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A PICTURE MAY BE WORTH A THOUSAND WORDS BUT THEY MAY NOT ALWAYS BE APPROPRIATE IN A MEDICAL CONTEXT

*Samuel D. Hodge, Jr.*¹

Theresa was plagued with years of back discomfort and trouble locating tops that fit correctly.² She decided to remedy the problem and researched breast reduction surgery as a solution. She viewed hundreds of before and after pictures on Instagram and investigated plastic surgeons on the Internet.³ Upon finishing her online search, Theresa made an appointment with Dr. James Jones—who had many social media subscribers and excellent reviews—to discuss the procedure.⁴

During their pre-operative meeting, the physician explained the surgical risks, had her sign an informed consent document, and asked if he could take pictures of the procedure to post on his social media platforms.⁵ He told her that the images would be used for educational purposes, since many people follow him on the Internet to learn more about cosmetic surgery.⁶ Grateful that the surgeon would be solving her breast problems and understanding that the images would be used for educational purposes, the patient consented to the request.⁷

While the surgery was underway, Dr. Jones handed his cell phone to an operating room nurse and requested that she videotape the procedure. Once the filming began, the physician started to narrate, “Today, I am performing a mammoplasty on a 22-year-old woman who has been deeply troubled by her body image.” He then picked up the tissue that he had excised and noted, “Look at the four pounds of

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2. This is a hypothetical case.

3. Katelyn G. Bennett & Christian J. Vercler, *When Is Posting About Patients on Social Media Unethical “Medutainment”?*, 20 *AMA J. ETHICS* 328, 328 (2018).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

extra breast tissue that this patient was carrying around. She is now going to have a perfectly contoured chest to fit her body size.”⁸ The nurse then uploaded the video to the doctor’s social media accounts as he completed the operation.⁹

Theresa awakened in the recovery room, and Dr. Jones told her that the surgery went beautifully and that she would be delighted with the results. The patient was discharged several hours later and told to follow-up in one week. Later that night, the woman logged into Snapchat and discovered the images of her surgery. She was horrified by the post and its graphic images.¹⁰

The patient returned to the surgeon one week later as instructed and was told that her incisions were healing nicely, but Dr. Jones observed that the patient was silent and on the verge of tears. Perplexed, he asked what was wrong, and Theresa replied, “I can’t believe you posted such personal images of me for the world to see and you call that education?”¹¹ The surgeon was taken aback by her reaction and replied, “But we discussed this, and you gave me permission to use the pictures from the surgery on social media.”¹² Between tears, Theresa angrily retorted, “Yes, but I expected that you would handle my experience with discretion and respect!”¹³

I. INTRODUCTION

More than two thousand years ago, Hippocrates authored the now-famous Oath that physicians recite on their graduation day. The pledge is part of a set of writings dubbed the Hippocratic Collection written by the Father of Medicine.¹⁴ A translation of the Oath provides, “What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.”¹⁵

Centuries later, healthcare providers still struggle with questions about the protection of medical information and the preservation of

8. *Id.* at 329.

9. Bennett & Vercler, *supra* note 3, at 329.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *From the Hippocratic Oath to HIPAA: A history of patient privacy*, BECKER’S HEALTH IT (Aug. 19, 2016), <https://www.beckershospitalreview.com/healthcare-information-technology/from-the-hippocratic-oath-to-hipaa-a-history-of-patient-privacy.html>.

15. *Id.*

trust with their patients.¹⁶ However, the recording and maintenance of medical data in traditional paper files have dramatically changed with the digitization of healthcare records and abilities Hippocrates would never have foreseen.¹⁷ This includes using medical photography and videos as a clinical tool that has become commonplace in a physician's practice, including images that are incorporated into the patient's chart.¹⁸ However, in the age of complex federal and state regulations protecting the privacy of a person's medical information and using the Internet as a tool of communication, medical imaging presents complex ethical, moral, and legal challenges.¹⁹ These problems are only compounded as physicians increasingly use social media platforms like Snapchat, Instagram, and Facebook to interact with other healthcare workers and the nonmedical community.²⁰ This Article will examine these challenges in informed consent, privacy, and liability contexts.²¹

II. THE HISTORY OF MEDICAL PHOTOGRAPHY

Artists have drawn the human form's complex structures for thousands of years to visualize medical procedures and document the pathologies of the body.²² Primitive man, armed with the understanding of how to make fire, provided medical drawings with their crude beginnings.²³ These early painters were fierce hunters whose existence was based upon their learning about the body.²⁴ On an ancient cavern wall in Southern Europe, using crude tools and their prey's bones, a hunter drew the first outline of a mammoth with its heart exposed.²⁵ Many years later, artists influenced by Greek and Roman sculptures fashioned depictions of the human figure assisted by discovering the principles of perspective and examining cadavers.²⁶ Leonardo da Vinci flourished during the Renaissance and married his scientific

16. *Id.*

17. *Id.*

18. See, e.g., Linda S. Smith, *Chart Smart: Documenting with photographs*, 37 *NURSING* 20, 20 (2007).

19. *Id.*

20. C. Lee Ventola, *Social Media and Health Care Professionals: Benefits, Risks, and Best Practices*, 39 *PHARMACY & THERAPEUTICS* 491, 491 (2014).

21. Page Y. Underwood et al., *Mobile Point-of-Care Medical Photography: Legal Considerations for Health Care Providers*, 40 *J. LEGAL MED.* 247, 248 (2020).

22. Alan E. Branigan, *History of Medical Illustration*, *ASS'N MED. ILLUSTRATORS*, <https://ami.org/professional-resources/advocacy/legal-news/27-main/medical-illustration/49-history-of-medical-illustration> (last visited May 30, 2021).

23. William E. Loechel, *The History of Medical Illustration*, 48 *BULL. MED. LIBR. ASS'N* 168, 168 (1960).

24. *Id.*

25. *Id.*

26. Branigan, *supra* note 22.

comprehension of anatomy with great artistic flair to create stunning cross-sections of the body's internal structures.²⁷ The centuries that followed saw the drawing of anatomic illustrations that became as celebrated as the authors who created them. Their depictions frequently survived longer than the books they accompanied.²⁸

Photography was first introduced in 1839, and the invention soon found its way into medicine through photomicrographs when the process was first presented to the Academy of Sciences.²⁹ A few years later, Alfred Donne published an atlas containing images taken through a microscope of platelets and organisms.³⁰ This finding soon led to the embracing of pictures by the healthcare community, eventually leading to the establishment of the first medical photography department in the United States at Bellevue Hospital in New York in the mid-1860s.³¹

The majority of clinical collections before the 1950s did not respect the patient's privacy.³² While there were some isolated instances in which the physician asked permission for publication of the medical pictures, most were used without consent, primarily when the person was from a lower economic status.³³ In only a limited number of instances was any attempt made to hide the patient's identity.³⁴

Medical photographs became a routine part of displays in science museums, medical libraries, and war galleries. However, these images were presented as either standalone pieces of art or illustrations, and "not themselves treated as objects, distributed and functioning in a diversity of practices and localities."³⁵ This use of medical imaging

27. *History of Medical Illustration*, COLUM. MED., <http://www.columbiamedicinemagazine.org/webextra/fall-2018/node%3Atitle%5D-2> (last visited May 30, 2021).

28. *Id.*

29. Emily Milam, *A Brief History of Early Medical Photography*, CLINICAL CORRELATIONS, Sept. 30, 2016, <https://www.clinicalcorrelations.org/2016/09/30/a-brief-history-of-early-medical-photography/#:~:text=the%20world's%20first%20application%20of,credited%20for%20the%20first%20photomicrograph.&text=IN%20the%20mid%2D1840s%2C%20Donn%C3%A9,photomicrograph%20atlas%20depicting%20medical%20specimens>.

30. *Id.*

31. *Id.*

32. Silvia Maina, *Medical photography in the nineteenth century: from portraits to clinical photography*, HEKTOEN INT'L J. (2018), <https://hekint.org/2018/03/05/medical-photography-nineteenth-century-portraits-clinical-photography/> (last visited May 30, 2021).

