

2012

Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers

Nicolas P. Terry

Indiana University Robert H. McKinney School of Law., npterry@iupui.edu

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Nicolas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 Neb. L. Rev. (2013)

Available at: <https://digitalcommons.unl.edu/nlr/vol90/iss3/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers

TABLE OF CONTENTS

I. Introduction	703
II. Social Media and Healthcare Workers Misbehaving	705
A. Social Media’s Exponential Growth	705
B. Healthcare Providers Misbehaving Online	708
III. Ethical Codes and Provider Policies	711
A. Ethical Guidelines	712
B. Employer Social Media Policies	716
C. Assessing Legal Limits on Policies	720
1. Labor Law	721
2. Privacy Law	725
IV. Provider Access to Patient Social Media Data	727
A. From Voyeurism to Obligation	727
B. Risk Managing Access	733
V. Regulating Friendships and Controlling Adverse Feedback	734
A. Revisiting the “Boundary” Issue	734
B. Provider Comparison Sites	738
C. Social Media Gag Agreements	743
VI. Conclusion	750

I. INTRODUCTION

In a prior article, I identified four scenarios where doctors and patients faced legal or ethical peril because of their participation in social media.¹ The imperiled scenarios described were physicians

© Copyright held by the NEBRASKA LAW REVIEW.

* Hall Render Professor of Law and Co-Director Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law. Email: npterry@iupui.edu. I thank Colleen Zern, Amanda Wong, and Professor Margaret McDermott of Saint Louis University for their excellent research assistance.

1. Nicolas P. Terry, *Physicians And Patients Who ‘Friend’ Or ‘Tweet’: Constructing A Legal Framework For Social Networking In A Highly Regulated Domain*, 43 IND. L. REV. 285 (2010).

posting their social information online, patients exposing their own health-related information online, physicians and patients becoming social networking “friends,” and physicians “tweeting” or wall-posting about their work.²

In the two years that have passed since that article was written, the unique or heightened risks associated with data posted on profile pages or interactions within those “walled gardens” have become widely appreciated. Equally, some of the previously identified pitfalls for professionals have materialized. In particular, online activities by healthcare professionals have increasingly jeopardized patient confidentiality. Other scenarios, happily, do not seem to have gained much traction. For example, tweeting from the operating theater seems to be more popular on *Grey’s Anatomy* than in real life.³

The last two years have seen important quantitative and qualitative shifts in social media use patterns as well as a rapid deployment of private ordering: social media policies and other contractual constructs emanating from physicians, professional organizations, employers, and educators. Yet, these private, often contractual attempts to regulate online interactions or social media conduct are not all benign, themselves creating ethical or legal risk.

In this Article, I concentrate on social media and these new risk management constructs and do so primarily from the perspective of physicians. Part II provides updated statistics on Internet use by healthcare workers and explores some of the scenarios that have led medical schools and healthcare entities to expressly address social media behavior. Part III inquires into how professional organizations or those who employ or credential physicians have attempted to change the rules of the game by promulgating social media policies and analyzes some of the legal constraints on those policies. Part IV deals with the reality of medically relevant information about patients increasingly moving online and asks whether physicians should attempt to access information that might be useful or even life-saving. Finally, Part V describes how the patient-physician dialog has increasingly spilled out of the consulting room and onto social media sites and explores how physicians should react not only to overtures for social media friendship but also to online critical patient comments.

2. *Id.* at 288.

3. *Grey’s Anatomy: Don’t Deceive Me (Please Don’t Go)* (ABC television broadcast Feb. 3, 2011); cf. Elizabeth Cohen, *Surgeons Send ‘Tweets’ From Operating Room*, CNN (Feb. 17, 2009), http://articles.cnn.com/2009-02-17/tech/twitter.surgery_1_twitter-and-facebook-social-networking-site-twitter-tweeted?_s=PM:TECH.

II. SOCIAL MEDIA AND HEALTHCARE WORKERS MISBEHAVING

A. Social Media's Exponential Growth

In the last two years, the growth of social media has been relentless, with Facebook alone gaining 250 million users.⁴ Facebook has only been in existence for six years yet has as many as 750 million users worldwide⁵ and as many as 157.2 million U.S. visitors per month.⁶ Twitter, at only five-years-old, has 200 million users.⁷ Membership numbers aside, the traditional web metric of unique visitors is also telling, with Facebook receiving 590 million unique visits per month, Twitter 97 million, and the professional-oriented LinkedIn 41 million.⁸

This growth is showing few signs of slowing. Obviously the total number of users is capped, and Facebook is already reaching 73% of the U.S. Internet population.⁹ As a result, future growth will come in the time spent connected to social networks as they become core communications platforms. For example, Comscore reports "Facebook's average U.S. visitor engagement has grown from 4.6 hours to 6.3 hours per month over the past year."¹⁰ Social media platforms are growing by adding messaging,¹¹ search,¹² and video communication.¹³ It has been predicted that "20 percent of business users will use social

4. Hilary Scott, *Report: Facebook Hits 750 Million Users*, PCMAG.COM (June 27, 2011), <http://www.pcmag.com/article2/0,2817,2387680,00.asp#fbid=ju9K8E2Oa6m>.

5. Jason Kincaid, *Facebook Now Has 750 Million Users*, TECHCRUNCH (June 23, 2011), <http://techcrunch.com/2011/06/23/facebook-750-million-users>.

6. Andrew Lipsman, *The Network Effect: Facebook, LinkedIn, Twitter & Tumblr Reach New Heights in May*, COMSCORE (June 15, 2011, 10:52 AM), http://blog.comscore.com/2011/06/facebook_linkedin_twitter_tumblr.html.

7. Nicholas Jackson, *Infographic: A Look at Twitter's Explosive Five-Year History*, ATLANTIC (July 18, 2011), <http://www.theatlantic.com/technology/archive/2011/07/infographic-a-look-at-twitters-explosive-five-year-history/242070>.

8. Paul Kiser, *Who Uses Facebook, Twitter, LinkedIn, & MySpace? 4thQ & 1stQ Stats and Analysis*, SOC. MEDIA TODAY (Apr. 13, 2011), <http://socialmediatoday.com/paulkiser/285851/who-uses-facebook-twitter-linkedin-myspace-4thq-1stq-stats-and-analysis>; see Leena Rao, *LinkedIn Now Adding Two New Members Every Second*, TECHCRUNCH (Aug. 4th, 2011), <http://techcrunch.com/2011/08/04/linkedin-now-adding-two-new-members-every-second>.

9. Lipsman, *supra* note 6.

10. *Id.*

11. MG Siegler, *Facebook's Modern Messaging System: Seamless, History, and a Social Inbox*, TECHCRUNCH (Nov. 15, 2010), <http://techcrunch.com/2010/11/15/facebook-messaging>.

12. See Mathew Ingram, *Be Afraid, Google. Facebook Will Do Search*, GIGAOM (Mar. 25, 2011), <http://gigaom.com/2011/03/25/facebook-search-googl>.

13. Verne G. Kopytoff, *Facebook Offers Video Chat Arrangement with Skype*, N.Y. TIMES, July 6, 2011, at B3, available at <http://www.nytimes.com/2011/07/07/technology/facebook-introduces-video-chat-in-a-partnership-with-skype.html?ref=technology>.

networks as their primary means of business communications by 2014.”¹⁴ This is based in part on the tighter integration of mobile devices, such as smartphones with address books, and on messaging over social media services.¹⁵

The uses for social media are broadening, as are the demographics of active users.¹⁶ We have known for sometime that the majority (and a steadily increasing number) of Americans seek medical information on the Internet.¹⁷

Social media still lags behind “traditional” Internet destinations (such as established health web sites) for researching health information.¹⁸ According to a 2009 survey by Manhattan Research, 35% of U.S. adults use social media to acquire such information,¹⁹ while a 2011 survey by National Research Corporation suggests that 20% of Americans use social media websites as a source of healthcare information, with 94% of respondents saying they use Facebook for that purpose.²⁰ Trust in these sites also is increasing, though it lags behind that expressed towards hospital web sites.²¹ Pew’s *The Social Life of Health Information* report for 2011 found that of adults who use social network sites (46% of all adults in the United States), only a relatively small number (11% of adults) followed their friends’ personal health experiences and only 7% used social media to acquire health information.²² Another 2011 poll suggested that 85% of sur-

14. Brad Reed, *Gartner: Social Networking Slowly Taking Over E-mail*, MACWORLD (Nov. 11, 2010), http://www.macworld.com/article/155663/2010/11/email_social_networking.html?lsrc=rss_main; see also Brian Barrett, *Facebook Messages: Every Email, Text, and Chat in one Place*, GIZMODO (Nov. 15, 2010), <http://gizmodo.com/5690405/facebook-email> (“Facebook’s looking towards the future, towards a generation that’s steadily and increasingly been abandoning email for instant communication. And the more we abandon email for text and chat, the more Facebook’s going to be the communication hub.”).

15. Reed, *supra* note 14.

16. Doug Gross, *Older Users Flocking to Facebook, Twitter*, CNN (Aug. 27, 2010), <http://www.cnn.com/2010/TECH/social.media/08/27/older.users.social.networks/index.html?hpt=C1>.

17. See SUSANNAH FOX, PEW RESEARCH CTR., *THE SOCIAL LIFE OF HEALTH INFORMATION*, 2011, at 2 (May 12, 2011), http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Social_Life_of_Health_Info.pdf.

18. *Healthcare Websites Beat Out Social Media as a Health Resource*, HEALTHCARE IT NEWS (May 2, 2011), <http://www.healthcareitnews.com/news/healthcare-websites-beat-out-social-media-health-resource> (reporting 68% for sites such as WebMD and 54% for social media sites).

19. *Health 2.0 on the Rise—35% of U.S. Adults Use Social Media for Medical Information*, MANHATTAN RESEARCH (Oct. 7, 2009), <http://manhattanresearch.com/News-and-Events/Press-Releases/health-2-0-social-media-on-the-rise>.

20. *1 in 5 Americans Use Social Media for Health Care Information*, TICKER NAT’L RES. CORP. (Feb. 28, 2011), <http://hcmg.nationalresearch.com/public/News.aspx?ID=9>.

21. *Id.*

22. FOX, *supra* note 17, at 2, 6.

veyed Americans were not yet ready to use social media or instant messaging conduits to communicate with their doctors.²³ However, a 2011 survey by Intuit Health found that 73% of Americans would use a secure online communication conduit with their doctor to, for example, get lab results or to make appointments.²⁴

The Pew report, noted above, found a larger utilization of social media for health information and support by caregivers than by the general population—20% of caregivers who use social network sites use them to acquire health information, compared with 12% of other users.²⁵ Those other users are also likely to be heavy users of narrowcast social media sites aimed at those, say, who suffer from—or support sufferers of—particular diseases.²⁶ Some of these are crowd-sourced sites such as Patients Like Me,²⁷ and use social media to create support and advocacy groups²⁸ and to accelerate clinical trials.²⁹ Other narrowcast sites have a less organic background, such as Diabetic Connect³⁰ and other sites built by Alliance Health Networks.³¹

The trend lines are unmistakable and remarkable. As people spend more time in social media, they will have more of their health-related experiences there as they gather and disseminate information (and misinformation). And, as patients turn towards social media, healthcare providers seem happy to provide an expanding number of destinations. Over 1,100 hospitals now have social networking sites, including over 1000 Facebook pages and nearly 800 Twitter feeds.³² Exactly how many physicians use social media is difficult to determine. However, a survey published in 2011 concluded that personal

23. Molly Merrill, *Americans Not Ready to Use Social Media to Talk to Their Doc*, HEALTHCARE IT NEWS (Mar. 24, 2011), <http://www.healthcareitnews.com/news/poll-84-percent-americans-wouldnt-use-social-media-talk-their-doc>.

24. Mike Milliard, *Americans Want Docs to be Online*, HEALTHCARE IT NEWS (Mar. 3, 2011), <http://www.healthcareitnews.com/news/americans-want-docs-be-online>.

25. Fox, *supra* note 17, at 7.

26. *E.g.*, DIABETIC CONNECT, <http://www.diabeticconnetion.com> (last visited July 18, 2011).

27. PATIENTSLIKEME, <http://www.patientslikeme.com> (last visited July 18, 2011).

28. *See, e.g.*, Elissa R. Weitzman et al., *Sharing Data for Public Health Research by Members of an International Online Diabetes Social Network*, PLOS ONE (Apr. 27, 2011), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0019256>. *See generally* Nancy Shute, *Web Communities Help Patients With Rare Diseases*, NPR (Apr. 4, 2011), <http://www.npr.org/2011/04/04/135106113/patients-with-rare-diseases-connect-online>.

29. Paul Wicks et al., *Accelerated Clinical Discovery Using Self-Reported Patient Data Collected Online and a Patient-Matching Algorithm*, 29 NATURE BIOTECH. 411, 411 (2011), available at <http://dx.doi.org/10.1038/nbt.1837>.

