

CHAPTER XIII: PHOTOGRAPHS, VIDEOTAPES AND OTHER IMAGES

Media Recordings (photographs, digital images, xrays, video and audio recordings) are routinely obtained by healthcare providers for:

- Clinical documentation of condition, illness or injury
- Clinical teaching and educational purposes.
- Provision of care through telemedicine technologies

Other instances for which images may be obtained are (consult Risk Manager or Legal Counsel):

- Publication and advertising
- Research
- Hospital security
- Individual identification
- Law Enforcement
- Forensic documentation
- Patients and families wanting to have documentation of their care (for instance, video recording the birth experience) or taking photos for other reasons

CONSENTS:

Recordings are most likely to be made in the following areas (but may also occur elsewhere):

- Emergency Department
- Operating Room
- Endoscopy Room
- Labor and Delivery
- Imaging/Nuclear Medicine
- Cardiac Catheterization Lab
- Family or patient therapy sessions

Staff in each area should be educated and policy should clarify circumstances when a consent is required. The consent should describe the intended use of the photograph, image or recording. It should also outline ownership, retention, and the process for releasing copies to outside requestors.

Consent may be a separate document or incorporated into existing consents, and should be signed by the patient or legal representative/parent. Generally, consent is not required when photographs are taken to document suspected abuse or neglect.

PICTURE IDENTIFICATION

With the advent of the “Red Flag Rules” (2010), along with general public and legislative concern about identity theft, including medical identity theft, many organizations are requesting picture identification prior to providing patient care. If your organization is scanning these photographs into your record and/or system, you are obligated to protect these in the same way you protect all PHI.

The Joint Commission’s National Patient Safety goals require at least two forms of patient identifier prior to the initiation of any procedure, no matter how routine. For many organizations, this will include the patient’s Name, DOB and wrist band ID. Some, however, are matching photographs of the patient on file to the patient presenting. Again, organizations must have documented procedures for protecting, releasing and storing this information.

Finally, HIPAA requires that organizations make every effort to ensure that the person receiving medical record copies is in fact the correct patient, and in many cases this involves requesting photo ID prior to receiving records. Generally documenting that this has been checked is sufficient for these purposes, and copies need not be made.

OWNERSHIP, STORAGE AND RETENTION:

Each organization should have a policy regarding the ownership of the media.

Organizations should determine what images and recordings are to be included, if any, in the legal medical or health record as a part of the designated record set. Once determined, the images and recordings become subject to the organization’s policy for medical record retention and destruction. Note that it is permissible to exclude certain types of images from your legal health record and therefore your retention requirements (for instance, training videotapes made of family therapy sessions). However, retention for these should be shorter time frame and delineated in policy to avoid any allegations of evidence tampering, since these images, if retained, could be subject to legal discovery whether designated as part of the record set or not.

Storage methods should also be documented in policy and may include as appropriate:

- * Physical placement of photographs in a paper record
- * Scanned images into electronic record
- * Separate storage areas for photos, digital diskettes, video tapes
- * Security of the images or recordings to avoid unauthorized viewing or loss.
- * Ease of retrieval when requested.

All images and recordings should be clearly identified with the patient’s name, identification number and the date and time the photo or recording was made.

DISCLOSURE

Except as required by federal or Maine State law, as with any Personal Health information, disclosure of photographs, videos, audiotapes, and other images should be done only with specific, written authorization from the patient or legal representative. This may be done with a standard authorization form that clearly states the purpose for which these media will be used.

Fortunately, technological advances have eliminated, in most cases, the need to release original films, and copies are suitable in most instances where information is needed. However, should there be a need to release the original record for continuing care, careful documentation of the circumstances, including the patient's (and recipient's) signature, is a best practice. Original images should NOT be released in any legal matter without the advice of legal counsel.

Careful attention should be paid to video recordings that may document the participation of more than one patient. Editing or other means of protecting the information and images of the non-authorizing parties must be done to protect their confidentiality.

FORENSIC PHOTOGRAPHS and RECORDINGS

Forensic photography references making images to record objects, scenes, and events to be used for legal purposes/processes. These types of photographs may be used for situational documentation, analysis, or to meet court proceedings. To be used in court proceedings, pictures/images are allowed under the applicable rules of evidence of a particular jurisdiction. Forensic imagery may be used to identify normally invisible detail (e.g., X-ray, infrared, ultraviolet). It is important to appreciate any photograph/image¹ may become a "forensic" photograph if it adds information required by a court and is allowed under the applicable rules of evidence of a particular jurisdiction. Law enforcement agencies (State and/or Federal) or State Medical Examiners may secure the services of specifically trained forensic photographers.

- Hospitals/healthcare facilities should have policies and procedures governing the taking and management of photographs and / or images for forensic purposes.
- Photographs and/or images taken for potential evidentiary purposes must be maintained securely.
 - Policies and procedures should clearly define the careful preservation of the chain of custody which must be maintained and documented (date, time, who, what, where, when, etc.).
 - Specific policies and procedure should be written to address photographs and/or images related to the management and care of alleged sexual assault victims.

- Photographs and/or images may include, but not be limited to, pictures of victims of self inflicted injuries, alleged assaults, rape of elders, adults and/or children, or other crime and/or accident scenes.
- Hospital/ healthcare facilities Risk Management policies and procedures should address crime and/or accident scene investigation processes addressing forensic photographs and images.
- Hospital/ healthcare facility legal counsel should review a facility's policies to ensure accuracy and integrity for potential submission and admissibility for evidentiary purposes in court proceedings.
- Careful consideration should be given to supporting and preserving the patient's rights during photographic or other imaging events. It should be noted if a law enforcement agency is actively conducting an investigation; it is responsible for taking photographs and/or images.

¹Note: Photographs now include digital images taken with cell phones or digital cameras.

CLINICAL PHOTOGRAPHY

Photographs or other images may be taken of wounds, rashes, etc. for a variety of clinical and educational purposes. As long as there is no way to identify the patient in these photos, consent is not required for their use.

Providers should do a risk benefit analysis regarding the value of photographing and /or videotaping procedures, including whether or not these will be shared with patients. There are pros and cons to both sides from a liability perspective. Any proposed routine videotaping should be reviewed by your organization's legal counsel.

RADIOLOGICAL IMAGES

Per Maine law, patients must be notified prior to the destruction of radiologic images. If unable to locate the individual patient, a public announcement, for instance in the newspaper, is considered sufficient.

PERSONAL PHOTOGRAPHS:

Organizational policies should be developed to address the photographing or video taping of events such as child birth by friends or family members. The goal is not to be overly restrictive while reducing any risk liability to the organization. Discussion with legal counsel may be necessary to develop policies that will be both customer friendly and legally sound.

Also, organizations need to consider the dangers of cell phone cameras. Signs reminding visitors and patients to respect the privacy of others may mitigate any concerns in this area. Staff should be reminded that picture taking is documenting PHI just like any other documentation, and they should be discouraged from taking casual pictures of patients and other staff members while at work. Similarly, photos of patients/staff etc. should not

be posted for public viewing or used for marketing without express written permission from the subject.

MICROFILM, MICROFICHE, FAXES, SCANNED IMAGES

Generally speaking, microfilm, faxed images, and printed copies of scanned documents should be treated (stored, protected, released and destroyed) following the same process as any other PHI held by your organization. Policies should specify how long after copying/filming original documents will be retained prior to being destroyed confidentially. Your organization's Risk Manager/Legal department should assist you in determining this, but careful review of the quality of the copies prior to destroying the originals is strongly recommended.