

Legal and Risk Management Considerations In the Age of Social Media



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PROGRAM OBJECTIVES

At the conclusion of this presentation, participants will be able to:

- Appreciate patient confidentiality and boundary issues which can occur with the use of social media.
- Recognize the behavioral health provider's duty of professionalism when engaging in social media.
- Discuss cases and case examples with social media as a central issue.
- Explore risk management and liability exposures pertaining to confidentiality, boundary issues, duties of professionalism and general standard of care issues as they apply to the use of social media.



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SOCIAL MEDIA CAN TAKE ON DIFFERENT FORMS

facebook
YouTube
digg
delicious
social bookmarking
LinkedIn

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SOCIAL MEDIA EMERGING ISSUES

- Online threats
 - Duty to Warn Considerations
 - Contact Authorities?
- Live streaming
 - Report?
 - Where is the Patient Located?

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CASE EXAMPLE

A psychiatric resident in the ED posts a picture on Instagram during a long overnight shift. The entry includes comments about the specific details of a newly admitted patient's bizarre behavior, the fact that he arrived under the influence, and includes some comments about his presentation including #bizarepatients. However, no specific patient identification (name, DOB, MR#) is included in the resident's post.

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LEGAL AND RISK MANAGEMENT CONSIDERATIONS

- Confidentiality
- Professionalism
- Boundaries
- Standards of Care



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CONFIDENTIALITY

- Communication *with* patients
- Communication *about* patients



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CONFIDENTIALITY: PRIVACY AND SECURITY

Behavioral health provider is responsible for preserving confidentiality of communications:

- Verbal
- Written
- Electronic



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CONFIDENTIALITY: COMMUNICATION WITH PATIENTS VIA EMAIL

- Private, but not confidential
- Encryption
- Should be part of the medical record
- Informed consent issues



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CONFIDENTIALITY: COMMUNICATION WITH PATIENTS

Email correspondence with patients can be problematic:

A California Appeals Court decision found that a patient's communication with her attorney via email may lose protection when there is a transmission from a workplace device.



Holmes v. Petrovich Development Co., LLC, 191 Cal.App.4th 1047 (2011).
Jennings v. Jennings, SC Supreme Court, 2012 S.C. LEXIS 204 (October 2012).



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CONFIDENTIALITY: COMMUNICATION WITH PATIENTS

- Facebook
 - Public by default, but can limit content
 - Not necessarily confidential
- Twitter (and other micro-blogging services)
 - Public by default, but can make private
 - Not confidential
 - Can be hacked, may not be secure
- The problem with trolling/fake profiles



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FACEBOOK WITH PATIENTS: CASE EXAMPLE

A clinician friended her patient on Facebook to monitor her activity. The patient posts message on her Facebook wall that says she is going to end her life. The clinician has other patients who have access to her Facebook page and they see the patient's post. However, the clinician is on vacation and does not see the post.



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FACEBOOK AND CONFIDENTIALITY

“The relationships to be fostered through those media are basic friendships, not attorney-client, physician-patient, or psychologist-patient types of relationships, and while one may expect that his or her friend will hold certain information in confidence, the maintenance of one’s friendships typically does not depend on confidentiality.”

McMillen v. Hummingbird Seedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 290 (Sept. 2010);
Trail v. Lesko, Allegheny Cty. CCP, C.A. No. GD 10-017249 (July 2012).



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CONFIDENTIALITY: DISCUSSING PATIENTS ONLINE

- May violate HIPAA
- May violate patient confidentiality/privacy
- May lead to lawsuit and/or disciplinary action
- Who else saw what you discussed?



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CONFIDENTIALITY: COMMUNICATION ABOUT PATIENTS

A Rhode Island physician was reprimanded and her privileges were revoked due to posting information online. The physician did not include the patient's name; however, sufficient information was conveyed such that others within the community could identify the patient.



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Conaboy, Chelsea. For doctors, social media a tricky case.
http://boston.com/lifestyle/health/articles/2011/04/20/for_doctors_social_media_a_tricky_case. April 20, 2011.



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CONFIDENTIALITY: WHAT IF A PATIENT REVIEWS YOU ONLINE?

