



Risks and Rewards

The Rise of Social Media in Health Care

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Speakers

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Jennifer is a partner and the vice chair of the Health Care Practice Group. Her practice includes the general representation of health care providers including hospitals, long-term care facilities, multi-specialty physician groups and ancillary service providers, as well as the special representation of pharmaceutical companies and device manufacturers in fraud and abuse and privacy compliance matters. Jennifer focuses on hospital-physician relationships, including Stark Law and Anti-Kickback statute compliance, and regularly assists in developing and implementing legal compliance programs.

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Stacey is the Deputy General Counsel, Corporate Integrity Officer and Privacy Officer at Rush-Copley Medical Center, located in Aurora, Illinois. She is responsible for oversight of the organization's Corporate Integrity program including HIPAA and also performs contract management and handles general in-house legal issues. She received her certification in Healthcare Compliance in 2009. Ms. Ries graduated from the University of Wisconsin - Madison with a BS in Nursing and received her Law Degree and Certificate in Health Law from DePaul University College of Law.

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The Medium Is The Message

- > The reason social media is different is *not* because the content is different
- > The reason social media is different is *not* because the audience is different
- > The reason social media is different is *not* because marketers, or companies are different
- > The reason social media is different *is* because the medium transforms the nature of communication and relationships
- > *It involves giving up control*
- > Unfortunately, the law was not set up that way...

Control

- > All law presumes control:
 - Intellectual property
 - Principles of liability
 - Someone is responsible; someone can be blamed
- > In the past, mass communication was expensive, limited and highly controlled
 - Broadcast licenses
 - Media buys
- > Thus, everything was great!

Then, This Guy Ruined Everything

- > Ray Tomlinson
- > Created the modern system of networked e-mail
- > *Not* the subject of a major Hollywood film



Yet Things Were Still Manageable...

- > E-mail vastly increased the amount of communication, and also increased the number of participants
- > Yet e-mail was, up until fairly recently, still a relatively modest phenomenon
- > And in the end, e-mail was still like mail
 - Directed, intentional, controlled

Community Changes Everything

- > The visionaries behind the notion of virtual worlds envisioned conversations and communities
- > Expanding the idea of “forums” and “chat boards” into the mainstream
- > Giving everybody a megaphone
- > The end of forgetting – all communication is permanent, and there are data points on everything you ever did online
- > Social media means that everyone talks, everyone remembers and your failure to speak is just as relevant as what you say
- > Blurring of the line between the personal and the professional, the private and the public

Rapid Transformation

- > In a very short period of time, everything changed
 - The first primitive “blogs” were created in 1994. By 2009 there were at least 133 million blogs.
 - Facebook launched in 2004. Now has nearly 1 billion active users
 - Twitter launched in 2006. Now has hundreds of millions of regular users
 - YouTube launched in 2005. Consumes as much bandwidth today alone as the entire Internet used less than a decade ago.
 - Integration of texting and the mobile web

You Tube, Google...



The Law Is Not Amused

- > All rules developed over centuries of common law and legislation are based on a principle that is no longer relevant
 - Branding is no longer about control of your marks
 - Libel is no longer about being “a publisher”
 - Copyright is not designed to deal with the realities of digital sharing
 - Employees have as loud a voice as their employers
 - Customers want to speak with you – in public
- > Social media creates internal and external legal risks that did not exist before

The Quadrants of Content

- > Official Outbound
- > Unofficial Outbound
- > Official Inbound
- > Unofficial Inbound

The External Issues

- > Social media means social and informal communication
- > But social and informal communication is rife with infringements, disparaging comments and uncontrolled speech
- > Are you sponsoring it?
- > Are you sending out a consistent message?
- > No editors?

