

Keeping Social Media Social

FOCUS 2012

November 29, 2012

Presented by Brian R. Purtell

DeWitt

Ross & Stevens s.c.  Law Firm

Presenter

Brian R. Purtell

Dewitt Ross & Stevens, S.C.

WHCA/WiCAL

606.252.9366

brp@dewittross.com

brian@whca.com

bpurtell@wical.org



Goals for Session

- Social Media benefits and risks
- Resident Privacy and Confidentiality
- Proper communication
- Training
- Policy
 - Do's
 - Don'ts
- Screening

Social Media Explained

Social media includes:

- web-based and mobile technologies used to turn [communication](#) into interactive dialogue...
- "a group of Internet-based applications that build on the ideological and technological foundations of [Web 2.0](#), and that allow the creation and exchange of [user-generated content](#)." ...
- Social media is media for social interaction as a super-set beyond social communication. Enabled by ubiquitously accessible and scalable communication techniques, social media has substantially changed the way organizations, communities, and individuals communicate.

Source, Wikipedia



Obligatory Discussion of Explosion of Social Media Users and Options

- Blah
- Blah (cont.)

Pros and Cons of Social Media

- Recruiting
- Digital branding/marketing of your facility
- Instantaneous and wide reaching
- Social media presence required to be relevant in digital age.
- Provides feedback
- Communication with current or prospective consumers
- Difficult to control once it is out in cyberspace
- Lack of privacy
- Can be misinterpreted and not suited to complex communications
- Data breaches
- Permanency
- Platform for grievances

Social Media Risks in Healthcare

- Misuse of social media leading to increased risk of PHI disclosure.
- HIPAA and state laws apply to social networking
- Information disseminated quickly and sender loses control of recipients
- Information is difficult to erase
- Employees (particularly Generation Y) are used to living in a digital fishbowl
- Family members are used to broadcasting their life
- Employee use at work

Privacy and Confidentiality Implications of Social Media

- Extension of privacy and confidentiality policy=update training and orientation of employees to understand that the same rules apply in the on-line community.
- Don't expect to prohibit usage: policies and training should reflect reality.

Privacy and Confidentiality

Implications of Social Media

- HIPAA protects a patient's protected health information, which is "all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral." 45 C.F.R. 160.103
- HIPAA's Privacy Rule applies to providers and their employees.
- Violations of HIPAA can result in fines up to \$250,000 and/or imprisonment for up to 10 years for knowingly misusing individually identifiable health information. HIPAA penalties and enforcement is significantly stronger under HITECH Act.
- OCR increasing audits on HITECH Act
- In 2012 publication of final rules implementing modifications to HIPAA.

Privacy and Confidentiality Implications of Social Media

Common issues:

- Statements/comments involving resident information
- Photos and/or videos
- Phone usage during work hours
- Distraction
- PHI/data loss or theft
- Texting, not just the “bad” kind

Develop Social Media Policy

Policy for “voice” of facility and facility official use of social media.

- Who, what, where, when, why, what purpose and goals.
- Transparency and honesty
- Consistent message
- Proper tone

Develop Social Media Policy

Policy for employees:

- Reserve the right to monitor all electronic communications made on company owned-computers and networks. No reasonable expectation of privacy.
- They may not speak on behalf of company.
- No photos, resident information under any circumstances
- Prohibit defamatory comments regarding the company, employees, residents and services.

Develop Social Media Policy

Policy for employees:

- Addressing resident interaction, e.g. do not “friend” residents
- State that violation of the policy may result in disciplinary action, up to, and including termination.
- Include reporting expectations
- Include non-retaliation language

Policy Development

Policy for employees:

- Update orientation
- Re-train
- Make it relevant
- Understand your topic
- Recognize different learning styles and employee attitudes on privacy issues!
- Provide concrete examples

Resident Privacy and Confidentiality

Technology and Social Media

Resident Privacy and Confidentiality

- Residents have rights under both state and federal laws regarding the privacy and confidentiality [*Insert applicable state laws discussion*].
- We have obligations to respect and protect these rights.
- As employees, you are obligated to follow our policies which are based on both our internal policy and applicable laws

Resident Privacy and Confidentiality

- Ask yourself:
 - Would you want the personal information about an elderly loved one discussed and commented upon by strangers?
 - While you may not be as concerned about sharing information about yourself, would you think an elderly loved one would want their images, condition, affliction, challenges, etc. discussed by complete strangers?

Staff Role in Respecting Rights

- Follow policy and training regarding the disclosure of resident personal or medical information
- Recognize the importance of maintaining confidence within the facility AND outside of the facility.
 - Your obligations to respect residents' rights do not stop at our doors
 - This includes on-line communications via social networks

Staff Role in Respecting Rights

Social media and your obligations:

- We can't or don't expect you to not use social media.
- Do not however discuss or reference residents in these forums.
- *[Insert, as applicable, facility social media policy and guidelines discussion]*

Staff Role in Respecting Rights

Social media and your obligations:

- Simple rule: Do not discuss any resident information on-line.
- This is simply an extension of the expectation that you should not be discussing resident information in any context outside of the facility.

Staff Role in Respecting Rights

Social media and your obligations:

Can you talk about your day, how you feel, etc.?

Sure, but keep resident information out of the discussion.

Appropriate vs. Inappropriate 'status updates'

"Appropriate"

"I had a tough day at work, one of my favorites residents died after a long illness"

*But even this invites questions that could lead to inappropriate disclosures

Inappropriate

"I had a tough day at work, Mary Smith, my favorite resident, died after a long battle with pancreatic cancer"

Appropriate vs. Inappropriate 'status updates'

How even an "appropriate" post can become inappropriate

Employee: "I had a tough day at work, one of my favorites residents died after a long illness"

Friend: "Sorry to hear that, who was it."