- Communications Decency Act
- Inconsistent legal precedent
- HIPAA
- Options?

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PROFESSIONALISM

- Held to a higher standard
- Personal reputation
- Professional reputation

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ONLINE PROFESSIONALISM: GUIDANCE

- AMA Policy in the Use of Social Media
- Federation of State Medical Boards (FSMB)
- The American College of Physician's (ACP) Ethics Manual
- ACP and FSMB's Joint Policy Paper



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YOUR ORGANIZATION'S POLICIES

- Patient contact prohibited?
- Are "posts" in compliance?
- Can you be terminated for online posts?
- Office staff friending/following patients
 - FTC Guidelines



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PROFESSIONALISM: PITFALLS OF SOCIAL NETWORKING

- Blurs line between personal and professional personas
- What constitutes a "friend?"
- Online profiles have been used to suspend trainees
- Online profiles may be used by admissions committees
- Consent?



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PROFESSIONALISM

- How do you monitor your “friends?”
- Negative “Tagging?”
- Security settings
- Questionable content?



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PROFESSIONALISM

- 6 Billion hours watched/month
- 300 hours of video uploaded every minute
- If posting, who views?
- If posting, who monitors?



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PROFESSIONALISM- PHOTOGRAPHS



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PROFESSIONALISM

The family of a 97 year old resident with Alzheimer's Disease filed suit against a nursing home claiming that a caretaker posted a video on YouTube where she engaged in a "lap dance" for the resident which they allege invaded his privacy and inflicted outrage, shame and humiliation for the purpose of entertainment. The family further claims that the video was posted on YouTube without the consent of the resident or his family.

<http://www.ghiprivacy.net/?p=7482>, Family Says Caretaker's Lap Dance for Alzheimer's Patient was Posted on YouTube, August 23, 2011
<http://www.courthousenews.com/2011/08/23/lapDance.pdf>

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PROFESSIONALISM: HOW CAN BLOGGING IMPACT A LAWSUIT

One of the first things you will hear when you are named in a lawsuit is do not discuss the case with anyone other than your attorney or your spouse.

This includes discussing the case in an online blogging venue.



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PROFESSIONALISM: HOW CAN BLOGGING IMPACT A LAWSUIT

Most skilled plaintiff's attorneys will conduct research on you:

- Before filing the suit
- During the trial
- All the way through trial

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PROFESSIONALISM: HOW CAN BLOGGING IMPACT A LAWSUIT

A pediatrician in Massachusetts was a named defendant in a lawsuit on a wrongful death claim. His case went to trial. "Dr. Flea" as he called himself engaged in online blogging about his trial including sharing defense strategies, discussions about the jury and opposing counsel representing the plaintiff who filed suit against him. During his cross examination at trial, plaintiff's counsel, who had been following the blog, confronted "Dr. Flea" while he was on the witness stand.



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PROFESSIONALISM: HOW CAN BLOGGING IMPACT A LAWSUIT

**Outcome:
The next day, the case settled**



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PROFESSIONALISM: ONLINE VIOLATIONS

Figure. Prevalence of Online Professionalism Violations Reported to State Medical Boards (N=48)



Bar length indicates total frequency for each violation type.

Greysen, SR, Chretien, K, Research Letter: *Physician Violations of Online Professionalism and Disciplinary Actions: A National Survey of State Medical Boards*, JAMA, 307:11(2012).

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BOUNDARY ISSUES WITH SOCIAL MEDIA

- Consider how professional boundaries may be affected by communications between clinician and “friends” or “followers”
- Record of electronic communications may support the existence of provider-patient relationship
- Licensure implications



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BOUNDARIES AND SOCIAL NETWORKING

Randomized, stratified mail survey of practicing physicians (PP), resident physicians (RP), and medical students(MS), (respondents = 455 out of 2,836 delivered surveys sent)

- 93.5% MS, 79.4% RP, 41.6% PP used social networking sites with FB being the most popular site
- 59% of respondents found it ethically unacceptable to interact with patients
- 79% of respondents did not think communication with patients within online social networking could be safely accomplished without compromising patient confidentiality



Bosslet, et al., "The Patient-Doctor Relationship and Online Social Networks: Results of a National Survey, Journal of General Internal Medicine," 26(10) 1168-74, June 2011.