30. DIABETIC CONNECT, *supra* note 26.

31. ALLIANCE HEALTH NETWORKS, <http://www.alliancehealthnetworks.com> (last visited July 18, 2011).

32. Ed Bennett, *Hospital Social Network List*, FOUND IN CACHE, <http://ebennett.org/hsn/> (last updated June 8, 2011).

use of social media by medical students and physicians mirrors that of the general population, with almost all medical students and 42% of physicians being on social media.³³ One aggregation site listed more than 1300 doctors actively using Twitter,³⁴ while one research study analyzed Twitter feeds from 260 self-identified doctors with more than 500 followers each.³⁵ Another study found that 44.5% of medical trainees had a Facebook account and that medical students were more frequent users than residents.³⁶ Even the Centers for Disease Control and Prevention published a toolkit addressed to providers promoting the use of social media “as part of an integrated health communications program.”³⁷

Use of social media by healthcare workers is also robust. A 2011 survey tracking social media use within healthcare institutions found that 84% of employees used sites such as Facebook for personal purposes and 68% for both personal and professional purposes.³⁸

B. Healthcare Providers Misbehaving Online

Recently, the American College of Physician Executives published a study of offline disruptive conduct by physicians.³⁹ More than 70% of physicians say that disruptive physician behavior occurs at least once a month at their organizations.⁴⁰ These behaviors include degrading comments and insults (observed by 59% of physicians), yelling (54%), discrimination (24%), inappropriate jokes (40%), profanity (41%), and spreading malicious rumors (21%).⁴¹ Unsurprisingly, similar behaviors occur online on social media platforms.

A 2007 cross-sectional analysis of medical students and residents at the University of Florida found the majority of accounts (83.3%)

33. Gabriel T. Bosslet et al., *The Patient-Doctor Relationship and Online Social Networks: Results of a National Survey*, 26 J. GEN. INTERNAL MED. 1168, 1168 (2011), available at <http://www.springerlink.com/content/m664151546731684/fulltext.pdf>.

34. TWITTER DOCTORS, <http://www.twitterdoctors.net> (last visited July 18, 2011).

35. Katherine C. Chretien et al., *Physicians on Twitter*, 305 JAMA 566, 566–68 (2011).

36. Lindsay A. Thompson et al., *The Intersection of Online Social Networking with Medical Professionalism*, 23 J. GEN. INTERNAL MED. 954, 955 (2008).

37. *The Health Communicator's Social Media Toolkit*, CTNS. FOR DISEASE CONTROL & PREVENTION, at 1 (Aug. 6, 2010), http://www.cdc.gov/healthcommunication/ToolsTemplates/SocialMediaToolkit_BM.pdf.

38. Anna Kuberacka et al., *Social Media Use in U.S. Healthcare Provider Institutions*, INST. FOR HEALTH TECH. TRANSFORMATION 2 (Aug. 30, 2011), <http://ihealthtran.com/pdf/frostiht2survey.pdf>.

39. Owen MacDonald, *Disruptive Physician Behavior*, QUANTIAMD (May 15, 2011), http://www.quantiamd.com/q-qcp/QuantiaMD_Whitepaper_ACPE_15May2011.pdf.

40. *Id.* at 2.

41. *Id.* at 4.

listed at least one form of personally identifiable information, that only a third (37.5%) were made private, and some accounts displayed potentially unprofessional material.⁴² A 2010 follow-up study examined photographs published on those accounts and found a number of identifiable patient photographs involving children treated on a medical “mission.”⁴³ A similar study of young New Zealand doctors found that 65% had Facebook accounts and that 37% of those Facebook users failed to use privacy settings.⁴⁴ Exposed information was described as including “personal information that might cause distress to patients or alter the professional boundary between patient and practitioner, as well as information that could bring the profession into disrepute.”⁴⁵

Sixty percent of medical schools responding to another study reported incidents of students posting unprofessional online content:

Violations of patient confidentiality were reported by 13% (6/46). Student use of profanity (52%; 22/42), frankly discriminatory language (48%; 19/40), depiction of intoxication (39%; 17/44), and sexually suggestive material (38%; 16/42) were commonly reported. Of 45 schools that reported an incident and responded to the question about disciplinary actions, 30 gave informal warning (67%) and 3 reported student dismissal (7%).⁴⁶

In 2011, two Baylor medical students faced disciplinary proceedings for a two-year-old video taken at a private party that subsequently was uploaded to YouTube.⁴⁷ The video apparently was offensive to Hispanic and poor patients at Ben Taub General Hospital.⁴⁸

Graduation is not necessarily a watershed. A recent study of tweets by 260 self-identified doctors on Twitter characterized 3% as “unprofessional,” 0.6% contained profanity, 0.3% contained sexually

42. Thompson, *supra* note 36, at 955–56.

43. Lindsay A. Thompson et al., *Protected Health Information on Social Networking Sites: Ethical and Legal Considerations*, 13 J. MED. INTERNET RES. 1 (2011), available at <http://www.jmir.org/2011/1/e8>.

44. Joanna MacDonald et al., *Privacy, Professionalism, and Facebook: A Dilemma for Young Doctors*, 44 MED. EDUC. 805, 805 (2010).

45. *Id.*

46. Katherine C. Chretien et al., *Online Posting of Unprofessional Content by Medical Students*, 302 JAMA 1309, 1309 (2009).

47. Isiah Carey, *2 Students Punished for YouTube Video*, MY FOX HOUSTON (Apr. 18, 2011), <http://www.myfoxxhouston.com/dpp/news/local/110418-2-students-punished-for-youtube-video>; see also Isiah Carey, *Video Insults Poor, Hispanic Patients*, MY FOX HOUSTON (Apr. 18, 2011) [hereinafter *Video Insults Poor*], <http://www.myfoxxhouston.com/dpp/news/local/110412-video-insults-poor-hispanic-patients> (reporting negative reactions to online posting of once-private video).

48. *Video Insults Poor*, *supra* note 47. For a more positive narrative about how an online video medical student project was used as a case study for developing responsible social media policies, see Jeanne M. Farnan et al., *The YouTube Generation Implications for Medical Professionalism*, 51 PERSP. BIOLOGY & MED. 517, 517–24 (2008).

explicit content, 0.1% contained discriminatory content, and 0.7% involved a potential privacy violation.⁴⁹

Increasingly, such behavior by healthcare workers is attracting adverse employment or credentialing decisions by hospitals. For example, in 2009 two nurses were terminated by Mercy Walworth Medical Center after photographing an X-ray showing a sexual device lodged in a patient's rectum; one picture was allegedly posted on a Facebook page and discussed on another.⁵⁰ In April 2010, four staff members were fired and three disciplined at St. Mary Medical Center in Long Beach, California.⁵¹ Allegedly, the staff members had taken pictures of a dying man who had been savagely attacked and then posted them on Facebook.⁵² In June 2010, Tri-City Medical Center in Oceanside, California terminated five nurses for discussing patients on Facebook.⁵³

Even apparently benign behavior involving social media is attracting adverse reactions. For example, in November 2008, nurses at a Fargo, North Dakota-based healthcare system used Facebook "to provide unauthorized shift change updates to their co-workers."⁵⁴ In 2011, Westerly Hospital in Rhode Island terminated the clinical privileges of a forty-eight-year-old emergency medicine physician and reported her to the state licensing board.⁵⁵ The physician had written about some of her clinical experiences on Facebook albeit without using patient names or intending to reveal patient information.⁵⁶ Subsequently, a third party was able to identify one of the patients because of the nature of an injury described.⁵⁷ In a consent agreement with the licensing board, the physician accepted a reprimand for unprofessional conduct, paid \$500 in administrative costs, and agreed

49. Chretien, *supra* note 35, at 567 (limiting study to those with more than 500 followers).

50. *Facebook Firings Show Privacy Concerns with Social Networking Sites*, 31 HEALTHCARE RISK MGMT. 49, 49 (2009), available at <http://www.khhra.org/fbfirmings.pdf>.

51. Molly Hennessy-Fisk, *When Facebook Goes to the Hospital, Patients May Suffer*, L.A. TIMES (Aug. 8, 2010), <http://articles.latimes.com/2010/aug/08/local/la-me-facebook-20100809>.

52. *Id.*

53. *Id.*; see also Roger Boyes, *And This is Me on Facebook . . . Helping with Brain Surgery*, TIMES (Aug. 18, 2008), <http://www.timesonline.co.uk/tol/news/world/europe/article4560908.ece> (reporting that Swedish nurse was suspended after posting photographs of brain and back surgeries on her Facebook page).

54. Chris Dimick, *Privacy Policies for Social Media*, J. AHIMA (Jan. 6, 2010), <http://journal.ahima.org/2010/01/06/social-media-policies>.

55. *In the matter of Alexandra Thran, MD*, ST. R.I. DEP'T HEALTH (Apr. 14, 2011), <http://www.health.ri.gov/discipline/MDAlexandraThran.pdf>.

56. *Id.*

57. *Id.*

to attend a continuing medical education session dealing with patient confidentiality.⁵⁸

III. ETHICAL CODES AND PROVIDER POLICIES

Divorce lawyers aside,⁵⁹ employers were one of the first groups to leverage social media by including online data in their background checks.⁶⁰ The majority of employers now include social media in their screening processes.⁶¹ In the healthcare environment, the seriousness of background checks has been further promoted by the growth of the negligent credentialing cause of action⁶² and the concomitant duties of disclosure placed on prior healthcare employers.⁶³ While only the occasional physician recruit will leave behind social media evidence of an interest in witchcraft or “pictures of her topless and drink-

58. *Id.*

59. *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, AM. ACAD. MATRIMONIAL LAW. (Feb. 10, 2010), <http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey->. See generally Leanne Italie, *Divorce Lawyers: Facebook Tops in Online Evidence in Court*, USA TODAY (June 29, 2010), http://www.usatoday.com/tech/news/2010-06-29-facebook-divorce_N.htm; Leanne Italie, *Facebook is Divorce Lawyers' New Best Friend*, MSNBC (June 28, 2010), http://www.msnbc.msn.com/id/37986320/ns/technology_and_science-tech_and_gadgets; Belinda Luscombe, *Facebook and Divorce: Airing the Dirty Laundry*, TIME (Jun. 22, 2009), <http://www.time.com/time/magazine/article/0,9171,1904147,00.html#ixzz1KZ8L7kVW>.

60. See, e.g., Alan Finder, *For Some, Online Persona Undermines a Résumé*, N.Y. TIMES (Jun. 11, 2006), <http://www.nytimes.com/2006/06/11/us/11recruit.html>; Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES, Jul. 21, 2011, at B1, available at http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?_r=1&ref=technology.

61. See Finder, *supra* note 60; Alison Kershaw, *Social Network Warning for Teachers*, INDEPENDENT (Apr. 24, 2011), <http://www.independent.co.uk/news/education/education-news/social-network-warning-for-teachers-2274310.html>; Bidhan Parmar, *Should You Check Facebook Before Hiring?*, WASH. POST (Jan. 22, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203193.html> (noting a December 2009 survey found 75% of U.S. recruiters said they were required to research applicants online). See generally John Sumser, *Social Intelligence*, HR EXAMINER (Apr. 7, 2011), <http://www.hrexaminer.com/social-intelligence>.

62. See, e.g., Larson v. Wasemiller, 738 N.W.2d 300, 306 (Minn. 2007).

63. Consider *Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs.*, 527 F.3d 412 (5th Cir. 2008), holding there could be liability for letters that were affirmatively misleading but that the defendants had no affirmative duty to disclose (referencing a form letter that was sent to the hospital by the Practice Group that confirmed the doctor's prior privileges but said no more). I agree with Sallie Sanford's argument that *Kadlec* notwithstanding “a requirement of greater candor is likely to be adopted either in a subsequent case, by statute, or through hospital accreditation standards.” Sallie Thieme Sanford, *Candor After Kadlec: Why, Despite the Fifth Circuit's Decision, Hospitals Should Anticipate an Expanded Obligation to Disclose Risky Physician Behavior*, 1 DREXEL L. REV. 383, 386 (2009).

ing from beer bong” for a recruiting firm to discover, zero tolerance for inappropriate social media behavior is becoming the norm.⁶⁴

This section analyzes the recently published American Medical Association (AMA) policy *Professionalism in the Use of Social Media*⁶⁵ and healthcare employer policies⁶⁶ and questions whether there are any legal limitations on such polices.

A. Ethical Guidelines

The legal profession generally got out in front of the medical profession in confronting the professionalism issue with social media. For example, in 2009 the Florida Supreme Court Judicial Ethics Advisory Committee considered the question of judges “friending” lawyers who might appear before the judge and concluded that “identification [as a “friend”] in a public forum of a lawyer who may appear before the judge does convey [the] impression [that the lawyer is in a position to influence the judge] and therefore is not permitted.”⁶⁷ Other judicial ethics advisory committees have been less absolute. For example, South Carolina permits social media relationships between a magistrate and law enforcement officers “as long as they do not discuss anything related to the judge’s position as magistrate.”⁶⁸ New York held there was nothing “inherently inappropriate” about a judge joining a social network but cautioned, “[a] judge must . . . consider whether any such online connections, alone or in combination with other facts, rise to the level of a ‘close social relationship’ requiring disclosure and/or recusal.”⁶⁹

64. Pamela L. Dolan, *Social Networking Etiquette: Making Virtual Acquaintances*, AMEDNEWS.COM (June 2, 2008), <http://www.ama-assn.org/amednews/2008/06/02/bisa0602.htm>.