33. *Id.*

34. Milam, *supra* note 29.

35. Mienke te Hennepe, *Private portraits or suffering on stage: curating clinical photographic collections in the museum context*, SCI. MUSEUMS GRP. J. (Mar. 8, 2016) <http://journal.science.museum.ac.uk/browse/issue-05/private-portraits-or-suffering/>.

raised privacy concerns for the first time and cast a shadow over the medical materials' sensitive nature.³⁶

This newfound concern over patient privacy is exemplified by an uncomfortable experience of a dermatologist who once spoke at a medical conference on skin diseases. After completing his presentation, the projectionist approached the physician and noted, "Say, Doctor! One of those women's faces shown on the screen was the very image of my sister-in-law."³⁷ In his subsequent memoirs, the dermatologist noted the discomfort he experienced when he realized that an image of a patient taken with the promise that it was not intended for public consumption had been displayed to the audience.³⁸

With the advent of the Kodak handheld camera, discussions started to occur among physicians over the meaning of medical photography.³⁹ Some maintained that patients were too often the subject of pictures that were taken needlessly.⁴⁰ This use followed a plea for "decency" in that the images should be confined to the body parts in question, and they should not reveal the patient's identity.⁴¹ This concern coincided with the publication of an influential *Harvard Law Review* article advocating the creation of a tort for invasion of privacy for the nonconsensual publication of a photograph.⁴²

Following World War II, professional organizations were created to deal with considering patients' rights in relation to medical photography.⁴³ This came to a head with the establishment of the doctrine of informed consent in *Salgo v. Leland Stanford, Jr. University Board of Trustees* where the court noted, "A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation to induce his patient's consent."⁴⁴ The circle was completed in the 1970s when informed consent required a physician to ask for a patient's permission to take a clinical photograph.⁴⁵ As noted in *Berthiaume's Estate v. Pratt*, which

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Maina, *supra* note 32.

41. Hennepe, *supra* note 35.

42. *Id.*

43. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957).

44. *Id.*

45. Hennepe, *supra* note 35.

involved whether a doctor had the right to take a patient's picture without consent:

We recognize the benefit to the science of medicine which comes from the making of photographs of the treatment and of medical abnormalities found in patients . . . [However, a] man may object to any invasion, as well as to an unlimited invasion. Widespread distribution of a photograph is not essential nor can it be said that publication in its common usage or in its legal meaning is necessary . . . Plaintiff's picture was taken without her authority or consent. Her right to decide whether her facial characteristics should be recorded for another's benefit or by reason of another's capriciousness has been violated. The scope of the authorization defines the extent of the acts necessary to constitute a violation. If plaintiff had consented to have her photograph taken only for defendant's private files certainly he would have no right to exhibit it to others without her permission.⁴⁶

Photographs can be distributed in a variety of ways well beyond the traditional printed copy. An electronic version of an image may be stored on the mechanism employed to take the image, but it can be easily copied to a computer, CD, or flash drive.⁴⁷ This makes keeping the medical photograph confidential a challenge, and digital transmissions merely compound the problem. Online file-sharing permits the digital image to be transmitted to others instantaneously through platforms such as photo sharing and social media websites.⁴⁸

III. THE USES OF MEDICAL PHOTOGRAPHY

Clinical or medical photography is defined as a technique to take and record the everyday presentation of medical maladies discovered in patients.⁴⁹ It is employed to aid in diagnosing and documenting an illness throughout the different phases of treatment.⁵⁰ The images become a part of the medical record and have both a medical and legal purpose.⁵¹ This photographic technique has altered the manner in which physicians provide, record, and discuss medical care. It has similarly prompted dialog in medical investigations, research, and clinical practice, and is utilized in every medical specialty.⁵² Clinical photography acts as an accurate and comprehensive way to support a patient's

46. *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 796–97 (Me. 1976).

47. Matthew T. Harting et al., *Medical photography: current technology, evolving issues and legal perspectives*, 69 INT'L J. CLINICAL PRAC. 401, 403 (2015).

48. *Id.*

49. Marc Schenker, *The Clinical Photography Walkthrough*, CONTRASTLY, <https://contrastly.com/the-clinical-photography-walkthrough/> (last visited May 30, 2021).

50. *Id.*

51. Harting et al., *supra* note 47, at 403.

52. *Id.* at 402.

diagnosis and to show the progression of a disease or illness over time. The pictures also allow the physician to graphically describe the abnormality more succinctly than can be conveyed in the written word.⁵³

A. *Uses of Medical Photography*

There are four interconnected ways in which medical photography is utilized in medicine: 1) medical documentation and consultation, 2) medical education, 3) patient and family education, and 4) medical publication.⁵⁴ Each medical specialty has its separate applications. For example, wound care requires a detailed assessment and record of the findings.⁵⁵ Pictures of the trauma over time can offer proof that the injury was repeatedly evaluated and staged.⁵⁶ The images can document either the healing process or show how different treatments were incorporated to address a non-healing wound.⁵⁷ They can also be used to shield the practice from liability for a wound development while the patient was at the facility.⁵⁸ Dermatology makes great use of medical imaging since the practice is a visually grounded specialty,⁵⁹ and it is used in ophthalmology to image the eye.⁶⁰ It has even found application in endoscopic and laparoscopic examinations of the internal structures of the body.⁶¹

Photographs are used to inform other physicians and patients on ways to better understand an illness or abnormality, and images taken during a surgical procedure are shown to patients to help them grasp the significance of the findings and determine a future treatment course.⁶² Medical photographs in scholarly publications are critical to establishing a clinical conclusion, a surgical procedure, or a post-operative result in a way that is much more educational than the written word.⁶³

53. Underwood et al., *supra* note 21, at 248.

54. Harting et al., *supra* note 47, at 402.

55. Elizabeth O'Connell-Gifford, *A Picture Can Be Worth a Thousand Words: The use of photo documentation in wound care*, HEALTHY SKIN, Oct. 20, 2011, at 25.

56. *Id.*

57. *Id.*

58. Harting et al., *supra* note 47, at 402.

59. Andrea Marks, *An image in time: medical photography in dermatology*, HEKTOEN INT'L J. (2013), <https://hekint.org/2017/01/23/an-image-in-time-medical-photography-in-dermatology/> (last visited May 30, 2021).

60. Harting et al., *supra* note 47, at 402.

61. *Id.*

62. *Id.*

63. Surajit Bhattacharya, *Clinical photography and our responsibilities*, 47 INDIAN J. PLASTIC SURGERY 277, 277 (2014).

B. Digital Media

The Internet has radically changed the way individuals seek medical information, and social media has had a considerable influence on this development. The phrase “social media” deals with the Internet tools that permit people and communities to associate, connect, and share information, feelings, photos, videos, and other things within Internet applications.⁶⁴ In medicine, this technology offers many ways for physicians to gain a competitive advantage over their colleagues.⁶⁵ There is also no question that the use of platforms like Snapchat, Instagram, and Facebook has generated much interest within the medical community, and its applications in medicine are continually expanding.⁶⁶ This use has even spilled over into blogs, media-sharing sites, and virtual reality tools. These platforms permit medical professionals to share materials, discuss medical developments or proposed policies, share with the community at large, and network with other healthcare providers, patients, and students.⁶⁷

The posting of medical pictures on social media has gained traction because of its capacity to quickly and easily reach a broad audience.⁶⁸ For instance, plastic surgeons regularly share pre-and post-operative pictures on social media platforms because it can constitute free advertising, which is a powerful tool for attracting patients.⁶⁹ This, however, is not without its problems. Traditionally, clinical pictures are subject to a degree of control, but technological developments permit posting patient images on the Internet with just a few clicks.⁷⁰ Studies have demonstrated that many healthcare professionals lack online etiquette training and often do not know how to use these tools properly.⁷¹ These problems have led to the posting of inappropriate photographs, raising issues concerning patient privacy.⁷²

64. Ivan De Martino et al., *Social media for patients: benefits and drawbacks*, 10 CURRENT REVS. IN MUSCULOSKELETAL MED. 141, 141 (2017).

65. *Social Media & HIPAA: When Sharing is Not Caring*, ALA. MED. ASS'N (Jan. 12, 2018), <https://alabamamedicine.org/social-media-hipaa-sharing-not-caring/>.

66. Genevieve M. Crane & Jerad M. Gardner, *Pathology Image-Sharing on Social Media: Recommendations for Protecting Privacy While Motivating Education*, 18 AMA J. ETHICS 817, 817 (2016).

67. Ventola, *supra* note 20, at 491.

68. Crane & Gardner, *supra* note 66, at 818.

69. Bennett & Vercler, *supra* note 3.

70. See generally César Palacios-González, *The ethics of clinical photography and social media*, 18 MED., HEALTH CARE & PHIL. 63 (2014).

71. Debra Gordon, *Physicians: Can social media make or break your career?*, MED. NEWS TODAY (July 7, 2017), <https://www.medicalnewstoday.com/articles/318012>.