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BOUNDARIES AND SOCIAL NETWORKING

Case Example: A patient sends a “friend” request or wants to “follow” you. Issues:

Accepts

- Possible alliance building
- Blurs boundary re: nature of relationship
- Blurs boundary re: treatment setting
- Invites breach of confidentiality

Declines

- Possible alliance destroying
- Confirms professionalism and commitment to patient’s best interest



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BOUNDARIES: DO YOU GOOGLE YOUR PATIENTS?

- Patient may experience it as a boundary violation
- May be difficult to respond naturally/ neutrally if you already know patient revelation
- May be difficult to respond if there is a discrepancy
- With consent, viewing patient's online info may lead to productive discussions re: online presence

34 White H, "Locating Clinical Boundaries in the World Wide Web," American Journal of Psychiatry. 2009; 166(5): 620-621.



BOUNDARIES: EMAIL/TEXTING

- Can be a slippery slope
- Do you have guidelines, policies, procedures in place to address issues?
 - Safety
 - Security
 - Patient consent
- Can establish a Provider-Patient relationship
- Licensed?



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HOW DOES CONTEXT INFLUENCE CLINICAL CARE?

- Email
- Smart phones & text messaging
- Mobile technologies

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RISK CONSIDERATIONS: EMAIL

- Who is reading email?
- Does patient receive the email?
- Safety precautions?
- Informed consent issues?
- HIPAA



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RISK ISSUES WITH SMARTPHONES

- Texting
- Photographs
- Distractions
- Privacy
- Security



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SMART PHONES: ADVANTAGES

- Facilitates communication
- Immediate access to clinical data
- Real time decision support
- Providers likely have device with them



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RISK CONSIDERATIONS: SMART PHONES/TEXTING

- Security issues?
- Safety precautions?
- Informed consent issues?
- Joint Commission Opinion



Joint Commission prohibits secure texting for patient care orders.
<http://www.beckershospitalreview.com/quality/joint-commission-prohibits-secure-texting-for-patient-care-orders.html>

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PATIENT PORTALS

For the Patient:

- Check appointment schedules
- Request an appointment
- Check lab results
- Examine bills & statements
- Request a prescription refill
- Complete new patient intake forms

For the Provider:

- Appointment reminders
- Electronic bills & statements
- Lab results



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PATIENT PORTALS: ISSUES TO CONSIDER

- Patient should not not have access to HCP records
- Patient only views what HCP wants
- HCP note in record remains protected
- Informed consent
- Policies and Procedures
- "Log on" credentials
- Auto "Log off"
- Back-up system

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CLOUD STORAGE



- Online storage by third parties
- Covered entity is responsible
- Business Associate Agreement needed
- Ensure third party is aware of HIPAA/HITECH

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MOBILE DEVICES ARE MOBILE



- 8,016 devices left in airports
- 1 laptop stolen every 53 seconds
- Most stolen off-site/in transit
- 70 million smartphones lost each year (only 7% found)

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USAToday.com, "Thousands of mobile devices lost at airports" (07/09/2012).
Arianna Schweber, "The Cost of Stolen Devices," (July 19, 2012),
<http://blogs.absolute.com/blog/the-cost-of-stolen-devices> (accessed 10/16/12).



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MOBILE DEVICES: RISK MANAGEMENT STRATEGIES

- Maintain control of device
- Encrypt *all* data
- Use secure connections
 - https
 - ssl
- Disable Wi-Fi and Bluetooth
- Camera phones



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MOBILE DEVICES: RISK MANAGEMENT STRATEGIES (CON'T)

- With Bluetooth—make sure to set them to “non-discoverable”
- Use passwords
- Avoid using public Wi-Fi and hotspots
- Avoid clicking on suspicious links
- Know what apps you are installing
- Keep security software “updated”
- Do not share usernames and passwords



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DATA BREACHES

- Encrypted software critical
- Subject to HIPAA fines
- Breach Notification Rule



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MOBILE APPS

- 2017: Expected that there will be 268.69 billion apps downloaded to smartphones
- 2018: Mobile health technology market expected to exceed \$8 billion