The Internal Issues

- > What, exactly, are your employees doing?
- > They probably should use social media, but how?
- > Have a policy
- > Have a strategy
- > Understanding how and why social media fits into the lives of your employees

Internal Social Media

Examples

- > Wikis
- > Twitter-like sites
(e.g., Yammer, Jitter)
- > Blogs
- > Websites with mostly controlled content but open for employee comments

Internal Social Media

Legal Considerations:

- > Discoverable
 - Fast moving and free-flowing informal dialogue
 - Post-hoc monitoring
- > Types of laws implicated
 - Regulatory
 - Privacy
 - Employment
 - Other
- > Controls
 - Subject to social media guidelines
 - Who's the owner
 - Who's monitoring
 - Careful communication principle reinforcement

Health Care Regulatory Issues

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Risks of Social Media Use

- > 60% of 78 U.S. medical schools responding to survey reported incidents of students posting unprofessional content online
 - 13% found postings that violated patient confidentiality
 - 52% found postings containing profanity
 - 48% found postings containing discriminatory language;
 - 39% found depictions of intoxication and
 - 38% found sexually suggestive material
 - JAMA, *Online Posting of Unprofessional Content by Medical Students*, Sept 23-30,2009.

Social Media & Patient Confidentiality

- > Breach of Patient Confidentiality:
 - HIPAA requires health care providers not to use or disclose individually identifiable health information for treatment, payment or health care operations purposes, and certain other limited circumstances.
 - It's easy to inadvertently disclose PHI through social media – whether the disclosure is of a name or other individually identifiable information

Social Media & Patient Confidentiality

- > E.g., Pediatric nurse posted a photo of a child in a hospital bed on her Facebook page, along with a request for prayers, as child was to undergo brain surgery.
 - Posting included child's first name
- > Nurse alleged the child's mother gave her the photo to post.
- > Even so:
 - Need HIPAA-compliant, signed authorization
 - Without authorization, as employee of hospital, nurse bound to safeguard the child's PHI, whether or not nurse had a direct treatment relationship with child.

Social Media & Other Business Risk



Screenshot | YouTube:Memorial Hermann

Houston Hospital Tweets an Open-heart Surgery

Social Media & Other Business Risk

- > February 22, 2012: Memorial Hermann Hospital “live tweeted” double coronary artery bypass
 - One surgeon tweeted, posted photos to Hospital's Facebook page and responded to questions while another performed the surgery
 - 4000 twitter followers
 - 100 tweets, photos and videos



Screenshot | YouTube/Memorial Hermann

Houston Hospital Tweets an Open-heart Surgery

Social Media & Other Business Risk

- > Patient authorization
 - Was PHI actually disclosed?
 - But, legal risk if consent not obtained
- > Malpractice risk
 - What if something went wrong?
 - But, tweet and post allowed for delay in “real time” posting
 - And, performing surgeon was expert and surgery was considered routine

Social Media & Other Business Risk

- > But, what if patient wants family member to record a surgery or other procedure – to share with other family members (lawyers?) who could not be present?

Social Media & Other Business Risk

- > Blogs, FAQs about specific medical conditions and “Ask the Professional” chats also create risk for health care providers
- > Consider:
 - Are you creating a physician-patient relationship?
 - Could there be an issue with the unlicensed practice of medicine?
 - Could a communication result in a claim of malpractice?
- > To reduce risk, need to steer clear of diagnosing or providing specific medical advice

Labor & Employment Issues

Stephanie Dodge Gournis
 Partner, Labor & Employment
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HR – Related Use of Social Media

- > Background Checks
- > Research Employee Misconduct
- > References post-term
- > Employee Relations
 - Building cross-discipline teams in organization
 - Collegial atmosphere through less formal interaction
 - Providing employees with avenue to communication issues and concerns

Table 1. Social Media Being Used in the HR Department and/or Used by Others in the Organization, by Industry

	Accounting	Construction	Finance	Health Care	Manufacturing	Non-Profit	Professional Services	Retail	Technology	Transportation	Utilities
LinkedIn	83.3%	100.0%	66.7%	50.0%	100.0%	50.0%	100.0%	82.8%			
Facebook	50.0	0.0	66.7	100.0	75.0	50.0	75.0	45.5			
MySpace	16.7	0.0	0.0	25.0	12.5	0.0	0.0	10.3			
Tumblr	33.3	50.0	0.0	75.0	42.5	50.0	50.0	48.3			
Blog	33.3	0.0	33.3	75.0	50.0	50.0	35.0	41.4			
Other*	16.7	50.0	0.0	0.0	0.0	50.0	0.0	10.3			

*Other: Yammer, SlideShare

Table 2. Social Media Being Used in the HR Department and/or Used by Others in the Organization, by Number of Employees

