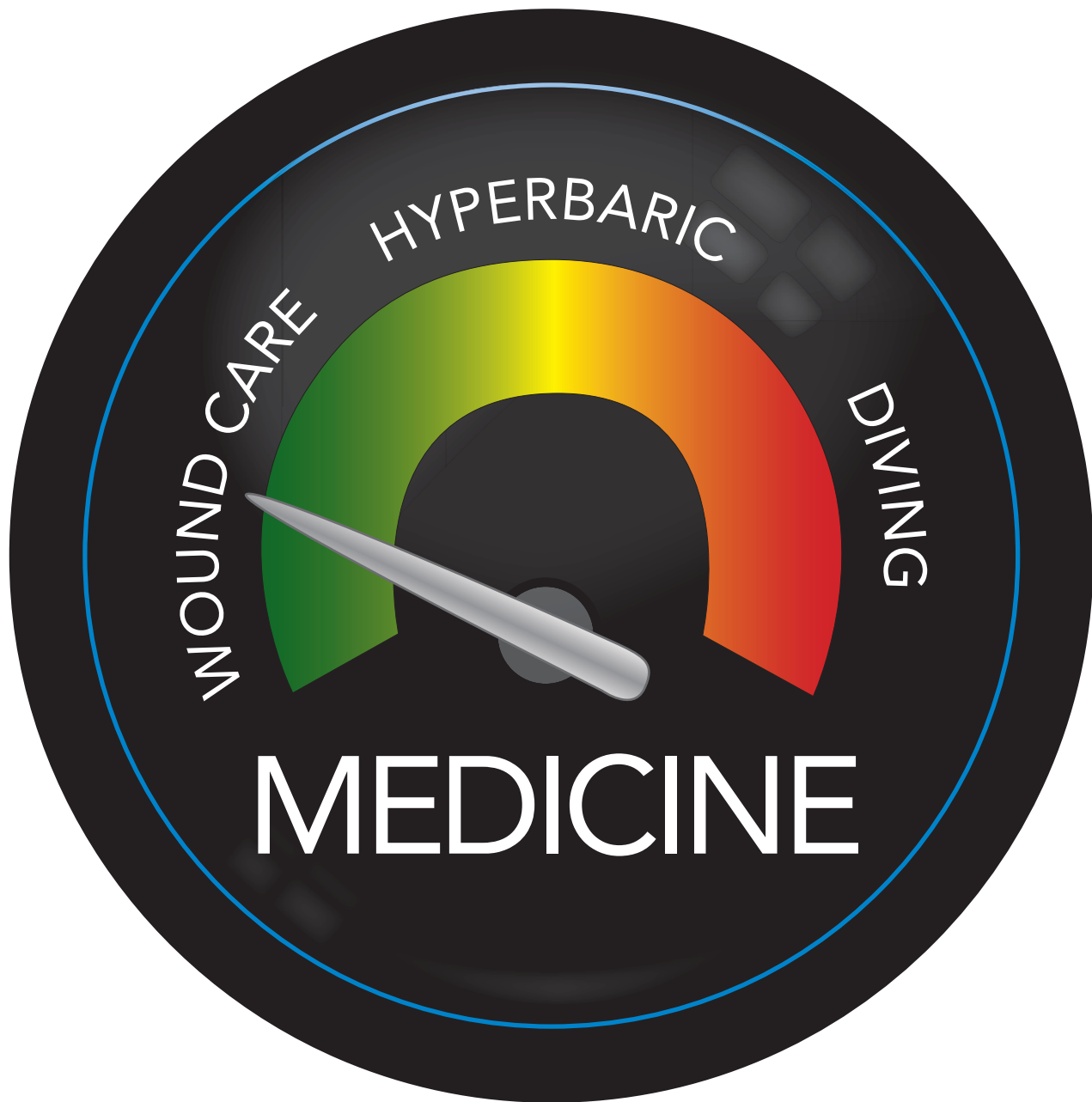


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# Designated Record Sets: The Overlooked HIPAA Requirement

By Kevin W. Yankowsky, JD

Over the past few years I have had many opportunities to speak to gatherings of wound care practitioners about a variety of issues relating to electronic health records, records retention in general, and the HIPAA requirements which apply thereto. One of the things I enjoy most about these speaking opportunities is the learning experience they often prove to be. Time and time again, I find myself surprised by how the reality of how many of these issues are handled in clinical settings differs from my theoretical expectations as an attorney removed from day to day clinical health care. One of the biggest surprises I have had in the recent past has to do with the lack of understanding of and compliance with HIPAA's requirement that healthcare providers have a Designated Record Set.