72. *Id.*

IV. THE PROBLEM

Regardless of the many benefits involving clinical photography, there remains one overriding factor: the patient's interest. The doctor's duty to value the patient's rights of privacy and the need for confidentiality must always be the overriding consideration.⁷³ Patients may initially be apathetic concerning medical photography, but this attitude often changes when it involves a patient's face or other sensitive body parts. This uneasiness is compounded by the growing ease to take digital pictures with mobile devices, such as smartphones, coupled with social media platforms available for the improper posting of these pictures outside the sphere of medical treatment.⁷⁴ These postings can harm the doctor-patient relationship, violate ethical mandates, and have legal implications for the physician.⁷⁵

Even if the posting falls within acceptable conduct parameters, the physician must recognize that using the doctor-patient relationship as a source of material to increase exposure, generate publicity, and attract new patients diminishes the healthcare provider's protective obligation towards the patient. This development, frequently masked as endeavors to inform and educate the community, has been dubbed "medutainment."⁷⁶ For example, even the best-meaning physician displaying pictures of the breasts or genitalia on social media to educate the public about a disease or medical issue must recognize that viewing the images is a matter of perspective.⁷⁷ Individuals frequently "sexualize the body depending on the context, and social media is certainly one of those contexts, whereas a journal article is not."⁷⁸

Patient attitudes towards medical photography vary depending upon how the image is taken and the body part being shown. A study involving patients in the emergency room revealed that 84% of those individuals would consent to a picture for medical purposes, and the vast majority would allow publication of non-genitalia body parts in scholarly publications.⁷⁹ However, they were not as favorably inclined to allow photographs of their genitals, especially if they were going to be posted on the Internet.⁸⁰

73. Rhys Van der Rijt & Stuart Hoffman, *Ethical considerations of clinical photography in an area of emergency technology and smartphones*, 40 J. MED. ETHICS 211 (2014)

74. *Id.* at 212.

75. *Id.* at 212

76. Bennett & Vercler, *supra* note 3, at 329.

77. *Id.* at 332.

78. *Id.*

79. Harting et al., *supra* note 47, at 403.

80. *Id.* at 403-04.

A survey devoted to plastic surgery revealed that patients preferred non-identifiable pictures for all uses, but their application for scientific purposes was highly favored unless the Internet was involved.⁸¹ If identifying information was included with the picture, the acceptance rate for Internet usage dropped to between 40% and 50%.⁸² The consensus is that patients disapprove of photographs of their genitalia, and they do not want the images to display any identifiable information, especially if the picture is posted on the Internet. They favor medical images that are non-identifiable, allowing their physicians to use the images and publish them in scholarly outlets.⁸³

Physician use of social media does not have the same restrictions attached to journal-based reporting, thereby permitting physicians to more rapidly disseminate unusual or novel findings and educational tips. A common criticism, however, is that these postings are not peer-reviewed.⁸⁴ This means that social media comments have not undergone rigorous scrutiny and editorial review before publication.⁸⁵ Ethical arguments also exist for not using medical images of patients to further a physician's self-interest. These include: 1) The patient's inability to properly give consent to the usage because of a medical illness or emotional distress; 2) Patients' beliefs that they are being forced into giving consent; 3) Patients' susceptibility to exploitations due to financial distress (if a public or teaching hospital is providing their care), and 4) Patients' potential objections to their physicians taking the pictures due to embarrassment regarding their content.⁸⁶

V. LEGAL CONSIDERATIONS

Medical photography has many legal risks, but their beneficial uses cannot be denied because they provide essential and legitimate information in a clinical setting.⁸⁷ Therefore, it is unrealistic for a health-care provider to implement a complete ban on this form of imaging. Instead, a physician or medical institution should carefully examine the legal hazards and obligations of utilizing photography and videos

81. *Id.* at 404.

82. *Id.*

83. *Id.*

84. Crane & Gardner, *supra* note 66, at 819.

85. *Id.*

86. Bhattacharya, *supra* note 63, at 278–79.

87. Danielle O. Dumestre & Frankie O. G. Fraulin, *Balancing the Need for Clinical Photography With Patient Privacy Issues: The Search for a Secure SmartPhone Application to Take and Store Clinical Photographs*, 25 *PLASTIC SURGERY* 255, 258–59 (2017).

in a medical environment.⁸⁸ These risks will vary based upon the type of healthcare provider, the individual taking a photograph, and the substance and reason for the image.⁸⁹ Legal considerations include copyright laws, patient consent, and the Health Insurance Portability and Accountability Act (HIPAA).⁹⁰ Privacy and Security mandates, and integration into the medical record.⁹¹

A. Copyright Issues

Photography has become a standard tool in many medical specialties; the images become part of the patient's chart and are covered by federal and state privacy laws.⁹² The pictures also serve as an adjunct to clinical care.⁹³ Therefore, the first inquiry concerning the use of a medical image starts with the chart's ownership. It may seem simplistic to distinguish between the physical document and the medical record information, but this difference is crucial as it pertains to ownership.⁹⁴

The physician owns the medical records itself but the patient controls the information in the chart.⁹⁵ Therefore, any discussion concerning the legal implications of clinical photography must include examining the copyright laws.⁹⁶ A copyright falls under the category of intellectual property and covers original works "that are fixed in a tangible form, whether published or unpublished."⁹⁷ A medical photograph comes within this definition.⁹⁸ This provides the owner with several exclusive rights, such as the ability to show the picture publicly,

88. Madison Pool, *Photographing Patients in the Healthcare Setting*, JD SUPRA (June 13, 2018), <https://www.jdsupra.com/legalnews/photographing-patients-in-the-91581/#:~:text=notably%2C%20HIPAA's%20privacy%20requirements%20generally,from%20sharing%20photographs%20or%20videos.>

89. *Id.*

90. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

91. Pool, *supra* note 88.

92. *Photography Consent and Related Legal Issues*, PLASTIC SURGERY KEY (Feb. 8, 2017), <https://plasticsurgerykey.com/photography-consent-and-related-legal-issues/> (last visited May 30, 2021).

93. Christopher Cunniff et al., *Informed consent for medical photographs*, 2 GENETICS IN MED. 353, 353 (2000).

94. PLASTIC SURGERY KEY, *supra* note 92.

95. *Id.*

96. Harting et al., *supra* note 47, at 404.

97. *What Is a Copyright*, FINDLAW, <https://www.findlaw.com/smallbusiness/intellectual-property/what-is-copyright.html> (last visited May 30, 2021).

98. *Id.*

create derivative works, and circulate reproductions of the images publicly.⁹⁹

There does not appear to be a clearly defined answer concerning who owns the copyright to a medical image. One source postulates that the institution owns the copyright in an unidentifiable image, and the patient retains the rights to an identifiable picture.¹⁰⁰ Another author answers the question on a more fundamental level by noting that whoever takes the picture owns the copyright. Therefore, if the physician takes and uses the photograph to publicize his or her practice, the patient depicted in the image does not have a commercial interest in any benefit that flows from the use of the picture subject to two exceptions.¹⁰¹ The physician must have the patient's consent if the images are protected health information (PHI); if the photographs are of a famous person, the patient must plainly understand that the images will be employed to promote the physician's practice.¹⁰²

B. Patient Consent

As noted in *Clayman v. Bernstein*, a patient has the right to choose “whether that which is his shall be given to the public and not only to restrict and limit but also to withhold absolutely his talents, property, or other subjects of the right of privacy from all dissemination.”¹⁰³ The facial characteristics of a patient belong to that person and may not be used without his consent.¹⁰⁴ Therefore, obtaining the permission of the patient before the images are taken is a prudent safeguard. This is needed for the protection and interest of the patient. However, there is rarely an issue concerning an image that remains exclusively within the medical records' confines.¹⁰⁵ On the other hand, scholarly publications usually want the patient's written consent for photographs that may identify the person. However, the formatting of that permission is not always indicated, nor is it always obvious which pictures mandate consent.¹⁰⁶

99. Sara Hawkins, *Copyright Fair Use and How it Works for Online Images*, SOC. MEDIA EXAM'R (Nov. 23, 2011), <https://www.socialmediaexaminer.com/copyright-fair-use-and-how-it-works-for-online-images/>.

100. Petra J. Lewis, *Guidelines for the Scholarly Use of Images*, 23 ACAD. RADIOLOGY 675, 676 (2016).

101. PLASTIC SURGERY KEY, *supra* note 92.

102. *Id.*

103. *Clayman v. Bernstein*, 38 Pa. D. & C. 543, 546 (Pa. C.P. 1940).

