How to Use Smartphone Technology to Document Your Nursing Home Care

These devices can help you avoid legal problems.

BY MICHAEL M. ROSENBLATT, DPM

Newsflash: A report from OIG has verified that the last podiatrist to be indict ed for Medicare fraud in the U.S. for nursing home (NH) care occurred in 2013. In the bizarre turn-around of “modern electronic surveillance,” foot doctors are now using their “smartphones” to document their visits to nursing homes. Since it is possible to record the date and time of a photograph on virtually every smartphone, (new) convictions have been just about impossible.

Mr. John Rice, of Health and Human Services told Healthcare News: ‘State prosecutors used to prove fraud with ease, because many foot doctors used repetitive documentation on their chart notes. They billed surgery without local anesthetic injections. All we had to do was interview NH patients and we secured easy convictions. Most of them resulted in loss of license and hefty fines. In more egregious cases, we secured prison sentences.’

Automatic smartphones data rec ordings document the date, time and, in some cases, the actual location of the photograph. While many Americans have been greatly concerned about “Government surveillance” of their private lives, doctors (of all kinds) are now turning to that very technology to make it impossi ble to charge them with a crime.’ Mr. Rice added: ‘Some of these doctors have downloaded hundreds of smartphone images to their computers. There is no point in even Mirandizing them anymore, because the date, time, and location are embedded in the picture. Courts frequently use cell phone data as evidence for convictions. The foot doctors are now using this for the reverse. There’s nothing we can do about it. Our forensic people can easily verify the data.’

Of course, the above newsflash is fanciful fiction. But it is NOT im-

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possible. You can document nursing home visits and routine foot care in both NH and office. And you can do it with technology you already have. Almost every smartphone allows for “electronic stamping” of the date, time, and even location of a photograph. Close-up photographic lenses are unnecessary. Most smartphones take very adequate pictures of toes and feet in even very close proximity.

Why Are There Still Convictions?
What kind of podiatrist is the perpetrator of this fraud? If you were to categorize them, you’d say that they probably do not read Podiatry Management Magazine. They are not members of APMA and rarely do surgery. These convictions are routinely reported.

A recent one described a Brookfield (CT) podiatrist convicted of 14 counts of fraud and 14 separate counts of “false statements.” This doctor faces a maximum of 10 years in prison for EACH count of the indictment and five years each on making false statements. The indictment specifically stated that: “He billed for nail avulsions without a local anesthetic.” This remains the number-one cause of “successful” podiatry/Medicare convictions. The reasons why some still do this are a complete mystery. Surely they know that charging for slant-back nail “surgeries” without injected local anesthetic is illegal. Do they think they are working in a vacuum?

Who Is Left Behind in the Catastrophe of a Medicare Conviction?
For the family “left behind”, this is a tsunami; this means wife and children. Once you go down this road, the road to “rehabilitation” takes years. By that time, you may be divorced and lose custody of your children. You will not be able to practice podiatry for many years, and even when you get back, you won’t be able to bill Medicare for additional years. It is hard to imagine how you can earn a living during the meantime, even if you stay out of prison. Most convicted felons will not qualify for other jobs, like teaching or government employment. Your student loans will still stand, and you will be listed as a permanent defaulter. The only jobs available to you may be as a surgical scrub tech, orderly, or janitor. No drug company will hire a convicted felon.

Defense and Prosecuting Attorney Strategies
When you go to your defense attorney’s office, they will want to ascertain the present value of your estate, investments, and home. Obviously, they do this to help you to “plan” for defense costs. They will also ask you if you have any parents or wealthy relatives who might assist financially in your defense. It is illegal to attempt to conceal, transfer, or hide assets from a potential future judgment and this certainly includes government liens. However, it is not illegal for your attorney to plan a defense strategy related to the value and configuration of your assets.

This is usually done on a temporal basis: The length of time discovery, defense planning, hiring expert witnesses and timing of court actions is highly variable. Usually, there is a tacit, non-discussed “agreement” between prosecuting and defense attorneys to allow defense attorneys to scrape you down to the bone. The process would be spread out on a timeline so that your defense attorney can have access to your money to strip you clean. They know your goose is cooked. The only question remaining is how to reduce/avoid prison time, and, of course, collect fees before everything is gone, which happens in almost every case. The only exception to this is if you have extremely rich relatives who are willing to spend up to one million dollars for your defense. Most assuredly, they will not be paid back. That money goes into the vacation home of your defense attorney.

Is this an “indictment” of defense attorneys? No. Since you got yourself into this, it is only their responsibility to attempt to clean up your mess. For them, obeying this article just takes away another potential client. But it’s temporary. If bitten, you will never be able to pay those fees again, to anyone.