Under HIPAA, all covered entities are required to define what subset of documents comprises its "Designated Record Set", and identify where those documents exist physically (such as in paper files, electronic record systems, or both). The purpose of this requirement is for each covered entity to specifically identify the exact information and records that patients may, by right of law, access and amend in accordance with their privacy rights under HIPAA. The HIPAA statute specifically provides that individuals must be given the

right to inspect and obtain a copy of medical information contained in their Designated Record Set. HIPAA further provides that individuals must be given the opportunity to request amendments to the medical information contained in those records. Obviously, these rights cannot be exercised without defining the documents to which they apply. This is the purpose of the Designated Record Set requirement under the statute.



Under HIPAA, a designated record set is a group of records maintained by or for a covered entity that includes medical records and billing records about individuals that are used in whole or in part by the covered entity to make decisions about the individual's care. For the purposes of the legal name "Designated Record Set" a

"record" is defined as "any item, collection, or grouping of information that includes protected health information and is maintained, collected used or disseminated by or for the covered entity."

To be in full compliance with HIPAA, it is important that every covered entity define what it considers to be its Designated Record Set. The easiest way to do this, in my judgment at least, is with an institutional policy on this subject. This is, generally speaking, a simple and

straightforward thing to do. However, I am generally amazed by how few wound care practitioners have even recognized that a Designate Record Set is required, much less already implemented a policy or other appropriate procedural mechanism to create one at their institution. If you have not already done so, one of the simplest and most straightforward things you can do to increase your HIPAA compliance is to prepare and formally enact such a policy now.

Finally, when considering a policy establishing a Designated Record Set, it is important for all practitioners to remember that the privacy laws of their individual state may very well exceed the requirements of federal law with respect to these important topics. Never forget that HIPAA, both in its privacy and security role, is a legal floor, not a legal ceiling. States cannot insist on lower privacy and security requirements for protected health information than those required by HIPAA. However, all 50 states are perfectly within their rights to insist on higher stands of protection for health information than provided by federal statute. If your state is one of those which has chosen to go beyond the requirements of HIPAA with respect to patient access to PHI, be sure that your Designated Record Set policy complies with your state's law on the topic as well as HIPAA's requirements.

HIPAA violations regarding Designated Record Sets are, in my opinion at least, some of the most needless and easily avoidable HIPAA problems faced by wound care practitioners. Check your (or your institution's) HIPAA policies now, and supplement them if necessary to properly identify and establish a Designated Record Set, to avoid this very unavoidable yet very common HIPAA compliance error.



**Kevin W. Yankowsky** is a partner in the Health Law Litigation group of Fulbright & Jaworski's Houston office. Kevin has served as lead counsel in over 20 jury trials and ten appeals, in both State and Federal Court, the majority of which involved claimed damages at trial in excess of \$1 million. Kevin's trial practice encompasses virtually all types of civil litigation facing the healthcare industry. He serves as lead counsel in professional liability claims, complex commercial suits, class actions, products liability matters, ERISA actions, premises liability suits, and Federal False Claims Act cases. In addition to his extensive courtroom experience, Kevin advises clients on Joint Commission investigations, hospital committee, and medical peer review matters. Kevin also serves as a frequent consultant on legal, litigation, and enterprise risk issues for health industry clients. Kevin's established reputation as both an accomplished trial lawyer and risk management consultant have also made him a frequently featured speaker at national health care industry conferences and professional symposiums across the country.



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