65. *AMA Policy: Professionalism in the Use of Social Media*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/meeting/professionalism-social-media.shtml> (last visited July 21, 2011) [hereinafter *AMA Policy*].

66. *See generally* Chris Boudreaux, *Policy Database*, SOC. MEDIA GOVERNANCE, <http://socialmediagovernance.com/policies.php> (last visited July 20, 2011).

67. *Opinion Number: 2009-20*, FLA. SUP. CT. JUD. ETHICS ADVISORY COMMITTEE (Nov. 17, 2009), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>. *See generally* John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25, available at <http://www.nytimes.com/2009/12/11/us/11judges.html>.

68. Advisory Com. on Standards of Judicial Conduct, *Opinion No. 17-2009*, S.C. JUD. DEP’T (Oct. 2009), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

69. *Opinion 08-176*, N.Y. ADVISORY COMMITTEE ON JUD. ETHICS (Jan. 29, 2009), <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>. Ohio has taken a similar stance. *Advisory Opinion: Judges May ‘Friend’ ‘Tweet’ if Proper Caution Exercised*, SUP. CT. OHIO & OHIO JUD. SYS. (Dec. 8, 2010), http://www.supremecourt.ohio.gov/PIO/news/2010/BOCadvisoryOp_120810.asp; *see also* Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 801 N.W.2d 752 (S.D. 2011) (deciding un-

At its mid-year meeting in November 2010, the AMA adopted its first policy on physician use of social media.⁷⁰ At that time an AMA board member noted, “[u]sing social media can help physicians create a professional presence online, express their personal views and foster relationships, but it can also create new challenges for the patient-physician relationship.”⁷¹

The AMA’s policy contains six sections with provisions that range from highly generalized statements to specific admonitions going to both process and substance. The most general statements are contained in the final section of the policy: “Physicians must recognize that actions online and content posted may negatively affect their reputations among patients and colleagues, may have consequences for their medical careers (particularly for physicians-in-training and medical students), and can undermine public trust in the medical profession.”⁷²

The policy also makes clear that the responsibility for navigating the challenges posed by social media rests not only with individual physicians, but also with the profession, generally.⁷³ Thus, physicians have an obligation to bring unprofessional content to the attention of posting colleagues and, if that fails to resolve the situation, to “report the matter to appropriate authorities.”⁷⁴ The substantive provisions of the AMA policy relate to the privacy and confidentiality of identifiable patient data,⁷⁵ the utilization of privacy and security settings combined with the obligation to self-audit,⁷⁶ and the maintenance of

invited “happy birthday” post by witness on judge’s *Facebook* page was “incidental contact” and not an *ex parte* communication).

70. *New AMA Policy Helps Guide Physicians’ Use of Social Media*, AM. MED. ASS’N (Nov. 8, 2010), <http://www.ama-assn.org/ama/pub/news/news/social-media-policy.page> [hereinafter *New AMA Policy*]; see also *AMA Policy*, *supra* note 65 (laying out *AMA* policy).

71. *New AMA Policy*, *supra* note 70 (quoting *AMA* Board Member Mary Anne McCaffree, M.D.).

72. *AMA Policy*, *supra* note 65, ¶ (f).

73. *Id.*

74. *Id.*

75. *Id.* ¶ (a) (“Physicians should be cognizant of standards of patient privacy and confidentiality that must be maintained in all environments, including online, and must refrain from posting identifiable patient information online.”).

76. *Id.* Subsection (b) states the following:

When using the Internet for social networking, physicians should use privacy settings to safeguard personal information and content to the extent possible, but should realize that privacy settings are not absolute and that once on the Internet, content is likely there permanently. Thus, physicians should routinely monitor their own Internet presence to ensure that the personal and professional information on their own sites and, to the extent possible, content posted about them by others, is accurate and appropriate.

Id.

appropriate boundaries with patients,⁷⁷ preferably by separating the personal from the professional.⁷⁸

Emerging policies and best practices emphasize the importance of physicians avoiding posts about patients. Thus, the AMA Policy statement provides that “[p]hysicians should be cognizant of standards of patient privacy and confidentiality that must be maintained in all environments, including online, and must refrain from posting identifiable patient information online.”⁷⁹

A small number of state medical associations have also provided information to physicians regarding the use of social media. In May 2011, the Massachusetts Medical Society published *Social Media Guidelines for Physicians*.⁸⁰ The Guidelines closely track the AMA policy. Indeed, the first three guidelines—stressing confidentiality, using available privacy and security settings, and maintaining appropriate physician-patient boundaries—are worded identically.⁸¹ Massachusetts expands on the fourth AMA policy (separate professional and personal social media sites) with the statement, “Physicians should accept patient online invitations to connect only on a physician’s professional social networking site, and should not accept invitations from patients to connect on personal networking sites.”⁸² The two policies use similar wording to emphasize that physicians owe a professional responsibility to advise and, if necessary, report their colleagues’ inappropriate use of social media and to employ identical wording on their exhortation as to the reputational impact of their online activities.⁸³ The Massachusetts policy adds an additional paragraph dealing with potential conflicts of interest as follows: “Physicians must disclose all financial or other material relationships they have with regard to the maker or provider of products and services they review or discuss in online communities. This includes discus-

77. *Id.* ¶ (c) (“If they interact with patients on the Internet, physicians must maintain appropriate boundaries of the patient-physician relationship in accordance with professional ethical guidelines just, as they would in any other context.”).

78. *Id.* ¶ (d) (“To maintain appropriate professional boundaries physicians should consider separating personal and professional content online.”).

79. *Id.* ¶ (a).

80. *Social Media Guidelines for Physicians*, MASS. MED. SOC’Y (May 21, 2011), http://www.massmed.org/AM/Template.cfm?Section=Legal_and_Regulatory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=55126.

81. *Compare Social Media Guidelines for Physicians*, *supra* note 80, with AMA Policy, *supra* note 65.

82. *Social Media Guidelines for Physicians*, *supra* note 80, ¶ (d).

83. *See* AMA Policy, *supra* note 65, ¶ (e) (“When physicians see content posted by colleagues that appears unprofessional they have a responsibility to bring that content to the attention of the individual, so that he or she can remove it and/or take other appropriate actions.”); *Social Media Guidelines for Physicians*, *supra* note 80, ¶ (e) (same).

sions and reviews of products and services provided to the physician for free.”⁸⁴

Additional useful caveats are to be found in the social media guide jointly prepared by the Australian and New Zealand medical associations.⁸⁵ For example, compared to U.S. models, their guide includes a more perceptive and informative explanation of the confidentiality challenges when alluding to patients on social media:

The accessibility and indexability of online information means that although a single posting on a social networking website may be sufficiently de-identified in its own right, this may be compromised by other postings on the same website, which are just a mouse click away.

In maintaining confidentiality, you must ensure that any patient or situation cannot be identified by the *sum* of information available online.⁸⁶

Although designed to address professionalism and ethical behavior, the AMA and state medical association policies are likely to have ramifications outside the ethics space. The AMA policy, in particular, likely will be incorporated by reference into employment and credentialing agreements, and, of course, a few states already incorporate AMA ethical standards into their licensure standards.⁸⁷ It is also likely that such policies will not only be admitted in actions complaining of physician conduct in social media cases but also will influence emerging common law standards.⁸⁸

84. *Id.* ¶ (f). In 2010, the Ohio State Medical Association released *Social Networking and the Medical Practice*, OSMA LEGAL SERVICES GROUP (2010), <http://www.osma.org/files/documents/tools-and-resources/running-a-practice/social-media-policy.pdf>. The introduction contains information about risks (including legal risks posed by anti-discrimination and privacy laws), advice on navigating some of the employment issues in the healthcare environment, a “Best Practices” statement, and sample policies on prohibited and restricted uses at work applicable to physicians’ employees. *Id.*

85. Austl. Med. Ass’n et al., *Social Media and the Medical Profession: A Guide to Online Professionalism for Medical Practitioners and Medical Students* (Nov. 30, 2010), http://ama.com.au/system/files/node/6231/Social+Media+and+the+Medical+Profession_FINAL+with+links.pdf.

86. *Id.* at 3.

87. *See, e.g.*, Utah Medical Practice Act Rule, UTAH ADMIN. CODE r. 156-67-502(15) (2011).

88. *See e.g.*, Hall v. Anwar, 774 So. 2d 41 (Fla. Dist. Ct. App. 2000) (discussing role of testimony of medical ethicist in medical malpractice case); Ketchup v. Howard, 543 S.E.2d 371, 377 (Ga. Ct. App. 2000) (“Code of Medical Ethics sets forth the medical profession’s standard on informed consent.”); Neade v. Portes, 710 N.E.2d 418, 427 (Ill. App. Ct. 1999) (relying on portion of Current Opinion section 8.132 to support state cause of action for breach of fiduciary duty); Perna v. Pirozzi, 457 A.2d 431, 440 (N.J. 1983) (applying rule similar to AMA ethical standard E-8.16 as basis for the duty of the doctor to provide his or her personal services in accordance with the agreement with the patient); *see also* Utah Medical Practice Act Rule, UTAH ADMIN. CODE r. 156-67-502(15) (2011) (providing that violation of AMA ethics code constitutes unprofessional conduct); *cf.* Frey v. Goshow-Harris, No. 06C-01-057 JOH, 2009 WL 2963789 (Del. Super. Ct. Sept. 16, 2009) (ruling that AMA ethical standard E-8.16, Substitution of Surgeon

B. Employer Social Media Policies

One of the major reasons that professional bodies such as the ABA and the AMA are developing ethical codes for social media interactions by their members is that these bodies have long policed professional advertising.⁸⁹ Social media is quickly becoming one of the most popular places for advertising and other forms of marketing. In fact, the likely onslaught of social media advertising that we are about to see must inform (in part driven by increasingly sophisticated location-based services) our analysis of the present, somewhat more benign, social media world that healthcare currently confronts.

Social media advertising and marketing is designed to monetize the new platforms. Recall the tough but accurate portrait painted by one commentator about Facebook:

[T]he whole point about Facebook is that users aren't customers. Anyone who supposes that Facebook's users are its customer has got the business model precisely backwards. Users pay nothing, because we aren't customers, but product. The customers are the advertisers to whom Facebook sells the information users hand over, knowingly or not.⁹⁰

Thus, developing ethical codes must be seen, at least in part, as a prophylactic reaction to how social media will present when fully monetized. It also explains the growth in employer policies that seek to regulate employee conduct online. Such regulation, at least in part, is driven by employers' desire to control messaging about the employers' goods or services.

Most of the troubling behaviors on social media that led to providers disciplining staff or terminating clinical privileges have involved potential privacy violations. In 2009, the HITECH Act strengthened HIPAA enforcement,⁹¹ and Secretary Sibelius consolidated security

without Patient's Knowledge or Consent, was not relevant to the case, or if relevant, it was likely to confuse the jury); *Hartsell v. Fort Sanders Reg'l Med. Ctr.*, 905 S.W.2d 944 (Tenn. Ct. App. 1995) (finding that ethical opinions are not the standard of care).

89. See generally Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315 (1998) (discussing "the results of Gallup polls regarding the public's ratings of the legal profession as having very high or high standards of honesty and ethics").

90. Andrew Brown, *Facebook is Not Your Friend*, GUARDIAN (May 14, 2010, 12:30 AM), <http://www.guardian.co.uk/commentisfree/andrewbrown/2010/may/14/facebook-not-your-friend>. Mike Elgan expressed similar sentiment. Mike Elgan, *Google's Business Model: YOU Are the Product*, DATAMATION (Feb. 5, 2009), http://itmanagement.earthweb.com/columns/executive_tech/article.php/3801006/Googles-Business-Model-YOU-Are-the-Product.htm ("Advertisers are Google's customer. What do they sell to advertisers? They sell you. Or, at least, they rent you out, or provide access to you.").

91. 42 U.S.C.A. § 1320d-5 (West, Westlaw through P.L. 112-89 (excluding P.L. 112-55, 112-74, and 112-81)).

and privacy enforcement in the Office of Civil Rights (OCR).⁹² In its “statement” case against Cignet Health of Prince George’s County, Maryland OCR imposed a \$4.3 million civil money penalty for HIPAA violations.⁹³ In July 2011, UCLA settled potential HIPAA violations for \$865,500 stemming from unauthorized employee views of celebrities and other patients.⁹⁴ Going forward, healthcare entities will likely be far more diligent about protecting patient privacy. This will probably include promulgating strengthened student, credentialing, and employment policies.

