phoright.htm).

**Formulating a workable policy**

Most photography, video and audio recording policies approach the issue from one of two perspectives: broadest use (within reason) vs. strongest restrictions (within reason). Whichever approach best fits your culture, we recommend separately addressing each of the following four categories of images:

- Facility personnel² taking photographs/recordings of patients for medical purposes.
- Facility personnel taking photographs/recordings containing PHI for non-medical use (e.g. personal use, education, marketing, publicity, television shows, documenting abuse or neglect, research, security, quality assurance, etc.).
- Patients or visitors³ taking photographs/recordings of patients (i.e. of themselves and the patient the visitor came to see vs. other patients).
- Patients or visitors taking images of facility personnel, equipment, computer screens or facilities.

With respect to each category, the facility should address:

- Whether a HIPAA authorization is required, whether a general consent will suffice, or whether no consent is required.
- Who must obtain the authorization/consent when required (health care provider, facility employee, or photographer).
- How will the photographs/recordings be taken (use of cell phones or personal cameras).
- Will encouraging recording with permission minimize surreptitious recording.
• How will the photographs/recordings be stored and transmitted (using only designated equipment vs. deleting images used for medical purposes).
• Permissible and prohibited uses or disclosures.

**Helpful suggestions**

When formulating your policy, you may want to also consider the following:

• Providers should generally treat photographs/recordings as PHI. Even a “public relations” photo in the cafeteria might disclose another patient’s identity and PHI. The importance of carefully vetting any images to be used for purposes other than patient care cannot be overstated.

• Photographs/recordings for patient care (such as a cell phone photo of a wound) should be treated as part of the medical record. Secure messaging systems and storage must be used if the photographs/recordings are to be maintained by the provider. Most concerns about transmitting PHI images can be cured by obtaining patient authorization.

• Identify high-risk areas for a privacy violation to occur. These could include emergency departments, labor and delivery, and waiting rooms. Focus your efforts on these high-risk areas.

• Consider designating a safe zone where images can be taken without significant risk of disclosure of PHI.

• If you suspect a violation, report it to the designated personnel, but do not confiscate or forcibly delete the photographs/recordings. You may, of course, request that the photographs/recordings be deleted.

• The rules for providers and patients are different. Patients may think nothing of posting photos that would be completely inappropriate (and could generate a HIPAA violation) if posted by a provider. Yet, facilities are obliged to protect patients from privacy invasions by other patients as well as staff. This requires thoughtful policies and education for both staff and the public.

• Post the photography policy or signs/posters addressing photography in various locations in the facility, especially in high-risk areas.

• Different areas in the facility may require different policies.

• Health care facilities may want to consider asking patients and visitors to acknowledge their agreement to comply with privacy policies.

*This is an edited version of an article from our COPIC Insight: “Emerging Issues in the Digital Age” report, which is now available for download to COPIC insureds under the “Practice Management Resources” section at www.callcopic.com/resources/pages/medical-guidelines-and-tools.aspx.*


2 “Hospital personnel” includes all Health Care Providers, hospital employees, workforce members, business associates and agents, as those terms are used in HIPAA.

3 “Visitors” broadly includes friends and family of the patient, strangers, media and law enforcement.