



HIPAA Lunch & Learn – Interacting with the Media and Public – Panel Discussion June 13, 2019

Panelists:

Amanda Reese, JD, CPHRM: Amanda is a member of the UW-Madison Office of Compliance, serving as the HIPAA Privacy Officer. Prior to working for UW-Madison, she served as the Associate Counsel and Privacy Officer for the University of Wisconsin Medical Foundation, Inc. (one of the “UW Health” entities), was in private practice with Michael Best & Friedrich LLP, and worked as the administrator for Madison Veterinary Specialists, SC. Amanda earned her undergraduate degree in Animal Science from Iowa State University and her law degree from Northern Illinois University.

Tricia Kvitrud, JD: Tricia Kvitrud is also an attorney with the UW-Madison Office of Legal Affairs, focusing her practice health law. Her portfolio includes the areas mentioned previously in Claire’s bio as well as risk management, and corporate and structural requirements related to health care entities. Tricia began her career at the law firm of Quarles & Brady, and later served as in-house counsel to a large integrated health system in Northern Wisconsin and Minnesota. She earned her undergraduate degree in Business from UW-Madison and her law degree from the University of Minnesota.

Claire Dalle Molle, JD: Claire Dalle Molle is an attorney with the UW-Madison Office of Legal Affairs. Her practice currently focuses primarily on health law. In this role, she advises faculty and employees of the University’s health sciences schools on matters including: patient care and risk management, regulatory compliance, practice regulation and licensing, health care information privacy and security, and health care and services contracting. Prior to working for UW-Madison, Claire worked for the Wisconsin Department of Children and Families and the Office of the State Public Defender. She earned her undergraduate degrees in Political Science and Spanish and her law degree from UW-Madison.

Lisa Brunette, MA: Lisa serves as the Director of Media Relations for UW Health and serves as the main point of contact for media-related issues impacting SMPH. In that role, she supervises a seven-person team at UW Health that proactively generates media coverage while also responding to media requests for information and experts. She is also responsible for providing communications counsel to physicians, staff, and senior leadership. Lisa earned her undergraduate degree from Ripon College in English and Philosophy, and obtained her master’s degree from Harvard University.

Questions / Discussion Points:

1. Is this all going overboard? Don’t people expect to be photographed all the time these days?

While individuals might expect to be photographed in a variety of public settings, we may not presume they expect to be – or want to be – photographed in settings where they interact with health care providers, researchers, educators, or individuals they know to be representing UW-Madison health sciences programs. As a Hybrid Covered Entity, UW-Madison is obligated to protect individually-identifiable health information, known as “Protected Health Information,” in accordance with HIPAA.

Additionally, a variety of state laws come into play in addition to HIPAA. Notably, the Wisconsin “Right of Privacy” law prohibits business use “of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.”

While it may feel like we go “overboard” to obtain written authorizations for the use of photos, videos, and audio recordings taken for promotional materials – it’s the law, and it’s the right thing to do. Building a routine practice of obtaining authorizations into your workflows will satisfy our legal obligation and contribute to the development of trusting, respectful relationships with all members of the communities we represent and serve.

2. **If we hire a photographer to take photos at an event in an area hospital – should we enter into a Business Associate agreement with him or her?**

A Business Associate Agreement may be necessary when retaining a photographer to take photos at an event where patients, research subjects, or other event participants will be photographed. Please contact your [HIPAA Privacy Coordinator](#) or the UW-Madison HIPAA Privacy Officer with questions to review the involved scenario and make a fact-based determination about whether a Business Associate Agreement is required to comply with HIPAA.

Additional information about Business Associate Agreements is available in HIPAA Policy 6.1, “Managing Arrangements with Business Associates of the University of Wisconsin-Madison.” (See <https://compliance.wisc.edu/policies-and-forms/>.)

3. **We want to use photos of our students taking blood-pressures or conducting gait assessments for people who attend a health fair in the community room of a local hospital. We’d like to post the photos on social media and on our school recruitment materials. Can’t we just post a sign saying that we intend to take photos?**

It is not acceptable to simply post a sign indicating an intent to take and use photos at an event such as a blood-pressure screening or gait-assessment clinic at a health fair held in a hospital facility.

Remember.... For UW-Madison, Protected Health Information (“PHI”) includes individually-identifiable health information in any medium which is **created or received** by a member of the UW-Madison Health Care Component workforce relating to any of the following:

- The past, present, or future physical or mental health conditions of the individual
- The provision of health care to the individual
- The past, present, or future payment for health care to an individual

HIPAA requires obtaining authorization from individuals (who might be patients, research subjects, or event participants) prior to using their PHI in social media posts, public websites, or school recruitment materials.

