SOCIAL MEDIA AND THE MEDICAL PROFESSION: ARE YOU EXPERIENCED? OR JUST DAZED AND CONFUSED?

By Daniel J. Burnick • Thursday, October 22, 2015

Recently, the following article was published in the 2015 Fall edition of *Alabama Medicine*, the quarterly magazine of the Medical Association of the State of Alabama. Although this article is directed to the medical community, it addresses issues that impact most, if not all employers.

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Usually, when I get to quote song titles from Jimi Hendrix and Led Zeppelin, it’s a good thing. Unfortunately, when it comes to talking about Social Media (SM) in the workplace, including physician’s offices, it quickly turns into a nightmare. As so many of us have heard on TV and in the movies, “anything you say can and will be used against you”. In today’s world, this is especially true with the use of Social Media. This is why it is so important to have a SM policy implemented AND enforced in your office. SM includes, but is not limited to, Facebook, Instagram, Twitter, LinkedIn, Pinterest, G+ and even your website.

“WE DON’T NEED YOUR PERMISSION”

That was a recent tweet put out by the Vanderbilt football team. The problem was that 4 football players are awaiting trial on rape charges. Obviously, not a lot of thought went into the tweet before someone hit the “send” button. As a result, there was a major backlash that forced the President and other University officials to apologize for the poorly worded tweet.

CECEL THE LION

Dr. Paul Palmer, a Dentist from Minnesota, is a perfect example of how quickly and effectively SM can destroy a reputation and a practice.

KIM KARDASHIAN, DICLEGIS AND THE FDA

I am not a big Kim fan, but she caught my attention when the FDA sent her and Duchesnay Inc., the manufacturer of Diclegis, a letter instructing them to remove an Instagram posting. She is pregnant, and posted a picture of her holding a prescription bottle of the pills urging pregnant women to ask their doctor about it while stating “it’s been studied and there was no increased risk to the baby”. The FDA, in a letter to Kim and Duchesnay, claims the post did not disclose the risks of the drug, and was misbranding.

YOU DO NEED A SM POLICY

From a legal perspective, I believe that it is imperative to implement a SM policy, train all owners and staff on the policy, and consistently enforce it. This will help avoid, but not necessarily escape, the numerous legal pitfalls facing physicians as the result of not complying with all the complicated and convoluted laws and regulations that may impact your practice. Areas to carefully evaluate, preferably in consultation with your legal counsel, include:

1. HIPAA. Physicians or staff discussing or mentioning patients on SM, even if not by name, can lead to allegations of HIPAA violations. Even responding to a post by a patient may lead to litigation.

2. National Labor Relations Act (NLRA). Many people think that the NLRA applies only to the unionized workplace. That belief is wrong. Section 7 of the NLRA protects “concerted activity” concerning “terms and conditions of employment” for all employees. If an employee is engaged in a conversation on SM, usually on Facebook, with other employees about wages, hours, the conduct of their supervisors, or other “terms and conditions of employment”, that conversation may be protected and the employee(s) cannot be disciplined. Over the past several years, the National Labor Relations Board (NLRB), with a majority being appointees who agree with President Obama's liberal interpretation of the NLRA, has been aggressively pursuing cases against employers who discipline employees in violation (or the perceived violation) of Section 7. Although Alabama is an “employee at will” state, if discipline is imposed in violation of the NLRA, there is exposure to a NLRA complaint or a lawsuit being filed. Although the NLRB has issued a number of position statements attempting to clarify what they believe is legal or illegal when it comes to SM, it is still very confusing.

3. Stupid employees doing stupid things on SM can subject you to liability. The most disturbing example of this occurred a number of years ago in California, when a 60 year old victim, who was stabbed more than 12 times and had his throat slashed so severely that he was almost decapitated, was taken to the emergency room. Staff, including nurses, photographed him and posted the pictures on Facebook. Are your staff members trained and instructed not to do such irresponsible things?

4. Patients have been known to take to SM to complain about services received and/or the amount charged for particular procedures. Your office should have a policy in place as to who is authorized to respond, and who is not authorized to respond. Careful consideration...
should be given as to what the response, if any, should be.

5. Ex-employees, on occasion, take to SM to express their feelings, sometimes justified, and sometimes not, about their departure, terms and conditions of employment, alleged improper treatment and alleged improper billing practices. Again, your office should have a policy in place as to who is authorized to respond, and who is not authorized to respond.

6. It is important to specify who owns the SM site(s), and who is authorized to post on the site(s). There have been a number of cases where the person in charge of SM has left their employment, and no one remaining had the passwords necessary to access the accounts once they left. At least one case involved a Twitter account, where the ex-employee slightly changed the name on the account and continued tweeting on behalf of his new employer, a competitor. Time consuming and expensive litigation ensued, and the case was ultimately settled before trial.

7. The use of personal SM sites by employees, and even owners, can easily lead to lawsuits or evidence in lawsuits that have been filed. For example, if an employee alleges racial harassment, and the accused harasser has a personal SM site with confederate flags, inappropriate racial comments and jokes, and links to controversial organizations (such as the KKK), the SM site could be used as evidence of racial animus should a lawsuit be filed. The same can be said in relation to allegations of sexual, age, pregnancy, disability and other claims of harassment or discrimination.

8. The use of SM and instant messaging to communicate with patients can be effective tools in treating your patients. However, it is important that there be a mechanism in place to ensure that records of these communications can be saved and placed in the charts of the patients.

9. With the concept of “telemedicine” constantly and rapidly evolving, it is critical that any billing practices for services provided through SM comply with the applicable laws and regulations.

10. More and more medical practices are marketing through SM. This is also regulated by the State Board. It is important that you and your staff are aware of, and comply with, any restrictions on the use of SM for marketing. An improper post by an employee on a personal SM site may be attributed to the practice.

11. Oftentimes, medical professionals and/or their staff express their personal opinions on the company or personal SM sites. These opinions may address Obamacare, BlueCross/BlueShield, pharmaceutical companies, the American Medical Association, the Medical Association of Alabama, and other health related issues. A policy can be put in place that requires any such posts to be prefaced by language stating that the opinions are those of the person posting, and not their company or employer.

12. Unfortunately, in today’s world, violence in the workplace, either by disgruntled employees/ex-employees, patients, or relatives of patients is becoming more frequent. Oftentimes, expressions of anger or potential violence are first made public on SM. Anytime a threat is made, it must be taken seriously, and the proper precautions must be made, including, but not limited to, notifying law enforcement, enhancing security measures at the office and informing employees to be on the lookout for any strange or unusual behavior.

CONCLUSION

SM is a wonderful tool that can be used to educate your patients, grow your practice, market, and even improve the efficiency of your practice. One should never forget that anything you say on SM can and will be used against you when you least likely expect it. SM can be a terrible sword that may lead to lawsuits, adverse publicity, disgruntled employees and loss of patients. I believe that all medical practices should implement SM policies and procedures, train their owners and staff on the policies and procedures, and update the policies and procedures as necessary. This should be done in consultation with legal counsel in light of the serious consequences of the improper use of SM.

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