

## Cell Phone Camera Use in Healthcare Facilities: Shutter It

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For many years, cell phone usage was prohibited in hospitals because it was believed that such usage presented radio wave or electromagnetic danger to certain patient equipment. Findings published in the March 2007 *Mayo Clinic Proceedings* refuted this long-held assumption and confirmed that cell phones used in a normal way do not interfere with patient equipment.<sup>1</sup> Accordingly, the researchers advised hospitals to abandon the ban on cell phone use.<sup>2</sup> Today, the renewed concern about cell phone use in hospitals is related not to interference with patient equipment but to protecting patients' privacy.

Hospitals, nursing homes, assisted living or adult care homes, and other healthcare facilities have a duty under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to protect confidential patient information. HIPAA defines protected health information (PHI) as "individually identifiable health information" (IIHI) that is (1) transmitted by electronic media; (2) maintained in any medium described in the definition of electronic media; or (3) transmitted or maintained in any other form or medium.<sup>3</sup> IIHI is defined as health information collected from an individual that is created or received by a healthcare provider, health plan, employer, or healthcare clearinghouse that pertains to the physical or mental health condition of an individual; the payment for, or provision of healthcare to that individual; and that identifies the individual or reasonably may be used to identify the individual.<sup>4</sup> Given these definitions, healthcare facilities generally have recognized that photographs that identify or allow for the identification of patients constitute PHI and, accordingly, have prohibited staff from taking photographs of a patient without the patient's consent.

With the ever-increasing popularity of cell phone cameras and online social networking websites, the potential for inappropriate use of such cameras in healthcare settings is tremendous. Over the past several years, numerous incidents in hospitals have led to employee suspensions or firings over the inappropriate and unauthorized dissemination of patient photographs. One of the most troubling occurred at Rady Children's Hospital in San Diego, CA, where a respiratory therapist was sentenced to forty-five years in prison after authorities discovered he had been molesting many of the severely disabled children under his care.<sup>5</sup> He also was involved in Internet pornography and used his cell phone to photograph the children, and he may have posted the pictures to the Internet.<sup>6</sup> Another incident involved a chief resident of general surgery at Mayo Clinic's Phoenix Hospital, who used his



cell phone to take an inappropriate photograph of a patient under anesthesia and then showed the picture to his colleagues.<sup>7</sup> Shortly following the incident, the resident either resigned or was asked to leave the hospital.<sup>8</sup> And earlier this year, two employees at the University of New Mexico Hospital used their cell phone cameras to take close-up photos of emergency room patients' injuries and then posted the pictures to their MySpace webpages.<sup>9</sup> These employees were fired because their actions violated the hospital's policy against the use of cell phone cameras in patient areas.<sup>10</sup>

Incidents of inappropriate cell phone camera use are not limited to physicians and healthcare facility employees, however. At the University of California at Los Angeles' Resnick Neuropsychiatric Hospital (Resnick), a patient violated the privacy of other patients after photographs taken during a group therapy session were posted to a social networking website.<sup>11</sup> The patient who took and posted the photos claimed that the other patients' consent was obtained, but hospital administrators rejected that claim, expressing their concern that given the nature of the group session, the individual patients involved may not have been fully competent to give their consent.<sup>12</sup>

Hospitals, nursing homes, and other healthcare facilities are certainly not alone in navigating the privacy issues arising from ongoing technological advancements. However, given the strict regulatory environment in which they operate and the increasing industry concern for patient privacy, healthcare facilities must be proactive in addressing cell phone camera use.

## Chair's Column— Welcome to HIT!

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The Health Information and Technology Practice Group (HIT PG) heads into the 2008-2009 year with great expectations. I will use this opportunity to introduce this year's leadership team:

- **Edward F. Shay, Chair**
- **Gerald "Jud" E. DeLoss, Vice Chair – Educational Programs**
- **Phyllis F. Granade, Vice Chair – Strategic Activities**
- **Patricia A. Markus, Vice Chair – Publications**
- **Rebecca L. Williams, Vice Chair – Research & Website**
- **Robert Q. Wilson, Vice Chair – Membership**
- **Alan S. Goldberg – Listserve Moderator**

For contact information, see page 10.