Employee: "Mary, she was so sweet"

Friend 2: "Mary Smith? I knew her too. She put up a good fight, but pancreatic cancer is a terrible way to go"

Employee: "yea, it was hard to see her suffer so much at the end"

Photographs, Video and Audio

Employee responsibilities include:

- Know the facility policy with respect to the possession and use of phones, cameras, video or other recording devices
- Understand that images (still or video) or other recordings are protected information about a resident and that there are very specific requirements about when these can be taken and used.
- Our policy explains the appropriate uses and necessary requirements that must be met before taking and photos or recordings. These must be followed strictly!

Photographs, Video and Audio

- Staff may not take photographs, videos or other recordings within the facility unless for appropriate reasons AND consistent with the facility policy as to necessary authorizations.
 - If you don't have the right reason AND the appropriate authorizations/consents, none should be taken/recorded.

Photographs, Video and Audio

- Under no circumstances should an employee post a photograph, video or recording taken of any residents regardless of where obtained.
 - Swift discipline will be taken and referrals to appropriate agencies will be made.

Photographs, Video and Audio

The following are actual case examples of incidents reported to State officials [*consider inserting examples of situations that have occurred locally to drive point home and as a source of discussion*]

:

- Cell phone photo of a client with food all over her face posted on caregiver's MySpace webpage with statement "good eater."
- Cell phone video of a caregiver jumping on a client's bed and client repeatedly asking "why would you do this to me?" and to "stop."
- Cell phone photo of caregivers giving a combative client a shower.
- Cell phone photo of a client on the toilet with Attends on her head, which was then sent to another caregiver's phone.
- Caregiver was outside the facility showing a cell phone photo of a deceased client to friends.
- Caregiver wrote comments on Facebook using client's name.
- Caregiver showed a client sexually inappropriate cell phone photos.

Photographs, Video and Audio

*[follow up discussion about examples of inappropriate usage:
consider:]*

- How would you feel if these involved one of your loved ones.
- The impact that such incidents have on your profession.
- The impact that such incidents would have on the residents, their families, the facility reputation, the staff involved.

Facility Policy Regarding Electronic Devices

Reporting Expectations

Just as your obligations to protect resident rights do not stop at our doors, your reporting expectations about violations of residents' rights, allegations of abuse, neglect, and misappropriation of property are not site specific.

Questions?

Policy Development

Policy for Residents and Families(?):

At least communicate importance of protecting resident privacy and confidentiality.

- Photos
- Social media posting
- Video conferencing

Social Media in the Hiring Process

- Screening
- Verification of references
- Background
- Information not on resume/application
- “If its public its fair game, right?”

Social Media in the Hiring Process

- Create standardized policies and procedures for HR to follow.
- Consistency is key, treat every applicant the same.
- If social networking sites are used, access the sites as late in the hiring process as possible.
- Segregate who does the research from the decision maker.
 - Have the researcher only report non-protected job related information.

Monitoring Employees' Social Media

Reasons **for** Monitoring

- Verifying information provided by applicant
- Improving productivity and efficiency
- Protecting employer's confidential information
- Preventing unlawful or improper activity

Cons of Monitoring

- True and accurate information?
- Mistaken identity
- Inconsistent application of HR policies
- No policy in place to address monitoring
- Privacy concerns

Monitoring Employee Usage

Workplace activity/usage much different than off duty conduct:

- Employees DO NOT have a reasonable expectation of privacy when using an employer's computer or electronic systems.
 - Added reason for providing phones if access needed.
- Provide notice in the Employee Handbook, that they have no reasonable expectation of privacy with regard to their work computer or any information stored or sent on the employer's system and that they are subject to monitoring.
- Can a company monitor an employee's personal email account that is accessed on the company computer?
 - Probably better to restrict usage.
- Company does not own the employee's passwords – even if used and saved on the employer owned system.

Mobile Devices in the Social Media Workplace

Ways to protect against dissemination of PHI

- Who issued the device? Do not permit personal mobile devices to transmit PHI. Only permit company issued devices with secure connections that are password protected should transmit.
- Automatic password protection after the mobile device is idle for a certain period (2 minutes, etc.)
- Automatic disabling of lost mobile devices or mobile devices not returned by terminated employees.
- Do not permit any texting of PHI.
- Use of secure encrypted email to send PHI.
- Education of doctors, referral sources, etc.

Social Media in Discipline or Termination of Employee

- Discrimination (from knowing information pertaining to protected class)
- Retaliation
- Unfair Labor Practice

Social Media in Discipline or Termination of Employee

National Labor Relations Act

- § 7 of the NLRA provides in part that employees have the right to engage in “concerted activities” for the purpose of collective bargaining or other mutual aid or protection.
- § 8 of the NLRA provides in part that it shall be an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7”.
- Applies in all workplaces, not just unionized settings

Social Media in Discipline or Termination of Employee

The National Labor Relations Act (29 USC 201, et seq.) provides employees with a right to engage in concerted activity, including discussing the terms and conditions of their employment with their co-workers.

Quandary: When is a social media communication “concerted activity?”

Social Media in Discipline or Termination of Employee

NLRB Steps In

- Aug 2011 and Jan 2012 memos re: “concerted activity” and social media.
 - NLRA protects employees who engage in concerted activity for their mutual aid or protection.
 - Board interprets protections as allowing leeway to express views in a manner that employers may consider rude, discourteous and/or disloyal.
- Prohibit discriminatory or harassing statements about co-workers and residents.
- Some unclear, but clearly can:
 - Prohibit release of PHI and protect resident confidentiality and privacy.

Questions