Government attorneys and investigators have no empathy for you or your family. Rather, each conviction becomes a notch on their belt and usually translates to direct career advancement. Healthcare investigators know that podiatry is an easy target. It makes sense for them to pick the lowest hanging fruit. They know how. They can “mine” computerized mining programs. Prosecutors generally know how many wedge resections are done in your community based upon statistical experience. But this is sus-
Documenting Strategies with Photographs

The photo you shoot must demonstrate a need for the procedure. Welcome to Honesty 1.1.

You CANNOT bill for surgical nail wedge excisions without an injectable local anesthetic. The amount to be injected is not disclosed in the law. This may vary because some patients may already be insensate and don’t react to probing or even nail trimming. In other cases, your interest may not be in removing large nail wedge borders for practical and fully medical reasons. Larger wedge sections tend to require more post-operative care. The patient’s circulation may not be “up” to handling larger sections. Remember the law also describes removing some eponychium, but that is not quantified either.

In some cases, post-operative nursing care may simply not be available. Yet, it is still necessary to provide a slightly more invasive technique than just trimming the nails. The other factor, usually not discussed by Medicare or investigators, is “operator skill.”

In podiatry school, there was a clinician who could remove large sections of ingrown nail wedges without local anesthetic, using nail splitters and amazingly competent technical skills. Government does not consider this an “excuse.” The law is the law.

There is no substitute for separately written and thorough chart notes. But when it comes to proving injections were made, there is nothing better than a photograph. The photo should include a blood trail from the injection site(s). Interviews with staff members are of questionable value. In most cases, government investigators won’t even talk to staff. NH employees are like will-o’-the-wisp: they come and go like magic. Surprisingly, they DO interview NH patients to ask them what was done. This may sound crazy, but a great many “successful” DPM convictions were the direct fruit of those “interviews.” This is terribly unfair, even ridiculous. By the time a patient enters a NH, he may not even be able to zip up his fly. But government will depend on him for a conviction.

While it is certainly possible to take beautiful pictures from an ordinary digital camera, we have found modern smartphones are easier to handle, easy to add sub-text to, and they are in your pocket anyway. Transferring those photos to your PC is a piece of cake. The photos are dated, so you already know when phone. When you take the photo, the GPS location of the NH is right in the metadata of the picture. The best way to prove that your photos are genuine and temporally correct is to email them to yourself roughly at time of execution. Whereas messaging may cost money for each picture, email is free.

Some people obsessed with privacy don’t want to leave digital tracks. But you do. Mixing digital tracks (like downloading your data to your PC) is another way to de-

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Forensic Examination of Photos

One of the features of cell phones is their use of EXIF (Exchangeable Image File Format data.) EXIF data is information embedded in the image or video that can contain all or some of the information below (what is actually in the image depends on the camera manufacturer). Typical meta-data include:

- Make of the camera that took the picture/video
- Model of the camera
- Serial number of the camera
- Date/time the image was taken (according to the camera’s clock)
- Filename
- Flash settings
- Aperture settings
- Image resolution
- Software
- And more…

Cell phone clocks (and dates) are usually set by the phone network. An argument can be made that this metadata can be tampered with. But the location of the photo is often traceable to a specific geographic code (GPS co-ordinates) on the cell liberately leave bread-crumbs. Any time data crosses tracks with another device, it leaves a trail. This is to your advantage.

Disclosing Data and Speaking to Investigators

Disclosure of any data to government authorities should not be made without prior discussion with a healthcare attorney. This is difficult sometimes, because Medicare routinely asks for data; and it seems cumbersome to have to hire an attorney each time. If you have a bad feeling about any requests, THAT is the time to call a healthcare attorney. Another situation is when they call for large amounts of documentation, say beyond one or two charts. Local healthcare attorneys are usually familiar with local Medicare authorities and know how to smell a rat. They know things about the process that you don’t. Be sure it’s a healthcare attorney. Your family attorney knows squat about this.

When you bill a governmental agency, they are entitled to see the data that they demand regarding the specific patient they wish to investigate. But that does NOT include data on other patients they don’t demand. Nor are you obligated to make any statements or comments. In any investigation, it is very unwise to...
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make any comments or answer any questions without your attorney present. This includes a description of your “photo library.” It is shockingly easy to incriminate yourself. Even the mildest comments will be used against you.

Any audit of your records is potentially a criminal investigation. If they question you, you reply by asking for their written questions, to which you will gladly answer in writing, in the future. One of the best ways to determine the seriousness of the situation is if there is more than one investigator present. The second one is there to verify your comments to be used against you in the future. But even just one auditor is no assurance of their intent. In the U.S., you have the right not to incriminate yourself, which means that you don’t HAVE to reply to their questions without your attorney present. (Cooking expert Martha Stewart found out about this the hard way. All she had to do was just keep her mouth shut).

