

Anything You Post Can, and May, Be Used Against You



Medical Malpractice Risk and Liabilities Associated with the Rise of Technology in Health Care¹

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**This is the second article in a four-part series exploring social media and electronic communication challenges for health centers.*

Imagine that you're a nurse at a health center and I'm your friend, but I'm not your patient nor have I visited the health center for medical care. I tweet the following: *"Marathon training is painful. Knee won't stop throbbing – Friend, you're a nurse, the popping sound I heard was probably nothing, right?"* You reply: *"You overachiever! Probably overdid it on the run, but maybe you need new sneakers? Ignore the pop and try some extra strength Tylenol."*

Another friend posts on Facebook, tagging you: *"I have the WORST headache ever: my head has been pounding for hours and it feels like a jackhammer in there –I'm miserable! Any advice?"* and you respond: *"Nothing a little Advil and shut-eye can't fix!"*

You may think you're helping by providing friendly advice, but as a health care professional, it's extremely risky to provide medical advice without first examining a patient or inquiring more about the injury or health condition.

Disclaimer: The following article is not specific legal advice. If you are involved in a potential or pending malpractice lawsuit, consult qualified legal counsel about your individual situation.

¹ For health centers, common risks associated with social media and electronic communication generally fall into three categories: privacy and security, medical malpractice, and reputation. The first article in the four-part series covered privacy and security risks related to social media use. This second article focuses on social media challenges related to malpractice risks and liability.

A Quick Reminder: What is Social Media?

The term “social media” is used to describe websites, applications, and other electronic platforms that enable users to create and share content such as pictures, personal messages, videos, ideas, news stories, and other information. While the scope is ever-expanding, this includes social networking websites such as Facebook, Twitter, Instagram, LinkedIn, Pinterest, and YouTube, as well as a multitude of blogs and other sites that have user-generated content. Online review sites (e.g., Yelp, Healthgrades, ZocDoc) may also be considered social media.



What if I did some real damage to my knee and delaying a visit to the doctor resulted in a permanent injury? What if the other friend's headache is really a concussion? If one of us takes your advice and it causes us further harm, we could sue you for malpractice. Even worse, if we live in different cities across the country (or just across the state line where you're licensed), you may have just engaged in the unlicensed practice of medicine.

Is everything I say a medical malpractice claim waiting to happen?

The examples in this article demonstrate how easy it is for a seemingly innocent comment on social media to escalate. However, in order for any of these situations to rise to the level of malpractice, there must be more to the story. The legal elements required to prove a malpractice claim are complex and vary somewhat from state-to-state, but it's helpful to understand the basics in order to take proper precautions

against potential malpractice claims.

Briefly, successful malpractice claims must prove the following elements:

1. A provider-patient relationship was established and therefore, the provider owed the patient a *duty of care*—a duty to provide reasonable care, as appropriate for the situation and the expertise of the provider (e.g., a medical assistant is not held to the same standard as a physician, but would be expected to call a physician into the room if necessary).
2. One or more of the provider's actions or inaction violated (in legal terms, “breached”) the duty of care, which means that the provider deviated from the professional standard of care and failed to provide appropriate care to the patient.
3. The provider's breach (the actions falling short of the standard of care) *caused or contributed* to some sort of harm to the patient, like a worsened condition due to improper or missed diagnosis.

4. The patient sustained damages (further injury, monetary harm e.g., medical costs, etc.) because of the provider's breach.

Social media and malpractice risks: What's twitter got to do with it?

There are two main areas of concern when it comes to social media, technology, and medical malpractice:

- Committing an act that constitutes potential malpractice; and
- The impact of social media use on a potential or pending malpractice proceeding.

In our previous *CHForum* article, “My Patient Wants to Friend Me on Facebook!,” we considered the rise of the connected patient and the increasing impulse of patients to connect with their doctors for social or informal, but ultimately non-medical, purposes. However, with websites like WebMD and MedHelp that offer aid in identifying symptoms or crowdsourcing health advice, many patients expect the convenience of instant communication when it comes to their health care. As a result, patients may find it convenient to reach out to providers (or health centers) with medical questions through public channels on social media, even if the health center has a patient portal or other secure means of communication set up for this purpose.

