Wound Care Photography:
Who's in Charge Here Anyway?

By Kevin W. Yankowsky, JD

No one can question the importance of documentation photography in modern clinical wound care, and I doubt there is a practitioner or facility in the country that does not utilize photography to some degree during patient treatment. The topic of photography in wound care is as broad and diverse as any issue facing practitioners, and could easily fill a book. With this article I would like to address one of the more troubling and, in my experience, overlooked problems associated with wound care photography: the question of who is truly in charge of photography in a given wound care setting.

It never ceases to amaze me how little centralized control facilities have over how and when wound care photographs are taken. Amazingly, many wound care facilities allow clinical staff to utilize camera phones or other personal photographic equipment to take patient photographs. If the photographs taken in this fashion contain protected health information, this can easily result in HIPAA privacy rule violations, and unless the facility in question is the one in a million which has administrative, technical, and physical safeguards governing the use of personal photographic devices, it is almost certainly a HIPAA security violation as well. Moreover, because photographs taken by camera phones and similar devices are almost always digital, the loss or theft of the photographic device and its data could easily constitute a HITECH breach as well, potentially obligating the institution to notify affected patients and expose the institution to significant regulatory penalties.

For all of these reasons, it is absolutely critical that practitioners or facility managers maintain control over who is taking clinical photographs and what photographic equipment is being used, regardless of how large or small a role photography has in their practice or institution. Under no circumstances should personal photographic devices be used by staff members during the course of their clinical duties. Instead, only designated photographic equipment (paid for, provided by, and owned by the institution) should be used for this purpose.

A second related issue is the question of photography by friends and family members of wound care patients. It continues to amaze me how many institutions are resigned to the "fact" that nothing can be done to stop these types of photographs from being taken. In my judgment, this is far from accurate. Health care institutions are, generally speaking, private property and therefore allowed to enforce their own rules regarding private, unauthorized photography. To my mind it is entirely appropriate for an institution to have a policy prohibiting all photography within its walls, except for photographs taken by clinical healthcare professionals expressly for the purpose of

clinical healthcare. These policies should be posted prominently in the institution and explained to patients and visitors on the grounds that they are necessary to help protect the privacy rights not only of patients but also of the staff members and the visitors themselves.

While some may view this as either an unusual or unworkable proposal, it has in fact already been widely implemented in other clinical areas. Labor and delivery units of hospitals have enforced no private photography rules for years. Substance abuse and mental health treatment centers have done the same thing for a similarly long period of time. Put simply, if they can do it, you can do it too. And while certainly it is unlikely that 100% of patient families will comply with the policy, any degree of compliance obtained is a step in the right direction.

To make photography work for patients, the photographic process must be understood and controlled. As the owner or manager of a wound care institution, it is up to you to take charge of how, when, and by whom photographs are taken of your patients in your institution. Legally speaking, the buck will almost always stop with you on issues relating to photography. Since you have the ultimate responsibility, it only makes sense to maintain ultimate control as well.

Kevin W. Yankowsky is a partner in the Health Law Litigation group of Fulbright & Jaworski's Houston office. Kevin has served as lead counsel in over 20 jury trials and ten appeals, in both State and Federal Court, the majority of which involved claimed damages at trial in excess of $1 million. Kevin's trial practice encompasses virtually all types of civil litigation facing the healthcare industry. He serves as lead counsel in professional liability claims, complex commercial suits, class actions, products liability matters, ERISA actions, premises liability suits, and Federal False Claims Act cases. In addition to his extensive courtroom experience, Kevin advises clients on Joint Commission investigations, hospital committee, and medical peer review matters. Kevin also serves as a frequent consultant on legal, litigation, and enterprise risk issues for health industry clients. Kevin's established reputation as both an accomplished trial lawyer and risk management consultant have also made him a frequently featured speaker at national health care industry conferences and professional symposiums across the country.