


Social Media, Healthcare and the Law

Developing A Social Media Policy

Midwest HIMSS 2010 Fall Technology Conference
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Brian Balow Tatiana Melnik
Member Associate



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Outline


- Social Media
 - description
 - importance
 - examples of issues
- Legal Issues
 - state
 - federal
- Crafting a Social Media Policy
 - things to consider and example



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What is Social Media?



- > A method of communication
- > Create and disseminate ideas and information
 - Instant
 - Efficient & Low Cost (Mayo Clinic spent \$1500) (Jacksonville BizJournal, 2009)
 - User-generated content
 - Collaborative
 - No degree required, everyone is an expert
 - Anyone can make a difference




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Some Examples


- > Facebook
- > Twitter
- > YouTube
- > Medscape (from WebMD)
- > Sermo
- > Healthy Place (for mental health)
- > Patients Like Me

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Why Does Social Media Matter?

- > **Facebook** (FaceBook Statistics)
 - More than 500 million active users
 - Average user has 130 "friends"
 - People spend *over 700 billion minutes per month* on Facebook
- > **Twitter** (Sharon Gaudin, Computer World, 2010)
 - More than 75 million users
 - About 6.2 million new users per month



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Why Does Social Media Matter?

- **Patients Like Me** (Health 2.0 Conference, Our Speakers, 2010)
 - More than 45,000 users
 - Patients voluntarily revealing protected health information
 - Tracking 19 diseases

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Why Does Social Media Matter?

- This is the primary way many people communicate today
 - use among teens (12-17) grew from 65% in February 2008 to 73% in September 2009 (Pew Internet & American Life Project, Social Media and Young Adults, 2010)
 - use among young adults (18-29) is at 72% as of September 2009 (Social Media and Young Adults)
 - use among adults (30+) grew from 8% in November 2008 to 47% in September 2009 (Social Media and Young Adults)
 - use among older adults (50+) nearly doubled from 22% in April 2009 to 42% in May 2010 (Pew Internet & American Life Project, Older Adults and Social Media, 2010)

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Why Does Social Media Matter?

- Patients want to be in control
 - 61% of American adults look online for health information (Pew Internet & American Life Project, The Social Life of Health Information, 2009)
- Peer professionals want to share
- Everyone wants to participate



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Why Does Social Media Matter?

- Easy
- + Fast
- + Popular
- = Lots of Potential for TROUBLE



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Examples of Trouble

- **Federal Prosecution** (Ag's Office, WD Penn.)
 - Pennsylvania
 - UPMC Shadyside Hospital
 - Employee selling PHI for personal gain (names, birth dates, social security numbers)
 - 14 count indictment (HIPAA and SSA)
 - possible punishment: 80 years, \$4,730,000 or both

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Examples of Trouble

- **Federal Prosecution**
 - in 2004, employee of Seattle Cancer Care Alliance pled guilty to HIPAA violations – 16 months in prison
 - used patient data to obtain credit cards, incurred \$9,139.42 in debts for items such as video games, clothes, and jewelry
 - notice that this was not PHI but credit card data

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Examples of Trouble

➤ Federal Prosecution - 2004 case cont.

a person who knowingly, *and in violation of HIPAA*, discloses individually identifiable health information to another person with intent to "sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm"

U.S.C. § 1320d-6(a)(3) and (b)(3)

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Examples of Trouble

➤ Iowa (Des Moines Register, 2010)

- Nurse fired because was using Facebook to exchange information about a patient with another health professional without consent
- No name, but enough information to identify patient

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Examples of Trouble

➤ Michigan (WJBK Fox 2 Detroit, 2010)

- Oakwood Hospital fired nurse for post on Facebook
- Posted that she came face-to-face with a cop killer and hoped he would rot in hell
- Did not mention name, but enough PHI to violate HIPAA? (maybe)

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Examples of Trouble

➤ Mississippi (WLT 3, Dec. 2009)