	Up to 50	51 to 100	101 to 250	251 to 1,000	1,000 & more	Overall
LinkedIn	100.0%	80.0%	90.0%	66.7%	71.4%	82.8%
Facebook	75.0	80.0	70.0	66.7	42.9	65.5
MySpace	25.0	0.0	20.0	0.0	0.0	10.3
Tumblr	75.0	30.0	70.0	33.3	28.6	48.3
Blog	50.0	40.0	40.0	66.7	28.6	41.4
Other	0.0	20.0	10.0	0.0	14.3	

(Source: HRFocus Social Media Survey)



Potential Employee Use/Misuse

Deloitte Workplace Ethics Survey 2009:

- > 22% of employees visit social networking sites 5 or more times per week
- > 53% of employees say their social networking sites are none of their employer's business
- > 61% of employees say they won't change online activity even if employers are monitoring their social networking profiles/activities – they know it's not private and have already made significant adjustments
- > 74% of employees say it's easy to damage a company's reputation on social media.

- > Employee productivity
- > Trade secret or proprietary information disclosure
- > Fair Credit Reporting Act
- > Federal contractor requirements
- > Privacy
- > Discrimination/Harassment
- > Wrongful termination
- > Defamation
- > Negligent referrals
- > Unauthorized use of company logos and copyrighted material

FTC Implications of Employee Use

- > Under FTC guidelines, an employer (and employee) may be liable for failing to disclose its material connection or employment relationship with an employee who posts comments on the Internet while off-duty which are false and unsubstantiated claims about the employer's services/products.

Social Media and the NLRA

- > In August 2011 and January 2012 the Acting NLRB GC issued two memoranda interpreting “concerted activity” under the NLRA as it relates to employee use of social media.
 - The NLRA protects employees who engage in concerted activity for their mutual aid or protection.
 - The NLRB interprets such protections as allowing employees leeway to express their views in a manner that employers may consider rude, discourteous and/or disloyal.

Social Media and the NLRA

- > NLRB Standard:
 - An employee may not be disciplined or discharged for engaging in these protected activities, even where the conduct is insubordinate or otherwise inappropriate, “unless the employee's actions are so opprobrious and egregious as to render him or her ‘unfit for further service.’”

Social Media and the NLRA

- > NLRB looks at four factors in determining whether employee comments are protected:
 - The place of the discussion;
 - The subject matter of the discussion;
 - The nature of the employee's outburst; and
 - Whether the outburst was, in any, way provoked by an employer's unfair labor practice.

Examples of protected employee conduct

- > Calling out and criticizing coworker with/to other employees.
- > Calling supervisor “scumbag” for not allowing employee representative at meeting.
- > Posting comments criticizing food and drinks employer offered at customer relations event.
- > Call an employer-owner an “@#!%##” in regards to tip policy.
- > Posting tweets critical of company’s editors.
- > Commenting online that employer’s policy “sucked.”

NLRB Review of Employer Policies

- > The NLRB will deem unlawful any social media, solicitation and/or confidentiality policy that employees could “reasonably interpret ...to prohibit protected activity...”
- > A general savings clauses may not be sufficient to cure an overly broad policy.

Unlawful Employer Policies

- > Prohibiting employees from blogging about company business on personal accounts on off-duty time.
- > Barring employees from posting anything they wouldn't want their manager to see or that would put their job in jeopardy.
- > Prohibiting disclosure of inappropriate or sensitive information about the employer; posting any pictures or comments involving the employer/employees that could be considered to be inappropriate.
- > Banning employees from revealing personal information about coworkers, customers, clients or partners without their consent, including pictures.
- > Preventing employees from using employer's logo, brand, product, and pictures of stores without prior authorization.

Unlawful Employer Policies (cont.)

- > Prohibiting employees using social media that may “violate, compromise, or disregard the rights and reasonable expectations of privacy or confidentiality of any person or entity.”
- > Prohibiting any communication or post that “constituted embarrassment, harassment or defamation of the hospital or any hospital employee, officer, board member, representative, or staff member.”
- > Banning any statement that “lacked truthfulness or might damage the reputation or good will of the hospital, its staff or employees.”

The Hard Limits

- > Can prohibit employee release of PHI.
- > Can prohibit employee release of confidential business information and trade secrets.
- > Can require employee disclaimers when discussing provided services.
- > Can prohibit employee violations of law, including discrimination, harassment and defamation.
- > Can place restrictions on employee use of social media during work time and on employer-sponsored sites??