Byrnes v. Johnson County Community College illustrates the necessity for such policies.⁹⁵ The plaintiff in *Byrnes* was a nursing student enrolled at the defendant community college.⁹⁶ With some other students and an instructor, she attended an obstetrics course at a local health system.⁹⁷ The instructor permitted the students to be photographed with an unidentified placenta.⁹⁸ After the students posted the photographs to Facebook, they were dismissed from the school and the plaintiff successfully applied for injunctive relief.⁹⁹ The court noted the following:

Neither defendant JCCC’s Nursing Student Code of Conduct nor any other code of conduct relating to JCCC and/or its nursing school regulates student photography of classroom or clinical events, nor prohibits the transmittal of photographs to others, including through social media such as Facebook. The “violation” which the Plaintiff and other students committed was not of a published code of conduct, but of the sense of propriety of Defendants Such standards are unclear, unpublished, and unfair to require students to comply with.¹⁰⁰

Almost all U.S. medical schools now have guidelines or policies for their students relating to Internet use.¹⁰¹ However, relatively few deal specifically with social media.¹⁰² Two notable exceptions are the

92. *Secretary Delegates HIPAA Security Rule to OCR*, U.S. DEP’T HEALTH & HUM. SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/srdelegationofauthoritytoocr.html> (last visited July 22, 2011).

93. *HHS Imposes a \$4.3 Million Civil Money Penalty for Violations of the HIPAA Privacy Rule*, U.S. DEP’T HEALTH & HUM. SERVICES (Feb. 22, 2011), <http://www.dhhs.gov/news/press/2011pres/02/20110222a.html> (imposing fines principally for violations involving patient access to records).

94. *UCLA Health System Settles Potential HIPAA Privacy and Security Violations*, U.S. DEP’T HEALTH & HUM. SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/news/uclahs.html> (last visited July 22, 2011).

95. No. 10-2690-EFM-DJW, 2011 WL 166715 (D. Kan. Jan. 19, 2011).

96. *Id.* at *1.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at *3.

101. Terry Kind et al, *Social Media Policies at US Medical Schools*, MED. EDUC. ON-LINE 3 (Sept. 15, 2010), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2941429/pdf/MEO-15-5324.pdf>.

102. *Id.*

social media policies posted by the Indiana University School of Medicine¹⁰³ and Mount Sinai School of Medicine.¹⁰⁴ Both contain compelling guidelines suggesting best practices for the use of social media by medical students. For example, the Indiana policy stresses professionalism and the challenges of an online world where “the lines between public and private, personal and professional are blurred.”¹⁰⁵ It recommends constant review and audit of the user’s online presence, the un-tagging of photographs posted by others, and strongly discourages social media interactions with patients.¹⁰⁶

The Mount Sinai Guidelines include an addendum containing fictional case examples.¹⁰⁷ These hypotheticals include suggested approaches to a patient attempting to “friend” a physician, a pediatric resident posting the picture of a recently discharged infant patient, and a photograph posted on Facebook of an inebriated student wearing a Mount Sinai t-shirt.¹⁰⁸

Given the regulatory environment, patient privacy is likely the dominant driver behind employment and educational social media policies. However, it is not the only driver. Just as physicians seek to control the message about the quality of their services and the collision course they find themselves on with opinion sites as discussed below,¹⁰⁹ so the recent proliferation of employment-based social media policies has been driven not only by risk management concerns but also by a desire to control the institution’s social media message. A 2011 survey noted one-third of institutions control access by employees, “typically due to security issues and concerns about employees’ productivity.”¹¹⁰

Social media policies are proliferating rapidly within all healthcare entities and generally will be designed to project the issues, norms, and values of individual institutions.¹¹¹ Notwithstanding, some pro-

103. *Guidelines for Use of Online Social Networks for Medical Students and Physicians-in-Training*, IND. U. SCH. MED., <http://student.medicine.iu.edu/documents/OnlineProfessionalism.pdf> (last visited July 22, 2011) [hereinafter *Indiana Guidelines*].

104. *Mount Sinai Medical Center Social Media Guideline*, MOUNT SINAI SCH. MED., <http://www.mssm.edu/about-us/services-and-resources/faculty-resources/handbooks-and-policies/faculty-handbook/institutional-policies/social-media-guidelines> (last visited July 22, 2011) [hereinafter *Sinai Guideline*].

105. *Indiana Guidelines*, *supra* note 103, at 3.

106. *Id.* at 4.

107. *Sinai Guideline*, *supra* note 104 (Addendum to Social Media Guideline).

108. *Id.*

109. *See infra* notes 316–25.

110. Kuberacka, *supra* note 38, at 2.

111. *See, for example*, the social media policies collected at Chris Boudreaux, *Policy Database*, SOCIAL MEDIA GOVERNANCE, <http://socialmediagovernance.com/policies.php> (last visited July 24, 2011) and Ed Bennett, *Healthcare Social Media Policies List*, FOUND IN CACHE, <http://ebennett.org/hslmp> (last visited July 24, 2011).

visions seem to be common across a sample of policies. First, most policies for social media postings insist upon expressing a clear distinction for employees between acting in a private capacity and acting in an official capacity or representing the entity.¹¹² Second, a typical policy will encourage good social media behavior, for example, by stressing accuracy and respect for co-workers and customers and by requiring an appropriate balance between social media usage and work commitments¹¹³ (some policies may even limit access to social media during work hours).¹¹⁴ Third, policies tend to highlight some specific legal restrictions.¹¹⁵ Thus, HIPAA compliance is likely to be mentioned accompanied by an express prohibition on posting identifiable information.¹¹⁶ Most policies explicitly ban abusive, profane, threatening, or offensive posts.¹¹⁷ Posting of copyright material also is likely to be expressly prohibited whereas the entity is likely to claim ownership of all posted material.¹¹⁸ Finally, most policies expressly note that violations will result in discipline or in termination of employment or clinical privileges.¹¹⁹

One issue that not all policies yet address is the extent to which these behavioral restrictions apply to social media use outside business hours. The Kaiser Permanente policy addresses this as follows:

This policy applies to employees using social media while at work. It also applies to the use of social media when away from work, when the employee's Kaiser Permanente affiliation is identified, known, or presumed. It does not

112. See, e.g., *Social Media Guidelines for Employees*, USCUNIVERSITYHOSPITAL.ORG, <http://www.uscuniversityhospital.org/connect/wp-content/uploads/Social-Media-Guidelines-for-Employees.pdf> (last visited Nov. 9, 2011); *Sutter Health and Affiliates Administrative Policies and Procedures: Social Media Policy*, SUTTERHEALTH.ORG 4 (Sept. 2011), <http://www.sutterhealth.org/employees/sutter-health-social-media-policy.pdf> [hereinafter *Sutter Health Policy*].

113. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112; *Sutter Health Policy*, *supra* note 112, at 4.

114. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112 (“Ensure that your blogging and social networking activity do not interfere with your work commitments.”); *Sutter Health Policy*, *supra* note 112, at 4 (“Individuals should limit participation in social media activities during work time unless required by their position . . .”).

115. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112 (discussing two patient privacy laws: HIPAA and the California Confidentiality and Medical Information Act); *Sutter Health Policy*, *supra* note 112, at 4 (discussing violations of patient privacy through HIPAA).

116. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112; *Sutter Health Policy*, *supra* note 112, at 4.

117. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112; *Sutter Health Policy*, *supra* note 112, at 3.

118. See, e.g., *Social Media Guidelines for Employees*, *supra* note 112; *Sutter Health Policy*, *supra* note 112, at 3.

119. See, e.g., *Sutter Health Policy*, *supra* note 112, at 6.

apply to content that is non-health care related or is otherwise unrelated to Kaiser Permanente.¹²⁰

The Ohio State Medical Association's policy statement includes a sample policy on "Restricted Use at Work."¹²¹ The section dealing with employee usage on personal property prohibits posts of proprietary information, information about patients covered by privacy laws, and "material that is fraudulent, harassing, embarrassing, sexually explicit, obscene, intimidating or defamatory against any other person employed by [Business]."¹²² While such restrictions may seem rooted in a sensible policy, more draconian models will no doubt follow. Thus, the branch of one business that has experienced boundary issues, the Kentucky Annual Conference of the United Methodist Church, requires the passwords to all its clergy members' social media sites and that the member add the conference as a "friend."¹²³

As will be seen in the next section, this is an issue that has considerable legal significance as healthcare entities seek to control activities occurring outside the workplace and/or on social media not directly controlled by the entity.

C. Assessing Legal Limits on Policies

As school and employer-generated social media policies proliferate, the question arises as to whether there are any legal limits on their application. Some broad theories have been argued.¹²⁴ For example, in *Esfeller v. O'Keefe*, a student at a state university allegedly harassed and threatened his ex-girlfriend on social media sites.¹²⁵ The university investigated his conduct, and a hearing panel found him in violation of the institution's Code of Conduct.¹²⁶ In his suit, the plaintiff alleged various civil rights and constitutional challenges to the code provision prohibiting "extreme, outrageous or persistent acts, or communications that are intended or reasonably likely to harass, intimidate, harm, or humiliate another."¹²⁷ His core argument was this provision was facially and as-applied overbroad and

120. *Kaiser Permanente Social Media Policy*, KAISER PERMANENTE, § 5.9 (Apr. 30, 2009), http://xnet.kp.org/newscenter/media/downloads/socialmediapolicy_091609.pdf.

121. *Social Networking and the Medical Practice*, *supra* note 84 (Restricted Use at Work).

122. *Id.*

123. Drew Glaser, *Church Calls for Social Networking Accountability*, CHARISMA NEWS (Jul. 5, 2011), <http://www.charismamag.com/index.php/news/31454-church-calls-for-social-networking-accountability>.

124. *Esfeller v. O'Keefe*, 391 F. App'x 337 (5th Cir. 2010).

125. *Id.* at 338.

126. *Id.*

127. *Id.* at 340.

vague.¹²⁸ The court noted that although the Code was broadly aimed at speech or conduct “that creates an intimidating, hostile, or offensive environment,” the prohibition required the expression to be “persistent, extreme or outrageous and ‘reasonably likely’ to cause harassment or intimidation.”¹²⁹ As a result the court was able to conclude the Code was directed “at speech that ‘intrudes upon . . . the rights of other students’ and is legitimately subject to regulation.”¹³⁰

Two more narrowly drawn limitations promise more traction: one operating on labor law principles and the other based on some privacy principles and legislation.

1. Labor Law

Employers leveraging social media policies may run afoul of several employment and labor law principles. For example, *Gaskell v. University of Kentucky* was an employment discrimination case brought by an unsuccessful candidate to be the defendant’s observatory director.¹³¹ The search process followed conventional academic processes until a member of the search committee conducted an Internet search on the plaintiff and found information on his personal web site that led some to characterize him as creationist, which he denied.¹³² The court held there was sufficient direct evidence of Title VII discrimination against the university.¹³³

As employers increasingly scrape data about potential employees from social media sites they are at peril when they make improper use of some types of data. Risk management strategies include the adoption of (non-discriminatory) written and exclusive criteria for hiring decisions¹³⁴ and the building of a firewall between a search committee and HR professionals tasked with performing background checks.¹³⁵ As one EEOC attorney remarked, “If you wouldn’t ask for it during an interview, don’t search for it online.”¹³⁶

128. *Id.* at 340–41.

129. *Id.* at 341.

130. *Id.*

131. No. 09-244-KSF, 2010 WL 4867630, slip op. at *1 (E.D. Ky. Nov. 23, 2010).

132. *Id.* at *4–5.

133. *Id.* at *9.

134. See, e.g., Meredith Levinson, *Social Networks: A New Hotbed for Hiring Discrimination Claims*, CIO (Apr. 18, 2011), http://www.cio.com/article/679830/Social_Networks_A_New_Hotbed_for_Hiring_Discrimination_Claims?page=1&taxonomyId=3123.

135. See, e.g., *Using Social Media Could Result in Bias Claims*, EMPLOYERS GROUP, <http://www.employersgroup.com/Content.aspx?id=1691> (last visited Nov. 10, 2011).

136. *Employment Regulation: Obama Regulatory Reform Initiatives Ignore Antiquated Wage-Hour Laws With New Burdens Added Elsewhere*, HR POLICY ASS’N (Sept. 1, 2011), http://www.hrpolicy.org/issues_story.aspx?gid=1128&sid=4537&miid=16.