104. *Id.* at 547.

105. Cunniff et al., *supra* note 93, at 355.

106. *Id.* at 353.

The growing use of the Internet as a source of medical information and marketing efforts by physicians makes it essential to secure consent for all uses of medical photographs, including publication through various electronic formats.¹⁰⁷ The following is sample language that may be incorporated into a consent form that the patient will be asked to sign before the images are taken:

I consent to all medical images and/or video being made of me or my child/dependent not limited to one date of service. I agree that duplicates may be made for the referring doctor.

I agree that the images may be:

(Please check Yes or No below to show the type of consent) Yes / No

- 1. Used by health professionals for education and training: _____
- 2. Used in paper or electronic health publications: _____
- 3. Used in commercial broadcast: _____
- 4. Used in marketing materials: _____

I further acknowledge that there were no promises of compensation for such use of the medical photo(s) and/or video taken by [name of medical provider] as consented above.¹⁰⁸

A consent form’s specifics may vary based on the purpose of the medical video or photograph and may also differ from state to state.¹⁰⁹

A physician or medical institution may desire to use institutional informed consent forms, such as those used for surgery, modified to encompass patient pictures and videos. Nevertheless, patients recognizable by their photographs should be afforded the chance to examine the materials in which they are depicted before use or renounce their ability to do so.¹¹⁰ The consent document must also contain a clause for using the material on the Internet and social media accounts, and this approval must be unalterable.¹¹¹ The following is sample language:

I hereby authorize [Name of Medical Provider] and its affiliates and agents to take photographs or produce videotapes, audiotapes, elec-

107. *Id.*

108. *Medical Photography Consent Form*, ZEITER EYE MED. GRP., INC., <http://www.cockerhammd.com/webdocuments/Photo-consent.pdf> (last visited May 30, 2021)

109. Pool, *supra* note 88.

110. June K. Robinson et al., *Protection of Patients’ Right to Privacy in Clinical Photographs, Video, and Detailed Case Descriptions*, 150 JAMA DERMATOLOGY 14, 14 (2014).

111. *Id.*

tronic files, or other types of media productions that capture my name, voice and/or image, to be released to members of the media, or to be used by [Medical Provider] for the purpose of: news media (online, print and/or broadcast), websites and social media, publications and/or promotional materials, medical and/or educational training, closed circuit television programs, any other lawful purpose, [and] advertisements[.] The information to be disclosed includes: photographic images of me, information about my medical condition and/or prognosis, video or audio of me and/or my voice, information about date(s), time(s) and type(s) of treatment received, images from records such as scans and/or X-rays, [and] other [specify].¹¹²

C. HIPAA and Privacy Concerns

Medical records contain information about a person's course of treatment or diagnosis and can include private and possibly embarrassing particulars of a patient's life.¹¹³ These records may include details about mental health, alcoholism and substance abuse, and sexually transmitted diseases.¹¹⁴ Congress enacted the HIPAA¹¹⁵ to augment the transferability and continuousness of health insurance in this country and added a mandate to protect the medical information's confidentiality.¹¹⁶ The legislation has become "the face of patient privacy guidelines."¹¹⁷ The law was initially praised for regulating health data sharing, but Congress failed to prioritize information privacy.¹¹⁸ Many healthcare providers believed the rules were "too open and permissive."¹¹⁹ The public also expressed displeasure about the lack of protection concerning their confidential health information and complained that their records merited that information's protection and privacy. The government answered by creating the HIPAA Privacy Rule, which gives patients access to their records, but bans the improper utilization and disclosure of sensitive material.¹²⁰

112. *Photo, Interview and Media Consent Form*, MEDSTAR HEALTH, <https://ct1.medstarhealth.org/content/uploads/sites/10/2018/07/Digital-Media-Consent-Form.pdf> (last visited May 30, 2021).

113. Karl A. Menninger, II, *Confidentiality of Medical and Other Treatment Records*, 87 AM. JUR. PROOF OF FACTS 3d 259 § 1 (2006).

114. *Id.*

115. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

116. John F. Nettrou et al., *Patients, pictures, and privacy: managing clinical photographs in the smartphone era*, 5 ARTHROPLASTY TODAY 57, 58 (2019).

117. BECKER'S HEALTH IT, *supra* note 14.

118. Austin Rutherford, *Byrne: Closing the Gap Between HIPAA and Patient Privacy*, 53 SAN DIEGO L. REV. 201, 202 (2016).

119. BECKER'S HEALTH IT, *supra* note 14.

120. *Id.*

The Privacy Rule creates national standards and regulations to safeguard a patient's medical records and other private health information and applies to health plans, healthcare clearinghouses, and providers that engage in certain electronic healthcare transactions.¹²¹ Protections must be implemented to safeguard personal health information privacy, and the Privacy Rule establishes restrictions and controls on the uses and disclosures that may be made without the patient's permission. Individuals are also given more control over their health information, such as inspecting and securing copies of their records, and requesting corrections of mistakes through amendments.¹²² An entity that violates the Rule may be held liable for civil and criminal penalties, especially if they violate a patient's privacy privileges.¹²³

The authors of the Privacy Rule specifically considered the use of medical photographs; they also included in the definition of PHI when they can be linked to a patient.¹²⁴ The final Privacy Rule¹²⁵ eased this privacy mandate by establishing a "de-identification" of the healthcare records process. This is important because identifiable and de-identification materials are handled differently.¹²⁶ Protected health information requires that medical providers follow HIPAA mandates unless it is impossible to identify the patient.¹²⁷

This means that photographs are permitted to be disclosed as long as no identifying information is included to link them to a specific person. Therefore, tattoos, anatomic abnormalities, birthmarks, scars, body piercings, facial pictures, and unique surroundings shown in the images must be removed.¹²⁸ The Privacy Rule regulations then list eighteen specific identifiers that must be removed from the images ranging from the patient's email address to biometric identifiers such as finger and voice prints.¹²⁹ In other words, if the image includes identifying information of a patient such as his or her face, a distinctive tattoo, or a unique physical abnormality, the photograph will be

121. *The HIPAA Privacy Rule*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html#:~:text=the%20HIPAA%20Privacy%20Rule%20establishes,certain%20health%20care%20transactions%20electronically> (last visited May 30, 2021).

122. *Id.*

123. *What does the HIPAA Privacy Rule do?*, U.S. DEP'T HEALTH & HUMAN SERVS. (Dec. 19, 2002), <https://www.hhs.gov/hipaa/for-individuals/faq/187/what-does-the-hipaa-privacy-rule-do/index.html> (last visited May 30, 2021).

124. Nettrou et al., *supra* note 116, at 58.

125. *See* 45 C.F.R. §164.514 (2013).

126. Nettrou et al., *supra* note 116, at 59.

127. *Id.* at 58.

128. *Id.* at 59.

129. *See* 45 C.F.R. §164.514(b)(2)(i).

considered PHI that may not be released or published without the permission of the patient.¹³⁰ The exception to this rule is when the photograph is used for treatment, payment, and healthcare purposes related to the physician's business operations.¹³¹

The second primary HIPAA regulation is the Security Rule,¹³² which establishes national criteria to safeguard patients' electronic PHI obtained, used, or kept by a Covered Entity. This is known as "electronically protected health information."¹³³ The Security Rule mandates suitable administrative, physical, and technical protections to guarantee the privacy, reliability, and safekeeping of electronic protected health data.¹³⁴ The Centers for Medicare and Medicaid Services (CMS) has been given the power to administer the HIPAA Security Standard.¹³⁵

A violation of these Rules can have significant consequences. For example, New York Presbyterian Hospital agreed to pay a \$3,300,000 fine as a result of the improper disclosure of the electronic PHI of 6,800 patients to Google and other Internet search engines due to a computer server that had been incorrectly reconfigured.¹³⁶ Additionally, Columbia University paid \$1,500,000 to settle perceived violations of the HIPAA Privacy and Security Rules.¹³⁷

These federal protections can be supplemented by state law to offer additional safeguards for patient PHI. Many jurisdictions have enacted stronger shields for sensitive classifications of materials, including behavioral health data, HIV test results, genetic testing, and alcohol and drug treatment materials.¹³⁸ For example, Washington's privacy law provides: "Under federal and Washington state laws, certain types of PHI are subject to heightened confidentiality. These

130. Robert M. Portman et al., *Legal issues surrounding the use of patient images*, DERMATOLOGY WORLD 24, 24 (Sept. 2017).

131. *Id.* at 25.