International Data Corporation;
<https://www.statista.com/statistics/266488/forecast-of-mobile-app-downloads/>

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GUIDELINES FOR PSYCHIATRISTS USING SOCIAL NETWORKING SITES

- **Respect Boundaries**
 - Do not invite patient to become an online friend
- **Avoid Dual Relationships**
 - Patient doesn't equal online friend
- **Respect Privacy**
 - Patient's online information shouldn't go into the medical record without consent
- **Maintain Professionalism**
 - Exercise restraint when disclosing on the internet
- **Respect Your Privacy**
 - Read site's privacy settings - technology is imperfect




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GUIDELINE/POLICY RESOURCES

- Mayo Clinic Center for Social Media: <http://socialmedia.mayoclinic.org>
- Vanderbilt University Medical Center: <http://www.mc.vanderbilt.edu/root/vumc.php?site=socialmediatoolkit&doc=2692>
- Sentara: <http://www.sentara.com/Policies/Pages/SocialMediaPolicy.aspx>
- Kaiser Permanente: http://xnet/kp.org/newscenter/media/downloads/socialmediapolicy_091609.pdf
- Sutter Health: http://www.sutterhealth.org/employees/social_networking_policy.pdf
- Ohio State University Medical Center: <http://www.scribd.com/doc/27663931/Ohio-State-University-Medical-Center-Social-Media-Participation-Policy>
- M.D. Anderson Cancer Center: <http://www2.mdanderson.org/cancerwise/policies-social-media-guidelines.html>
- The Cleveland Clinic: <http://my.clevelandclinic.org/about-cleveland-clinic/about-the-website/social-media-policy.aspx>
- University of Maryland Medical Center: <http://www.umm.edu/resources/web-compliance-policy.htm>
- Centers for Disease Prevention and Control: <http://www.cdc.gov/SocialMedia/Tools/guidelines/index.html>
- Practice Guidelines for Video-Based Online Mental Health Services: <http://www.americantelemed.org/practice/standards/ata-standards-guidelines/practice-guidelines-for-video-based-online-mental-health-services>




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GUIDELINE/POLICY RESOURCES

- AMA Policy: Professionalism in the Use of Social Media: [http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9124.page?_utma=247071366.1376930666.1405358850.1405358850.1405358850.1&_utmb=247071366.0.10.1405358850&_utmc=247071366&_utmx=-&_utmz=247071366.1405358850.1.1.utmcsr=ama-assn.org|utmccn=\(referral\)|utmcmd=referral|utmctt=/ama&_utmv=-&_utmk=215473940](http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion9124.page?_utma=247071366.1376930666.1405358850.1405358850.1405358850.1&_utmb=247071366.0.10.1405358850&_utmc=247071366&_utmx=-&_utmz=247071366.1405358850.1.1.utmcsr=ama-assn.org|utmccn=(referral)|utmcmd=referral|utmctt=/ama&_utmv=-&_utmk=215473940)
- APA Principles of Medical Ethics, Section 4, article 3: <http://www.psych.org/MainMenu/PsychiatricPractice/Ethics/ResourcesStandards.aspx>
- AACAP Practice Parameter for Telepsychiatry with Children and Adolescents: <http://www.in-sight.net/articles/Practice-Parameter-for-Telepsychiatry-with-Children-and-Adolescents-2008.pdf>
- The Joint Commission, Update: Texting Orders: https://www.jointcommission.org/assets/1/6/Update_Texting_Orders.pdf




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GUIDELINE/POLICY RESOURCES

- APA Telepsychiatry resource document:
<http://www.psych.org/Departments/HSF/UnderservedClearinghouse/UnderservedClearinghouse/undocuments/telepsychiatry.aspx>
- FTC guidelines:
<http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>
- Federation of State Medical Boards: Model Policy Guidelines for the Appropriate Use of Social Media and Social Networking in Medical Practice <http://www.fsmb.org/pdf/pub-social-media-guidelines.pdf>
- ACP/FSMB, "Online Medical Professionalism: Patient and Public Relationships: Policy Statement From the American College of Physicians and the Federation of State Medical Boards," (April 2013), <http://annals.org/article.aspx?articleid=1675927>



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