Both employees and potential employees may be protected under state non-work hours' statutes. For example, the Colorado legislation provides, "It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours"137 A narrower species of behavioral immunity applies in some states to non-work consumption of lawful products such as alcohol.138 Notwithstanding, these statutes tend to have safe harbors for employers in cases that impinge upon critical employer responsibilities.139

The National Labor Relations Act (NLRA)¹⁴⁰ may have the most immediate impact and may cause employers to revise their social media policies or their enforcement. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁴¹ Section 8(a)(1) of the NLRA provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."¹⁴²

In *Guard Publishing Co. v. National Labor Relations Board*,¹⁴³ the National Labor Relations Board (NLRB) found an Oregon newspaper committed unfair labor practices when it disciplined a copy editor, the paper's union president, for sending a union-related email to her fellow employees.¹⁴⁴ An administrative law judge found the paper had not violated the NLRA merely by maintaining an email policy but found it did violate the Act by discriminatorily enforcing the policy to prohibit union-related e-mails while allowing a variety of non-work-related e-mails.¹⁴⁵ NLRB broadly concurred with those findings except in holding that there was no evidence the employer allowed emails to solicit or support non-union organizations.¹⁴⁶ The D.C. Circuit disagreed on this point on the basis that "neither the company's written policy nor its express enforcement rationales relied on an or-

137. COLO. REV. STAT. § 24-34-402.5(1) (2010); see also N.Y. LABOR LAW § 201-d(2) (McKinney 2011) (prohibiting similar conduct in New York).

138. See, e.g., 820 ILL. COMP. STAT. ANN. 55/5 (West 2008).

139. See, e.g., COLO. REV. STAT. § 24-34-402.5(1)(a)-(b).

140. 29 U.S.C. §§ 151-169 (2006).

141. *Id.* § 157.

142. *Id.* § 158(a)(1).

143. 571 F.3d 53 (D.C. Cir. 2009).

144. *Id.* at 54.

145. *Id.* at 57.

146. *Id.*

ganizational justification” and “the only employee e-mails that had ever led to discipline were the union-related e-mails at issue here.”¹⁴⁷

The NLRB has been seeking to test the extent to which these principles apply to social media policies and employee discussions on social media relating to employment conditions.¹⁴⁸ In the Board’s first social media case against American Medical Response of Connecticut, LLC, a healthcare worker allegedly was discharged after posting negative comments about a supervisor on a personal Facebook page.¹⁴⁹ The board alleged the company had an overly broad social media policy regarding blogging, Internet posting, and communications between employees contrary to Section 8(a)(1).¹⁵⁰ However, the case settled in February 2011 when the company apparently agreed to rescind and revise its policy.¹⁵¹

In an advice memorandum published on April 21, 2011, the NLRB commented on the dismissal of a newspaper reporter for posting unprofessional and inappropriate tweets to a work-related Twitter account, and concluded the dismissal was triggered by inappropriate and offensive postings that did not involve concerted activity protected under the NLRA.¹⁵² The same result was arrived at in another case involving complaints about a bar’s tip-sharing policy that the employee posted on Facebook in correspondence with his stepsister.¹⁵³ The employee did not discuss the post with fellow employees and they did not respond to it, leading to the conclusion that there was no protected concerted activity.¹⁵⁴

147. *Id.* at 60.

148. Some of the issues argued are peripheral. For example, in *Flagstaff Medical Center, Inc.*, the NLRB decided that a hospital policy prohibiting employees from taking photographs was permissible. 357 N.L.R.B. No. 65, 2011 WL 4498271, at *6 (Aug. 26, 2011).

149. Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at B1, available at <http://www.nytimes.com/2010/11/09/business/09facebook.html?scp=1&sq=Facebook,%20NLRB&st=cse>.

150. *Id.*

151. *Settlement reached in case involving discharge for Facebook comments*, NAT’L LAB. REL. BOARD (Feb. 8, 2011), <https://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>; see Steven Musil, *Company settles Facebook firing case*, CNET (Feb. 7, 2011), http://news.cnet.com/8301-1023_3-20030955-93.html.

152. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, Nat’l Labor Relations Bd., to Cornele A. Overstreet, Reg’l Dir. Region 28, Nat’l Labor Relations Bd. (Apr. 21, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580495256>.

153. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, Nat’l Labor Relations Bd., to Gail R. Moran, Acting Reg’l Dir. Region 13, Nat’l Labor Relations Bd. (July 7, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c6>.

154. *Id.* at 3.

In August 2011 the NLRB's general counsel released a report detailing the disposition of fourteen cases involving social media.¹⁵⁵ In four cases the NLRB's Division of Advice held that employees' social media activities were examples of protected concerted activity.¹⁵⁶ In five cases the Division held that provisions of employers' social media policies were overly broad.¹⁵⁷ Subsequently, *Hispanics United of Buffalo, Inc.*, one of the concerted activity cases discussed in the report, went forward for adjudication by the NLRB division of judges.¹⁵⁸ In that case, an employee at a New York nonprofit posted a co-worker's complaints to Facebook that other employees were not doing enough to help the organization's clients.¹⁵⁹ Other co-workers entered the social media conversation, defending their performance and complaining about working conditions.¹⁶⁰ The employer terminated five employees for bullying and harassing the original complainant.¹⁶¹ The ALJ concluded: "Employees have a protected right to discuss matters affecting their employment amongst themselves. Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7."¹⁶²

According to Philip Gordon, "There can be no question that the [NLRB] appears to want to take the law in a direction that will open social media to virtually unfettered use by employees to communicate about work conditions, defined very broadly."¹⁶³

A related issue has arisen with regard to employees terminated for breach of social media and related policies who subsequently seek unemployment compensation. *Chapman v. Unemployment Compensation Board of Review* involved a registered nurse who used her cell phone to make a social media post critical of a co-employee at the same time as she was distributing medications to patients.¹⁶⁴ She

155. Lafe E. Solomon, Nat'l Labor Relations Bd. Office of the Gen. Counsel, Report of the General Counsel (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743>.

156. *Id.*

157. *Id.*

158. No. 3-CA-27872, 2011 WL 3894520 (Sept. 2, 2011); see *Administrative Law Judge finds New York nonprofit unlawfully discharged employees following Facebook posts*, NAT'L LAB. REL. BOARD (Sept. 7, 2011), <https://www.nlr.gov/news/administrative-law-judge-finds-new-york-nonprofit-unlawfully-discharged-employees-following-fac> (discussing the above ALJ ruling).

159. No. 3-CA-27872, 2011 WL 3894520.

160. *Id.*

161. *Id.*

162. *Id.*

163. Philip Gordon, *The Latest from the NLRB on Social Media*, WORKPLACE PRIVACY COUNS. (May 2, 2011), <http://privacyblog.littler.com/2011/05/articles/labor-relations/the-latest-from-the-nlr-on-social-media/#more>.

164. 20 A.3d 603, 605 (Pa. Commw. Ct. 2011).

was discharged for breach of her employer's cell phone policy.¹⁶⁵ The court upheld a finding that she was ineligible for unemployment compensation because her discharge was for "willful misconduct;" there was sufficient evidence that she knew of the policy, that the policy was reasonable, and that the policy was breached.¹⁶⁶ The court did not address the question whether her Facebook account had been searched illegally on procedural grounds.

2. *Privacy Law*

The existence of the HIPAA Privacy and Security rules¹⁶⁷ provides context for the increasingly risk averse approach by medical schools and healthcare employers to social media. However, their substantive provisions have little salience with regard to the relationship between, say, a hospital and its employees. Those relationships are generally untouched by HIPAA. However, other privacy regimes may be applicable.

Take, for example, *Johnson v. K-Mart Corp.*,¹⁶⁸ where private detectives posed as employees at one of the defendant's distribution centers that had experienced theft, vandalism, sabotage, and drug use.¹⁶⁹ Reports submitted by the investigators included employee family matters, sexual and romantic conduct, future employment plans, complaints about the defendant, and even private matters such as personal health issues.¹⁷⁰ When the investigation was exposed, some of the employees brought an action against the employer for intrusion upon seclusion, publication of private facts, and intentional infliction of emotional distress.¹⁷¹

The Illinois appellate court upheld the trial court's summary judgment on the emotional distress count because of a failure to establish serious emotional distress.¹⁷² However, on the other two common law counts the court reversed the defense's summary disposition.¹⁷³ On seclusion,¹⁷⁴ the court felt the employees had a reasonable expectation of privacy when communicating with co-workers, particularly when

165. *Id.*

166. *Id.* at 610.

167. 45 C.F.R. §§ 164.102–164.534 (2009).

168. 723 N.E.2d 1192 (Ill. App. Ct. 2000).

169. *Id.* at 1194.

170. *Id.*

171. *Id.* at 1193

172. *Id.* at 1198.

173. *Id.* at 1197.

174. See *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1017 (Ill. App. Ct. 2004). "The elements of the cause of action typically are stated as: (1) the defendant committed an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion would be highly offensive or objectionable to a reasonable person; (3) the matter intruded on was private; and (4) the intrusion caused the plaintiff anguish and suffering." *Id.*

such communications took place at social gatherings outside of the workplace.¹⁷⁵ On the private facts count, the court believed an issue of fact existed as to whether making such private facts public to the employer was highly offensive.¹⁷⁶ Clearly there are lessons here for an employer who would snoop on the social media postings of an employee or employment applicant, at the very least when the employee has secured, say, his Facebook page with reasonable security and privacy settings.¹⁷⁷ As previously argued, “True to its context-based framework the law of boundaries should recognize private or secluded areas that have been established by users of social network sites.”¹⁷⁸

As employees and applicants become more aware of the risks of exposing social media data and interactions and make better efforts to secure their spaces, employers have begun to request their social media passwords during the application process.¹⁷⁹ In early 2011, such a case involving an applicant for a Department of Corrections (DOC) position led to the ACLU sending a strong letter to the employer, the Maryland DOC.¹⁸⁰ In its letter the ACLU argued: “While employers may permissibly incorporate some limited review of public internet postings into their background investigation procedures, review of password-protected materials overrides the privacy protections users have erected and thus violates their reasonable expectations of privacy in these communications.”¹⁸¹

The ACLU constructed its primary legal arguments (including reasonable expectations of privacy) around the Stored Communications Act (SCA).¹⁸² The SCA prohibits unlawful access to stored electronic communications¹⁸³ and permits a civil cause of action.¹⁸⁴ Notably, the SCA may contain more effective protections¹⁸⁵ than the better-known Electronic Communications Privacy Act of 1986.¹⁸⁶ Specifically, SCA applies to one who “intentionally accesses without authori-

175. *Johnson*, 723 N.E.2d at 1196.

176. *Id.* at 1197.

177. *See Terry*, *supra* note 1, at 327–29.

178. *See id.*

179. *See, e.g.*, Letter from Deborah A. Jeon, Legal Director, Am. Civil Liberties Union of Md. Found., to Gary D. Maynard, Sec’y, Md. Dep’t of Pub. Safety & Corr. Servs. (Jan. 25, 2011), available at <http://www.aclu-md.org/aPress/Press2011/collinsletterfinal.pdf>.

180. *Id.*

181. *Id.*

182. 18 U.S.C. §§ 2701–2712 (2006). There are also several state law analogs to the SCA. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-4A-02 (West 2011); N.J. STAT. ANN. § 2A:156A-27 (West 2011).

183. 18 U.S.C. § 2701.

184. *Id.* § 2707.

185. *See generally* Miguel Helft & Claire C. Miller, *1986 Privacy Law is Outrun by the Web*, N.Y. TIMES, Jan. 10, 2011, at A1, available at <http://www.nytimes.com/2011/01/10/technology/10privacy.html>.

186. 18 U.S.C. §§ 2510–2522 (2006).

zation a facility through which an electronic communication service is provided.”¹⁸⁷

The first issue that arises in such a case is whether a social media space is capable of protection under the SCA, in contrast to, say, a publicly accessible web site or blog. Here the ACLU relied on *Crispin v. Christian Audigier, Inc.*¹⁸⁸ *Crispin* was an IP case in which defendants subpoenaed communications on Facebook and MySpace.¹⁸⁹ Plaintiff relied, inter alia, on the SCA to quash the subpoena.¹⁹⁰ The court concluded the SCA applied at least to the sites’ private messaging and to user areas with “restricted access” secured by privacy settings, notwithstanding the number of “friends” that could view the content.¹⁹¹

Clearly the employer in the DOC case literally has “authorization” because it has received the account password from the prospective employee. However, the ACLU relied on *Pietrylo v. Hillstone Restaurant Group*¹⁹² for the proposition that access via a password obtained through coercion or provided under pressure was not authorized.¹⁹³

After receiving the ACLU’s letter the DOC suspended its practice.¹⁹⁴ In March 2011, legislation was introduced into the Maryland Senate that would prohibit an employer from requiring either employment applicants or employees from disclosing authentication information for any non-employer online account.¹⁹⁵

IV. PROVIDER ACCESS TO PATIENT SOCIAL MEDIA DATA

A. From Voyeurism to Obligation

If the theme of the prior section was what doctors discover when they “Google” themselves, this part asks whether there are circumstances when physicians should Google their patients or examine their social media pages. Specifically, this section explores the implications of patient-related therapeutic information, maybe even life-

187. *Id.* § 2701(a)(1).

188. 717 F. Supp. 2d 965 (C.D. Cal. 2010).

189. *Id.* at 968–69.

190. *Id.* at 969.

191. *Id.* at 991.

192. No. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009).

193. Letter from Deborah A. Jeon, *supra* note 179. The *Pietrylo* court had held that a jury issue was presented on this issue. *Pietrylo*, 2009 WL 3128420, at *3. Using someone else’s password to access a social media site in violation of terms of use may also implicate some anti-hacking statutes. *See infra* text accompanying notes 229–34.