132. See 45 C.F.R. § 160; *id.* § 164(A), (C).

133. *Summary of the HIPAA Security Rule*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html> (last visited May 30, 2021).

134. *The Security Rule*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/security/index.html> (last visited May 30, 2021).

135. GINA MARIE STEVENS, CONG. RESEARCH SERV., RL3398, ENFORCEMENT OF THE HIPAA PRIVACY AND SECURITY RULES 6 (2008).

136. *New York and Presbyterian Hospital Resolution Agreement*, <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/enforcement/examples/ny-and-presbyterian-hospital-settlement-agreement.pdf>.

137. *Data Breach Results in \$4.8 Million HIPAA Settlements*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/examples/new-york-and-presbyterian-hospital/index.html> (last visited May 30, 2021).

138. Underwood et al., *supra* note 21, at 250.

types of PHI include mental health treatment records, records relating to testing or treatment for HIV/AIDS or other STDs, and substance abuse treatment program records.”¹³⁹

D. Use of Smart Phones

The recent growth of technology has led to the extensive adoption of clinical photography as a communication instrument for patient interaction.¹⁴⁰ Smartphones have even emerged as a routine device used by physicians to transmit medical images as part of the patient management process.¹⁴¹ The technology allows for sending an image to a physician to instantly evaluate pathology or injury, especially when distance is involved.¹⁴² Some electronic medical records systems have become so sophisticated that they can transmit the clinical photographs directly from a mobile device to the patient’s file.¹⁴³ Statistically, more than half of all doctors use text messaging and digital image transmission when conversing with other physicians and patients.¹⁴⁴

Smartphones present dangerous risks concerning patients’ privacy, and healthcare organizations have started to implement policies to mitigate this concern.¹⁴⁵ Identifiable risks include losing the device, having it stolen, downloading viruses or malware, allowing others to use the mobile device, and unsecured internet use.¹⁴⁶ The University of Pittsburgh Medical Center (UPMC) provides a sample policy on the use of wireless communication transmitting devices:

Staff use of wireless communication devices is subject to the requirements of HIPAA and rules for patient confidentiality as well as [wireless data network] and [mobile device exchange access standard]. Staff using personal wireless communication device in patient

139. *Use and Disclosure of Protected Health Information (PHI)*, UW MED. 1, 24, http://depts.washington.edu/comply/docs/comp_103.pdf (last visited May 30, 2021).

140. Van der Rijt & Hoffman, *supra* note 73, at 211.

141. *Id.*

142. *Id.* at 212.

143. *Clinical Photography – Why a Policy Is a Good Idea*, PROF’L SOLS. INS. CO. (June 27, 2018), <https://www.psicinsurance.com/posts-articles/physicians/risk-management/clinical-photography--why-a-policy-is-a-good-idea.aspx#:~:text=even%20if%20your%20EMR%20only,using%20this%20mode%20of%20documentation>.

144. Nettrour et al., *supra* note 116, at 58.

145. Harting et al., *supra* note 47, at 407.

146. Oi Lee, *5 Risks Associated with Using Mobile Devices in Healthcare*, POLICYMEDICAL, <https://www.policymedical.com/risks-associated-using-mobile-devices-healthcare/> (last visited Dec. 2, 2020).

care areas should place such device in “silent” not “vibrate” mode.¹⁴⁷

UPMC has another policy dealing with photographing and filming which prohibits taking pictures by a hospital employee unless it is “appropriate and necessary for a business, education or patient care purpose, or if it is otherwise approved by a member of the Executive Management” of the facility.¹⁴⁸ When the imaging is related to an external or internal media relations event, either the UPMC Marketing Communications or UPMC Media Relations department must approve of the filming before the use. Patients may be photographed for identification, diagnosis, treatment, or organizational purpose or for other internal uses provided the patient signs the hospital’s Consent to Media Treatment form. If the images are to be used for external purposes, all identifying information concerning the patient must be removed in accordance with state and federal law.¹⁴⁹

Mobile phones present other healthcare challenges that are not as obvious. They act as a ready platform for the colonization of nosocomial agents and microbial contamination. For instance, an inspection of the smartphones of healthcare workers discovered contamination in 20.6% of the devices tested and posed possible modes of transmission of an infectious process.¹⁵⁰ Their use near patient beds or essential equipment is also hazardous and could turn off ventilators or disrupt Pacemakers.¹⁵¹ Other malfunctions linked to electromagnetic interference consist of complete stops with no alarms in syringe pumps and improper pulsing by an external Pacemaker.¹⁵²

E. Record Integration

Medical photographs have become a vital component of medicine for many healthcare providers, especially in today’s digital age. As a nontraditional media, these images are frequently placed in a patient’s chart as an adjunct to the medical treatment and shown to others in an

147. *Photographing, Filming and Recording within UPMC Facilities*, UPMC PRIVACY & INFO. SEC. POLICIES 33 (2017) (citing Policy HS-FM0214).

148. *Id.*

149. *Id.*

150. Abhinav Singh & Bharathi Purohit, *Mobile Phones in Hospital Settings: A Serious Threat to Infection Control Practices*, OCCUPATIONAL HEALTH & SAFETY (Mar. 1, 2012), <https://ohsonline.com/articles/2012/03/01/mobile-phones-in-hospital-settings.aspx?m=2>.

151. . *Cell phone use in hospitals poses danger: study*, REUTERS (Sept. 7, 2007, 7:30 AM) <https://www.reuters.com/article/us-mobilephones-hospitals/cell-phone-use-in-hospitals-poses-danger-study-idUSL0685683920070907>.

152. *Id.*

educational setting.¹⁵³ In the old days of the paper chart, the pictures would be stapled or pasted to a piece of paper in the file. Some providers, however, have difficulty incorporating the images into the electronic healthcare record (EHR).¹⁵⁴ For example, they must decide what method will be used to combine the pictures and videos into the file, how the images will be moved from the camera to the digital record, and whether there is a mobile application that can safely and securely interact with the provider's EHR system.¹⁵⁵

Congress has enacted other legislation that seeks to promote the adoption and meaningful use of health information technology, the Health Information Technology for Economic and Clinical Health (HITECH) Act.¹⁵⁶ This law aims to simplify the delivery of medical care and decrease expenses by encouraging health information technology through electronic health records.¹⁵⁷ Major concerns stemming from the conversion to the electronic transmission of health information are privacy and security, so the HITECH Act enlarges a number of the HIPAA requirements.¹⁵⁸ Many medical images are now maintained in an electronic configuration, so the HITECH Act provisions apply to them.

The legislation mandates data breach reporting obligations for unauthorized uses and disclosures of "unsecured PHI."¹⁵⁹ These notice requirements are comparable to various state data breach laws linked to personally identifiable financial information.¹⁶⁰ The statute mandates that patients and the federal government be informed of any unsecured data breaches.¹⁶¹ The penalties for the wrongful disclosure of protected health information can be substantial, and the reporting requirements subject the healthcare provider to adverse publicity.¹⁶²

153. Lou Ann Wiedemann, *Using Clinical Photos in EHRs*, AM. HEALTH INFO. MGMT. ASS'N, <https://bok.ahima.org/doc?oid=99593#.X8jGK2hKhaQ> (last visited May 30, 2021).

154. *Id.*

155. Pool, *supra* note 88.

156. *HITECH Act Enforcement Interim Final Rule*, U.S. DEP'T HEALTH & HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/special-topics/hitech-act-enforcement-interim-final-rule/index.html> (last visited May 30, 2021).

157. Caroline E. Fife & Kevin W. Yankowsky, *HIPAA and HITECH: Where Are Your Photos. . . Do You Know?*, TODAY'S WOUND CLINIC (Apr. 8, 2011), <https://www.todayswoundclinic.com/articles/hipaa-and-hitech-where-are-your-photos-Ä-do-you-know>.

158. *Id.*

159. *HITECH Act Summary*, HIPAA SURVIVAL GUIDE, <https://www.hipaasurvivalguide.com/hitech-act-summary.php> (last visited May 30, 2021).