A HIPAA-compliant authorization must be used which includes core elements and required statements enumerated at 45 CFR 164.508(c); it is also written in plain English and a copy of the signed authorization is provided to the individual.

UW-Madison’s HIPAA-compliant authorizations are available at www.compliance.wisc.edu/hipaa.

4. **We previously took full-face photos and videos at an event – before becoming aware of the compliance issues involved. Can we use the photos if we haven’t gotten complaints about them? What should we do?**

You should not continue using photos in any way unless/until you obtain a HIPAA-compliant authorization to use the photos as intended. Continued use of the photos without authorization violates HIPAA and places UW-Madison at risk for significant penalties – which could include financial penalties or entering into a Corrective Action Plan with the Office for Civil Rights of the US Department of Health and Human Services.

If you have contact information for the individuals in the photos, reach out to them and ask that they complete HIPAA authorizations. Approach the situation in a way that strengthens your relationships with them and fosters a level of respect between them and your program. They may be flattered to learn you want to continue using their photos, and honored to help promote your use of their photos in a compliant

way.

If you do not have contact information for the individuals and cannot obtain written authorizations, you should not use the photos. Delete the photos from social media and any webpages where the content is stored, and make plans for the authorized capture of new photos to use moving forward. Photos for which you do not have authorization should be securely destroyed/deleted. Contact your [HIPAA Security Coordinator](#) for support with destruction and deletion (it is important to work with trained IT professionals to ensure complete and thorough deletion).

5. **Do we have Media resources available to us on campus or through UW Health that we could arrange so we don't need to enter into Business Associate agreements, and already have confidence in the security of the equipment and storage mechanisms that will be used?**

Yes! The UW-Madison [Media Solutions](#) Team at the School of Medicine and Public Health can provide services for any units on campus. They primarily serve Health Sciences faculty, staff and students, but are available to serve all campus departments.

In addition, the UW Health marketing and communications department also has in-house videographers and a photographer. Their work, however, is confined to UW Health and the UW School of Medicine and Public Health.

6. **What should we do if someone gives us permission to use a photo but later changes their mind?**

The HIPAA Privacy Rule gives individuals the right to revoke authorization for use of their PHI; when an individual indicates they wish to revoke authorization, they should be directed to submit their revocation in writing to the HIPAA Privacy Officer as indicated in the instructions section of our HIPAA-compliant authorizations.

When an individual revokes their authorization for use/disclosure of photos, all efforts should be made to locate and delete the photos from online social media, websites, etc. Any retained photos/files (in media proofs, drafts, etc.) should be flagged in a way that clearly signifies for staff that they may not be used moving forward.

7. **A physician went on an international mission trip and took photos of the patients she worked with overseas. She did not obtain authorizations or even get contact information so we could request permission later. These are non-US residents, and they agreed to having their photo taken. Does HIPAA apply?**

HIPAA applies to PHI which is created or received by members of a Hybrid Entity's workforce. If authorizations were not obtained and no contact information is available, you cannot use the photos.

In February 2004 Guidance, the NIH clarified this point stating that "[a]ll **individually identifiable health information, including individually identifiable health information of non-U.S. citizens, is PHI when it is held by a covered entity**, unless it is otherwise excepted from the definition of PHI at Section 164.501 of the Privacy Rule." (See <https://www.hhs.gov/ohrp/sachrp-committee/recommendations/2004-september-27-letter-appendix-h/index.html>.)

8. **What is the best way to initiate a project that might involve the media, a film crew, or photographer? What about for areas of UW-Madison beyond SMPH?**

If your project involves UW Health or the School of Medicine and Public Health, contact Lisa Brunette in UW Health's Media Relations team. She or her designees will facilitate connections to the appropriate

staff at UW Health and/or UW-Madison who need to be involved.

If your project involves other areas of the UW-Madison campus, contact the HIPAA Privacy Officer or a member of the Health Law Team of the Office of Legal Affairs. Similarly, they will facilitate connections to the appropriate staff at UW-Madison who need to be involved.

9. **I'd like to hire a photographer and videographer to provide coverage at an event where research subjects will be in attendance. They've agreed to enter into a BAA. What is the best way for them to transfer the photos and videos they take? Should I request a Secured Box Folder?**

Work with the HIPAA Security Risk Analysts of the UW-Madison Office of Cybersecurity to determine the best transfer method for your specific scenario. To initiate work with them, complete a "Joint Security & Privacy Review" request (also referred to as a "JSPR Form") at www.go.wisc.edu/hipaasecurity.

10. **Is it OK for employees and students to use their personally-owned devices to take photos at events where an individual has given authorization and approval for taking and using their photos online? It is so much easier to post to social media directly from a mobile device. It would be very inconvenient if I have to carry around a separate digital camera, move the pictures from the camera to a computer, and then post them.**

Using personally-owned devices is sometimes acceptable – if the devices are managed/supported by UW-Madison and configured in a way that does not result in the photos being uploaded and stored in third-party programs/tools such as iCloud, GooglePhotos, or any other back-up platform provided through your cell phone service.