Or, a patient may reach out to a provider with whom (s)he does not have an established relationship for medical advice due to that provider's expertise or social media presence. A provider's response to this question could establish a treatment

relationship (more on this to follow), making the provider accountable for the advice.

While it is far more common for a provider's use of social media to be used against him or her in a malpractice proceeding than it is for online communications to be the source of malpractice claims, providers should remain cautious about all of their online behavior.

Provider-patient relationships and the duty of care

As previously mentioned, whether or not a provider owes a "duty of care" to a patient depends, in part, on whether (or not) a provider-patient relationship has been established. If a provider owes a duty of care to a patient and (s)he fails to diagnose, treat or otherwise care for that patient, the provider could face a malpractice action.

Online interactions between patients and providers complicate this question by creating uncertainty around when and how such a relationship begins and what type of activity constitutes "practicing medicine."

Consider the following scenarios:

- A provider tweets a reminder to check for ticks. An individual replies to this tweet with specific questions about Lyme disease, but has never had a face to face visit with the provider. Does the online interaction create a provider-patient relationship? If the provider responds, is the provider "practicing medicine" by giving generic medical advice?
- A health center patient sends a message to the patient's provider through the health center's Face-

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book page about a potentially urgent health condition. Could a failure to respond in a timely manner constitute a breach of the duty of care?

- For Federal Tort Claims Act (FTCA)* purposes, a "health center patient" is someone who accesses care/who has accessed care *at a health center site* unless the individual is receiving triage services. Do online communications constitute triage services, thereby making the individual a "health center patient" for FTCA purposes?

[*FTCA provides medical malpractice protection for Federally Qualified Health Centers that meet certain requirements annually.]

- A pediatrician writes a personal blog with general advice for raising healthy kids. A parent reads a blog entry on warning signs of childhood diabetes and posts a question specifically about his or her child's medical condition. If the pediatrician responds, is this child she's never seen before now his or her patient?

Unfortunately, the law is slow to catch up with technology, so there are few clear lines defining when an interaction on social media establishes

(or clearly doesn't) a provider-patient relationship, leaving all of us with more questions than answers.

Practically speaking, health centers can and should explain to patients how to communicate with providers safely and securely, providing examples of when it is appropriate, or not, to use certain channels. In addition, the health center's social media presence should include disclaimers that comments do not constitute medical advice and that patients should call with questions or to make appointments (or for emergencies, call 911).

If patients routinely post questions publicly that are more appropriate for an exam room, the health center may want to increase moderation [i.e., its supervision/oversight] of these pages or accounts and consider setting up a standard message directing patients to a more appropriate venue for health concerns.

Personal social media accounts

Health care providers' personal use of social media can pose a malpractice risk as well. Any posts published around the same time when the alleged malpractice occurred may be directly relevant and could spell trouble.

In an extreme example, a provider updating Facebook during a medical procedure could demonstrate negligence or, at the very least, serve as a general indication of the provider's poor judgment (not to mention the likely HIPAA violation if any identifiable information was shared). A more realistic example would be a provider tweeting that (s)he is nervous, but excited, about performing a new procedure the next day.

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Even posts that have nothing to do with the facts and circumstances of a malpractice claim (or medicine in general) could be used to paint a provider in a negative light. For example, a series of posts at three or four in the morning or a tweet about being out at a bar sent shortly before the beginning of a shift may suggest that the provider was not fully rested for a 6 AM visit.

Or, if a provider's friend shares a controversial news story and the provider gets into a heated argument with another acquaintance in the comments, complete with profanity and derogatory statements. This exchange may be used to illustrate poor character, a quick temper, or other damaging personality traits. The more you tweet or share, the more posts opposing counsel has to choose from in establishing your character and defining the theme of the case.

More concretely, something as innocent as a phone buzzing to announce a new message could momentarily distract a provider from the patient's description of their health concern and the provider could miss a key detail that the patient doesn't highlight again. Or, the same new message "ding" could impede a provider's concentration while conducting a physical exam.

Best practices for social media use

Despite the alarming examples above, providers and health centers can – and should, if they desire – still use social media. It can be a great resource to educate patients and to build relationships with peers and colleagues. However, it is important for providers and health centers to

be cautious about online activity, particularly when the subject matter enters the medical realm.