160. *Id.*

161. Fife & Yankowsky, *supra* note 157.

162. *Id.*

This means that any photograph that becomes part of the clinical record must be afforded “the same privacy, security, and confidentiality requirements as any other document within the record.”¹⁶³ As noted previously, pictures containing PHI do not require the patient’s consent if the physicians use the images in healthcare operations such as in-house training and teaching purposes. However, medical photographs used externally at such places as a conference or seminar mandate the patient’s permission.¹⁶⁴

HITECH also requires that the same degree of security used to protect electronic data security be employed to safeguard electronic photographic data.¹⁶⁵ The healthcare provider must use robust encryption tools in the storage and data pathways running in and out of the system.¹⁶⁶ The technique most frequently discussed to protect this digital information is a firewall. The utilization of cryptography also helps safeguard protected health information, especially during digital health data transmission. Other security tools include cloud computing, antivirus software, initial risk assessment programs, and radio frequency identification.¹⁶⁷

Physicians are at risk if they leave pictures containing identifiable patient information unencrypted in a camera. That data must be treated with the same respect as the digital chart.¹⁶⁸ These requirements can be distilled into four simple principles:

1. The pictures must be placed in the correct patient’s chart.
2. The designated record set which makes up the medical records including the photographs must be formally identified.
3. Any camera that includes PHI, must be downloaded in a judicious manner since most cameras cannot encrypt the digital information.
4. All photographs that contain patient identifiable information must be kept in a location that can be encrypted, preferably in the electronic medical record.¹⁶⁹

Many digital cameras are now equipped with Wi-Fi technology that allows the images to be directly transmitted to the electronic medical

163. Wiedemann, *supra* note 153.

164. Kristi Alvarado, *What You MUST Understand About HIPAA and Patient Photography*, NOVARAD, <https://blog.novarad.net/what-you-must-understand-about-hipaa-and-patient-photography> (last visited May 30, 2021).

165. Fife & Yankowsky, *supra* note 157.

166. *Id.*

167. Clemens Scott Kruse et al., *Security Techniques for the Electronic Health Records*, 41 J. MED. SYS. 127, 133 (2017).

168. Fife & Yankowsky, *supra* note 157.

169. *Id.*

record, making the physician's compliance with the legislation much easier.¹⁷⁰

VI. COURT CASES

A Westlaw search reveals 727 cases involving the phrase "medical photography." These matters range from informed consent disputes to cause of actions for invasion of privacy and infliction of emotional distress.¹⁷¹ The following is a representative sample of this litigation.

A. Consent

Issues concerning informed consent to use a medical photograph will occasionally end up in court. *Ruffino v. Neiman* demonstrates that the court will uphold a validly executed consent form.¹⁷² The plaintiff instituted a lawsuit against a doctor claiming an alleged breach of the physician-patient duty of confidentiality due to an advertisement in a newspaper that included images of the plaintiff pre-and post-hair transplant surgery.¹⁷³ The facts show that the patient signed a consent form that provided:

I hereby irrevocably consent that my picture or portrait of me, or of any part of me, or reproductions therefore [*sic*], may be used by [defendant] and his associates, for such purposes as he may desire in connection with his research, writing, and professional activities, and may be used, exhibited, and published through any medium whatsoever as part of or in connection with his research, writing, and professional activities, even though such use may be for advertising purposes of trade.¹⁷⁴

The plaintiff claimed that he signed the consent form only after having been guaranteed by the defendant that his pictures would not be used "outside of the office."¹⁷⁵ The court dismissed the complaint even though there may have been a question about whether the plaintiff was told that the images would not be published because he could not "avoid the consequences of his written consent."¹⁷⁶

In *Morse v. Studin*, the plaintiff Morse attempted to recover damages for a violation of New York's Civil Rights Law.¹⁷⁷ The defendant is a plastic surgeon who performed several surgical procedures on the

170. *Id.*

171. This Westlaw search was conducted by the author on April 5, 2021.

172. *Ruffino v. Neiman*, 794 N.Y.S.2d 228, 229 (N.Y. App. Div. 2005).

173. *Id.* at 228.

174. *Id.* at 229.

175. *Id.*

176. *Id.*

177. *Morse v. Studin*, 725 N.Y.S.2d 93, 94 (N.Y. App. Div. 2001).

plaintiff and published before and after pictures of her in a newsletter sent to patients.¹⁷⁸ Morse claimed that these photographs were used for a commercial purpose without her written permission.¹⁷⁹ The court noted that “a name, portrait or picture is used ‘for advertising purposes’ if it appears in a publication which, taken in its entirety, was distributed for use in, or as part of, an advertisement or solicitation for the patronage of a particular product or service.”¹⁸⁰ In this case, the newsletter was disseminated to obtain patients for the physician’s medical practice.¹⁸¹ The publication was not mailed for educational purposes as the defendant maintained, nor was it covered by the written consent form executed by the patient.¹⁸² Therefore, whether the physician knew or should have known for purposes of punitive damages that he lacked consent to use the photographs is an issue for the fact finder and not the subject of a motion for summary judgment.¹⁸³

A consent case involving pre-and post-surgery photographs was at issue in *Judge v. Saltz Plastic Surgery, PC*.¹⁸⁴ The defendant gave pictures of various patients to a television reporter showing their cosmetic surgery results.¹⁸⁵ They included images of the plaintiff who had signed a release that noted:

I consent to be photographed or televised before, during, and after the operation(s) or procedure(s) to be performed, including appropriate portions of my body, for medical, scientific or educational purposes, provided my identity is not revealed by the pictures.¹⁸⁶

Subsequently, the physician asked the patient to participate in a television interview about plastic surgery because she was pleased with her results, and the plaintiff agreed.¹⁸⁷ The interview was conducted in the physician’s office, and the plaintiff participated in a simulated physical examination.¹⁸⁸ After the interview, the reporter met with the office manager and asked for before and after pictures of the plaintiff’s surgery which showed the patient undressed from the neck to her upper thigh.¹⁸⁹ These pictures were used in the television broadcast

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Morse*, 725 N.Y.S.2d at 95.

184. 330 P.3d 126 (Utah Ct. App. 2014).

185. *Id.* at 129.

186. *Id.* at 129.

187. *Id.*

188. *Id.*

189. *Id.* at 130.

and in an online story.¹⁹⁰ The station superimposed black bars over portions of the images but identified the plaintiff during the broadcast by name.¹⁹¹

The patient filed suit against the defendant under various theories, and the physician countered that the mere release of the pictures did not establish that they were being given to the public, nor did the defendant disclose private facts.¹⁹² The physician's motion for summary judgment was granted, but this decision was reversed on appeal.¹⁹³ On the invasion of privacy claim, the court noted that a person could reasonably conclude that giving the pictures to a reporter, knowing that a story was being done on the topic, made it "substantially certain" that the images would not be broadcast.¹⁹⁴ This should have put the physician on notice that the pictures could have been disclosed to the public. Just because the plaintiff may have engaged in activities that could be classified as a matter of legitimate public interest does not mean that she opened the door to the disclosure of private facts.¹⁹⁵ Therefore, reasonable minds could differ in opinion regarding whether appearing in a story about plastic surgery provides a legitimate public interest in giving permission to show the plaintiff's graphic pictures.¹⁹⁶ The consent form in question never explicitly stated that the physician could release the pictures to a third party.¹⁹⁷ This creates an ambiguity in the release that must be decided by the fact finder. There is also a question of whether the release of pictures to the reporter constituted an educational purpose.¹⁹⁸

B. Proof of Injury

Photographs and videos of an injury or surgical procedure are among the most obvious uses of medical imaging in a legal setting. Often, the wound will no longer be visible or will have changed by the time counsel becomes involved with the case.¹⁹⁹ Therefore, a request for medical records should include a demand for any and all client

190. *Judge*, 330 P.3d at 130.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Judge*, 330 P.3d at 135.

196. *Id.* at 136.

197. *Id.*

198. *Id.*

199. ANN M. HARALAMBIE, 3 *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 17:3 (2020).

pictures in the medical file. However, these pictures may not always be admissible in court.

In *People v. Covington*,²⁰⁰ the defendant returned home in a troubled and drunk state.²⁰¹ Upon entering the dwelling, he began screaming at his spouse and fired two shots into the floor. One of those bullets hit his wife and she was taken to the hospital for treatment.²⁰² Photographs were taken of the wound by a physician's assistant at the request of the police.²⁰³ Before starting her husband's criminal trial, the wife filed a motion to prevent the showing of the pictures based on doctor-patient privilege which was overruled.²⁰⁴ An element of second-degree assault in Colorado is the need to show a serious bodily injury so the physician's assistant was permitted to describe the injury; he used the pictures to show the wound damage.²⁰⁵ The defense attempted to use the medical records on cross-examination to demonstrate that the bullet did not strike any important bodily part, but the court prevented this line of questioning based on the wife's doctor-patient privilege.²⁰⁶

On appeal of his conviction, the husband maintained that the pictures of his wife's wounds were inadmissible because they revealed information covered by the wife's doctor-patient relationship. The court agreed and reversed the guilty finding.²⁰⁷ Colorado law provides that a healthcare provider may not be examined about any information obtained during treatment without the consent of the patient. This privilege is designed to encourage patients to disclose medically pertinent information to a physician by minimizing the chances of embarrassment by a later public disclosure.²⁰⁸ This protection is broader than just communications and embraces observations stemming from an examination required to treat the patient.²⁰⁹ The photographs of the wound revealed the observations the physician's assistant made during his treatment of the wife, so they are privileged and inadmissible without the wife's consent.²¹⁰

200. 19 P.3d 15 (Colo. 2001).