Your department may be able to provide limited support to your device in order to facilitate taking photos at events. Your department might also want to consider purchasing a device (and arranging for appropriate configuration and management of the device) that is dedicated for use at events so individuals' personally-owned devices are not used. This could also allow for more consistent tracking, indexing, editing, and use of photos and videos over time

Work with your [HIPAA Security Coordinator](#) and/or the HIPAA Security Risk Analysts of the UW-Madison Office of Cybersecurity to determine the best ways to address your specific situation. To initiate work with them, complete a "Joint Security & Privacy Review" request (also referred to as a "JSPR Form") at www.go.wisc.edu/hipaasecurity

11. **Do I need to get authorization if a patient or research subject takes their own photos, and shares them with me for use online? Can't we imply that they authorized the use since they gave the photos to me?**

Yes, you need to obtain an authorization in order to place photos online which you receive directly from a patient, participant, or research subject. This is true for any photos, videos, or recordings you receive from an individual which you want to share and promote in any type of print or electronic medium.

When you receive the photos or videos, follow up with a quick thank-you and ask the individual to complete and return a signed HIPAA authorization. UW-Madison's HIPAA authorization form is available at www.compliance.wisc.edu/hipaa.

12. A student mentioned not wanting to be photographed when working with patients at a wellness fair, even where a participant agreed and provided authorization. Shouldn't we be training our students to get used to being photographed?

This question raises issues about students' privacy rights under FERPA (which are not addressed here, but should be considered) as well as personal reasons students, members of the public, and colleagues may not wish to be photographed by people who they understand might wish to use photographs publicly. Here, the student may have a valid reason for not having his/her photo taken; it would be best not to photograph a student who has clearly indicated their discomfort with you doing so – and ask if another student could be involved instead since you have a participant available and willing. If the situation seems concerning to you, speak with the student privately after the event, and follow up with your administrators or the UW-Madison Office of Legal Affairs if needed.

In all situations, keep in mind that individuals might have general privacy/confidentiality concerns due to their opinions and beliefs about social media. In some situations, individuals may fear for their safety due to online bullying, domestic violence, or other unique dynamics or past experiences with social media of which you are unaware. Unique angles of photography may allow for capturing scenes of informational booths, medical equipment, complimentary hand-outs or give-aways in ways that allow you to take photos without any students' or participants' identifying images.

With students – special consideration should also be given to prioritizing their educational and training experiences. If a student is not yet confident enough in his or her skills to feel comfortable having photos or videos captured, consider modifying your approach in a way that prevents negatively impacting any phase of learning.

13. When interviewing students or alumni about why they pursued a certain specialty practice area – they may reference a personal anecdote, such as “my mother had diabetes,” or something like that. Would that be considered PHI? Do we need to obtain the mother’s authorization to write about that in a blog post, journal article, or social media post?

Here, information about the student's mother might be considered PHI – but a fact-specific determination should be made in consultation with the HIPAA Privacy Officer as to whether HIPAA or other privacy laws come into play.

To steer clear of privacy issues altogether, in this particular situation, an interviewer could write about the student “watching a family member experience the effects of uncontrolled diabetes” or “feeling motivated to address a condition experienced by family members.” Those descriptions are generic enough so as not to identify a particular person but to still convey the motivating factor and family connection.

If the area of specialty discussed in a story relates to a stigmatizing or sensitive condition (such as Alzheimer's Disease, Schizophrenia, HIV/AIDS, or certain reproductive diseases or procedures) – even greater care should be taken to avoid identifying a family member, unless the proposed story has been reviewed by the HIPAA Privacy Officer or Legal Counsel and any needed permissions are obtained.

14. I am a UW-Madison employee, but most of the PHI that crosses my desk relates to UW Health patients, and UW Health stores the authorizations that relate to our use/disclosure of those patients' PHI. Do I need to obtain UW-Madison authorizations, too? Or store copies of the UW Health authorizations in my UW-Madison files?

UW-Madison and UW Health participate in an affiliated covered entity. We also use very similar authorization forms which were developed collaboratively. If UW Health has obtained and stored the

authorization relating to your use/disclosure of an individual's PHI, you do not need to obtain duplicate UW-Madison authorization forms or store copies of the UW Health authorizations in a duplicate file.

Thank you for your time and attention to compliance with applicable regulations and with UW-Madison policies and procedures.

Contact the HIPAA Privacy Officer, HIPAA Security Officer, or your HIPAA Privacy or Security Coordinators with questions, concerns, or suggestions for future educational topics.

www.compliance.wisc.edu/hipaa

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