Legal Risks of Social Media: What Dietetics Practitioners Need to Know

Few technological advancements have had a greater impact on modern life over the past few years than the emergence of social media. The rapid growth in the use of social media has been astounding—Facebook, Twitter, and LinkedIn, three of the most popular communication-based social media websites, now have over one billion combined registered accounts.1 These websites represent the modern public assembly or the modern private conversation, depending on how one chooses to utilize them. In many ways, public health care is a natural fit into social media, offering a venue for physicians, specialists such as registered dietitians (RDs), other dietetics practitioners, research/academic institutions, and entire agencies to communicate with a large audience quickly and conveniently. The potential uses of social media in health care have not been ignored—as of October 2011, over 1,200 US hospitals had at least one social media website associated with their organization.2

But the increasing usage of social media leaves its users, especially those who use it in a professional capacity, in a precarious state. The technology has been so recently integrated into the basic understanding of interpersonal communication that there are few explicit laws or regulations regarding social media; there is no “social media constitution.”3 That does not mean, however, that there are no risks in using the technology. There are legal risks in using social media, personally and professionally, but the rules are being written as cases appear that force consideration. For example, in 2011 a Boston, MA, physician was fired from her hospital, reprimanded by the medical board, lost her privileges to work in the emergency room, and was fined after posting information about a patient on Facebook.4 As a breach of patient privacy, the legal lapse here is obvious, but works to illustrate an important point—although the method of communication is different, the legal risks of social media still fall under several familiar categories of professional behavior. These rules of conduct apply not only to interaction between organizations and the public, but among colleagues as well. There are certain nuances to consider when it comes to the legal risks of social media, especially for members of the health care community, as well as a number of ways to minimize these risks.

OVERVIEW OF LEGAL RISKS

In one sense, it is difficult to discuss the legal risks of social media with too much authority; significant state or federal laws are still developing as professionals and organizations test the technology in various settings. It introduces an element of uncertainty with regard to ethical behavior, which is apparent in how physicians use social media: 87% of physicians utilize a social media website for personal use, while only 67% employ a social media website for professional use.5 Some apprehension is reasonable.

Evaluating legal risks is still possible, though. It is true for many dietetics practitioners, technicians, and even students that direct experience with the legalities of social media is lacking, but what is social media if not simply an expanded form of communication? Where physical meetings, phone calls, and personal e-mails were once mandatory in sharing information, social media websites have made communication possible on any scale, at any time. But while the scale and speed of communication may have changed, the guidelines of sharing of information, opinions, and thoughts have not. Until there is a definitive set of laws regarding social media, professional users, including those in health care, should be able to feel comfortable using the technology if they understand basic areas of conflict.

Privacy

One of the most immediately and concerning risks of social media in health care is related to privacy. The term can take on different meanings, but of utmost concern is patient privacy. Patient privacy is in large part federally protected through the Health Insurance Portability and Accountability Act (HIPAA) for covered medical practices. The security that HIPAA provides for a patient has become closely associated with fair and ethical modern medicine, as it protects against unwarranted disclosure of identifiable information on medical conditions, treatment, and payment.6 It is the essence of “doctor-patient confidence,” and it absolutely applies to social media. HIPAA was enacted in 1996, well preceding the emergence of popular social media websites, but was made “future proof” as it specifically protects against electronically transmitted information media. A covered dietetics practitioner or related entity cannot knowingly disclose private patient information over a social media network without risking legal or employment penalties, as seen in Boston.4 The penalties for noncompliance with HIPAA can be quite severe (see the Figure), and they apply the same for breaches through social media. Not covered legally by HIPAA, but rather organizationally, are also concerns over disclosing personal information about coworkers, colleagues, and members of an association in an online venue.

Privacy is an issue that is attenuated by the nature of the Internet and social media websites. It is difficult to say for certain why, but these websites are still often treated as entirely separate from real-world concerns; people, profes-

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sional or otherwise, appear to become less inhibited when the audience for their thoughts is virtual and they are shielded from direct, in-person response. There may be psychological basis for the effect,7 but Katharine F. Meyer, attorney for GKG Law, explains it simply: “Common sense tends to go out the window with social media.” Social media can be and often is used informally, but medical professionals are still bound by expectations of behavior. Even privacy settings on many of the websites, such as Facebook or Twitter, can be inadvertently bypassed; information disclosed to friends and family can quickly become public.3 Social media should be approached with the same professionalism as any other interpersonal, professional-to-client or professional-to-professional meeting. This is advice that should probably be heeded by everyone, but it seems particularly suited to the intricacies of privacy for members of the health care community.

