

What Were They Thinking? Film Crew in ER Brings Lawsuit to Hospital

Save to myBoK

by Ron Hedges

As this blog is about legal consequences, I try to provide current examples of what those consequences might be using a specific set of facts. This month's example comes from the filming of a documentary television series in New York and Presbyterian Hospital (NYP), one which left me with the question "What were they thinking?" This filming spawned a civil action against NYP and a treating physician as well as a \$2.2 million settlement between NYP and the Office for Civil Rights' (OCR) Department of Health and Human Services (HHS).

On April 26, 2016, the HHS Press Office announced the settlement, which was based on the "egregious disclosure of two patients' protected health information (PHI) to film crews and staff during the filming of 'NY Med,' an ABC television series, without first obtaining authorization from the patients." The statement went on to explain: "In particular, OCR found that NYP allowed the ABC crew to film someone who was dying and another person in significant distress, even after a medical professional urged the crew to stop."

According to the statement, the actions of NYP "blatantly violate the HIPAA Rules, which were specifically designed to prohibit the disclosure of individuals' PHI, including images." OCR also found that, by allowing "virtually unfettered access," NYP effectively created "an environment where PHI could not be protected from impermissible disclosure to the ABC film crew and staff." In addition to the dollar settlement, NYP agreed to two years of monitoring by OCR, "helping ensure that NYP will remain compliant with its HIPAA obligations while it continues to provide care for patients."

The civil action resulted from the facts described above. The decedent had been brought to NYP's emergency room after he had been hit by a vehicle. NYP's chief surgical resident, who was named as a defendant along with NYP, was responsible for the decedent's treatment. The news crew and staff were in NYP filming a documentary television series about medical trauma and the physicians who treated patients for that trauma with NYP's knowledge and permission. The crew filmed the defendant physician declaring the decedent dead and apparently filmed treatment that had been given to the decedent. The crew also filmed the physician informing the decedent's family of his death.

Over a year later, the decedent's widow and other family members saw an episode of "NY Med" that included recordings of the decedent's treatment and death. No one ever obtained the consent of the decedent or his family for either the action filming or the crew's presence, let alone for use of the footage in the show. Not surprisingly, the widow—both in her own name and as the executor of the decedent's estate—and other family members sued NYP, the chief surgical resident, and ABC. Lower courts took actions that dismissed all of the claims. The plaintiffs appealed the dismissal of claims against NYP and the physician but did not appeal from the dismissal in favor of ABC. The New York Court of Appeals concluded that the plaintiffs had stated a claim for breach of physician-patient confidentiality and remanded. The case is *Chanko v. ABC, Inc.*, No. 44 (N.Y. Ct. App. Mar. 31, 2016). It should be noted, however, that all this took place at the earliest stages of the civil action before the defendants had answered the complaint or discovery had been conducted.

What does all this mean for the healthcare provider and health information professional?

1. The same conduct by a different healthcare provider can give rise to liability for a HIPAA violation as well as possible liability under State law.
2. Consent to "something" by the provider does not excuse the provider from securing consent from patients.
3. Providers and healthcare professionals must constantly remember their fundamental obligation to protect patient confidentiality and PHI.

Film crews may seem exciting, but healthcare providers must remember that their obligation is first and foremost to their patients.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

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