201. *Id.* at 15.

202. *Id.* at 18.

203. *Id.*

204. *Id.*

205. *Id.* at 19.

206. *Covington*, 19 P.3d at 19.

207. *Id.*

208. *Id.*

209. *Id.* at 20.

210. *Id.* at 20.

State v. Cloud involved the appeal of a second-degree murder conviction.²¹¹ At trial, the government introduced several photographs of the victim showing him lying on the floor in a pool of coagulated blood and close-ups of three defensive wounds suffered by the decedent, one in the armpit and two on her hands.²¹² These pictures were employed to demonstrate that, given the nature of the attack and the number of wounds, the defendant acted with the necessary intent to uphold a conviction of second-degree murder.²¹³

On appeal, the defendant maintained that it was an error for the trial judge to admit the gruesome photographs because they had no relevance to the question of the murder.²¹⁴ The appellate court agreed and noted that the admission of photographic evidence depicting a person's injuries requires the judge to weigh their probative value against the risk that their admission "will create substantial danger of undue prejudice."²¹⁵ The consideration "in the context of potentially prejudicial photographs of the victim's body is that such photographs would generally be inappropriate where the only relevant evidence they convey can be put before the jury readily and accurately by other means not accompanied by the potential prejudice."²¹⁶ Under the circumstances, the pictures of the decedent's body had no evidentiary value as to any issue in the case. They were improperly admitted into evidence, and "the inference is strong that they were used primarily to inflame the jury."²¹⁷

The opposite result was reached in *Moss v. State*, where color images were admitted even though they showed the victim lying on the ground, covered in blood, obtaining emergency treatment from a medical technician.²¹⁸ The officer's testimony concerning the victim when he arrived on the scene was relevant as was the pictures' use.²¹⁹ The color photographs showed the decedent's head from two different viewpoints.²²⁰ One, taken from the victim's left side, revealed a bullet wound over the victim's left eye not visible in the crime scene photo-

211. 722 P.2d 750, 751 (Utah 1986).

212. *Id.*

213. *Id.*

214. *Id.* at 752.

215. *Id.* at 752 (quoting *State v. Garcia*, 663 P.2d 60, 64 (Utah 1983)).

216. *Id.*

217. *Cloud*, 722 P.2d at 755.

218. 860 S.W.2d 194, 195 (Tex. App. 1993).

219. *Id.*

220. *Id.*

graphs.²²¹ The other picture showed the victim's cranium from the right side as well as part of his bare chest.²²²

The defendant maintained that the photographs were inadmissible because of their gruesome nature that showed the fatal wound in much detail and the decedent's "ghastly stare of death."²²³ The court disagreed and found the photographs had probative value that was not outweighed by the danger of unfair prejudice.²²⁴ The photographs clarify and support observations and conclusions about the victim's injury and reveal the manner of death.

C. *The Taking of Inappropriate Photographs*

The taking of inappropriate or unneeded pictures can result in a healthcare provider's license suspension. That was the issue in *Dwyer v. Connecticut State Department of Health*.²²⁵ The plaintiff was licensed to remove superfluous hair by electrolysis. Two patients visited him for hair removal; one for removal of excessive hair from the chin, and the other for the elimination of hair from her upper lip. The first patient was asked to disrobe, and the plaintiff photographed her breasts and thighs.²²⁶ The other partially disrobed, and he took pictures of her breasts, stomach, and navel.²²⁷ The proffered excuse for taking the sensitive pictures was for the alleged purpose of detailing the propensity of patients with excessive hair and to show how that hair could be effectively eliminated.²²⁸ Neither woman gave consent to the taking of the images, and one of them did not know that the pictures were taken until after the event.²²⁹

Disciplinary charges were filed against the plaintiff to have his license revoked for "immoral, dishonorable or unprofessional conduct."²³⁰ The evidence showed that the plaintiff had taken about two hundred pictures of female patients that he "viewed from time to time for professional reasons."²³¹ The Disciplinary Board ruled that there was no legitimate reason to take the pictures for the treatment of the two patients and that his conduct was unprofessional at a minimum.²³²

221. *Id.* at 196.

222. *Id.*

223. *Id.*

224. *Moss*, 860 S.W.2d at 196.

225. 151 A.2d 331, 332 (Conn. 1959).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Dwyer*, 151 A.2d at 332.

232. *Id.*

The suspension of his license was upheld on appeal.²³³ The court found that the Board had the power to determine if the plaintiff had perpetrated acts that were harmful to the public's interest and constituted unprofessional conduct.²³⁴ The plaintiff's own experts noted that the taking of sensitive pictures would be allowed under certain situations, but they also testified that the photographs needed to be taken with the patient's express consent.²³⁵

In one of the more unusual cases, Dr. Dwyer, the chief resident at a prestigious hospital, had his career derailed by a single incident that occurred over the taking of an inappropriate photograph.²³⁶ The physician was scheduled to perform a hernia repair, but the patient was extremely nervous.²³⁷ The resident talked him through the pre-operative process, and the patient was anesthetized.²³⁸ As the resident inserted the catheter, he noticed a tattoo on the patient's penis that read "joystick."²³⁹ Dr. Dwyer immediately took out his cell phone and took a photograph of the man's genitalia, which he displayed to colleagues.²⁴⁰ One of the surgical staff members who had witnessed the taking of the picture became very upset by the doctor's cavalier attitude and anonymously notified a local paper about the incident.²⁴¹

The reporter then contacted the hospital about the matter and Dr. Dwyer was immediately suspended.²⁴² The physician was also ordered to call the patient and tell him what had occurred so that the patient would not read about the incident for the first time in the paper.²⁴³ The patient was initially alarmed when he received the call believing that something had gone wrong during the operation.²⁴⁴ The resident explained that nothing had gone wrong during the operation, but that he had made an egregious error in judgment and had taken a picture of the patient's tattoo.²⁴⁵ Dr. Dwyer then had to admit that he showed the pictures to other physicians and that a newspaper was running a

233. *Id.*

234. *Id.* at 332–33.

235. *Id.* at 333.

236. Ann W. Latner, *Invading a Patient's Privacy Costs a Physician*, *RENAL & UROLOGY NEWS* (July 27, 2011), <https://www.renalandurologynews.com/home/departments/legal-issues-in-medicine/invading-a-patients-privacy-costs-a-physician/>.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Latner, *supra* note 236.

243. *Id.*

244. *Id.*

245. *Id.*

story about the incident.²⁴⁶ The resident's apologies did not assuage the patient's anger and embarrassment, and the man hired an attorney who threatened litigation.²⁴⁷ The hospital ended up paying \$250,000 in settlement, the resident was terminated from his position, and his future job offer was rescinded.²⁴⁸

Sometimes, healthcare workers just exercise bad judgment in taking a photograph. One example of this is when hospital employees took pictures of the victim of a shark attack who subsequently died from his wounds.²⁴⁹ Several staff members at Martin Memorial Medical Center in Florida were disciplined for their participation in the taking and emailing of photographs of the victim's fatal wounds while he was in the emergency room.²⁵⁰ The decedent suffered "two shark bites, one more serious than the other."²⁵¹ The more serious wound on the back of the right thigh was about nine to ten inches long and very deep, causing massive blood loss.²⁵²

D. Medical Malpractice

Medical photographs have proven to be a double-edged sword. They have many benefits in clinical practice, but they can also be used against a physician in a medical malpractice claim. *Mazella v. Beals* involved a malpractice claim against a physician on the basis that his substandard care of the plaintiff's husband for major depression was the cause of his suicide.²⁵³ The defendant admitted that he varied from accepted medical practice by prescribing Paxil for more than ten years while inadequately monitoring the patient's condition. However, the physician asserted that superseding acts caused the patient's suicide, including the actions of another physician.²⁵⁴ At trial, the physician attempted to block the introduction of photographs of the decedent taken after his death, claiming that they lacked probative value because there was no dispute over the manner of death.²⁵⁵ The plaintiff's expert testified that the photographs were relevant because they showed that the patient's death was "very violent and bloody"

246. *Id.*

247. *Id.*

248. Latner, *supra* note 236.

249. *Photos of shark victim underscore threat from cell phone cameras*, RELIAS MEDIA (May 1, 2010), <https://www.reliasmedia.com/articles/18855-photos-of-shark-victim-underscore-threat-from-cell-phone-cameras>.

