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WHAT'S ON YOUR WALL?

PRIVACY RULES AND PATIENT PHOTOS IN THE FACILITY AND SOCIAL MEDIA

by Andrew R. Quinio

A picture is worth a thousand words, but in terms of HIPAA and patient privacy, could it be worth a few thousand dollars in civil penalties?

It is not uncommon to find bulletin boards inside a nursing facility filled with photos of smiling patients, their families, and staff at social gatherings posted by the facility for all visitors to see. However, what appears to be an innocuous way of spotlighting your community can be a violation of HIPAA. That is because full face photographic images and any comparable images of patients constitute individually identifiable health information prohibited from disclosure under [45 C.F.R. section 164.514\(b\)](#).

Even adorable photos of newborn babies are not safe from HIPAA's privacy rules, as the New York Times reported in August 2014 regarding a Manhattan obstetrician who cleared long-adored photos of his infant patients from his bulletin boards out of zealous compliance with federal privacy regulations. Rachel Seeger, a spokesperson for the Department of Health and Human Services' Office of Civil Rights confirmed with the New York Times that such displays were indeed illegal, stating, "A patient's photograph that identifies him/her cannot be posted in public areas."

But HIPAA does not completely render the walls of long term care providers empty and absent of personality. Photos of patients at facility gatherings can still be displayed as long as the patients or their personal representatives provide specific, written authorization for the photos to be displayed. Specific authorization, according to Seeger, means an official, HIPAA-compliant form that includes certain necessary elements, including terms for revocation and expiration, among other things. Thus, your facility bulletin board featuring photos of patients enjoying the recent 4th of July dietician-approved barbecue is safe, as long as the patients or their responsible parties gave written permission to use their likenesses. For added safety, move the bulletin board farther away from the lobby or waiting room, where members of the general public are unlikely to see it.

Meanwhile, HIPAA compliance does not end on the physical walls of the facility, but continues on to the digital walls of social media, where long term care providers have begun to maintain an active presence. Protecting patient privacy is particularly challenging when patients' family members, and not facility staff, are the ones taking photographs of other patients and posting them on Facebook or Twitter. Aside from scenarios where visitors purposefully take photographs of other patients, it is not unimaginable for someone to take a photo of their loved one while also inadvertently taking a photo of their loved one's roommate, who is visible in the background (i.e., "photobomb") and has their image posted on a website visible to hundreds of viewers. In that case, the facility is generally safe from liability because a covered entity would not be responsible for the actions by a patient's friends or family, according to the Department of Health and Human Services' Office of Civil Rights. Still, facilities should inform visitors through signs prominently displayed in the building that picture-taking is not permitted. Doing so may allow a facility to demonstrate that it was taking reasonable steps to protect patient privacy.

Facilities may also be safe if a patient's image makes its way to a page sponsored or maintained by that facility. Through Facebook pages, facilities have offered largely unregulated virtual bulletin boards that may be accessed and viewed by the general public, creating the false appearance that the facility has authorized or approved of the content that is uploaded on to it. Fortunately, under [Section 230 of the Communications Decency Act](#), a healthcare provider cannot be held liable for postings made by other parties just because it owns or sponsors the forum. Still, facilities should continuously monitor their social media pages and remove any content that breaches patient privacy.

Although photos of patients in social settings may raise added legal compliance headaches, they serve as valuable reminders that caregivers are also engaged in the important work of restoring the cherished bonds that patients have with their community. Thankfully, the laws and regulations are not too rigid that they hinder this reminder. That is a picture worth posting.

About the Author:

Andrew Quinio joined Wroten & Associates in 2013. He was admitted to the California State Bar and the U.S. District Court for the Central District of California in 2012.

Mr. Quinio obtained his Juris Doctorate from the University of Southern California, Gould School of Law. While at USC, he was a finalist in the Hale Moot Court Honors Competition, and later competed in the National Moot Court Competition. During his third year, he served as an Editor on the Moot Court Executive Board. Upon graduation, Mr. Quinio received the USC Edward and Eleanor Shattuck Award, which is awarded to law students that exhibit the greatest potential for becoming outstanding members of the bar. During law school, he clerked for the Tax Division of the U.S. Attorney's Office and several complex civil litigation firms. Prior to joining Wroten & Associates, he clerked for the Los Angeles District Attorney's Office.

Mr. Quinio is an honors graduate of UC Berkeley, where he obtained a degree in Political Science and a minor degree in Public Policy. Mr. Quinio is a former Commissioner for the City of Mission Viejo Planning and Transportation Commission. He is currently a member of the Orange County and Los Angeles Bar Associations.

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