194. Alexis Madrigal, *Maryland Agency Stops Asking Interviewees for Facebook Login*, ATLANTIC (Feb. 22, 2011), <http://www.theatlantic.com/technology/archive/2011/02/maryland-agency-stops-asking-interviewees-for-facebook-login-info/71582>.

195. S.B. 971, 2011 Leg., 428th Sess. (Md. 2011), available at <http://mlis.state.md.us/2011rs/bills/sb/sb0971f.pdf>.

saving data, being available online. Should the physician seek to access that information and, if that was recognized as possible, could such an opportunity morph into a legal obligation imposed on the physician?

Frequently a physician (particularly a psychiatrist or a pediatrician) who is interested in what the patient may have posted online will be in a position to request access to social media from the patient. The question is whether the physician is under a duty to make that request and then harvest this information about the patient. Distilled, the issue implicates both scope of duty and the standard of care. As to the latter:

[T]he law implies that a physician employed to treat a patient contracts with his patient that: (1) he possesses that reasonable degree of learning and skill which is ordinarily possessed by others of the profession; (2) he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed; and (3) he will use his best judgment in the application of his skill in deciding upon the nature of the injury and the best mode of treatment.¹⁹⁶

Hall v. Hilbun, the canonical malpractice case, defines the doctor's professional services subject to due care as "the entire caring process, including but not limited to *examination, history, testing, diagnosis, course of treatment, medication, surgery, follow-up, after-care and the like.*"¹⁹⁷ The standard of due care includes being familiar with the state of current scientific and medical knowledge and technology.¹⁹⁸ It is well established that the malpractice duty extends beyond mere physical presentation to broader circumstances, such as the dissemination of information in duty to warn¹⁹⁹ and informed consent cases.²⁰⁰ Furthermore, doctors are expected to be cognizant of some of the social situations of their patients.²⁰¹

The standard of care clearly contemplates robust collection of information from and about the patient.²⁰² For example, malpractice lia-

196. *Day v. Johnson*, 255 P.3d 1064, 1069 (Colo. 2011) (en banc).

197. 466 So. 2d 856, 871 (Miss. 1985) (emphasis added).

198. *See, e.g., Klisch v. MeritCare Med. Grp, Inc.*, 134 F.3d 1356, 1359 (8th Cir. 1998); *Scafile v. Bazzone*, 962 So. 2d 585, 593 (Miss. Ct. App. 2006); *Dailey v. Methodist Med. Ctr.*, 790 So. 2d 903, 915 (Miss. Ct. App. 2001); *Nowatske v. Osterloh*, 543 N.W.2d 265, 271 (Wis. 1996).

199. *See, e.g., Munstermann ex rel. Estate of Rowe v. Alegent Health-Immanuel Med. Ctr.*, 271 Neb. 834, 716 N.W.2d 73 (2006).

200. *See, e.g., Truman v. Thomas*, 611 P.2d 902 (Cal. 1980).

201. *See, e.g., Landeros v. Flood*, 551 P.2d 389 (Cal. 1976) (failure to diagnose child abuse). *But see also Arato v. Avedon*, 858 P.2d 598 (Cal. 1993) (rejecting plaintiff's contention that informed consent duty extends to taking into account patient's financial situation).

202. *See, e.g., Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); *Salinetro v. Nysstrom*, 341 So. 2d 1059 (Fla. Dist. Ct. App. 1977); *Monier v. Winkler*, 511 N.E.2d 246 (Ill. App. Ct. 1987); *Wheeler v. Yettie Kersting Mem'l Hosp.*, 866 S.W.2d 32 (Tex. App. 1993).

bility has been predicated on a physician's failure to take a history,²⁰³ the taking of an inadequate history,²⁰⁴ or failure to chart.²⁰⁵ Physicians who find themselves in the position of having inadequate information or knowledge may have duties to so disclose that state to the patient²⁰⁶ or to consult with colleagues.²⁰⁷

Assume, however, that the patient does not give the physician access to their social media or that a hypothetical such as the following occurs:

As his patient lay unconscious in an emergency room from an overdose of sedatives, psychiatrist Damir Huremovic was faced with a moral dilemma: A friend of the patient had forwarded to Huremovic a suicidal e-mail from the patient that included a link to a Web site and blog he wrote. Should Huremovic go online and check it out, even without his patient's consent?²⁰⁸

Indeed, such an event may not be limited to the purely hypothetical. One neurosurgeon has related how in the summer of 2010 a fifty-six year old woman presented herself at a Wisconsin hospital emergency room complaining of chest discomfort.²⁰⁹ There was evidence of prior strokes and fluid around her heart.²¹⁰ The patient reported several hospital visits but then lapsed into a coma.²¹¹ There was no history, and family members had no useful information.²¹² However, the patient did have a Facebook page where she had posted her medications, symptoms, hospitalizations, and conditions.²¹³ She also described how she had felt and other physical indications.²¹⁴ From this information the medical team was able to deduce that "she'd been

203. See, e.g., *Pantaleo v. Our Lady of the Resurrection Med. Ctr.*, 696 N.E.2d 717, 724 (Ill. App. Ct. 1998); *Moore v. Francisco*, 583 P.2d 391, 395 (Kan. Ct. App. 1978); *Gibides v. Powell*, 682 N.Y.S.2d 771, 772 (N.Y. App. Div. 1998); *Krapivka v. Maimonides Med. Ctr.*, 501 N.Y.S.2d 429, 432 (N.Y. App. Div. 1986).

204. See, e.g., *Skar v. City of Lincoln*, 599 F.2d 253, 260 (8th Cir. 1979); *Speer v. State*, 495 A.2d 733, 734–35 (Conn. App. Ct. 1985); *Nickerson v. Lee*, 674 N.E.2d 1111, 1115 (Mass. App. Ct. 1997); *Krapivka*, 501 N.Y.S.2d at 431 (N.Y. App. Div. 1986).

205. *Johnson v. Hillcrest Health Ctr., Inc.*, 70 P.3d 811, 817 (Okla. 2003).

206. See, e.g., *Manion v. Tweedy*, 100 N.W.2d 124, 128 (Minn. 1959); *Johnson v. Kokemoor*, 545 N.W.2d 495, 505–06 (Wis. 1996).

207. See, e.g., *Ziegert v. S. Chi. Cmty. Hosp.*, 425 N.E.2d 450, 455 (Ill. App. Ct. 1981); *Carman v. Dippold*, 379 N.E.2d 1365, 1369 (Ill. App. Ct. 1978).

208. Dana Scarton, *Google and Facebook Raise New Issues For Therapists and Their Clients*, WASH. POST (Mar. 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/29/AR2010032902942.html>.

209. Newt Gingrich & Kamal Thapar, *Facebook Is — Literally — a Lifesaver*, AOL NEWS (Dec 6, 2010), <http://www.aolnews.com/2010/12/06/Facebook-is-literally-a-lifesaver>.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

throwing blood clots to the brain;” the team was then able to perform successful brain surgery, and bring the patient out of the coma.²¹⁵

Assume, first, that the data is publicly available (because, for example, the patient has not set any privacy or security settings on a Facebook page). Then the question is, first and almost exclusively, a therapeutic one. If the physician proceeds to access the information (or, say, perform a Google search on the patient), will that dilute or otherwise impede the therapeutic relationship going forward? For example, one study raised the following hypothetical:

[H]ow should a doctor react when he discovers that a patient is still smoking if this patient had assured the doctor that he has stopped? Should the doctor take advantage of this knowledge in order to provide additional patient information and counselling [sic] or should he not mention this fact in order to avoid being accused of spying on his patient?²¹⁶

Addressing the issue from an ethical perspective is difficult. Arguably, any such investigation by the physician violates patient dignity and autonomy and breaches the trust relationship.²¹⁷ A more instrumental approach might be to permit such searches assuming that the purpose of the search is strictly related to treating the patient and that the patient has not, for example, prohibited such data collection by the physician. In 2009, the Ethics Committee of the American Psychiatric Association (APA) answered the question, “Is it ethical to do a Google search on your patient’s name?” by making a similar point as follows:

The standard of practice for learning about a patient’s medical condition is through face-to-face interviews, and this information may be supplemented by collateral information, for example, medical records or family members. Refusal or inability by patients to provide important historical information is not uncommon; in this circumstance collateral data may assume an important role. “Googling” a patient in such a scenario may provide useful information. However, information obtained this way, such as on a MySpace Web site, may not be current or accurate, especially for clinical purposes. Similarly, newspaper articles may not be reliable. Information such as birth records and sexual-offender registration is more likely to be trustworthy. Whenever information is obtained through a Google search, it is important to corroborate it.²¹⁸

The APA also addressed the question of handling data discovered online noting, “Clinicians who routinely act on information that cannot be verified as fact may be at risk of practicing incompetently.”²¹⁹ The APA further stated, “It is prudent to identify the source of infor-

215. *Id.*

216. Ghassan Moubarak et al., *Facebook Activity of Residents and Fellows and its Impact on the Doctor-Patient Relationship*, 37 J. MED. ETHICS 101, 102 (2011).

217. Jun Yan, *Psychiatrists Must Beware the Perils of Cyberspace*, 44 PSYCHIATRIC NEWS 9, 9 (2009), available at <http://pn.psychiatryonline.org/content/44/14/9.1.full> (quoting Jacob Sperber, M.D.).

218. *Is it Ethical to ‘Google’ Patients?*, 44 PSYCHIATRIC NEWS 11, 11 (2009), available at <http://pn.psychiatryonline.org/content/44/9/11.1.full>.

219. *Id.*

mation that is entered into a medical record.”²²⁰ It is likely that more social media policies will seek to address this issue. For example, the Indiana University Medical School Social Media Guidelines provide, “[p]rivate patient information obtained on a social networking site should not be entered in the patient’s medical record without the patient’s knowledge and consent.”²²¹

Neither federal nor state privacy regimes seem to address the issue. The situation in Canada may be different.²²² For example, Alberta’s Health Information Act provides, “A custodian must collect individually identifying health information *directly from the individual* who is the subject of the information”²²³ Although, the same legislation provides exceptions such as “where collection from the individual who is the subject of the information is not reasonably practicable.”²²⁴

It is difficult to see any other legal issues arising unless, for example, the doctor was working for an employer and somehow fell afoul of the Genetic Information Nondiscrimination Act of 2008 (GINA)²²⁵ and its regulations.²²⁶ GINA makes it illegal for employers to “request, require, or purchase genetic information with respect to an employee or a family member of the employee.”²²⁷ The Equal Employment Opportunity Commission’s November 2010 final rule makes clear that conducting an Internet search likely to result in the discovery of such information is included in that prohibition.²²⁸

Assume in the alternative that the data lies behind a Facebook privacy setting. The first problem is that unauthorized access—anything from using the patient’s discovered login information²²⁹ without permission, successfully using a guessed password, or outright hacking—likely will be a violation of the social media site’s terms of use. For example, Facebook’s terms of use provide: “You will not share your

220. *Id.*

221. Indiana Guidelines, *supra* note 103, at subsection IV(d)(ii).

222. *See, e.g.*, Health Information Act, R.S.A. 2000, c. H-5 § 22 (Can.), available at <http://www.qp.alberta.ca/documents/Acts/H05.pdf>.

223. *Id.* § 22(1) (emphasis added).

224. *Id.* § 22(2)(d).

225. Pub. L. No. 110-233, 122 Stat. 881 (2008).

226. 29 C.F.R. §§ 1635.1–1635.12 (2010).

227. Pub. L. No. 110-233, § 202(b), 122 Stat. 881, 907.

228. 29 C.F.R. § 1635.8; *see also* Blanco v. Bath Iron Works Corp., No. 2:10-cv-00429-JAW, 2011 WL 2636901 (D. Me. July 6, 2011) (noting that company physician’s disclosure to the employer that employee allegedly omitted ADHD diagnosis on pre-employment questionnaire potentially violated ADA confidentiality provision).

229. For example, many passwords are still found on post-it notes stuck to the subject’s computer.

password, . . . let anyone else access your account, or do anything else that might jeopardize the security of your account.”²³⁰

At first sight this may not seem to be of particular concern to the third party physician seeking access. However, a series of federal²³¹ and state²³² cases suggest that at least some knowing violations of terms of use may be characterized as criminal. *A fortiori*, the physician who enters a patient’s secured social media page is acting against the patient’s desire to define her “circle of intimacy” and as a result could have violated the intrusion into seclusion privacy tort.²³³ This should also be the case if the physician had been permitted access but then had exceeded the permission and accessed other data. Neither the HIPAA Privacy Code nor even more advanced state codes designed to reduce the HIPAA-free zone would apply to a physician accessing such information.²³⁴ However, once accessed by a healthcare provider, any recovered data likely would be subject to such protections going forward.