250. *Id.*

251. *Id.*

252. *Id.*

253. 57 N.E.3d 1083, 1085 (N.Y. 2016).

254. *Id.*

255. *Id.*

and that suicides are often the byproduct of antidepressant use.²⁵⁶ The jury found in favor of the plaintiff and awarded \$1,200,000 in damages.²⁵⁷

On appeal, the defendant argued that the admission of the pictures denied him a fair trial because they only aroused the jury's emotions.²⁵⁸ The court disagreed and opined that they revealed the manner of suicide and were relevant to the plaintiff's theory of liability.²⁵⁹ They showed the violent manner of the suicide, death by self-inflicted knife wounds, which demonstrated that his extreme mental condition was related to the long-term use of Paxil.²⁶⁰ They were also consistent with the paramedic's testimony, who explained the condition in which he discovered the corpse and the autopsy report, which was allowed without objection.²⁶¹

Photographs of a patient's abdomen were allowed in *Krueger v. Frisenda* resulting in a \$1,750,000 million malpractice award.²⁶² The facts revealed that the defendant tore the plaintiff's cecum resulting in twelve operations; she had to use an ostomy bag, had a Hickman catheter placed in her clavicle, and had part of the bowel removed.²⁶³ This left her with massive scarring; she will have to wear a binder indefinitely.²⁶⁴ The decision to admit the photographs was upheld on appeal since they were relevant to the jury's assessment of the plaintiff's pain and suffering.²⁶⁵

The plaintiff suffered from carpal tunnel syndrome in *Scarlett v. Ouellette* and underwent surgery to remedy the problem.²⁶⁶ She sued the surgeon for malpractice, and the defense wanted to call an expert who opined that her wrist swelling was fictitious and a self-inflicted injury.²⁶⁷ He used photographs of another person's legs that showed abnormal swelling as a depiction of a self-inflicted wound.²⁶⁸ Plaintiff's counsel objected on relevancy and prejudice, but was overruled.²⁶⁹ On rebuttal, plaintiff's expert stated that the images showed

256. *Id.* at 1089.

257. *Id.*

258. *Id.* at 1093.

259. *Mazella*, 57 N.E.3d at 1093.

260. *Id.*

261. *Id.*

262. 630 N.Y.S.2d 376, 377 (N.Y. App. Div. 1995).

263. *Id.*

264. *Id.*

265. *Id.*

266. 948 So. 2d 859, 861 (Fla. Dist. Ct. App. 2007).

267. *Id.* at 861–62.

268. *Id.* at 862.

269. *Id.*

a person with elephantitis. The jury returned with a verdict for the defense and an appeal was filed.²⁷⁰

The award was upheld, and the court noted that the trial judge did not abuse his discretion in allowing the pictures showing swelling in another person's legs.²⁷¹ They were introduced to show the jury an example of a self-inflicted wound rather than evidence to establish the standard of care.²⁷² The defendant's expert also laid the proper foundation for the photographs by noting that he had observed similar swelling in another patient, which he had diagnosed as a self-inflicted wound.²⁷³

Photograph evidence is not always admissible in a malpractice action. In *Catlett v. MacQueen*, the plaintiff was taken to an emergency room for injuries sustained on her feet from a car accident, and the wounds were contaminated by debris.²⁷⁴ Debridement was performed, and the plaintiff consented to the removal of three toes.²⁷⁵ Three days later, her condition worsened so she was taken to another hospital that had hyperbaric oxygen.²⁷⁶ An orthopedic surgeon took several color pictures of her feet within two hours of her arrival.²⁷⁷ However, nothing helped, so a below the knee amputation was performed.²⁷⁸

A malpractice action was filed against the physician in the first hospital and the judge refused to allow the pictures taken upon her arrival at the second facility to be used as evidence.²⁷⁹ The surgeon who performed the subsequent amputation testified that the defendant created an environment favorable to infection by suturing the foot wounds and that he should have performed a procedure to alleviate the pressure and improve circulation.²⁸⁰ The court would not allow the photographs to be used by the testifying expert because they were gruesome and presented the danger of unfair prejudice.²⁸¹ This ruling was upheld on appeal, based on the fact that the expert did not rely upon the pictures in his testimony.²⁸² The pictures were offered as "pictorial testimony" to help the jury understand the expert's opin-

270. *Id.*

271. *Id.* at 863.

272. *Scarlett*, 948 So. 2d at 863.

273. *Id.*

274. 375 S.E.2d 184, 185 (W. Va. 1988).

275. *Id.*

276. *Id.* at 186.

277. *Id.* at 186.

278. *Id.*

279. *Id.* at 186-87.

280. *MacQueen*, 375 S.E.2d at 187.

281. *Id.*

282. *Id.*

ion.²⁸³ The admissibility of evidence is generally within the trial judge's province, whose ruling will not be overturned unless there has been an abuse of discretion.²⁸⁴ The expert described the condition of the plaintiff's feet during his testimony, so they were not needed as other evidence assisted the jury.²⁸⁵

A similar result was obtained in *Pyskaty v. Oyama*.²⁸⁶ This malpractice action involved the diagnosis and treatment of a perirectal abscess by the defendant, which led to the spread of an infection, gangrene development, and the loss of a large part of scrotal tissue.²⁸⁷ The initial injury was caused by a fall in the woods while the plaintiff was tracking a deer.²⁸⁸ Following the patient's initial treatment, his left buttock became grossly enlarged, and he was diagnosed with cellulitis.²⁸⁹ A mass then developed that was thought to be an abscess; the plaintiff's testicles had swollen to the size of a grapefruit and smelled putrid.²⁹⁰ The patient ended up having three operations to drain the abscess and he lost the growth of hair in half of the area and needed to have psychotherapy for sexual problems.²⁹¹

Before trial, the defense filed a motion in limine to bar the plaintiff from using medical pictures taken during and after the operative procedures on the basis that they did not depict the plaintiff's condition at the time of the alleged malpractice, so they were not probative; this motion was granted.²⁹² On appeal, the plaintiff asserted that the pictures would show the "actual nature and extent of the injury."²⁹³ The court upheld the trial court's ruling and noted that the abuse of discretion standard gauges the admission of pictures.²⁹⁴ There is no such abuse when their prejudicial effect is outweighed by their probative value. In this case, the plaintiff's injuries were adequately and graphically described in the testimony.²⁹⁵ Some of the images showed the patient in the middle of a surgical procedure while under anesthesia and they did not show the plaintiff's condition when he was seen by

283. *Id.*

284. *Id.* at 188.

285. *Id.*

286. 641 N.E.2d 552, 572 (Ill. App. Ct. 1994).

287. *Id.* at 556.

288. *Id.* at 557.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Oyama*, 641 N.E.2d at 558.

293. *Id.* at 568.

294. *Id.*

295. *Id.*

the defendant.²⁹⁶ Therefore, they could only have prejudiced the defense.²⁹⁷ The plaintiff was also not denied the right to adequately describe the nature of his injury to the fact finder.²⁹⁸

VII. CONCLUSION

Clinical photography is employed to aid in diagnosing and documenting an illness throughout the different phases of treatment. Over the years, they have become a part of the medical record, and have both a medical and legal purpose. They have also changed the way physicians provide, record, and discuss medical care and they have prompted dialog in medical investigations, research, and clinical practice.

Regardless of their many benefits, there remains one overriding factor: the patient's interest. The doctor's duty to value the patient's privacy rights and the need for confidentiality must always be the overarching consideration. However, the improper use of medical images can harm the doctor-patient relationship, violate ethical mandates, or have legal implications for the physician. This is especially true when physicians post patient images on social media platforms without consent.

Various state and federal laws have been enacted to protect the privacy of medical records and photographs are considered part of a patient's chart. These complex sets of rules require strict adherence by the healthcare provider, and the failure to comply with these mandates can result in disciplinary and financial consequences. They can also result in lawsuits by patients against offending physicians under a variety of legal theories. While a picture may be worth a thousand words, its improper use can cost millions of dollars.

296. *Id.*

297. *Id.*

298. *Oyama*, 641 N.E.2d at 568.