

IN FOCUS...

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QUARTERLY
NEWS

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This quarter's focus is: **Social Media Posts — How private posts may be open to the public when litigation comes.**

"If my coworker wouldn't have left the unit to go on a smoke break — this would not have happened..."

"Ugh, my night was sh*@!
The ED was overcrowded
and the nurse manager was
a complete bi\$%&."

"I'm so sick of the hospital not having the proper equipment — it's like we are left to ration everything!"

Social media posts and online communications through Facebook, chat rooms, Twitter, Instagram and the like have been incorporated into our everyday life. Even when communications occur in closed groups with strict privacy settings, these communications more than likely will not remain private if a lawsuit emerges. The courts are leaning towards not caring if the intent was to keep the post private or even if the posts were made outside work hours. What courts are now looking at is the type of language used, e.g vulgar, disrespectful, and the potential impact of that communication.

Recently, there was a story about a dentist performing oral surgery on a hover board. Most people hearing this story would agree that this behavior was egregious and many may think that this dentist was in litigation because of the video. Interestingly, the video posts were "private", and only came out during the discovery process when the dentist was being investigated for Medicaid fraud through a whistleblower action. The video posts lead to additional criminal charges and certainly confirmed that there was a complete loss of professional judgment.

The latest trend of YouTube videos where the health care provider is singing and dancingⁱ or the TikTok videos that hospital personnel are creating and posting online could easily become problematic for a hospital. Although entertaining, it raises an immediate concern about the trust in a provider-patient relationship. In one TikTok video, it looks like an entire

ICU has nothing to do except dance. See YouTube comments from a conservative reporter alerting to the concern of who is taking care of the patients during the making of these videos during work hours.ⁱⁱ [See Hospital Staff records TikTok Dance Videos during Pandemic <https://www.youtube.com/watch?v=laLKKqo5tk4>.]

As technology advances and social media guidelines continue to be addressed by employers, there is no secret that maintaining professionalism in online communications is paramount. An online post lasts forever. If public, the entire world can see it. If private, it is only a matter of time before an online post (public or private) resurfaces at some later date. This post may have significant personal and professional impact if one is not careful.

In 2010, published by the AMA, the Council on Ethical and Judicial Affairs was asked to address online professionalism. Online behavior by healthcare providers was a concern as unprofessional behavior could negatively impact the physician-patient relationship. At that time, the maintenance of boundaries and focus on privacy settings was recommended.ⁱⁱⁱ In a follow up article in 2015 in the AMA Journal of Ethics, the AMA warned that although privacy settings are important, there is no guarantee that the privacy setting would prevent a Plaintiff's attorney from fact gathering evidence to hold against the health care provider in a medical malpractice case.^{iv}



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Fast forward to 2020, public university employees for the State of Florida may have greater exposure especially as the boundaries between personal and professional social media posts are blurred. Courts have addressed the issue of first amendment speech rights in labor employment disputes by using a balancing test. **The balancing test tips in favor of removing privacy protection when posts are unprofessional and disrespectful.** The courts' reasoning is that unprofessional speech may interfere with an employer's efficient operations and impact adverse employment consequences.^v Discovery of private social media is already being used against Plaintiff's in personal injury lawsuits, so it is expected that it will be routinely requested from physicians in medical malpractice lawsuits. This may have a significant impact on the hospital if the physician is employed or in residency and the posts meant to simply vent frustrations regarding perhaps an overly stressful shift or frustrating manager are posted. **Bottom line, pause before you post and use common sense.**

REFERENCES

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- v. The Florida Bar Journal Vol 94, No/6 November/December 2020, Social Media and the Progressive Limitations on Public Sector Employees' First Amendment Right to Free Speech, pg. 50-52
- vi. <http://www.ihl.org/education/IHIOpenSchool/resources/Pages/Activities/PaulLevySocialMediaInHealthCare.aspx>

SOCIAL MEDIA LOSS PREVENTION TIPS^{vi}:

Pause before posting

- Are you protecting patient and hospital privacy?
- Are you protecting your professional relationships and responsibilities?
- Are you respecting boundaries in your patient – physician relationship?

Private postings (family, coworkers, friends)

- Limit what you post.
- Keep postings free of vulgar speech, unprofessional speech that may reference your employer, coworker or patient.
- Maintain privacy settings and do not invite any person that you do not know.

Keep in mind that it is hard to separate professional posts vs personal ones.

- Use your common sense.
- Always follow HIPAA guidelines.

If you can't say anything nice, Don't say anything at all... And don't write it on Facebook either!



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