Assume, therefore, there are situations where either unsecured health-related data resides on a patient’s social media pages that a physician can access without legal jeopardy or that the physician has the opportunity to request permission for access from the patient or from a surrogate. In such scenarios one psychiatrist has suggested that “[y]ou could almost make the argument that it’s negligent not to search online when there is public information available.”²³⁵ Assuming such an affirmative duty is recognized, the narrow legal question likely to be addressed by the courts is whether to have an open-ended rule (such as one based on reasonable foresight in the circumstances) or a more narrowly defined one that will permit many such cases to be

230. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php> (last updated Apr. 26, 2011).

231. *See, e.g.*, *United States v. Nosal*, 642 F.3d 781, 785 (9th Cir. 2011) (“[A]n employee ‘exceeds authorized access’ . . . when he or she violates the employer’s computer access restrictions—including use restrictions.”); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010) (ruling that defendant violated the Computer Fraud and Abuse Act when he accessed personal information in Social Security Administration databases for nonbusiness reasons); *cf.* *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (holding that misdemeanor conviction under CFAA based only on defendant’s intentional violation of internet website’s terms of service would violate void-for-vagueness doctrine). *See generally* Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006).

232. *See, e.g.*, *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750 (N.D. Cal. July 20, 2010); *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 1299698 (N.D. Cal. May 11, 2009). *See generally* CAL. PENAL CODE § 502 (West 2010).

233. Terry, *supra* note 1, at 329.

234. Social media sites are not covered entities under HIPAA and are not “organized for the primary purpose of maintaining medical information.” California Confidentiality of Medical Information Act, CAL. CIV. CODE § 56.06 (West 2008).

235. Scarton, *supra* note 208.

resolved in the physician's favor on a motion for summary judgment. The *Tarasoff*²³⁶ line of cases is illustrative with courts moving away from open-ended tests for when a psychotherapist owes a duty to warn a potential victim to a more structured rule such as requiring "specific threats to a readily identifiable victim."²³⁷ In this context, it would not be surprising to see the courts limiting physician liability for failure to access online information concerning a patient to cases where the physician has been informed that relevant information actually exists. To impose a duty to search for merely speculative information would constitute an unnecessary burden on the physician.

B. Risk Managing Access

A recent study published in *Pediatrics* recognized many positive aspects of social media but also highlighted the risks.²³⁸ The study concluded by encouraging pediatricians to engage their patients (and their parents) in the use of social media.²³⁹ Studies also suggest a correlation in teenagers and young adults between very frequent uses of social media and narcissistic tendencies or other psychological disorders.²⁴⁰

Given the nascent duty on providers discussed above, the key question is whether some private ordering tools can be brought to bear on the issue to effectively risk manage it. Overreaching contractual agreements granting *pro forma* access to patient social media data no doubt will risk characterization as adhesive and unconscionable.²⁴¹ However, there are other techniques for risk-managing such cases.

For pediatricians and psychiatrists—physicians most likely to want access to social media information—the first and most obvious approach is to discuss the issue in advance (even at the commencement of the physician-patient relationship) and request access to such social media data. Because of the potential criminal and civil conse-

236. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

237. *Brady v. Hopper*, 570 F. Supp. 1333, 1338 (D. Colo. 1983); cf. *Hamman v. County of Maricopa*, 775 P.2d 1122 (Ariz. 1989) (holding that psychiatrists have a duty to "foreseeable victims" of a potentially violent patient).

238. Gwenn S. O'Keeffe & Kathleen Clarke-Pearson, *The Impact of Social Media on Children, Adolescents, and Families*, 127 *PEDIATRICS* 800, 803 (2011), available at <http://pediatrics.aappublications.org/content/early/2011/03/28/peds.2011-0054>.

239. *Id.*

240. See, e.g., *Social Networking's Good and Bad Impacts On Kids*, *SCIENCE DAILY* (Aug. 6, 2011), <http://www.sciencedaily.com/releases/2011/08/110806203538.htm> (reporting plenary speech by Dr. Larry Rosen at 119th Annual Convention of the American Psychological Association).

241. See, e.g., *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (finding that contractual requirement upon admission that patient arbitrate malpractice claim and waive right to jury trial was unenforceable as falling beyond patient's reasonable expectations); *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985); cf. *Cleveland v. Mann*, 942 So. 2d 108 (Miss. 2006).

quences of a physician using the log-in information of another person discussed above,²⁴² the physician should ask the patient to log on to show the social media information.²⁴³ It may be that these issues will become more commonly included in more general releases and consent forms that all physicians will present to their patients. Finally, in an extreme case where the physician is faced with an emergency situation and intends to access the social media without permission, this should be charted and the reasons for the intrusive behavior and the narrow range of data sought should be recorded.

V. REGULATING FRIENDSHIPS AND CONTROLLING ADVERSE FEEDBACK

The persistent and arguably most difficult issue for physicians remains the extent to which they should engage with patients on social media. One of the reasons physicians increasingly are counseled about boundary issues when they interact with patients online is they might discuss and disagree about care issues in a public place. The second part of this section discusses a more extreme take on this dynamic and questions the extent to which providers can curtail social media commentary about their professional performance with what I term “social gag orders.”

A. Revisiting the “Boundary” Issue

There is ambivalence among physicians regarding social media that is borne out by the data. While the majority of doctors, residents, and medical students view social media interactions with patients as ethically unacceptable, more than one-third were neutral or thought such interactions were acceptable.²⁴⁴ Of course, the underlying ethical position about boundaries transcends social media considerations. As stated by Nadelson and Notman,

An essential element of the physician’s role is the idea that what is best for the patient must be the physician’s first priority. Physicians must set aside their own needs in the service of addressing their patient’s needs. Relationships, such as business involvements, that coexist simultaneously with the doctor–patient relationship have the potential to undermine the physician’s ability to focus primarily on the patients’ well being, and can affect the physician’s judgment.²⁴⁵

The social media version of this issue is now attracting detailed treatment from ethical frameworks and in the academic literature. The primary caveat in the new AMA guidelines is that physicians in-

242. See *supra* text accompanying notes 229–34.

243. See CAL. PENAL CODE § 502 (West 2010).

244. Bosslet et al., *supra* note 33, at 1172.

245. Carol Nadelson & Malkah T. Notman, *Boundaries in the Doctor–Patient Relationship*, 23 J. THEORETICAL MED. AND BIOETHICS 191, 195 (2002).

teracting with patients on social media platforms “must maintain appropriate boundaries of the patient-physician relationship in accordance with professional ethical guidelines just, [sic] as they would in any other context.”²⁴⁶ Some commentators argue online friendships with patients “may open the door to interactions . . . that are extraneous to the patient-doctor relationship, do not prioritise the therapeutic interests of the patient and lead to potentially problematic physician self-disclosure.”²⁴⁷ And, of course, in some specialties such as psychotherapy where the psychiatrist seeks to avoid self-disclosure in order to promote transference, exposing the physician’s social media presence to the patient could be strongly counter-therapeutic.²⁴⁸

Given the necessity of maintaining boundaries, the most frequent risk management recommendation is to use different sites to host the physician’s professional and personal profiles.²⁴⁹ For example, LinkedIn,²⁵⁰ unlike some direct Facebook competitors such as MySpace, has carved out a niche as a site for professional interactions rather than the more social or (dangerously) mixed uses of Facebook.²⁵¹ Its espoused value proposition is: “Stay informed about your contacts and industry. Find the people [and] knowledge you need to achieve your goals. Control your professional identity online.”²⁵²

The specific AMA guidance is that “[t]o maintain appropriate professional boundaries physicians should consider separating personal and professional content online.”²⁵³ Similar advice is appearing in medical articles on professionalism.²⁵⁴ The AMA guidelines acknowledge that participation in social media “can support physicians’ personal expression, enable individual physicians to have a professional presence online, [and] foster collegiality and camaraderie within the profession”²⁵⁵

Seeking to fulfill some of this promise in a less risky environment several physician-only professional networking sites have been launched. For example, Sermo describes itself as “the largest online

246. AMA Policy, *supra* note 65, ¶ (c).

247. J.S. Guseh et al., *Medical Professionalism in the Age of Online Social Networking*, 35 J. MED. ETHICS 584, 584–85 (2009); see also Sachin H. Jain, *Practicing Medicine in the Age of Facebook*, 361 NEW ENG. J. MED. 649, 649 (2009) (discussing a physician’s acceptance of a friend request from an ex-patient).

248. John S. Luo, *The Facebook Phenomenon: Boundaries and Controversies*, 16 PRIMARY PSYCHIATRY 19, 20 (2009).

249. See, e.g., AMA Policy, *supra* note 65, ¶ (d).

250. LINKEDIN, <http://www.linkedin.com> (last visited July 24, 2011).

251. See generally Evelyn M. Rusli, *LinkedIn Soars in Debut*, DEALBOOK (May 19, 2011), <http://dealbook.nytimes.com/2011/05/19/linkedin-soars-in-i-p-o/?hp>.

252. LINKEDIN, *supra* note 250.

253. AMA Policy, *supra* note 65, ¶ (d).

254. Arash Mostaghimi & Bradley H. Crotty, *Professionalism in the Digital Age*, 154 ANNALS INTERN MED. 560, 561 (2011).

255. AMA Policy, *supra* note 65.

physician community in the US” where physicians are able to discuss difficult cases, exchange observations about drugs, devices, clinical issues, and “find potentially life-saving insights that have yet to be announced by conventional media sources.”²⁵⁶ Ozmosis²⁵⁷ and Within3²⁵⁸ share a different business model that includes creating “walled garden”²⁵⁹ search and collaboration services for hospital systems. Finally, Medpedia is a long-term project backed by leading healthcare providers around the world “to evolve a new model for sharing and advancing knowledge about health, medicine and the body among medical professionals and the general public.”²⁶⁰

Obviously, there will be outlying or exceptional cases that identify advantages in accepting blurred professional and private relationships notwithstanding generalized risks. For example, in the UK a surgeon read some posts by a Facebook friend and immediately contacted him, correctly suspecting appendicitis.²⁶¹ Overall, however, intervening in the health care of non-patients is fraught with medico-legal peril, and the optimal method for avoiding the inadvertent creation of a physician-patient relationship is to strictly maintain a personal-professional boundary.²⁶² The maintenance of boundaries and avoidance of legal risk explains why many healthcare entities’ social media plans frequently rotate around providing community forums for engagement rather than the entity itself answering specific questions.²⁶³

Whether or not a separate site is utilized for the physician’s professional profile, there is no doubt the physician should use strong privacy and security settings on any “personal” site. Users continue to suffer privacy and security costs as social media platforms modify their settings.²⁶⁴ Nevertheless, they remain a low friction risk management technique for social media users. There is some evidence that the publicity given to Facebook’s privacy and security issues and the site’s improvement of their controls has led to an increase in their use even among groups, such as students, that previously had es-

256. SERMO, <http://www.sermo.com/about/introduction> (last visited July 24, 2011).

257. OZMOSIS, <http://ozmosis.com> (last visited July 24, 2011).

258. WITHIN3, <https://www.within3.com> (last visited July 24, 2011).

259. *Walled garden (technology)*, WIKIPEDIA.ORG, [http://en.wikipedia.org/wiki/Walled_garden_\(technology\)](http://en.wikipedia.org/wiki/Walled_garden_(technology)) (last visited Nov. 11, 2011).

260. MEDPEDIA, <http://www.medpedia.com/about> (last visited July 24, 2011).

261. *Facebook Diagnosis by Bridgend Surgeon Saves Friend*, BBC NEWS (Feb. 16, 2011), <http://www.bbc.co.uk/news/uk-wales-12477764>.

262. *See generally* Terry, *supra* note 1, at 330–33.

263. Pamela L. Dolan, *Patients Social Media Use Raises Practical Issues For Doctors*, AMEDNEWS.COM (Mar. 28, 2011), <http://www.ama-assn.org/amednews/2011/03/28/bil20328.htm>.

264. Kurt Opsahl, *Facebook’s Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUND. (Apr. 28, 2010), <http://www.eff.org/deeplinks/2010/04/facebook-time-line>.

chewed such protections.²⁶⁵ Using high privacy and security settings is also the best argument that a user has some expectation of privacy.²⁶⁶

On their personal sites physicians should limit identifying information that relates to their professional activities and affiliations. A family name or initials rather than the full name used professionally might be appropriate, and care should be taken in choosing a profile graphic rather than an identifying picture. However, Arash Mostaghimi and Bradley Crotty recognize:

[A]bsolute separation of professional and personal identities is nearly impossible. Although using a pseudonym may reduce the chances of incidental disclosure, patients who are motivated to identify information about their physicians probably will succeed. Physicians who are aware of their digital identities will be best able to address any questions that a search may reveal.²⁶⁷

The AMA policy also is realistic, noting, “privacy settings are not absolute and that once on the Internet, content is likely there permanently” and recommending that “physicians should routinely monitor their own Internet presence to ensure that the personal and professional information on their own sites and, to the extent possible, content posted about them by others, is accurate and appropriate.”²⁶⁸

According to a survey of French residents and fellows, relatively few patients currently are looking to “friend” their doctors, with only 8% having received such a request.²⁶⁹ A survey of over 3000 physicians and medical students published in 2011 painted a more troubling picture with considerable numbers of social media-using family practitioners (42%), obstetricians (38%), pediatricians (27%), and all physicians (34%) having received a friend request from a patient or a patient’s family member.²⁷⁰ Of the physicians who had received such requests 57% had a blanket policy against accepting while 43% accepted on a case-by-case basis.²⁷¹ The dynamic is heavily asymmetrical; only a very few physicians had initiated a friend request to a patient.²⁷²

The Mount Sinai Social Media Guidelines discussed above²⁷³ contains this hypothetical:

265. See, e.g., Jacqui Cheng, *Students Finally Wake Up to Facebook Privacy Issues*, ARS TECHNICA, http://arstechnica.com/web/news/2010/07/students-finally-wake-up-to-facebook-privacy-issues.ars?utm_source=rss&utm_medium=rss&utm_campaign=rss (last visited July 24, 2011).