**Antitrust**

Antitrust is a term that is strongly associated with profit-driven business, especially since Microsoft helped popularize the term with its decades-long battle with the US government over purported unfair business dealings.8 Antitrust laws are in place to prevent anticompetitive business practices and to “promote fair competition.”9 In an ideal world, perhaps the health care community would not have to be concerned over such matters, but there is a powerful business element to modern health care. In 2009, health care expenses projected at over $2.5 trillion and accounted for over one sixth of the US economy.10 Money is a significant

### Figure. Penalties for noncompliance with the Health Insurance Portability and Accountability Act (HIPAA). Data from the US Department of Health and Human Services.6

| Civil Money Penalties (administered by the Department of Health and Human Services, Office for Civil Rights) | • $100 per failure to comply with a Privacy Rule requirement  
• Up to $25,000 per year for multiple violations of the same Privacy Rule requirement |
| Criminal Penalties (enforced by the Department of Justice) | • $50,000 and up to 1 year imprisonment for knowingly obtaining or disclosing identifiable health information  
• $100,000 and up to 5 years imprisonment if infraction involves false pretenses  
• $250,000 and up to 10 years imprisonment if identifiable health information is obtained for personal gain or malicious harm |
factor in health care. When that money comes from a combination of government and private sources, antitrust issues must be considered in the realm of social media.

Much like the issue of privacy, antitrust concerns are still guided by the antitrust statutes of analog communication; the main difference, once again, is how much easier social media makes the transmission of business or practice-sensitive information. Pricing issues must be spoken about very carefully, if at all, on social media networks. Whether such discussions involve appointment, treatment, or continuing care costs in a health care setting, there is always concern that discussing these topics may lead to action that undermines business competition among health care providers. Especially dangerous in relation to social media is the ability to quickly change public perception for or against particular professionals or entire institutions. Meyer advises that official social media websites that represent associations “cannot be motivating groups to affect the marketplace.” The Department of Justice and Federal Trade Commission (FTC) will pursue associations that attempt to alter the marketplace through subversive means. The nature of social media means the potential audience for these messages number in the hundreds of millions, so care must be taken to make sure a social media website follows standard business ethics.

Other Concerns

In addition to privacy and antitrust issues, there are other legal concerns that members of the health care community, from practitioners to researchers to students, should keep in mind when approaching social media.

Defamation is an issue that has the potential to quickly spiral out of control when paired with social media—harming the reputation of a health care professional can be especially injurious. As they have the power to directly influence the health of their “clients,” patient confidence in a practitioner’s skills and character is vital in establishing a presence in the health care community. Social media websites make transmitting and receiving comments harmful to one’s reputation easier than ever. The very nature of social media automatically fulfills one of the legal requirements to prove a statement is defamatory—it gives the statement an audience beyond the speaker and the injured party. A frustrated dietetic technician making a derogatory comment about an RD on Twitter may be doing active harm to the RD’s reputation, and the offense may be actionable in the same way as a comment made in person. For professionals, it is best to follow some basic advice—if it should not be said in person, it should not be said on a social media website.

Copyright infringement is fairly common on social media websites, though these infractions are rarely performed maliciously. For a dietetics practitioner, it may be something as simple as posting a sizeable excerpt, passage, or entire work from a peer-reviewed journal article on a Facebook account without proper attribution or without permission from the authors or publication; this is technically a form of plagiarism and a breach of copyright law. It is a danger inherent in social media due to the potential audience of any given message, and one that is largely nonexistent in person-to-person communication. Though it has little exposure or specific precedence in terms of social media at the moment, copyright laws are clear: the copyright owner must offer consent for their original works to be shared or displayed.

Sharing ideas or research is important in health care, but the expanded audience of a social media website requires that the information being shared is monitored at all times.

Health care employees on all levels should also be aware of the views of the FTC on the topic of endorsements, which updated its guidelines on the topic in 2009 to include information on social networking. The guidelines tend to emphasize larger-scale marketing or commercial advertising issues, but there are implications in the health care field beyond products. Recognized endorsements in the social media age can be as simple as a physician or medical specialist defending a colleague from negative feedback by a patient on a rate-your-doctor website. This person is offering an endorsement—he or she is advertising the skill or competence of a health care worker, even if only in an attempt to prevent defamation—and failure to identify as a fellow employee risks being labeled as engaging in deceptive advertising. In addition, as health care specialists, RDs, dietetic technicians, registered, and other members of the nutrition care community must be particularly aware of the extent of their expertise. Expert endorsement, be it for a medication, treatment, fellow professionals, organization, or product, must be buoyed by qualification; offering expert endorsement without the proper knowledge or experience may be considered deceptive. If the person or organization offering an endorsement is in any material way (monetarily or in the form of other benefits) connected to the person, product, or service being advertised, they must disclose the connection, and failure to do so may result in penalties from the FTC. Endorsements in health care are different than endorsements in most other industries due to the ultimate “product” they are advertising—health. A celebrity-endorsed cleaning agent that leaves a mess after use is an unfortunate annoyance; a medical specialist-endorsed treatment that does not achieve expected results may end in tragedy, personally and professionally.

