

Just a quick pic: Ethics of medical photography



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CASE SCENARIO

A 42-year-old man arrives for treatment of a dermatologic zebra condition, which you successfully treat with a novel medication. You publish a case report with nonidentifying photos of your patient's trunk. Shortly after publication, your Internet savvy patient returns to your office angry that photographs of him were used for this publication. Upon review of his chart, you see that at his initial visit, he signed a photography consent form that allowed for use of the photographs for teaching or publication purposes. When you show him the form, he becomes even more upset, stating that he was asked to sign a bunch of forms that he did not have a chance to read or understand. He also notes that the publication contains photographs from follow-up visits during which he was not asked to sign any forms.

What do you do next?

- A. Retract the images. He did not properly consent to use of photographs.
- B. Discuss with the patient that the publication will help the dermatology community treat others with similar diseases, offer an apology for any discomfort experienced by him as a result of the misunderstanding, and clearly state that there is nothing else that can be done since the photographs have already been published.
- C. Consult your risk management team.
- D. Emphasize that the photos are nonidentifiable. Show the patient the consent forms again and point out the clause that states that the image consent is valid for all patient visits, unless it is revoked in writing.

DISCUSSION

Clinical photography is rapidly becoming a routine aspect of health care, particularly in visually oriented fields such as dermatology.¹⁻³ These clinical images generally are used for 3 broad categories: publication, education, and clinical documentation.² While modern bedside photography has enhanced documentation, medical and patient education, and communication between treating clinicians, it poses

risks to patients' rights to autonomy and privacy.^{1,3} Central to this is the issue of informed consent.

Informed consent, defined as the "legal embodiment of the concept that each individual has the right to make decisions affecting his or her health," is a vital and legal part of the patient-physician relationship. Failure to adhere to informed consent laws can constitute medical negligence or legal battery and is one of the most

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common reasons for lawsuits.⁴ Although there are standardized informed consent processes for procedures such as surgeries and blood transfusions, documentation of consent for clinical photography varies by institution. Furthermore, there are no uniform laws or regulations regarding clinical photography consent across jurisdictions.¹

In addition to issues of consent, the increasing prevalence of clinical photography raises another question: who owns the image? In nonclinical photography, whoever creates the photograph owns the copyright and, by extension, the photograph. The same concept applies to medical photography in that the photographer, and subsequently the journal's publisher in the case of publication, owns the clinical photo—however, the great distinction in medical photography is that the patient actually owns the data contained in the images (barring any legal agreement stating otherwise) and the physician may not capitalize on the use of the clinical photos without explicit permission from the patient. Furthermore, the Health Information Portability and Accountability Act (HIPAA) of 1996 directly references full facial and other comparably identifiable photographs. As such, identifiable images fall under the privacy regulations of HIPAA.⁵

The importance of obtaining informed consent before both the taking and use of clinical photographs cannot be overemphasized. This holds true even for situations in which the patient is not identifiable.⁵ Although there is no uniform blueprint for obtaining consent for clinical photography, there are specific good practice standards that should be followed: the physician should provide informed

consent for each use of the image before photography takes place; the patient should be informed that consent can be withdrawn at any time even after signing a consent form; the photographer should respect the dignity of the patient at all times and capture the minimum required body parts; the face should only be photographed when essential to the image; the consent should specifically state the number of visits or time period for which it applies; and images should be stored in a secure location with regulated access.^{1,2}

In obtaining consent, physicians should, at the very minimum, explain the purpose of the clinical photography, the reason for the consent process, and the confidentiality of the photos. Furthermore, it is imperative that patients understand that refusal will have no bearing on their care, they may revoke consent for any or all photos at any time, and, perhaps most crucially, if images are published for educational or publication purposes, those images can become part of the public domain and may become impossible to remove.³ Of note, though proper documentation of informed consent will minimize the risk of legal consequences, patients have the right to revoke consent for publication in the future, and this request should be honored to the best of the physician's capabilities. The patient–physician relation is, at its core, dependent upon trust, and by failing to obtain consent in a transparent and accurate manner or not honoring a patient's desire to revoke consent, physicians violate this trust, thereby jeopardizing the patient–physician relationship, neglecting ethical codes of conduct, and ultimately increasing the risk for legal consequences.^{1,2}