The HIT PG is divided into affinity groups—subsets of HIT lawyers who share a substantive interest in one or more areas of HIT law. Each affinity group has a leadership team that coordinates its activities with the larger HIT PG effort. HIT members may join any or all of the affinity groups in which they have an interest. HIT's affinity groups take on substantive responsibilities for the HIT PG's planned activities. The affinity group leadership teams include:

- **Electronic Health Records**

Kevin Lyles  
Laird Pisto  
William Roach

- **Emerging Uses of Health Information**

Steve Bernstein  
Daniel Orenstein  
Linda Ross

- **Telemedicine**

Maryam Khotani  
Amy Leopard

- **Privacy and Security Compliance and Enforcement**

Robert Coffield  
Greg Ewing

- **Tech Licensing and Intellectual Property**

Heidi Echols  
Dina Ross

The HIT PG's activities plan for this year offers many opportunities for HIT PG members to get involved. This year HIT PG intends to leverage the knowledge within our affinity groups by asking each to take the lead on one edition of *HIT News*, and to plan and host one teleconference that reflects the subject matter focus of the affinity group.

HIT PG continues to seek volunteers. We welcome HIT lawyers who want to write for *HIT News* or prepare the short, timely summaries of developments that we send to our members as email alerts. As the year unfolds, we will also seek HIT PG members' involvement in teleconferences and member briefings. The HIT PG believes that health information technology and exchange will play a vital role in future developments of the healthcare industry. To the extent that those future developments involve health reform legislation or legislation specific to health information and technology, we will focus on such legislation. The HIT PG welcomes our members who wish to join in analyzing and explaining new legislation to our members. In short, now is a great time to get involved in the HIT PG. Join us!

## Policy Recommendations

To practically address these concerns and avoid potential liability following such incidents, covered entities should consider creating and adopting policies surrounding the use of cell phone cameras in their facilities, as follows:

- Facilities should take appropriate steps to protect the safety of other patients or residents, as well as staff, practitioners, and visitors, by adopting a written policy that is communicated to all employees detailing the facility's limitations on cell phone camera use and outlining consequences for failure to abide by the policy.
- Employees and staff should be advised that cell phone cameras are never to be used to record images of patients. Such images, if needed for purposes of care or training, should be obtained only by authorized persons using specified equipment and pursuant to a specific facility policy.
- The policy should indicate that any authorized photographs or images are the sole property of the facility. Additionally, the policy should prohibit distribution of photographs or other images to any person outside the facility, absent written authorization for a permissible use.
- Facility staff, including volunteers and members of the medical staff, should be trained annually on the policy in conjunction with other compliance training sessions. Sign-in should be required of all attendees at such training sessions, and attendance should be made a condition of employment.
- Whatever policy a healthcare facility adopts, the facility should conspicuously post signs that clearly state the nature and extent of the ban on cell phone or cell phone camera usage within the facility so that volunteers, visitors, employees, and practitioners all understand what is permitted.

- Facilities should train staff to require any resident, visitor, employee, or any other individual inside the facility who is observed taking photographs with a cell phone to immediately erase the photographs from the phone.
- Enforcement of the policy is essential. Facilities' policies should include specific consequences for failure to abide by the policy, and those consequences should be applied uniformly to violators.
- When a patient or resident is admitted into the facility, each patient or resident (or his or her responsible party) should sign a form stating that he or she has been informed that cell phone and cell phone camera use are prohibited or limited inside the facility.

Two of the facilities mentioned above adopted different measures, following the cited incidents, to address the HIPAA concerns and privacy abuses implicated by the cell phone camera use of their patients and employees.

- Resnick reinstated a complete ban on the use of any cell phones or laptops within the facility, regardless of whether or not such phones or laptops include a camera. Officials took this measure in lieu of requiring staff to check whether cell phones or laptops contained cameras.<sup>13</sup>
- Rady Children's Hospital banned employees' use of cell phones on hospital floors. Employees must keep their cell phones in their lockers. Visitors are asked to refrain from using their cell phones but, if they choose to use the camera function, they are instructed that they may photograph only their own child while inside the facility.<sup>14</sup>

Failure to implement and enforce policies and procedures that adequately protect the privacy of patients, residents, and others from the consequences of inappropriate camera phone use may subject a facility and members of its work force to liability. Patients or residents may file complaints about HIPAA violations with the Office for Civil Rights within the Department of Health and Human Services. Such complaints will result in an investigation into the incident, and a potential fine if the facility does not take appropriate steps to resolve the incident and prevent future similar occurrences. As the incidents noted above demonstrate, unflattering media exposure also can result from such instances.