Unless they can prove “probable cause” for your falsifying data, you have no legal obligation to turn over your cell phone. They have to have a search warrant for that. Your attorney will advise you when to disclose information about your clinical photographs. These people are NOT your friends, even if they are polite, calm, and friendly. It is just a show. They mean to take you down: “Say hello, good bye. Have a nice day.” That’s about it.

Different Apps to Choose From

It is not necessary to describe every single smartphone or their individual application for this purpose, but you can do some pretty quick research to find the right one for you. “Photo Date, Location, and Caption Stamp Camera” (Figure 1) is published by FundVid Apps, LLC, and is available for iPhones, iPod touch, and iPads. It costs 99 cents. It is exceptionally easy to use, and it allows you to imbed a caption into the picture. It automatically includes the date. The location is described as the city you are in. You can add the location of the facility in the “caption” any way you wish.

There are others to choose from; and no doubt more will be added as time goes by. The cost of such cell phone applications is well… almost nothing. You can look-up their reviews. You can even download a couple and test them out. One strategy is to put a piece of paper on the patient, marking the name and date. But it takes less time to embed this information into the photo itself, and is better documentation.

Even older smartphones still allow these apps, and although their cameras may not be quite as good, they are still excellent, even at close range. Cost is so miniscule that there is no connection with cost versus risk of losing everything. That’s true with many modern technologies.

Setting Up the “Pose”

There are different ways to set up the “pose.” I recommend carrying Betadine swabs, which photograph beautifully in color. They also serve as a method to disinfect the toe prior to surgery. You can paint the toe just before the injection, and since you don’t use epinephrine, you can express a small blood trail from the injection site(s), rolling over the purple color.

Tuberculin and 3cc syringes provide an excellent way to administer the injection(s). You can spray the toe with ethyl chloride if you wish, or use a vibration device to help “anesthetize” the skin. Expensive vibration skin site devices are not necessary, but if you wish you can use them. These are available from Amazon.com and can be located under “vibration skin devices.”

You just apply this with some pressure against the skin and inject between the applicator tips. It is unlikely that the patient will feel anything. These devices are battery operated. Don’t swab the skin with alcohol swabs first. The Betadine is all that is necessary. The amount and location of the injection site rely on your own medical judgment. You can circumferentially inject a toe if you wish. In most cases, that is unnecessary. And it is NOT specified in the law. But you MUST inject it.

Some elderly patients with neurologic abnormalities will jerk their legs back and howl when a stimulus is applied. You need to have a firm grasp of their ankle during the injection. When you see this, always re-
member to report in your chart note that the patient has contracture deformities and hyperreflexia. This can be caused by ALS, encephalitis, diffuse UMN lesions, and focal and generalized dementia. This might very well qualify them for a Medicare-covered diagnosis. But if you don’t write it down, you have no defense. Proper medical records are well worth the time and effort.

Be sure to enter the patient’s name in the “caption.” The date and time will appear automatically. You can also specify a “code” for the location of the NH, office, extended care facility, whatever you wish. A few initials or abbreviations you can recognize are fine. These are all embedded in the caption, permanently.

**Post-Operative Images**

It is up to you whether or not you wish to include post-operative images. Sometimes, you might find them helpful. The purpose of the documentation is to prove you actually INJECTED the patient (Figure 3), not necessarily to include the extent of your surgery. The law requires that you also remove eponychium, but the amount is unspecified.

You may prefer to use your written documentation to include and describe the extent of the surgery. Some computerized podiatry-record programs make it very difficult, if not impossible, to include images in their documentation.

It is not necessary to include the photos in the written documentation, unless your computerized chart note system “cooperates.” Everything you do takes time. The purpose of photo-documentation is for protection against audit. In the case of office procedures, the purpose of the photograph may be different. Nail wedge resection audits are usually confined to extended care facilities, but not always.

**The purpose of the documentation is to prove you actually injected the patient.**

You can add anything you want to the distal medial aspect of the great toe. You can also note that there is an ingrown nail on the medial side of the right hallux, and a fungus fifth toenail. There is some redness at the lines as well as the almost cyanotic appearance of the skin. Your best bet is to just download photos to your PC (either MAC of PC) with a cable. Then you can transfer them to disks or a memory stick. There is no need to print them. You will end up with a library of dated photos. Even if they are not connected to a particular patient’s medical records, you still have access to them. You should ALWAYS keep your NH records yourself, since they will never be obtainable in the future. Anything you write in the NH record will be lost forever, even as recently as six months after you see the patient. You should be making copies of every NH chart note you write into, usually on site.