ANALYSIS OF CASE SCENARIO

Choice A, retracting the images, is the most ethical course of action. It is unclear if this patient ever received informed consent for his clinical photography in a manner that would be in line with the good practices and minimum components of consent as outlined above. When a patient signs consent paperwork without reading the contents of it, it is the responsibility of the physician and staff to make sure that the patient truly understood the nature of the paperwork. Further, as the patient himself pointed out, he did not provide consent for photographs that were taken at subsequent follow-up appointments. His right to autonomy and privacy were violated by the publication of those images. Furthermore,

patients have the right to revoke consent at any time. Even if a patient had been provided with informed consent in an appropriate manner for all photographs, a request to withdraw the photographs at a later time should be honored, if feasible. In such a case, it is the ethical and moral, though perhaps not the legal, duty of the physician to honor the privacy and autonomy of the patient. It should be noted, however, that while we feel that choice A is the best answer, it is incomplete. A further discussion should take place with the patient explaining that once an image is printed or published online, it becomes part of the public domain and might be difficult or even impossible to retract.

Choice B, justifying your actions, might appear reasonable; however, it is not strictly truthful and fails to respect the privacy and autonomy of the patient. Discussing the benefits and educational value of the publication can be an appropriate response if the patient is willing to engage in that conversation, especially if an apology for any misunderstanding is proffered. However, stating that nothing can be done and essentially washing one's hands of the matter is morally and ethically objectionable as it dismisses the psychologic harm done to the patient and transgresses the patient–physician trust. The physician should offer at the very least to contact the journal and request a retraction of the images, even if that means retracting the article as a whole.

Choice C, consulting risk management, is inappropriate as a first step as it ignores the patient's concerns and focuses solely on the physician's worry regarding litigation.

However, having the advice of seasoned risk management professionals and some time to ponder it, might help the physician handle the patient's concerns constructively, ethically, and with empathy, necessary steps in maintaining the physician–patient relationship and avoiding litigation. Regardless, meeting with the risk management team at a future date might be prudent to review how to avoid such situations and improve the consent process.

Choice D, highlighting the anonymity of the photos while emphasizing that consent for their use was previously provided, might appear enticing but is ethically wrong. This option violates the good practice standards of clinical photography by failing to honor that consent must be obtained in a clear and transparent fashion and, more importantly, that it may be revoked at any time. This option perpetuates the breach in the patient's privacy and autonomy and further weakens the patient–physician relationship.

BOTTOM LINE

Clinical photography, while an invaluable asset for education, publication, and the patient's own medical record, can often be at ethical, moral, and even legal crossroads with patient privacy and autonomy. The patient–physician relationship might be irrevocably damaged by misuse or mishandling of patient images. A clear and thorough informed consent process is necessary for obtaining clinical photography. Patients should be made aware that they might revoke consent at any time; however, once images are published, it might be impossible to remove them from the public domain.

REFERENCES

1. Van der Rijt R, Hoffman S. Ethical considerations of clinical photography in an area of emerging technology and smartphones. *J Med Ethics*. 2014;40:211-212.
2. Creighton S, Alderson J, Brown S, et al. Medical photography: ethics, consent and the intersex patient. *BJU Int*. 2002;89:67-71. discussion 71-72.
3. Lakdawala N, Fontanella D, Grant-Kels JM. Ethical considerations in dermatologic photography. *Clin Dermatol*. 2012;30:486-491.
4. Paterick TJ, Carson GV, Allen MC, et al. Medical informed consent: general considerations for physicians. *Mayo Clin Proc*. 2008;83:313-319.
5. Segal J, Sacopulos MJ. Photography consent and related legal issues. *Facial Plast Surg Clin North Am*. 2010;18:237-244.