Questions Left Unanswered

- > Can a health care provider prohibit the posting of photos taken anywhere on hospital property?
- > Can a health care provider require employees to be “respectful” in online communications?
- > Can an employer prohibit unauthorized use of hospital logos or trademarks?
- > Can an employer enforce policies outside the workplace?

Questions Left Unanswered

- > How can a health care employer promote its vision, mission and values in employee interactions?
- > How can we protect public image and perceptions as to quality of care?

Facebook and RCMC



- > Cleaned up unofficial Facebook pages and added “official” pages
- > Currently have 9 official pages
- > Posts are reviewed at least once daily
- > Negative posts are not deleted, but a response is posted
- > Only spam and profanity are deleted

facebook

Sign Up facebook helps you connect and share with the people in your life.



Rush-Copley Medical Center Like

Hospital · Health Agency · Aurora, Illinois



Wall Rush-Copley Medical Center · Everyone (Top Posts)

Share: Post Photo Video

Write something...

Rush-Copley Medical Center shared a link.
An Outstanding Place to Work - Rush-Copley Medical Center
www.rushcopley.com

A recent independent study that measures the overall engagement and satisfaction of hospital employees puts Rush-Copley in the top 10 percent in the nation for the fourth year in a row.*

Want to like or comment on this page?

To interact with Rush-Copley Medical Center you need to sign up for Facebook first.

Sign Up
It's free and anyone can join. Already a member? Log in.

Hospitals in Nearby Cities

Elk Grove Village Hospitals
25 near Elk Grove Village

Elmhurst Hospitals
17 near Elmhurst

facebook

Email Password [Log In](#)

Keep me logged in [Forgot your password?](#)

[Sign Up](#) Facebook helps you connect and share with the people in your life.

[Wall](#) [Info](#) [Extended Info](#) [Photos](#) [Links](#) [Notes](#) [Events](#)

About
Rush-Copley's Level III NICU has special expertise to handle 24-hour cover...
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Hospital/Clinic · Aurora, Illinois

Wall [Post](#) [Photo](#) [Video](#) Rush-Copley NICU · Everyone (Top Posts)

Shares [Post](#) [Photo](#) [Video](#)

Write something...

Rush-Copley NICU
In addition to parents being able to feed, provide basic infant care, operate necessary equipment and administer medications, ANP recommends parents be trained in providing infant CPR prior to discharge. This will enhance the safety of care and help increase parent confidence in caring for their infant. Infant CPR is available for parents of NICU infants and offered three times a month. Next class is Sunday, January 22, in Conference Room 3 from 7:30-8:30 p.m. Class will be taught in both English and Spanish.
[Like](#) · [Comment](#) · January 12 at 8:28am · [🌐](#)

Want to like or comment on this page?
To interact with Rush-Copley NICU you need to sign up for Facebook first.
[Sign Up](#)
It's free and anyone can join. Already a member? [Log In](#).

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Managing Facebook

- > Daily review
- > Daily searches by keyword to see what others are saying
- > Daily/weekly updating of pages by page managers
- > Page managers have guidelines
- > Facebook birthday ads used – nominal charges monthly

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Twitter and RCMC

- > One account currently
- > Tweet once per week
- > Used to advertise and post links to press releases



YouTube and RCMC

- > Multiple videos posted describing hospital programs as well as physician office practices
- > Utilized our own physicians to discuss the hospital and practices on the videos





The screenshot shows a YouTube video player interface. At the top, the YouTube logo is on the left, and a search bar contains the text "rush-copley". To the right of the search bar are the words "Browse" and "Movies". Below the search bar, the video title is "Welcome to Rush-Copley Medical Group". Underneath the title, there is a channel name "rushcopley", a "Subscribe" button, and a dropdown menu showing "60 videos". The video player itself shows a man in a suit and glasses speaking. To the right of the video frame, there is a text overlay that reads: "Welcome to Rush-Copley Medical Group" followed by "Introduction by John Davine, M.D. Rush-Copley Medical Group Medical Advisor". At the bottom of the video player, there is a progress bar showing "0:06 / 2:45" and icons for play, volume, and settings. Below the video player, there are buttons for "Like", "Add to", "Share", and "Print". The view count is "288 views".

