

SHIELDING PATIENTS FROM SOCIAL MEDIA

How Healthcare Facilities Can Protect Patient Privacy and Limit Liability

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The majority of Americans have a smartphone. And now, more than ever, they are using their smartphones to take photos and videos of everyday interactions that can easily and quickly be disseminated. As these devices have become more ubiquitous and social media more prevalent, the threat they pose to patient privacy has increased. There is now a much higher risk of the distribution of patient photos and videos that could violate patient privacy, and healthcare facilities should take note.

Under the Health Insurance Portability and Accountability Act (HIPAA), health-

care providers must “reasonably safeguard protected health information from any intentional or unintentional use or disclosure.”¹ HIPAA protects patients from disclosure of information through which the patient could be identified, which includes photos and videos. While HIPAA only regulates the actions of a healthcare facility and its workforce (not the actions of patients or visitors), facilities should take measures to protect themselves from claims that they negligently permitted third parties to capture photos/videos of patients within the facility’s care. Therefore, healthcare fa-

cilities should strongly consider adopting and enforcing policies that limit visitors’ and patients’ ability to photograph or record other patients. Such reasonable measures to protect patient privacy would aid in defense of the facility and its workforce should a claim ever be brought by a patient who was photographed or recorded without consent.

THE PROBLEM

There are often moments family members and visitors may want to capture within a healthcare facility, like births and victories

¹ 45 C.F.R. § 164.530.



in overcoming illness. More often now, with the advent of social media, some will even document the progress of their loved one throughout a hospital stay for their social media followers. However, anyone who has been in a hospital knows the close quarters which patients and visitors can sometimes find themselves in. Patients may be placed in shared rooms or may be seen waiting in hallways or moving about the hospital. If a camera-wielder isn't careful, they may inadvertently capture another patient in the background who did not consent to be in the picture or video. Or the photographer could have malicious intentions, deliberately photographing a patient they don't know without consent. Patients may be particularly vulnerable to falling victim to such violations of privacy, depending on their state of consciousness.

Most facilities likely have policies in place to regulate their workforce's use of cell phones while caring for patients. Health care providers are familiar with HIPAA and know that they must not violate patient privacy. However, many facilities may not have a policy in place for regulating the photographs and videos that may be taken by patients or their visitors. As such a scenario does not present a traditional HIPAA breach, some facilities may not have appreciated the risk and taken steps to manage it. Facilities may also feel that smartphone use is rampant, hard to detect, and therefore uncontrollable. However, the key to risk management here is for a facility to make reasonably diligent efforts to protect patient privacy. Therefore, establishing a policy limiting photo/video taking and making the rules clear to providers, patients, and visitors alike is a valuable step a facility can take in reducing its exposure.

ADDRESSING THE PROBLEM WITH TARGETED AND PRACTICAL POLICIES

Some healthcare facilities have been proactive in addressing the risk posed by smartphones and have policies in place. Facilities have taken different approaches to the issue. Some facilities have instituted an outright ban on photographs and videos, while others allow them to be taken in certain circumstances, with varying degrees of limitation.

While a complete ban would theoretically provide the most protection to healthcare providers and patient privacy, logistically, such a ban would be difficult to enforce across an entire facility at all hours. As smartphone use is so pervasive, a complete ban would likely be violated. If the facility's policy is routinely violated, it could defeat the argument that reasonable

measures were taken to enforce the policy and protect patient privacy.

Therefore, a better approach might be to place more reasonable and practical limitations on photography and video recording in the facility. The outlines of the policy would likely depend on the subject of the photo/video, the relationship between the subject and the photographer, and the location where it is being taken. Where a photo or video is being taken by visitors who are family or friends of the patient, and no other patients or patient information are visible, a patient's consent should be sufficient. However, where the photo/video would involve a patient whom the photographer does not know, consent from the patient and/or facility should be obtained.

The need to prevent potential obstacles to the provision of patient care may be a good reason to prohibit photo/video capturing in areas with unstable patients, such as the Emergency Room and the Intensive Care Unit. A common location for the issue to arise is in the labor and delivery room. A good compromise may be only to prohibit photo/video recording during the delivery, so as not to interfere with the provision of care or create a potential risk to the health of the mother and baby. Another idea may be to limit photo and video capturing to patient rooms. This could be a particularly strong policy in facilities where patients are placed in private rooms.

It is also important to include that a health care provider may, at his or her discretion, prohibit photographs and videos of the patient. This will provide the flexibility for a patient's provider to make sure there is no interference with the patient's care in any given circumstance.

ENFORCEMENT

Having a policy in place does not protect it if it is not reasonably enforced. The first step to successful enforcement must be making patients, visitors, and the facility's workforce aware of the policy and its restrictions. The workforce must be aware of the policy's guidelines so that they can recognize a violation and step in to protect patient privacy. Of course, employees can't be all-knowing, but they must be expected to intervene where they see or suspect that the policy has been or is about to be violated. Patients should be made aware of the policy upon admission and that they and their visitors will not have unlimited ability to use their cameras, as they may not invade another patient's privacy. As for visitors, the most effective way to enforce the policy would likely be through prominently displayed signs that outline the

highlights of the policy in visitor/patient areas, along with posting the information on the facility's website.

DAMAGE CONTROL

Often, by the time a violation is realized, the photograph or video will have already been taken. Even with diligent observation from providers and employees and reasonable efforts to preemptively enforce the policy, the chances are that some unauthorized photos or videos will still be taken. Therefore, a comprehensive policy should lay out a procedure for facility employees to follow when they become aware that an unauthorized photograph or video has been taken. Rapid response is critical, as the content can be quickly disseminated across social media beyond repair.

The first step, of course, would be to politely ask the camera-wielder to stop using the camera and to delete any photos or videos they may have taken in violation of the policy. It is also important to inquire whether any such content has been posted to a social media account or placed in cloud storage, as the photo/video would need to be deleted from those locations as well. If the individual refuses to cease taking the photos/video, there should be a procedure in place for notifying security and seeing that the individual is removed from the facility if necessary (assuming the culprit is not a patient in need of care and treatment). Once again, the policy should only call for reasonable steps to be taken—the facility cannot commandeer an individual's personal property to delete unauthorized photos/videos. Additionally, where it is discovered that an unauthorized photo or video of a patient has been taken, the occurrence and any steps taken to try to rectify it should be documented in the patient's medical record.

While healthcare facilities cannot eradicate the threat to patient privacy that smartphones and social media pose, formulating and implementing a policy that provides reasonable protections is something facilities can do to diminish their risk of future liability for the unauthorized photographing or recording of non-consenting patients.



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¹ 45 C.F.R. § 164.530.