Here are some general tips:

- **Establish and routinely update policies.** Many workplaces prohibit or limit use of smartphones for personal matters at work, especially for social media use. A rule as simple as requiring cell phones to be on silent when working with patients can reduce distractions.
- **Do not give medical advice online.** Answering a friend's health question may seem innocuous, but it's best to avoid giving out any clinical advice online so as not to inadvertently establish a provider-patient relationship or engage in the improper practice of medicine.

If you're unsure if a post or message could be problematic, use disclaimers [similar to the legal disclaimer that appears at the beginning of this article] to clearly state that the content is not meant as individual medical advice and encourage the recipient(s) to consult their primary care providers or other appropriate medical professional.

- **Redirect patient inquiries.**

If you receive clinical questions from a patient on social media, direct him or her to more appropriate channels like messaging in a secure patient portal or calling the health center. Given the question, it may be most appropriate for the patient to schedule a visit so that a health professional can examine him or her and answer questions in person.

- **Avoid posting about work on social media.**

Social media is a prime location for many people to share (and vent) about their experiences in real time. Though it may be tempting to post about a particularly frustrating patient or unique diagnosis, it is best not to. Even if it is posted anonymously or you change the names or alter the facts slightly, these posts and comments could inadvertently identify patients (leading to a HIPAA violation) or could be used against you if you find yourself involved in a malpractice proceeding.

- **Control who can view your profiles and accounts.**

Providers should keep personal and professional accounts separate and should use the highest possible security settings on both. It is also a good idea to routinely go through your "friends" or followers to make sure you know with whom you're sharing information. Security settings on a social media platforms change from time to time so you may also need to routinely make adjustments to what and with whom you're sharing online.

- **Think Before You Post.**

Everyone should use discretion when posting messages or pictures online.

Once you post, the information is public, it's linked to your name, and it's more or less permanent. Even if you delete it, the information is likely to be archived and accessible somewhere. Consider what articles, blog posts, and videos you're commenting on or sharing. If someone tags you in a picture (i.e., identifies you as a person in the photograph, linking your account(s) to the picture), consider "removing the tag" if it isn't a picture you would want to post yourself.

If you or one of your colleagues are involved in a pending malpractice action, there are additional precautions to consider:

- **Do not delete past posts.** This advice may seem counterintuitive, but famously, "it's not the crime, it's the cover up!" If there are posts that may shed a negative light on a certain provider or a particular incident, deleting them can make the situation worse by suggesting that the provider or the organization has something to hide.
- **Do not post about possible, pending, or even closed legal matters on social media.** If you are involved in a malpractice action, your mantra should be "anything I post or share can be used against me." Particularly while a claim is pending, the best practice is to assume everyone can see everything you post online so it is important to be especially vigilant. Understandably, the proceeding will be on the forefront of your mind and you may wish to update family and friends on the status or they may inquire how it's going,

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but it is best not to discuss an ongoing matter online (or through email or text).

- **Lock down your profile(s).** If you have not done so already, consider enhancing security on your profiles (or, as appropriate, deleting them) for the duration of the proceeding.
- **Do not "friend" or newly connect with ANYONE connected to the pending case.** This includes your attorney and their staff, opposing counsel and their staff, the individual who sued you, etc. While your attorney will want to see your social media profiles and may ask to see pictures and comments you've posted, do not share your account log in information and password with your attorney.

If the malpractice claim leads to a more formal proceeding (like a trial), do not make any attempt to connect with judges and jurors or even search for them on social media (the latter could result in an accidental invitation or connection).
- **Watch out for moles.** It sounds dramatic, but people investigating you or someone else at your place of employment may try to "friend" you or your colleagues on social

media. Be sure you know who is asking to connect with you and do not accept invitations from strangers.

Even for people you do know, consider: Do you really know them (i.e., Is it a common name? Does the picture look like them?) Do you want to give them access to your profile(s)? Can you accept their friendship, but limit the posts they can see?

What's next?

Future articles in this series will consider the implications of social media use for health care providers' professional reputations and take a closer look at privacy and security issues with other forms of electronic communication (e.g., email, text, and secure patient portals). ♦

Author's note: We want to hear from you! Do you have a social media close call, blunder, or success story you would be willing to share? We're looking for real world examples of social media and technology pitfalls, challenging situations, and solutions related to health centers and providers connecting with patients online (or through electronic means like texting or emailing patients). If we include your story in a future article, all identifiable information will, of course, be removed!

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