- *Governor tweeted:* "Glad the Legislature recognizes our dire fiscal situation. Look forward to hearing their ideas on how to trim expenses."
- *Nurse tweeted back:* "Schedule regular medical exams like everyone else instead of paying UMC employees overtime to do it when clinics are usually closed."
- Problem: Nurse *indirectly* referenced PHI because she *tweeted back* to the Governor

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Examples of Trouble

➤ Minnesota (WCCO TV, 2009)

- Minnesota Department of Health investigated reports of inappropriate photos posted on Facebook
- Nursing home employee fired after discovered that she posted unauthorized pictures of herself with patients

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Examples of Trouble

➤ Wisconsin (WISN-TV, 2009)

- Two nurses fired for taking pictures of a patient's X-rays
- One nurse posted the pictures on her Facebook account, police haven't found anyone who saw the pictures
- No violation of Wisconsin state laws but investigating whether violated HIPAA
- Hospital referred the case to the FBI

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Examples of Trouble

- **Illinois and Indiana?**
 - No reports made public yet
 - Does this mean type of activity isn't happening?
 - People gossip in every state



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What's Really the Problem?

- **Blurring of the lines between professional and personal**
 - People do not consider the potential impact of their communications (ignorance is not bliss)
 - Personal opinion v. professional advice
 - Eric Schmidt, CEO of Google, prediction to the WSJ
- **Once you send, you CAN'T UNSEND**
 - WayBackMachine - <http://www.archive.org>

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What About the Good?

- Hospitals sharing information – as of August 2010, hospitals accounted for:
 - 391 YouTube channels
 - 631 Facebook pages
 - 634 Twitter accounts
 - 87 Blogs (Ed Bennett, Found in Cache)
- Patients stay informed, have more control and learn from actual experts

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Legal Issues with Social Media

- **State and Federal Laws**
 - Strict privacy requirements and related data security laws and regulations
 - Revealing that the person is a patient is itself a problem
 - Limits your ability to respond to others online because you would be disclosing PHI

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Legal Issues with Social Media

- **Confidentiality**
 - Providers are "covered entities" under HIPAA and State Laws
 - Business Associates are also covered
 - Affirmative legal obligation to safeguard PHI
 - Must have *authorization* from patient to post information

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Legal Issues with Social Media

- Discrimination
- Harassment
- Privacy
- Stored Communications Act of 1986
 - violation to gain unauthorized access
 - employees with "private" pages
- National Labor Relations Act

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Legal Issues with Social Media

- Negligence
- Defamation
- Intellectual property infringement
- Off-the-clock work by nonexempt employees
- HIPAA and HITECH
- FTC Endorsement Guidelines

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Legal Issues with Social Media

State Laws



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Legal Issues with Social Media

- Some of the Applicable State Statutes
 - Illinois:
 - Medical Patient Rights Act, 410 ILCS 50
 - Genetic Information Privacy Act, 410 ILCS 513
 - **Additional Resource(s)**:
Illinois Hospital Association –
<http://www.ihatoday.org/issues/it/hipaa.html>

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Legal Issues with Social Media

- Some of the Applicable State Statutes
 - Indiana:
 - Health Records, IC 16-39 *et seq.*
 - Health Records and Identifying Information Protection, Act No. 356
 - **Additional Resource**:
Indiana Health Coverage Programs –
<http://indianamedicaid.com/ihcp/ProviderServices/hipaa.asp>

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Legal Issues with Social Media

- Some of the Applicable State Statutes
 - Iowa:
 - Acquired Immune Deficiency Syndrome, Iowa Code § 141A
 - Hospitalization of Persons with Mental Illness, Iowa Code § 229.25
 - **Additional Resource**:
Iowa Dept. of Human Services –
<http://www.dhs.state.ia.us/Consumers/Health/HIPAA/Home.html>

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Legal Issues with Social Media

