

Conflict of interest and privilege in clinical and medicolegal photography

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A clinical photographer's work can have legal consequences, conflict of interest and privilege, are two of these areas. As healthcare professionals we need to be aware of the impact of the law on our professional practice.

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Introduction

The range of a Clinical photographers work is not restricted to patient photography but many other aspects including; Press and Public Relations work, medicolegal, operating theatre photography indeed anything required by an employer. As a consequence there are occasions when photographic requests may conflict with a photographer's status as an employee or the work output may be classed as privileged.

For each of these this paper will cover the legal definition, a real life scenario showing where 'conflict of interest' or 'privilege' can occur and discussion including examples from the literature or cases.

Conflict of interest

Definition

"A conflict of interest occurs when an individual or organization is involved in multiple interests, one of which could possibly corrupt the motivation. The presence of a conflict of interest is independent of the occurrence of impropriety. Therefore, a conflict of interest can be discovered and voluntarily defused before any corruption occurs."¹

An example of this is the requirement for any writers for this journal, the Journal of Visual Communication in Medicine, to declare any interests relating to the paper they have written². This follows the recommendations of the Conflict of Interest Policy of The International Committee of Medical Journal Editors (ICMJE)³.

Where an expert is instructed by a lawyer they are expected to give an unbiased opinion⁴. The expert is acting on behalf of the courts so is expected to be independent. So an expert should ensure that there are no conflicts of interest before accepting instructions.

Scenario 1

"During a period of snow and freezing weather a hospital secretary fell and suffered a fracture to her wrist whilst on an untreated path at the Hospital where she works. This was treated in casualty and led to a residual lack of joint movement. The member of staff has come via her Trade Union's Solicitors asking if you can take some photographs of her injuries as she is seeking compensation from the Hospital."

What is your answer in the following circumstances?

- A. You work for the same Hospital/Trust as the secretary.
- B. You are self-employed but contracted to the hospital to supply medical photographic services.
- C. You are self-employed with no connection to the Hospital or Trust.
- D. You are employed by a different Trust.

Whether a conflict does or doesn't exist depends on the closeness of the relationship. In A the relationship is too close and you would have to decline the instructions.

You could however suggest a colleague at another hospital. If you are a contractor, B, the relationship is far enough removed for you to undertake the work as you are not an employee, the same is true for C and D.

Discussion

Care must be taken if approached by colleagues as for National Health Service (NHS) photographers there is a conflict of interest if the injury was sustained in the hospital or while working for the same NHS Trust.

As an employee of the health authority or an independent medical photographer it would be inadvisable to provide photographs for a medical negligence claim against a consultant you work with or for an action by an employee against the health authority you work for. If you are asked to undertake such work your interest should be declared as soon as possible. They may still be happy for you to undertake the work but you need to declare the interest.

Similarly with accidents, occupational injuries and other personal injuries if you have any involvement with the second party to the action this should be declared. For example, if you were asked to write a report by an insurance company on a series of photographs that a close colleague had taken. You may be able to be objective but the report would carry little credence.

Privilege

Definition

"An evidentiary privilege is a rule of evidence that allows the holder of the privilege to refuse to provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding. The rationale is that clients ought to be able to communicate freely with their lawyers, in order to facilitate the proper functioning of the legal system."⁵

Scenario 2

"You were asked to take a series of photographs of hospital equipment showing how it could become a danger to patients. Some time later a solicitor asks you for copies of those photographs for litigation purposes. This request was passed on to the Trust's solicitors."

What would happen next?

- A If the photographs had been taken as teaching materials to support staff in reporting possible dangers.
- B If the photographs had been taken as part of a review to determine the degree of liability and possible litigation from broken equipment.

The key is why the photographs were taken. In A they are unlikely to be privileged but in B they are privileged though the exact wording of the original request will have bearing on the privilege.

Discussion

Photographs taken of hospital personnel, patients, relatives or members of the general public involved in accidents in the hospital are for the Trust's benefit and as such are privileged⁶.

Absolute privilege protects statements made by a client to his solicitor and in the case of the NHS reports or material evidence made by employees on behalf of the health authority for litigation purposes⁷. Any work undertaken in this context by an employee by the nature of their relationship to the Trust's is privileged.

If a case is brought by an employee or patient against the Trust's any photographs would need to be obtained by their solicitor through the discovery procedure⁸. They can of course have their own photographs taken, but Department of Health guidelines do not allow easy access to such evidence.

Where records are made primarily to prevent similar accidents occurring and not specifically in anticipation of litigation it was held that a NHS confidential accident report was not subject to legal professional privilege⁹. For a fuller discussion of legal issues around privilege see Clinical Negligence by Buchan and Lewis¹⁰.

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