Risky Business: Treading Tweeting the Symptoms of Social Media

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Introduction
The age of social media is changing the social fabric of the world and transforming the way we communicate. We are in the midst of a transformation from the "industrial media" age to the "social media" age. "Social media" allows anyone to create and disseminate information, ideas, and experiences and communicate quickly and efficiently using low cost and highly scalable web-based technology.

Blogs and blogging can be viewed as a benchmark for the start of the social media paradigm shift. Blogs moved us from a read-only web to a "world live web" driven by user-generated content through tools such as blogs, wikis, podcasts, picture sharing, micro-blogs, livecasting, social news, tagging, social bookmarking, and social network platforms. Names such as MySpace, YouTube, Flickr, Skype, Facebook, Delicious, and Twitter have become iconic words in today's electronically connected world. By example, consider the rise of the "Facebook nation," now over 400 million people, which makes it the third largest country behind China and India.

As the social media shift occurs, the way we seek out and deliver healthcare is changing. The healthcare industry is embarking on a new generation of care delivery: one built around participatory medicine, where the active role of the patient is emphasized in medical decision making. Participatory medicine involves a new breed of informed health consumers, known as "e-patients," who are using the web to gather information, seek online guidance, demand better health information and services, and insist on a different relationship with their doctors. Social media allows online care systems to evolve to connect consumers to physicians immediately, whenever and wherever they need them, breaking down traditional barriers to access and allowing limited physician resources to be allocated in new ways.

Why Does Social Media Matter?
Why should healthcare lawyers be concerned? Lawyers are communicators who live in the world of information—reading, writing, interpreting, communicating, and networking. We need to understand and use these social technology tools. In addition, legal disputes often arise when there are changes in the normal course of doing business. The impact of social media is causing fundamental changes leading to questions from healthcare clients.

To date there are at least 540 hospitals in the United States utilizing social media tools: Hospitals account for 247 YouTube channels, 316 Facebook pages, 419 Twitter accounts, and 67 blogs. Creative hospitals have used viral videos on YouTube to promote breast cancer awareness, generating millions of views. Hospitals are learning to monitor social media channels and capitalize on content captured by their patients. For example, Mayo Clinic utilized a patient recorded video to highlight the healing power of music, which was then seen by millions.

Likewise, healthcare professionals, including physicians, nurses, and others are blogging and using social networking tools like Twitter to communicate and collaborate. The number of medbloggers is in the thousands. Physicians and healthcare
professionals are using social media tools through online health communities, like MedHelp, to provide current medical information to the public and answer questions. Knowledge about health and medicine is being crowdsourced by dynamic wiki-based systems, like the Medpedia Project, that allows health professionals across disciplines to create content and collaborate.

The Intersection of Social Media and the Law

As social media extends its reach to the healthcare setting, some interesting scenarios arise that might lead to liability for healthcare providers. For example, would you feel comfortable with your surgeon tweeting from the operating room during your surgery? Would you consider tweeting from the operating room while having surgery? Both have been done and both raise interesting issues for patients and healthcare providers.

On October 29, 2008, a patient provided what is believed to be the first live tweet from the operating room. Robert Hendrick, co-founder of the website changehealthcare.com, tweeted from the operating room at the Surgical Clinic in Nashville, TN while laser ablation surgery was being performed on him to remove his varicose veins. The tweets, which continued throughout follow-up surgeries, included references to the temperature of the room (cold), the effectiveness (and lack thereof) of the numbing medicine, kudos to the “rock star” surgeon for allowing the live tweets, the music playing in the operating room (country music—it is Nashville after all), the taste of burnt blood in the back of his throat from the laser (which was normal according to the surgeon), and the “Bad bad stick. Ow ow ow ow ow.”

On the other side of thescalpel, surgeons from Henry Ford Hospital in Detroit, MI tweeted live while performing surgery to remove a cancerous tumor from a man’s kidney. They were able to provide short, real-time updates while the lead surgeon performed the procedure and the chief resident typed the tweets. The lead surgeon, Dr. Craig Rogers, provided the final tweet, “The robotic partial nephrectomy was a success. Thank you for joining us today.”

Why would a patient choose to tweet during surgery? According to Robert Hendricks, it was to encourage transparency in healthcare and to some extent to provide a distraction from his nervousness about the surgery. One of the primary reasons for a surgeon tweeting during surgery is education. It can educate patients and transform the fear of an unknown, scary procedure into something that is understandable and more familiar and keep family members informed during a patient's surgical procedure. Dr. Rogers, who performed the cancer surgery at Henry Ford Hospital, used it as a form of patient education, intending to “get the word out” that a tumor can be removed without taking the entire kidney. In any event, tweeting during surgery is something that the newer generation of providers might be more inclined to embrace because they are “used to putting their life online.”