Medical Advice

It seems appropriate to round out the discussion by considering the risks the health care community faces when offering medical advice in a digital forum. There is certainly no shortage of public desire for online medical advice—in 2009, a survey found that 61% of adults looked online for health information, and there is no reason to doubt that this number has increased in the interim. But even though social networking websites technically allow medical professionals to directly communicate with patients or the general public on specific queries, the potential legal liabilities make this interaction ill-advised. Web-based medical information websites such as make it very clear in their terms of use that the content of their website “is not intended to be a substitute for professional medical advice, diagnosis, or treatment,” and that they are not liable for how this information is used. It is vital that any Facebook message, Tweet, blog post, or other social media communication on a patient-focused health topic is grounded on similar disclaimers. Explicit disclaimers help to
defend against liability lawsuits if the information provided proves ineffective, or worse, for a particular patient’s or consumer’s needs. And while nutrition and dietetics may be based more on lifestyle choices than medication and physical treatment, advice offered in an informal, online setting is set against the same standards as other health fields. Social media websites allow the health care community to achieve its humanitarian goal of helping maintain and improve public health, but aid must be measured against practical legal concerns.

AVOIDING LEGAL PITFALLS—POLICIES AND COMMON SENSE

There is no getting around it—the new world of social media represents some potential legal challenges for professional and organizations, both in health care and other fields. The technology is certainly new, and history shows that it takes time for laws to develop that govern important new technologies(as seen with early portable cameras). The effects of social media are tangible, be they positive or negative, and there is no reason to suspect that its impact will at any point diminish. So while state or federal laws wait to be written, it is incumbent upon employers to offer an effective social media policy for employees to follow. Kevin Pho, MD, founder of and frequent contributor to KevinMD.com, suggests that, “Without a social media policy, employees risk finding out the hard way what they should and should not say.”

As of March 2011, 31% of companies polled in a Health Care Compliance Association survey had a specific policy related to social media, while 21% used a general policy. While the number of specific social media policies has increased, 45% of companies had no social media policy at all. It is somewhat curious that for as integrated as social media has become with many organizations, so few have, as of yet, chosen to draft a concrete set of guidelines. Some of the small number that do, though, are highlighted on the website http://socialmediagovernance.com. The website has a running list that provides the names of some organizations with specific social media policies and offers direct links that can be viewed online. There are several hospitals or health care organizations listed, from the Mayo Clinic to the Ohio State University Medical Center, with some form of direction on the usage of social media for employees. The very first point on the Mayo Clinic social media policy presents a familiar thought: “Follow all applicable Mayo Clinic policies.” It goes on to reiterate some of those policies and offer directions specific to social media, but the basic and most important idea is this—social media, modern and different as it is from older methods of communication, is not separated in regulatory standards just by virtue of being new.

That is an important point no matter where social media is being utilized, be it a hospital, research lab, school, or other nonprofit. A social networking policy does not need to be complicated, even if the technology it aims to standardize is. Common sense absolutely has a place in the use of social media,
and several of the policies listed on http://socialmediagovernance.org emphasize that idea. Identify your thoughts as your own and not as representing your employers when you are not authorized to speak on their behalf.23 “be responsible and be ethical,”24 always work to maintain the privacy of patients and employees,25 and so on. Nothing in any of these policies radically rethinks how a member of the health care community should act in the course of his or her work, even if one of the methods they use to communicate is unfamiliar. And the idea that social media is not meant to be complicated is not just buried in the policies of various organizations, companies, or medical institutions; there are “Complete Idiot’s Guides” available to the public that explain some of the legal “dos and don’ts” of the emerging technology.26 If this kind of information is accessible to such an extent that there are idiot’s guides being written, there should be an expectation for anyone using social media in a professional capacity to be well versed on the topic. The legal risks of social media can be mitigated so long as its users make an effort to understand them and employ their common sense—and where individual common sense fails, a simple, effective social media policy should work in its stead.

Social media websites like Facebook, LinkedIn, Twitter, blogs, and many others represent a significant leap forward in professional communication. Thoughts and information can be shared as quickly as they can be typed, which is both an advantage and disadvantage of the technology. A message can be written and sent out for the world to see before the author has had time to consider the consequences. The Internet has suddenly become simultaneously more inclusive and less forgiving with the emergence of social media, where a name and face are a given for users. Certainly, there are legal risks in using social media professionally, and some of these risks are more inherent to health care professionals. “But the benefits absolutely outweigh the risks,” Pho says. It is difficult to disagree, especially when the benefits are communicating at the speed of light and the risks can be greatly diminished by utilizing common sense. Social media websites have changed communication, in health care and beyond—now it is up to its users to understand their words have meaning and consequence, no matter the form in which they are expressed.

References