- Some of the Applicable State Statues
 - Michigan:
 - Mental Health Code, Act 258 of 1974, MCL 330.1001 *et seq.*
 - Michigan Medical Records Access Act, Act 47 of 2004, MCL 333.26261 *et seq.*
 - **Additional Resource:**
Michigan Bar, Healthcare Law Section – <http://www.michbar.org/health/hcresources.cfm>

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Legal Issues with Social Media

- Some of the Applicable State Statues
 - Minnesota:
 - Chapters 144 – 159 cover Health
 - Minnesota Health Records Act, Minn. Stat. §§ 144.291 *et seq.*
 - Healthcare Bill of Rights, Minn. Stat. §§ 144.651 *et seq.*
 - **Additional Resource:**
Univ. of Minnesota, Privacy & Security Project – <http://www.ahc.umn.edu/privacy/home.html>

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Legal Issues with Social Media

- Some of the Applicable State Statues
 - Wisconsin
 - Chapter 51: State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act
 - Chapter 153: Healthcare Information
 - Chapter 252: Communicable Disease
 - **Additional Resource:**
HIPAA Collaborative of Wisconsin (HIPAACOW) – <http://hipaacow.org/home/home.aspx>

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Legal Issues with Social Media

- Other Sources of State Law
 - State Constitutions
 - Regulations
 - Rules
 - Common Law



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Legal Issues with Social Media

Federal Laws



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Legal Issues with Social Media

- HIPAA
 - Privacy Rule
 - Keep protected health information secure
 - Disclosure allowed under certain defined circumstances
 - **Currently under revision, stay tuned**
(see also the state resources listed above)

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Legal Issues with Social Media

- HITECH Breach (HHS and FTC)
 - "the **unauthorized** acquisition, access, use, or **disclosure** of protected health information which **compromises** the **security or privacy** of such information, **except** where an unauthorized person to whom such information is disclosed would **not** reasonably have been able to **retain** such information"
 - If posted online, **retained** for a very long time
 - Not covered by any of the breach exceptions

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Legal Issues with Social Media

- HITECH Breach (HHS and FTC) –
Who is under Obligations?
 - Covered Entity
 - Business Associate
 - Subcontractor Requirements

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Legal Issues with Social Media

- HITECH Breach (HHS and FTC) –
What are you required to do?
 - Required to investigate
 - Required to give notice

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Legal Issues with Social Media

- **Investigation and Notice**
 - CEs must provide notification (where warranted) "without unreasonable delay" but in no event longer than 60 days after a breach is "discovered"
 - A breach is **discovered** when it is **known**, or by exercise of reasonable diligence, would have been known *by a member of the covered entity's workforce*
 - People in your workforce who spot a breach on another employees site start the clock running

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Legal Issues with Social Media

- HITECH Breach (HHS and FTC) –
What are you required to do?
 - Required to reprimand
 - Required to record/notify Secretary

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Legal Issues with Social Media

- HITECH Breach (HHS and FTC) –
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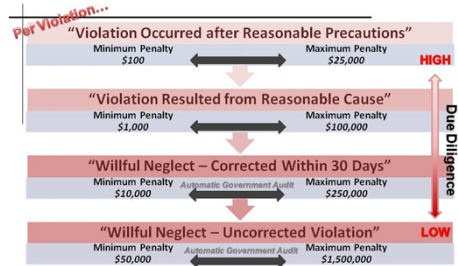
Legal Issues with Social Media

- State AG's have power to enforce HITECH breach provisions
- Connecticut AG first to file

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HITECH Act Penalties



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Legal Issues with Social Media

- New breach legislation on the way (maybe)
 - July 21, 2010 - **Data Security Act of 2010** – introduced by Senator Carper (D-Delaware) and Senator Bennett (R-Utah)
 - August 5, 2010 - **Data Security and Breach Notification Act of 2010** - introduced by Senator Pryor (D-Arkansas) and Senator Rockefeller (D-West Virginia)

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Legal Issues with Social Media

