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Social Media Can Lead to Suits Against EP for Malpractice, Civil Defamation

Posts are one of plaintiff's "best tools"

In 2013, an emergency department (ED) director was terminated after commenting on a patient's photo, which had been posted on Facebook by an ED nurse.¹ In a similar case the same year, an emergency physician (EP) was sued after posting a photo of an intoxicated patient that included comments.²

"Consider a Facebook post like

you 'just took care of a 99-year-old drunk driver in the ER,'" says **Tom Scaletta**, MD, FAAEM, chair of the ED at Edward Hospital in Naperville, IL.

This post would violate the Health Insurance Portability and Accountability Act (HIPAA) even though the patient isn't named, he explains. This is because the patient's

advanced age creates a small enough cohort in the geographical area the poster resides in to determine the patient's identity. "Moreover, the civil defamation suit, assuming the post was discovered by an angry family, could be steep," warns Scaletta.

Since most professional liability policies don't cover such an occurrence, EPs would have to retain

their own defense counsel, adds Scaletta. “The ED is a high-risk area, since this is where socially interesting things happen,” he says. “For some, social media posting is a stress reliever, especially after a grueling shift.”

However, a post such as “Heroin shooter last night begged for admission to treat his low back pain and nothing but IV Dilaudid works. Conveniently had ‘fever and chills’ at home. I guess he knows how to surf the Internet. Not fooled!” can also be a career-ending mistake.

“If you see any colleagues beginning to cross the line, do them a favor and suggest they stop,” advises Scaletta. “Remind them that web crawlers and other permanent archiving tools make years-old comments very easy to find.”

EPs should remember that what they post on the Internet is going to be there permanently, warns **Andrew Wong, MD**, assistant clinical professor of emergency medicine at University of California Irvine School of Medicine and associate medical director of the ED at UC Irvine Health.

“If there is anything that you would want to post regarding a patient case, which should almost never be the case on social media, make sure to ask permission from the patient,” he advises. “Some experts say you can obtain it verbally, but written authorization is even better.”

All Data Likely Discoverable

“Just like in divorce cases, where electronic data and social media postings are Exhibit A, the same is now true in medical malpractice actions,” says **John W. Miller II**, principal at Sterling Risk Advisors in Atlanta, GA.

An EP’s social media posts are all potentially discoverable, says Scaletta, depending on the situation and state rules.

“Where once we only had to worry about the medicine and what the experts said relative to the documentation of care, plaintiff attorneys now use electronic information, be it social media or otherwise, to discredit the defendant,” says Miller.

Any information in the public realm, including social media posts, are “fair game” for plaintiff attorneys, says Miller. “The subpoena of electronic information has become one of the best tools in the plaintiff attorney’s arsenal for creating traps in the defendant’s testimony,” he adds.

When physicians use a phone for both business and personal communication, typically the plaintiff attorney gets access to all the data, not just that which is pertinent to the case. “There is an argument that some malpractice insurers are making for physicians to keep two different cell phones — one for business and one for personal use,” says Miller.

This has been successful to an extent, says Miller, in keeping data from the phone used for personal matters from being subpoenaed. “But to the extent a physician uses his or her business phone for personal reasons, usually all the data in that phone become discoverable,” he says.

Posts Can Help or Harm Defense

Depending on the facts of a medical negligence case, social media posts can complicate both the prosecution or defense. A recent lawsuit alleged a patient was harmed because an on-call surgeon failed to return to the hospital to attend to a

patient he performed a procedure on earlier that day.

“He contended that he never got the pages, the cell phone calls, or the text messages from the hospital,” says Miller. During the litigation, a Facebook post was revealed showing the physician and his wife celebrating their anniversary on the night in question, with an open bottle of wine between them. “Needless to say, this compromised the defense of his case,” says Miller.

Another recent case was won by an orthopedist after the jury was shown a video posted to social media depicting the patient using the arm that, under oath, he had claimed was incapable of lifting more than 10 pounds, subsequent to a procedure he alleged was a violation of the standard of care.

“The video showed the plaintiff picking up a relative at a family reunion and twirling them around his body with said arm,” says Miller. Here are important considerations for EPs involving liability risks of social media:

- **EPs might face defamation lawsuits if they respond to others’ social media posts.**

“Emergency physicians need to be careful about associating on Facebook with coworkers,” says Scaletta. In a widely publicized case, an ED technician was suspended for posting patient information to her Twitter account.³

“If a 19-year-old technician cannot resist the urge to post something that is inappropriate, and the emergency physician clicks ‘Like,’ this could end a job, and possibly a career,” he warns.

EPs might also be tempted to respond to negative posts by patients on social media that criticize the EP. “There is legal risk related to inappropriate, in-kind responses to patients’ opinions,” says Scaletta.

“These might instigate a defamation lawsuit.”

Sometimes colleagues defend the EP or the ED against derogatory things said in a social media post. “It just becomes a firestorm,” says Miller. “Now you’ve really upset the patient and, potentially, violated HIPAA by discussing the patient’s treatment online.”

EPs at Edward Hospital were tempted to respond to a recent negative post on the hospital’s Facebook page that named a specific EP and ED nurse. “Many staff knew about the posting, as they follow the hospital site. They were upset because they knew that the remarks were completely baseless,” says Scaletta. He counseled staff not to reply to the posting, since this could be construed as a HIPAA violation.

“While it’s tempting to set the record straight, particularly to something in the public realm, our advice is to leave it be,” says Miller.

Miller has seen such responses inflame situations into a lawsuit or a state board complaint. “Generally, responding only makes it worse, as you’re not going to win. The poster will always have the last word,” says Miller.

• If EPs post risk-management questions, these can be discoverable during litigation.

“These may be temporally related to a particular case that converts to a claim,” says Scaletta.

• EPs should proceed with caution before using Facebook to learn more about patients.

“In general, we would advise against physicians using social media as a regular part of their work,” says Miller. “We would tend to avoid researching patients beyond how they presented clinically.”

However, Miller knows of a provider who received a lab report with a diagnosis of metastatic cancer, and discovered the patient had moved out of state with no forwarding information. “The physician felt so compelled to make sure that this person knew of their diagnosis that he actually resorted to social media,” he says. By posting on social media, the physician was able to track down the patient.

“Using the Internet to look up a patient needs some forethought, but it may be a helpful source that may uncover a safety issue,” Miller concludes.

In some cases, EDs have used social media posts in a patient’s phone to find next of kin, when the patient presented with no contact information. “These exceptions need to be carefully thought through, with counsel engaged to be sure no laws or regulations are violated,” cautions Miller.

Scaletta once suspected that a patient was misrepresenting her condition. He found a website the patient was apparently using to raise

money for what appeared to be a fictitious disorder. “We flagged her in the system to alert other providers of this fact,” he says.

Scaletta also used Facebook to show that a patient was sending messages that suggested suicidal ideation. This resulted in the decision to admit the patient to a psychiatric facility. ■

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SOURCES

- **John W. Miller II**, Principal, Sterling Risk Advisors, Atlanta, GA. Phone: (678) 424-6503. Fax: (678) 424-6523. E-mail: jmiller@sterlingra.com.
- **Tom Scaletta**, MD, FAAEM, Chair, Emergency Department, Edward Hospital, Naperville, IL. Phone: (630) 527-5025. E-mail: tscaletta@edward.org.
- **Andrew Wong**, MD, Department of Emergency Medicine, University of California Irvine School of Medicine. E-mail: andrew.wong@uci.edu.