
Legal Considerations in Social Media

Daniel F. Shay, Esq.

Daniel F. Shay, Esq.
Alice G. Gosfield and Associates, PC
2309 Delancey Place
Philadelphia, PA 19103
(215) 735-2384
Dshay@gosfield.com
www.gosfield.com

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Introduction

- Social media usage is on the rise.
 - Since 2005, U.S. social media usage increased from 8% to 77% by 2016.
 - Social media is convenient and useful for marketing, and may help improve quality of care.
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Introduction 2

- Overview of Social Media.
 - Legal concerns
 - HIPAA/Confidentiality
 - Medical Malpractice
 - Practical guidance for physician practices.
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Social Media Overview

- General definition of “Social Media”
 - “Forms of electronic communication (such as web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).” -- Merriam-webster.com definition.
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Social Media Overview 2 – Popular Sites

- Facebook and Twitter
 - Facebook estimates 1 billion active users per month. Has most of the common features already described.
 - Has numerous privacy controls. Can create custom groups of friends and differentiate who can see what you post.
 - Twitter is different, but also hugely popular. Limits user posts (“tweets”) to 280 characters (including spaces and punctuation).
 - Can “retweet” another user’s tweet on your own account.
 - Can delete your own messages, but not retweets of your message.
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Social Media Overview 4 – Popular Sites

- Twitter (continued)
 - Two privacy settings: public account, and “protected” account.
 - Public accounts are visible to anyone on the internet, even through browser windows.
 - “Protected accounts can only be seen by followers, each of whom must be approved.
 - Pinterest, Instagram, LinkedIn, Yelp, etc.
 - Usually have some, but not all of the features of Facebook or Twitter.
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Confidentiality and HIPAA Concerns

- PHI in social media context is complicated.
 - Anything posted on social media is unencrypted, and therefore “Unsecured PHI” (UPHI).
 - Improper disclosures implicate Privacy Rule and Breach Notification Rule.
 - Whether breach occurred depends on site and tools used.
 - Failure to address social media in HIPAA policies may violate HIPAA Security Rule.
 - Can be an issue in the loss of personal and work devices, like phones, tablets, laptops.
 - Also, most texting is unsecured.
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Confidentiality and HIPAA Concerns 2

- Policies must address avoiding improper disclosures on social media.
 - Common misconception: patient inquiry to practice does not constitute HIPAA authorization to disclose.
 - Some disclosure may be intentional.
 - More likely, disclosure will be unintentional.
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Medical Malpractice Concerns

- Physicians are already wary of using social media for clinical purposes.
 - QuantiaMD survey – 40% of surveyed physicians were not interested in diagnosing/treating online.
 - “There is no substitute, clinically, for actually seeing and examining the patient.”
 - “Lawsuits, lawsuits, lawsuits.”
 - One primary concern: establishment of physician-patient relationship.
 - Not much caselaw for social media sites, specifically.
 - Can analogize from other cases, however.
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Medical Malpractice Concerns 2

- Caselaw analogs
 - Most relate to establishment of doctor-patient relationship.
 - Examples:
 - Attending supervising residents gets phone call re: care question.
 - Phone call from fishing trawler in Bering Strait to ship-to-shore contracted medical provider.
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Medical Malpractice Concerns 3

- Caselaw takeaways:
 - The physician-patient relationship can be established through minimal contacts. No need to physically encounter the patient. Telephone conversations, even when someone else was actually laying hands on the patient, have been enough.
 - These analyses may expand to social media setting.
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Medical Malpractice Concerns 4

- Social media also raise issues re: confidentiality of records for discovery purposes.
 - If you disclose online, can be discovered in lawsuit during “discovery” phase.
 - The “E” in “E-mail” stands for “evidence.”
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Practical Guidance for Physician Practices

- Clear, firm policies re: social media and personal device use.
 - Consider limiting the time employees may use social media during work.
 - Total ban is probably impractical.
 - Consider NLRB restrictions.
 - Control who posts on practice's behalf on social media.
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Practical Guidance 2

- Generational differences can come into play.
 - Younger patients & employees are more likely to use social media. Also more comfortable with broadcasting their lives.
 - May lead to patients feeling “shut out” of physician’s lives if physicians maintain professional boundaries.
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Practical Guidance 3 – Professional Associations

- AMA suggests maintaining separate accounts: personal and professional.
 - AAFP suggests not accepting patient friend requests. Use business pages instead.
 - ACP advises using same standards online as physician would use in clinic. Be aware of the privacy settings on social media sites, too.
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Practical Guidance 4 – HIPAA and Confidentiality

- Understand how information flows on networks. How quickly it can be disseminated.
 - Demonstrate this, where possible.
 - Educate practice employees on HIPAA in electronic context.
 - Reminders on what constitutes PHI, in context.
 - Use more secure methods of communication, or suggest telephone/in-person meetings.
 - **Update your Security Risk Assessment!!!**
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Practical Guidance 5 – Malpractice

- Simplest approach: do not engage in clinical activity over electronic media.
 - Policies should address how to respond to “Does this look infected?” inquiries. Advise setting up office appointment.
 - For more serious inquiries (e.g. “Am I having a heart attack?”), advise contacting practice or visiting emergency department. Don’t advise on whether it is/isn’t a heart attack.
 - Doctors Company – social media “not appropriate for doctor-patient communications.” Also, it’s all available for discovery.
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Practical Guidance 6 – Malpractice (continued)

- With individuals who are not patients, goal is to avoid establishing doctor-patient relationship.
 - No responses to clinical questions.
 - With existing patients, goal is to avoid “harm.”
 - Low risk: general information, like JAMA article, WebMD entry, CDC web page, etc., without making diagnosis.
 - Anything more serious, take it off-line.
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Practical Guidance 7 – Contractual Considerations

- When joining an organization, find out about their social media policies.
 - What are you allowed to do? What is prohibited?
 - Who owns your online material?
 - Get copies of existing policies and review them prior to signing, just like any other external document.
 - This goes double if they are “incorporated by reference.”
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Conclusion

- Electronic communication is a fact of life.
 - Social media, and other electronic practice tools are the backbone of this communication.
 - As younger patients enter the market, social media will become even more important.
 - Physicians need to understand their legal risks in this setting, and how to navigate them.
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Additional Resources

- Shay, Daniel, "Physicians and Social Media: Untangling the Web," Health Law Handbook, 2014 ed., Alice G. Gosfield, editor. Available at www.gosfield.com.
 - Shay, Daniel, "Physician Use of Social Media: Navigating the Risks" Medical Economics, Aug. 25, 2014, pp. 44-46. Available at www.gosfield.com.
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