In addition, states are beginning to enact laws designed to enforce patients' privacy rights. California recently enacted legislation, that took effect on January 1, 2009, that requires healthcare organizations to adopt protections aimed at preventing unlawful and unauthorized access to patient data.<sup>15</sup> Facilities will have to monitor employees' access to data, and breaches of privacy must be disclosed to affected patients and to the California Department of Health (CDH) within five days of discovery.<sup>16</sup> The new law also allows the CDH to fine organizations up to \$25,000 for each patient whose medical information may have been accessed or disclosed unlawfully, and patients may file suits directly against parties that failed to adequately protect their data.<sup>17</sup> In light of

these new laws, Resnick's ban on cell phone use does not appear draconian.

As technology advances and wireless handheld devices, phones, cameras, and computers become ever smaller and add new features, healthcare facilities need to proactively respond to the potential privacy violations that the use of such devices presents. Cameras on cell phones, PDAs, and laptops are particularly troublesome because they can be used without anyone knowing that a photograph is being taken. Further, the user can instantaneously transmit the photograph to the Internet, at which point the subject's PHI is no longer protected or private.

Although the inconveniences are real, and patient and practitioner push-back is likely, Resnick's complete ban on the use of cell phones may be the safest policy to ensure that patient privacy is protected. Healthcare facilities should be known for the patient care they provide, not the unauthorized or inappropriate photographs of their patients that surface on Facebook.

- 1 See Jeffrey L. Tri, MSEE, Rodney P. Severson, CBET, Linda K. Hyberger, MA, CCRC, and David L. Hayes, MD, 82 *MAYO CLIN. PROC.* (3), 282-285 (2007), available at [www.mayoclinicproceedings.com/inside.asp?AID=4308&UID=](http://www.mayoclinicproceedings.com/inside.asp?AID=4308&UID=).
- 2 See *id.* at 285.
- 3 45 C.F.R. § 160.103.
- 4 See *id.*
- 5 See Joe, Hughes, *Therapist at Children's Hospital Accused of Child Molestation, Porn*, SAN DIEGO UNION-TRIB., Mar. 10, 2006, available at [www.signonsandiego.com/uniontrib/20060310/news\\_1n10child.html](http://www.signonsandiego.com/uniontrib/20060310/news_1n10child.html).
- 6 See *id.* But see Randy Dotinga, *Hospitals Nationwide Combat Employee Camera-Phone Abuse*, WIRED MAG., June 1, 2007, available at [www.wired.com/medtech/health/news/2007/06/hospital\\_cameras](http://www.wired.com/medtech/health/news/2007/06/hospital_cameras) (asserting that, contrary to the [Union Tribune] report, none of the images was distributed on the Internet).
- 7 See Orlando Sentinel.com, Dec. 19, 2007, available at [http://blogs.orlando-sentinel.com/features\\_popculture\\_blog/2007/12/reason-237852-w.html](http://blogs.orlando-sentinel.com/features_popculture_blog/2007/12/reason-237852-w.html).
- 8 See Associated Press, *Doctor not likely to be prosecuted over tattoo picture*, Tucson Citizen.com, Dec. 27, 2007, available at [www.tucsoncitizen.com/daily/local/72614.php](http://www.tucsoncitizen.com/daily/local/72614.php).
- 9 See Associated Press, *Hospital employees post patients' pictures on Web Sites*, INT'L HERALD TRIB., Sept. 22, 2008, available at [www.ihf.com/articles/2008/09/22/america/22patients.php](http://www.ihf.com/articles/2008/09/22/america/22patients.php).
- 10 See *id.*
- 11 See *UCLA bans cellphones at hospital*, L.A. TIMES, March 18, 2008, at B-6, available at <http://articles.latimes.com/2008/mar/18/local/me-ucla18>.
- 12 See *id.*
- 13 See *id.*
- 14 See *id.*
- 15 See Cal. S.B. 541.
- 16 See *id.*
- 17 See *id.*; see also Cal. A.B. 211.