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Internal Social Media

- > Most organizations have intranet
- > Internal Blogs developed for idea sharing and communications
 - General hospital blog
 - Nursing blog

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It is Working?

- > **Difficult to measure, but..**
 - Call center volume is up
 - Web chat participation has increased
 - Facebook “likes” increase weekly
 - Patients mention social media outlets

Take Away Tips...

- > **Develop a policy regarding social media:**
 - Broad definitions of all types of e-communication and e-devices
 - Staff should use appropriate disclaimers (be aware of your association with employer)
 - Policy applies at home and at work
 - What you publish will exist for a long time
 - Do not discuss patient information

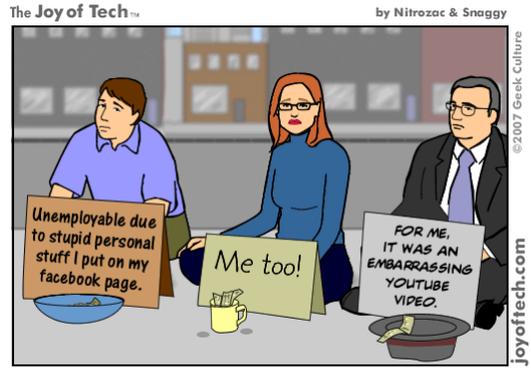
Take Away Tips...

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Content to Consider Screening

- > Regulated Communications
- > False or Unsubstantiated claims
- > Quality Assurance Complaints
- > Medical Advice or Endorsements
- > Competitors and/or Competitive Products
- > Confidential Information
- > Financial Disclosures
- > Comments regarding ongoing litigation
- > Personally identifiable information
- > Intellectual property issues
- > Inappropriate/profane/slanderous/derogatory material
- > Links to third-party websites
- > Minors (both due to consent issues and content issues)
- > Endorsements (disclosure, disclosure, disclosure)

Final Thoughts on Social Media



Signs of the social networking times.

Questions

Social Media Policy Considerations

- > Determine position on use of social media:
 - By employees while in the workplace
 - By employees while outside the workplace
 - By the company with respect to services provided
 - By the company during the recruiting or hiring process

Social Media Policy Considerations

- > Define appropriate social media use:
 - Prohibit false or obscene statements
 - Prohibit harassing statements or statements disparaging an individual's race, religion, age, sex or disability
 - Prohibit posting of any confidential information about patients

Social Media Policy Considerations

- > Define appropriate social media use (con't):
 - Prohibit posting of any patient photos on personal social media sites
 - Prohibit posting of photos taken on company property on personal social media sites
 - Encourage employees to post photos of coworkers only if taken outside of work and only with the coworker's permission

Social Media Policy Considerations

- > Explicitly state the policy is not intended to interfere with protected activity or infringe upon employees' rights
- > Prohibit disparaging comments about the company, coworkers or supervisors that are not related to working conditions

Social Media Policy Considerations

- > Prohibit disclosure of company financial, proprietary or other confidential information
- > Prohibit use of company trademarks or logos on personal social media
- > Specify that employees are not to speak for companies on social networking sites or blogs, only for themselves

Social Media Policy Considerations

- > Require supervisors to comment on an employee's performance only as part of a formally established review process
- > Prohibit managers from publishing any informal reviews – whether on social networking sites or anywhere else

Social Media Policy Considerations

- > When including educational information about health activities, include disclaimer as to medical advice
- > State that posts by others not affiliated with Hospital are the poster's own opinion and not attributable to Hospital
- > Provide notice that Hospital may review, edit or remove postings from social media pages

Social Media Policy Considerations

- > Reiterate that harassment and discrimination policies apply to employee communications on social networking websites

Social Media Policy Considerations

- > Prohibit use of unauthorized data
- > Prohibit conduct or statements that are “contrary to the employer’s business interests”
 - Reflects poorly on employer
 - Damages customer relationships
 - Exposes employer to potential legal liability

Social Media Policy Considerations

- > Require employees to sign an acknowledgement that they have received, read and understand the policy
- > Provide that employees who violate the policy will be subject to discipline up to and including immediate discharge
- > Enforce the policy consistently

