

USE OF Social Media and Mobile Devices

Is Your License at Risk



Karen A. Butler, RN, BSN, JD

- Thuillez, Ford, Gold, Butler & Monroe, LLP



A New Age

- What about the rules?



Professional Misconduct

- 8 NYCRR 29.1(b)(8) Revealing personally identifiable facts, data or information obtained in a professional capacity without that person's consent
- 8 NYCRR 29.2(a)(2) Willfully abusing, harassing, or intimidating a patient either physically or verbally

- Moral unfitness
- An upstate New York nurse who snapped photos of an unconscious male patient's penis and sent the lewd snaps to her co-workers has surrendered her medical license.
- Kristen J, 27, agreed to give up her license Monday after pleading guilty to a misdemeanor charge of sharing unlawful surveillance Photos

- As part of a plea deal that nixed the felony charges in the case, the nurse who used to work at Upstate University Hospital in Syracuse also agreed to spend three years on probation.
- Her license was revoked for moral unfitness

- Johnson was arrested last May following a nine-month investigation launched by the Onondaga County District Attorney's Office because her colleagues reported that she had sent them inappropriate cellphone pictures multiple times.

- Along with photos of the male patient's privates, authorities also discovered some shots of a fellow nurse cleaning out a comatose female patient's gastrointestinal blood clot

Federal Regulations Released

August 2016

- CMS Issues Memo with Social Media Guidelines (8/16)
- Applies to Long Term Care
- Must have written policies

- Nursing home workers across the country are posting embarrassing and dehumanizing photos of elderly residents on social media networks such as Snapchat, violating their privacy, dignity and, sometimes, the law.

- ProPublica has identified 35 instances since 2012 in which workers at nursing homes and assisted-living centers have surreptitiously shared photos or videos of residents, some of whom were partially or completely naked. At least 16 cases involved Snapchat, a social media service in which photos appear for a few seconds and then disappear with no lasting record.

- Some have led to criminal charges, including a case filed in California against a nursing assistant.

HIPAA

- **DO: Understand what is considered a HIPAA violation on social networks.**
- Under HIPAA, a breach or violation is an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information (PHI).

EXAMPLES

- Common examples of social media HIPAA violations include:
- Posting verbal “gossip” about a patient to unauthorized individuals, even if the name is not disclosed.
- Sharing of photographs, or any form of PHI without written consent from a patient.

- A mistaken belief that posts are private or have been deleted
- Sharing of seemingly innocent comments or pictures, such as a workplace lunch which happens to have visible patient files underneath.
- **DON'T: Post anything you wouldn't say in an elevator or coffee shop.**

- According to HHS, the majority of HIPAA violations from recent years have occurred from employees mishandling PHI, many of which stem from inappropriate social sharing.

- Violations under the HIPAA Privacy Rule include Civil Money Penalties which can result in fines ranging from \$100 – \$1,500,000 or Criminal Penalties which can result in fines up to \$250,000 and up to 10 years in prison. Other consequences of violating HIPAA include lawsuits, the loss of a medical license or employee termination.

We know that, right?

- Facebook
- Twitter
- Snapchat
- Messenger
- Texting
- Email
- Smart phones

- A nurse posts on Facebook that her patient fell and she ended up “covered in poop”

- A nurse runs into a friend on pediatrics whose daughter is very sick.
- The nurse posts a “selfie” with herself and the little girl and posts it on her FB page
- The nurse adds the caption “my very brave cancer patient”
- The Mom’s “friend” reports the nurse to the hospital. She is fired.

- A nurse is very concerned about a patient she learns is terminally ill.
- She finds out the patient has a “GoFundMe” page. She donates money and writes a brief note encouraging others to do the same because her patient is sick and has no family

Email and Texting

- You forget to give medication to a patient. You text a co-worker
- Your patient falls during the night. You send an email to your manager about the incident
 - You attach the incident report to the email

- You email a copy of the Monday OR schedule to a co-worker on vacation
- One of the doctors takes a picture of the OR schedule before he leaves for the day

Misconceptions

- A mistaken belief that the communication or post is private and accessible only to the intended recipient. The nurse may fail to recognize that content once posted or sent can be disseminated to others.

- A mistaken belief that content deleted from a site is no longer accessible. The moment something is posted, it lives on a server that can always be discoverable in a court of law.

- A mistaken belief that it is harmless if private information about patients is disclosed if the communication is accessed only by the intended recipient. This is still a breach of confidentiality.

- A mistaken belief that it is acceptable to discuss or refer to patients if they are not identified by name, but referred to by a nickname, room number, diagnosis or condition. This too is a breach of confidentiality

A New Age of Patient Sharing

- Patient blogs and web pages
- Many patients and/or their families now start a web page or blog so they can keep friends updated
- What if you share something on the patient's page?

- A patient and his wife have a web page to share information with family and friends after a horrific accident leaves the patient in ICU.
- Susan is told about the web page by the wife who frequently shows Susan encouraging posts

- The wife gives Susan the web address so she can see the web page
- That night Susan looks at the web page and is moved by the many notes of encouragement
- Susan writes her own note “I know its been a hard week. Hopefully surgery tomorrow will go well.”

- The patient is outraged. He had not told his family he was having another surgery!

Patient Portals

- Patients are encouraged to set up a portal.
- Patients email providers, update drug lists, send questions, review test results.
- Be very careful entering information in a patient portal

Pictures

- Can never take a picture of any patient or even visitor without consent
- Cannot take on your phone
- If picture is taken by the hospital must have written consent and uses secure camera.

Pictures

- In some institutions medical students and/or residents routinely take pictures of patient records
- This is to help them to follow the patient, give report, prepare for the next day
- You cannot take pictures of a record which is then stored on your phone!

What Can Happen

- Discipline or even termination by employer
- Reporting to the State Education Department (Nursing Board)
- OMIG-May be precluded from working for any Medicaid facility for five or more years
- OIG-Federal-Precludes from practice in any facility receiving Medicare.

- Attorney General-Prosecution for neglect/abuse of a patient
- Justice Center for Protection of persons with special Needs

Litigation

- All social media, emails, blogs, texts are discoverable
- Plaintiffs can obtain all information posted on social media even if the account is deleted
- Even information generally about your job or schedule can be used against you in litigation

