Q We had a party for the elderly patients in our hospice-care ward. One of our staff took a “humorous” photo with her cell phone of one of the patients. She then posted the photo on her personal website with a caption. It came to our attention after she showed the picture on the laboratory computer to other staff members, one of whom was offended by the caption. What is our liability in this situation?

A Without the patient’s permission to take the photo, this is a clear violation of HIPAA, not to mention an assault on the dignity of the patient. The staff member responsible should be appropriately disciplined. Whether an apology is also owed to the patient and her family should be the subject of a discussion with your hospital risk manager and attorney.

Certainly, if the patient chose to pursue the matter, your institution would be liable for damages for violation of privacy requirements.

This brings up an area of risk management that is often overlooked in daily operation. It is common for hospitals to take photographs for a variety of purposes: marketing, documentation of treatment or injuries, and — as might have occurred in this situation — for the pleasure and benefit of patients at ward parties or celebrations at holiday time. Providing that the appropriate permissions and releases have been secured, there is no harm in taking pictures and publishing them. It must be remembered, that a hospital is not a “public place” that permits anyone — staff or visitors — to take indiscriminate photographs without fear of liability. This incident points out the need to address the issue of cameras in the hospital at a multitude of levels.

It is a good idea to review hospital policies on photographs and make certain that all responsible parties understand their use. The laboratory may, indeed, have a legitimate reason to take photographs, such as documenting the degree of bruising following a traumatic venipuncture, or the degree of induration on a skin test. The availability of digital cameras and the ease of integrating digital information onto a hospital record (especially if it is already computerized) means that photographic documentation may increase in the future.

This situation, however, arose from a lack of understanding about the degree of privacy and respect to which patients are entitled, as well as the increasing popularity of “photo-phones.” Sensitive documents, installations, and information, as well as patient privacy, are at risk for compromise because it is so easy to use these devices. There is an ongoing debate in the computer industry about the limits that should be placed on the use of these phones. According to Carla Thornton in PC World (January 2004), software to disable photo-phones as they enter sensitive locations, such as hospitals, is already available but requires institutions and cell-phone providers to cooperate in use — not a practical solution yet, but one that might be if institutions as a group press for it.

It might be worth a discussion with administration to decide whether there is a need for a hospital policy on carrying or using photo-phones (or, for that matter, cameras) in the building. In response to the ubiquitous nature of these small digital cameras, some government offices and private institutions across the country have already taken the step of banning the use of cameras and camera phones, according to Thornton. Because an employee at the hospital has access to hospital telecommunications to call out or be reached in case of emergency, you may elect to ban staff from carrying such phones during working hours without compromising the legitimate needs of staff to stay in contact with others outside the hospital, if need be.

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This column is intended to provide risk management and human resource management education; it is not intended to provide specific legal advice. If you require legal advice, the services of an attorney should be sought. Dr. Harty-Golder welcomes your questions, which can be sent to her at toadehall@comcast.net.