However, being comfortable with putting information online for everyone to see can lead to trouble. For example, many people lack common sense about the extent of information that is appropriate to put online. Indeed, a common acronym used among those using social media is “TMI”—too much information. When restraint is not used in putting health-care-related information online, it can lead to problems. For example, an emergency room physician who entertains guests at a dinner party with anecdotes about his patients could potentially violate the Health Insurance Portability and Accountability Act (HIPAA) or other privacy laws, but the likelihood of the violation being discovered is slight. However, the disclosure risk becomes much higher when that same physician tweets his thoughts about patients to his followers on Twitter.

Even seemingly innocuous information can potentially be used to the detriment of the individual or entity that posts it online. For example, an insurance company called Manulife used vacation photographs shared online via Facebook as part of its investigation of an insured woman that led to the discontinuation of long term sick leave benefits she was receiving as a result of alleged depression.

In December of 2009, a hospital employee was forced to resign because of a single tweet. She was responding to the following tweet from the Mississippi governor: “Glad the Legislature recognizes our dire fiscal situation. Look forward to hearing their ideas on how to trim expenses.” The hospital
employee had been told that the governor had come to a hospital clinic three years earlier on a Saturday, when the clinic was usually closed, and had the clinic specially staffed with 15-20 people so the governor could get a check up. About an hour after the governor's tweet, the hospital employee tweeted back, "Schedule regular medical exams like everyone else instead of paying UMC employees overtime to do it when clinics are usually closed." Because the employee's tweet indirectly referenced the governor's personal healthcare, UMC management placed the employee on unpaid suspension. Ultimately, she resigned.

Some of the questions surrounding this scenario include whether the employee was on the job at the time of her tweet; whether her tweet could be imputed to her employer (hospital); whether there was a violation of HIPAA or any other privacy law; whether the hospital has a policy regarding employee use of social media and, if so, whether the employee's actions violated that policy; and whether the hospital could have legitimately terminated the employee for her actions.

What if the tweet in the above example had included health information about the governor that was intentionally inaccurate or misleading? A number of cases have been brought based on libel/defamation as a result of online comments. In January 2009, a patient settled with a San Francisco chiropractor who sued him over negative reviews published on Yelp, a social rating site. The patient posted a review critical of the chiropractor's billing practices and indicated that the chiropractor was being dishonest with insurers. After the chiropractor complained about the online review, the patient replaced his post with new comments stating that the chiropractor was trying to scare him into removing the negative post. A complaint was filed in February 2008, in San Francisco County, CA, alleging defamation-libel and false light-invasion of privacy.

In response to online physician rating websites, like Yelp, RateMD, and others, a company now offers physicians an anti-defamation service, including contract provisions restricting a patient's right to make negative comments on rating websites. In true social media fashion, one physician rating website has responded with "The gag contract Wall of Shame" listing physicians who are known to require patients to sign these restrictive contracts before they are accepted as a patient. Information shared via social media also may impact litigation. A potential plaintiff might be inclined to scrutinize a surgeon's tweets during the patient's procedure in order to determine the possibility of a malpractice action against the surgeon. Online communications via social media may be discoverable. In a 2008 case involving the denial by an insurance company to cover treatment for eating disorders, a federal court in Newark, NJ ordered the production of emails, diaries, and other information shared with others, including online via Facebook and MySpace. The insurance company sought to show that the eating disorders were non-covered psychological issues as opposed to biologically related medical conditions. A physician in the Boston, MA area was sued for malpractice and decided to anonymously blog about his trial as it progressed, using the name "Dr. Flea," but the blog was discovered mid-trial, as was Dr. Flea's true identity. The case was settled shortly thereafter.

Besides the above examples, there are a number of other scenarios that could lead to liability. For example, what happens if an "off-duty" physician responds to a health question by a neighbor while doing yard work? Suppose the same exchange occurs through online "messages" between a physician and one of the physician's "friends" on Facebook, creating an electronic record of the exchange that could potentially support the existence of a physician-patient relationship, thereby creating certain liability arising therefrom (e.g., HIPAA, medical malpractice, patient abandonment, etc.).

Another area of concern due to the rise in use of social media tools is whether or not superiors or managers should "friend" or "follow" subordinates on social media platforms like Facebook and Twitter. Some employment lawyers recommend a zero tolerance approach to friendship among superiors and subordinates. The authors of a National Law Journal article warn that bosses who "friend" are begging to be sued. The article stresses that online activities between boss and employee can trigger or exacerbate a host of legal claims, including harassment, discrimination, or wrongful termination. Moreover, there can be claims of favoritism if the boss only "friends" a select group of employees.

In the healthcare context complex situations can arise. For example, what guidance should be given on whether a physician should "friend" a nurse and vice versa? Physicians and nurses have a responsibility to report activities that might endanger the well being of patients to the hospital or state licensure boards. Suppose a physician sees a post on a colleague's Facebook wall indicating that he has been drinking alcohol recently, and the physician knows that the colleague is or has been on call. What duty arises to report the discovered, potentially incriminating social media message? Should this
be treated any differently from a situation where the physician smells alcohol on his colleague’s breath?

