Compliance Corner

Keeping Compliance in the Picture

by Michelle DeBarge and Jody Erdfarb

In the ever-changing landscape of health-care laws and regulations, it has become increasingly difficult for dental providers to keep pace with requirements. Our regular column, "Compliance Corner," offers AACA members an opportunity to ask our legal counsel questions and learn from the questions of others.

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Dear Compliance Corner,

Before-and-after pictures are the cornerstone of our marketing strategy. We always take pictures of our patients before using Clear Aligner Therapy and after the course of therapy is complete—and we use those photos in a variety of ways to market our practice. We post them on a bulletin board in our office, we use them on our website, and we post them on Instagram. We want everyone to see our patients' wonderful results! Unfortunately, a patient recently complained about the use of her photos in an Instagram post and threatened us with legal action. She looks gorgeous! What's the problem? Could I actually get into trouble for posting these pictures?

From,
Not So Picture Perfect

Dear Not So Picture Perfect,

Given the increasing use of social media, your question is especially relevant to dentists that rely on before-and-after pictures to market their practices. Over the last several years, not only has government enforcement increased in the area of patient privacy, but also, patients themselves have become highly sensitive to these issues. While you might have been surprised that a patient complained about her picture being posted on your Instagram account without her consent, it does not surprise us at all.

Understanding the risks

Managing an unhappy patient is difficult, but handling a privacy-based lawsuit could be a nightmare, resulting in a huge jury verdict for what might seem like a minor infraction. In 2013, a jury in Indiana awarded $1.4 million to a plaintiff who alleged that her privacy was violated when a Walgreens pharmacist inappropriately shared the plaintiff's prescription history with her ex-boyfriend.

Moreover, many patients now understand that they can report privacy issues to state and federal government agencies, leading to timely, costly, and aggravating government investigations. In 2016, Complete P.T. Pool & Land Physical Therapy, Inc., a physical therapy practice in California, agreed to pay $25,000 and adopt a corrective action plan requiring regular monitoring and reporting to the government, to settle an allegation that the practice violated HIPAA by posting patient testimonials, including names and photographs, to its website without obtaining valid, HIPAA-compliant authorizations. The government investigation was triggered by a patient complaint in 2012.

Implementing the solution

Given these risks, in order to adequately protect your practice, it is essential to obtain legally compliant authorization forms from patients before disclosing their photos. Even obtaining verbal permission will not suffice; neither will a hastily scribbled consent form. In order to be considered legally valid, the authorization form must include all the elements required by HIPAA and any other applicable state and federal laws. Many of these laws mandate the inclusion of exact language, without which the authorization is not considered valid. For example, HIPAA requires that the form include, in part, a "specific and meaningful" description of the information to be disclosed, a statement notifying the individual of his/her right to revoke the authorization in writing, and a date on which the consent expires.

Dispelling the myths

The following are 5 common myths regarding the use of before-and-after pictures for marketing your dental practice:

Myth #1: Only medical record information/information about the patient's diagnosis is legally required to be protected; photographs are fair game.

This is not correct. It is a common misconception that only sensitive medical information or diagnoses are protected, but in reality, HIPAA applies to protected health information (PHI), which is defined as "individually identifiable health information." Since photographs could reasonably identify an individual, they constitute PHI. Other similar federal and state laws would also consider photographs protected information. Furthermore, a patient can definitely allege an invasion-of-privacy claim in a lawsuit based on disclosure of a photograph. In many ways, a photograph is much more identifiable than the patient's name.

Myth #2: Pictures showing just the patient's teeth are always OK.

Even pictures showing only the patient's teeth—and not the patient's other facial features—are risky. From a HIPAA perspective, only information that could reasonably identify the individual is protected, but that standard is very broad. In order to get full immunity from HIPAA, PHI must be de-identified in accordance with HIPAA's requirements; this requires, in part, removing "full face photographic images and any comparable images." What counts as a comparable image is an open question, and one can easily imagine a patient or government agent arguing that there is a reasonable basis to identify an individual with distinctive teeth—even if only from an image of the patient's mouth. The safest route still is getting a legally compliant authorization from the patient.

Myth #3: If the patient told me it was OK to use his/her picture, then I have no problem.

We have heard many variations of this myth, including "If she posed for the picture, then we could assume that she consented to the photo being used to market the practice." Or, our personal favorite, "I can't be penalized for posting the patient's photo without her permission because she looks so great in the photo!" Unfortunately for those who rely on this defense, the privacy protection afforded to patients applies regardless of whether the patient willingly posed for the picture and regardless of how great he/she might look in the shot.

Myth #4: If I only post the picture on a bulletin board in my office and not on social media, then I don't have to worry.

While social media posting presents its own unique risks, paper health information is still subject to federal and state laws protecting health information. For example, HIPAA applies to disclosures of PHI in any form or medium, including paper. Therefore, posting a picture on a bulletin board in a dental office requires legally compliant authorization from the patient as well.

Myth #5: Everyone posts before-and-after pictures and no one obtains authorizations. There's no way my small practice would become a target of a government investigation or lawsuit.

Not everyone who speeds gets a speeding ticket, but the "everyone was speeding" defense never works. Disgruntled patients and employees do not necessarily care about the size of your practice when they file a lawsuit against you or report you to the government. And the government has made a point of pursuing small providers, to emphasize that size does not matter when it comes to HIPAA compliance.

The lesson is clear: when it comes to using those before-and-after pictures, always obtain legally valid patient authorization first. Given the high risk of failing to get authorization and the low cost to your practice of getting it, this one is a no-brainer. No amount of marketing value can cover the potential liability of being sued or investigated and dealing with the resulting reputational harm. In this case, an ounce of prevention is worth far more than a pound of cure. ■

Please contact Jody Erdfarb at JErdfarb@wiggin.com for more information.