**What Does a Close-up Phone Picture Look Like?**

Figure 2 was taken with an iPhone4, without any special lenses or additional lighting from the built-in camera. Notice the clarity of the skin lines as well as the almost cyanotic appearance of the skin.

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**When the Auditor Calls**

Auditors will want to see your medical records for a group of patients they select themselves. The question remains: Should you include the photos in addition to the records? There are different approaches, so ask your attorney. They may consider it best to just send them in if you have them. Mostly requested will be nail wedge resections, anyway.

For this situation, you could print them out. Never send them the ONLY memory stick with your entire collection. First, they are not asking for it. Second, they will be “lost” and it will be as though you never sent them. Nobody will acknowledge they were sent. Attorneys will advise you to NEVER volunteer information not specifically demanded. The same goes with a search warrant (SW). Any SW should be carefully examined to make sure it is correct. If a search warrant is in the name of only your partner and not you, it does not apply to you.

Authorities cannot simply “add your name” without probable cause. A search warrant must be signed by a sitting judge. Your attorney should speak for you on this, because if you try yourself, it might be viewed as “obstruction of justice” for which you can be charged. It is unwise to get into an argument over a SW at the door. Just remember that the data can be excluded by the Courts in the future, as the “fruit of the poisoned tree” relating to the Exclusionary Rule of the Fourth Amendment. While you are at the door looking over the SW, you can call your attorney, who

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Figure 3 was taken with an iP...
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will then speak to the authorities on your behalf.

A call to an attorney will not be viewed as obstruction of justice. This is usually regarded as a legal emergency and the paralegals will put you right through. You can then notify your attorney about the “conditions” in the SW. You are not required to allow the authorities to hear you speak with your attorney. A situation like this is best not handled by you. Members of the Bar have certain privileges that you don’t have.

HIPAA Regulations and Email

It is not illegal to email Personal Health information. But there are specific requirements, discussed here:

Dermatologic disorders are extremely photogenic.

http://hipaemailcompliance.org/hipaa-email-compliance/ or here: http://hipaa.yale.edu/guidance/emailconfidentiality.html

An advantage of emailing the photos to yourself is that there will be another permanent record of the date and time they were sent. In forensic terms, this cements authenticity of your photos. The courts routinely use cell phone transmission evidence to secure convictions. E-mailing uses that very same technique, this time to exonerate rather than convict. Maybe this is overkill. A library of photos tends to stand by itself. An important issue is how courts “view” photo evidence. If you have a library of pictures, courts will tend to regard them as genuine. This is definitely an uphill battle for prosecutors. Like rabbits, they tend to take the easiest road. You are definitely NOT the easiest road.

Whenever you are asked to send in computerized and other information of any kind, including photographs, you are entitled to demand that the auditors present their badge/employee number from the State or Federal Government. You have both a right and an obligation to demand this prior to disclosure of any materials. When you do this, you are also “notifying” them that you know their game, their rules. This sends an unwritten message of your own: “Don’t tread on me.”

After they supply you with their identity information, you should store that in a safe place, since HIPAA auditors have a right to request this of YOU in the future!

Uncompensated NH Visits

30-60% of NH visits are uncompensated. You can drastically improve that average by locating usable non-RFC billing codes. All you have to do is just look at patients’ H&Ps, and you will find a wealth of diagnostic data for you to qualify a standard visit, even if the patient does not have thickened nails. Some DPMs miss draining ulcers between toes or calluses with a nidus of possible infection. The patient may have AIDS, chronic alcoholism, a coagulation defect, or even diabetes! If you take the trouble to look at the ankle or heel, you might see an ulcer in the process of breaking down. Act like a doctor and you will be paid more for your trouble. You can also photograph other actionable diagnoses, some of which are very photogenic. Even small ulcers look “great” in a smartphone picture. Dermatologic disorders are extremely photogenic.

Conclusion

It makes everyone heartsick to read about Medicare convictions. This tragedy has affected far too many decent, but otherwise fragile and misguided people. Today, almost everyone has a cheap digital camera and/or a smartphone. Using these properly can protect you from being a victim.

 Disclaimer: Dr. Rosenblatt is NOT an attorney and strongly advises anyone with a legal question to refer to their own licensed attorney. This article is informational only and does not offer any legal advice.

Dr. Rosenblatt is now retired from podiatry and lives in San Jose, CA. He owned a Medicare-Certified Surgical Center in Washington State. He has been a frequent contributor to Podiatry Management Magazine.