The impact of learning sensitive information online could give rise to potential employment discrimination claims. For example, a manager may learn personal information about an employee such as religious affiliation, age, ethnicity, political beliefs, and health conditions that are included on the employee’s profile or publicly posted on the employee’s Facebook wall. This may cause liability for the manager and the organization, particularly if an adverse employment decision is made after the manager becomes aware of the information. Employment issues may arise in other online contexts as well. For example, lawsuits may arise based on a recommendation provided for a current or recent employee on LinkedIn.

Another layer of complexity is added when the information learned by the manager is not obtained through legitimate “friending” or “following” but through unauthorized access to an employee’s online profile or other online information. In a New Jersey case, a group of employees created a special invitation-only group on MySpace for griping about their managers and the customers of the employer. 29 Comments on the “gripe site” ultimately led to the termination of two of the employees after a manager obtained access to the online group by obtaining the login information from an employee member of the group. The terminated employees filed a lawsuit based on, among other theories, wrongful termination due to restrictions on Freedom of Speech and invasion of privacy and unauthorized access to stored communications under the federal Stored Communications Act. 30

There are a myriad of other laws potentially implicated through the use of social media. Most are not specific to social media but the potential for liability under existing laws is heightened when social media is involved due to the rapid and wide dissemination of information via social media. For example, the wide dissemination of an online blog would make it easier to discover a copyright or trademark violation due to increased access and the searchability of the internet. Social media also can create documentation showing violations of particular laws such as, for example, antitrust laws prohibiting price fixing (e.g., by sharing salary information within an online group), laws limiting lobbying activities by nonprofit organizations, and harassment and other discrimination laws.

**Developing a Social Media Policy**

The above discussion suggests the necessity for healthcare providers to address the use of social media. The first question that the provider must consider is what stance to take regarding social media. Should the provider block the usage of social media or take a proactive approach recognizing that employees are likely already using social media in the workplace? How should a hospital address non-employed physicians who are members of the hospital’s medical staff?

Paul Levy, Chief Executive Officer at Beth Israel Deaconess Medical Center in Boston, who blogs at Running a Hospital, addressed these issues by taking the positive approach and emphasizing appropriate use of social media. 31 Mr. Levy highlighted that limiting people’s access to social media in the workplace will inhibit the growth of community and encourage useful information sharing. He also indicated that it creates a generation gap. Finally, he pointed out that “any form of communication (even conversations in the elevator) can violate important privacy rules.” Like any other communication or communication tool—social media can be used in productive or unproductive ways.

As a part of the process of deciding to implement a social media policy, providers should review existing policies, procedures, and guidelines, which can often be modified to address communications via social media. Common issues such as the confidentiality of information, internet use, harassment and other inappropriate behavior, the authority to act on behalf of the organization, personal use of email (including the right to privacy, if any, regarding such email), and use of logos, brands, and intellectual property rights may already be addressed in current policy. Because social media issues extend beyond the walls of the employer, a policy should educate employees about the risks from posting confidential patient information or other business-related information on personal blogs and social media channels while outside the workplace.

A social media policy that takes a proactive approach and encourages employees to use social media properly within the context of the organization should set forth guidelines for proper use. Employee guidelines and best practices should focus on what employees “can” do instead of what they “cannot” do. For example, constructive rules and guidance may include:

- Be transparent and authentic;
- Never represent yourself in a false way;
- Don’t betray a patient’s or colleague’s trust;
- Be responsible for what you write;
- Be authentic and consider your audience;
- Protect confidential and proprietary information;
- Post factual, meaningful and courteous comments;
- Use common sense and common courtesy;
- Add value to yourself and your company;
- Find the proper balance between your use of social media and your other work.
Conclusion
Hospitals, physicians, and healthcare providers face new challenges that accompany the use of social media to network and communicate. As providers and the lawyers who represent them begin to address such challenges, the potential areas of liability and the practical suggestions regarding the content of social media policies should be considered in the context of what role the provider wishes to play in controlling social media and limiting liability that could arise therefrom. For additional information about liability issues and drafting a social media policy, check out the materials from the 2010 Hospitals and Health Systems Institute on the topic of social media.

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Endnotes
1. Traditional media resources such as newspapers, television, and film that require more significant resources to create and publish.
3. In 2004 there were less than 2 million blogs. In 2010 there are now over 126 million blogs. See www.blogguide.com.
4. Facebook now has over 400 million users 50% of whom log on every day. These users share 3 billion photos each month and 5 billion pieces of content (links, news, posts, notes) each week. Users spend an average of 55 minutes per day on Facebook. See www.facebook.com/facebook/facts.php?news=intl&ft=statistics.
18. Id.
19. Id.

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