- If employee violates a patient's privacy **the medical facility can be liable**
 - *Yath v. Fairview Clinics*, MN Ct. of App.
 - HIPAA *does not* preempt state law causes of action
 - patient could sue clinic and medical assistant who snooped
 - Minnesota statute prohibiting wrongful disclosure of health records

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Legal Issues with Social Media

- High stakes if employees violate patient's privacy
 - Liability under HIPAA and state laws, including criminal liability (meaning jail time)
 - PR problems
 - \$\$\$

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Legal Issues with Social Media

- Litigation
 - Tweets discoverable
 - Facebook posts discoverable (probably)
- Labor Issues
 - Boss "friending" or "following" subordinate
 - Harassment
 - Discrimination – evidence of favoritism
 - Wrongful termination

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Why Have a Social Media Policy?

- To protect your patients' rights
- To instill professionalism throughout your enterprise
- To protect your *organization* from liability
- To protect your *employees* from liability

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Why Have a Social Media Policy?

- If the organization *does not know* that employees are posting PHI but knows of the popularity of social networking websites and that its employees use such websites
 - Under Proposed HIPAA changes – *may be* "willful neglect" if no policies and procedures in place
 - in the HIPAA *proposed* rule, HHS focused on lack of policies and procedures

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Why Have a Social Media Policy?

- Rogue employee defense
 - Can shield employers from liability to the extent the conduct occurred in spite of and contrary to reasonable safeguards, including documented *training*

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Why Have a Social Media Policy?

- **Will not work if**
 - cannot demonstrate a strict policy
 - cannot demonstrate training structure designed to prevent the "rogue" conduct

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Formulating a Policy

- What is your stance?
 - Does your organization want to allow the use of social media? If so, with whose "tools"?
 - Allow use only under certain circumstances?
- Review current communications policies and procedures
 - Can generally be modified to address social media
 - Good opportunity to review all policies

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Formulating a Policy

- Focus on what employees can do
 - Be transparent and authentic
 - Be responsible for what you write
 - Protected PHI and proprietary information
 - Use common sense and common courtesy
 - Think twice before you hit post!



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Formulating a Policy

- Be consistent with your policies
- Enforce your policies – having policies will not help if they are not properly enforced
- Review policies periodically
- **EMPLOYEES MUST BE AWARE OF POLICIES AND RAMIFICATIONS OF VIOLATIONS**



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Example: Kaiser Permanente

- Statement
- Purpose
- Scope
- Definitions
- Hosted Sites / Non-Hosted Sites
- Blogging Best Practices
 - If allow comments, see the Mayo Clinic comments policy
- Other considerations
 - Facebook
 - Twitter
 - Off Hours Discussions
 - Discussing Patients
 - Discussing Work



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Other Policy Examples

- Mayo Clinic
 - Participation Guidelines for the Public – Basic rules of the road for blogs, etc. - <http://sharing.mayoclinic.org/guidelines/>
 - Comments Policy – How the Mayo Clinic handles submitted comments - <http://www.mayoclinic.org/blogs/comment.html>
 - Guidelines for Employees & Code of Ethics - <http://sharing.mayoclinic.org/guidelines-for-mayo-clinic-employees/>
- Vanderbilt University Medical Center
 - Social Media Toolkit <http://www.mc.vanderbilt.edu/root/vumc.php?site=socialmediatoolkit>
- More resources available upon request



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Hosted by the Institution

- If the *institution* is hosting the blog, managing the Facebook page, etc.
 - Post a disclaimer to visitors that everything is public:

"This is a publicly available website and no information that is posted is protected. Please do not post personal information, including medical information, about yourself or others."
 - Review the Terms & Conditions



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Disclaimer

This slide presentation is informational only and was prepared to summarize relevant legal consideration when formulating a social media policy. It does not constitute legal or professional advice.

You are encouraged to consult with an attorney if you have specific questions relating to any of the topics covered in this presentation, and Dickinson Wright would be pleased to assist you on these matters.



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