266. Terry, *supra* note 1, at 294–96.

267. Mostaghimi & Crotty, *supra* note 254, at 561–62.

268. AMA Policy, *supra* note 65, ¶ (b).

269. Moubarak et al., *supra* note 216, at 102.

270. Bosslet et al., *supra* note 33, at 1171.

271. *Id.*

272. *Id.*

273. Sinai Guideline, *supra* note 104.

A patient attempts to “friend” an attending physician on Facebook. This is almost always inappropriate, unless the doctor-patient relationship has ended. Even after the doctor-patient relationship has ended, it would be inappropriate to discuss health-related information.²⁷⁴

The British Medical Association (BMA) has also endorsed a policy that is more rigorous than the AMA’s.²⁷⁵ For the BMA the increased likelihood of “inappropriate boundary transgressions” online and the ethical issues that might arise if “doctors become party to information about their patients that is not disclosed as part of a clinical consultation” require a more absolutist approach.²⁷⁶ Thus, the BMA’s recommendation is that “doctors and medical students who receive friend requests from current or former patients should politely refuse and explain to the patient the reasons why it would be inappropriate for them to accept the request.”²⁷⁷ This is similar to the position taken by the Australian and New Zealand medical associations, which recommend against social media relationships with current or former patients.²⁷⁸

Of course many of the above policies, suggestions, or precautions may be subsumed under a single, general question, which a physician should ask before engaging with a patient on social media: What is my motivation for doing this? The ethical underpinning of the patient-physician relationship is that it exists to serve a patient’s needs, and is “based on trust and gives rise to physicians’ ethical obligations to place patients’ welfare above their own self-interest”²⁷⁹

B. Provider Comparison Sites

There are numerous potential frames for this analysis, some of which are quite benign. For example, the New England “prescriber information legislation” that resulted in the Supreme Court’s speech-protecting opinion in *Sorrell v. IMS Health Inc.*,²⁸⁰ was at root an attempt by physicians to control the distribution of information about their practices. Equally, the increasing dissemination of consumer-facing quality information is viewed as key to most cost curve bending

274. *Id.*

275. *See Using social media: practical and ethical guidance for doctors and medical students*, BRITISH MED. ASS’N (2011), http://www.bma.org.uk/images/socialmedia/guidancemay2011_tcm41-206859.pdf.

276. *Id.*

277. *Id.*

278. Austl. Med. Ass’n et al., *supra* note 85, at 5.

279. *Opinion 10.015 - The Patient-Physician Relationship*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion10015.page?> (last visited July 24, 2011).

280. 131 S. Ct. 2653 (2011).

strategies including patient-centered care and consumer-directed healthcare.²⁸¹

To the chagrin of many providers, a number of states entered the provider performance information space with web-accessible databases²⁸² using similar data as is reported to the National Practitioner Data Bank²⁸³ (that is not publicly accessible²⁸⁴). Organizations such as HealthGrades then aggregated that limited data. Some state non-profit organizations such as the California HealthCare Foundation subsequently introduced ratings sites for hospitals,²⁸⁵ as did states such as Illinois,²⁸⁶ Maryland,²⁸⁷ and Minnesota.²⁸⁸ Healthcare entities were more likely to have national comparison information posted about them by private ratings companies such as HealthGrades.²⁸⁹ However, the Centers for Medicare & Medicaid Services

-
281. See, e.g., Nicolas P. Terry, *Personal Health Records: Directing More Costs and Risks to Consumers?*, 1 DREXEL L. REV. 216, 230 (2009).
282. See, e.g., *Consumer Resources*, N.C. MED. BOARD, http://www.ncmedboard.org/consumer_resources (last visited July 24, 2011); *Disclaimers*, VA. BOARD MED., <http://www.vahealthprovider.com/disclaimers.asp> (last visited July 24, 2011); *Malpractice Claim Information*, OREGON.GOV, <http://www.oregon.gov/OMB/MalpracticeClaimInformation.shtml> (last visited July 24, 2011); *Search for a license*, ST. CONN. ELICENSING WEBSITE, <https://www.elicense.ct.gov/Lookup/LicenseLookup.aspx> (last visited July 24, 2011).
283. DATA BANK, <http://www.npdb-hipdb.hrsa.gov> (last visited July 24, 2011).
284. However, HRSA has made publicly available a deidentified version of the data for researchers and others. See Alina Selyukh, *U.S. government draws fire for pulling doctor data*, REUTERS (Sept. 15, 2011), <http://www.reuters.com/article/2011/09/16/us-usa-malpractice-database-idUSTRE78F03G20110916>. This was withdrawn in September 2011 after a reporter was able to overlay other data and reidentify a physician's record. *Id.* Correspondence that followed between the Association of Health Care Journalists and HRSA is also available. See Letter from Charles Ornstein et al., Pres., Ass'n of Health Care Journalists, to Mary K. Wakefield, Adm'r, Health Res. and Servs. Admin. (Sept. 15, 2011), available at http://www.healthjournalism.org/uploads/NPDB_HRSA.pdf; see also Duff Wilson, *Senator Protests Agency Decision to Remove Doctor Data Online*, N.Y. TIMES (October 7, 2011), <http://prescriptions.blogs.nytimes.com/2011/10/07/senator-protests-agency-decision-to-remove-doctor-data-online> (discussing Senator Charles E. Grassley's criticism of the Obama administration's decision to pull off the Web a database of doctor malpractice and disciplinary cases).
285. CALHOSPITALCOMPARE.ORG, <http://www.calhospitalcompare.org/?v=2> (last visited July 24, 2011).
286. *Find Your Health Care Facility*, ILL. HOSP. REPORT CARD, <http://www.healthcarereportcard.illinois.gov> (last visited July 24, 2011).
287. *Quality*, MD. HOSP. ASS'N, <http://www.mdhospitals.org/quality> (last visited July 24, 2011).
288. *Adverse Health Events Reporting*, MINN. DEP'T HEALTH, <http://www.health.state.mn.us/patientsafety/adverseselect.cfm> (last visited July 24, 2011).
289. HEALTH GRADES, <http://www.healthgrades.com/find%2Da%2Dhospital/?intcid=WLCM-Hosp> (last visited July 24, 2011); see also *Commonwealth Fund Adds Data to Hospital Comparison Website*, iHEALTHBEAT (July 27, 2011), <http://www.ihealthbeat.org/articles/2011/7/27/commonwealth-fund-adds-data-to-hospital-comparison-website.aspx> (announcing the website "WhyNotTheBest.org," which

(CMS) has now extended its long-term care comparative data model (Nursing Home Compare) introduced in 2008 to hospitals.²⁹⁰ Recently, CMS added Hospital Acquired Condition (HAC) Measures to its Hospital Compare website.²⁹¹ These HAC rates, derived from billing data, reflect per hospital incidences of common adverse events. In response, the American Hospital Association (AHA) published an advisory statement urging their members to check the accuracy of the HAC data published about them and noting:

Hospitals strongly oppose inclusion of the HACs for reporting on *Hospital Compare*. CMS has never made specifications available for the calculation of the HAC rates, so fundamental assessments of the accuracy of capturing the incidence of these conditions have never been conducted. Hospitals continue to urge CMS not to publish these data.²⁹²

The Department of Health and Human Services (HHS) recently raised the ire of physicians again in mid-2011 with a proposal to use “secret shoppers” to “collect data from physician offices in order to accurately gauge availability of Primary Care Physicians (PCPs) accepting new patients, assess the timeliness of services from PCPs, and gain insight into the precise reasons that PCP availability is lacking.”²⁹³ After the plan was detailed in the *New York Times* accompanied by a “government snooping . . . —Big Brother” quote from a doctor,²⁹⁴ politics prevailed and the plan was shelved.²⁹⁵

While providers may be upset over such developments, there is little to be done in the face of the acknowledged benefits of effectiveness and outcomes research. Further, such data tends to be aggregated, generally valid, and as a result viewed as objective (if unpopular) data

includes data on hospital quality measures); *Hospital Report Cards: Mortality and Complication Outcomes 2012 Methodology*, HEALTH GRADES (2011), <http://cdn.mm-health.com/6a/b751d0f50711e0a39812313d278dea/file/HospitalReportCardsMortalityComplications2012.pdf> (discussing results of study comparing hospital performance).

290. *Hospital Compare*, U.S. DEP'T HEALTH & HUMAN SERVS., <http://www.hospitalcompare.hhs.gov> (last visited July 24, 2011).
291. *HAC Posting on Hospital Compare*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Apr. 1, 2011), http://www.cms.gov/HospitalQualityInits/06_HACPost.asp.
292. *Quality Advisory: Public Reporting of Medicare Hospital-Acquired Conditions Data*, AM. HOSP. ASS'N (Mar. 25, 2011), <http://www.bizjournals.com/tampabay/Quality%20Advisory.pdf>.
293. *Agency Information Collection Request*, EDOCKET (Apr. 28, 2011), <http://edocket.access.gpo.gov/2011/2011-10251.htm>.
294. Robert Pear, *U.S. Plans Stealth Survey on Access to Doctors*, N.Y. TIMES, June 27, 2011, at A1, available at http://www.nytimes.com/2011/06/27/health/policy/27docs.html?_r=1 (quoting Raymond Scalettar, an internist in Washington).
295. Sarah Kliff, *White House Dumps 'Secret Shopper' Survey of Doctors*, POLITICO (June 28, 2011), <http://www.politico.com/news/stories/0611/57975.html>; see Robert Pear, *Administration Halts Survey of Making Doctor Visits*, N.Y. TIMES, June 29, 2011, at A15, available at <http://www.nytimes.com/2011/06/29/health/policy/29docs.html?ref=health>.

rather than opinion. In other words, it is unlikely to be taken personally.²⁹⁶

However, private individuals who create adverse public reviews of identified providers do not seem to do so on a personal level. In cases where the provider of a service or product disagrees with a review provided by a private entity or individual, the most likely cause of action contemplated would be defamation.²⁹⁷ Nevertheless, defenses of opinion, truth, and lack of malice make defamation cases difficult to win.²⁹⁸ For example, a Minnesota neurologist recently sued the son of a former patient regarding online comments the latter had posted concerning the doctor's interpersonal conduct.²⁹⁹ Granting the defendant's motion for summary judgment the Minnesota District Court noted, "Because the medium has changed [to the Internet], however, does not make statements of this sort any more or less defamatory."³⁰⁰ The court continued, "Looking at the statements as a whole, the Court does not find defamatory meaning, but rather a sometimes emotional discussion of the issues."³⁰¹

In some cases a product disparagement cause of action may be appropriate,³⁰² and, if the person giving the opinion has a financial stake in the market involved, unfair competition may become rele-

296. See also Robert A. Cherry & Gregory M. Caputo, *Reporting Quality Data on Your Hospital Website: What? Why? How?*, 37 *PHYSICIAN EXECUTIVE* 24 (2011) ("Physicians may be more supportive of a hospital's efforts to publicly report quality metrics on its website if the data were considered accurate and reflective of the severity of illness of the patients cared for in their practices.")

297. See, e.g., *Colantonio v. Mercy Med. Ctr.*, 901 N.Y.S.2d 370, 374-75 (N.Y. App. Div. 2010) (holding statements to be "nonactionable expressions of opinion" where physician sued medical center and employees for defamation even though the physician raised a genuine issue of material fact as to whether the statements were made with malice).

298. See, e.g., *Elite Funding Corp. v. Mid-Hudson Better Bus. Bureau*, 629 N.Y.S.2d 611 (N.Y. App. Div. 1995) (holding the Better Business Bureau was entitled to summary judgment because the complaints were true and the bureau enjoyed both the qualified "common interest" privilege and constitutional "fair comment" privilege where mortgage brokerage company brought a defamation suit against the bureau for rating the company "unsatisfactory" after failing to respond to several consumer complaints).

299. Christa Lawler, *Duluth doctor appealing judge's decision to toss out defamation suit*, *DULUTH NEWS TRIB.* (June 25, 2011), <http://www.duluthnewstribune.com/event/article/id/202704/>.

300. *McKee v. Laurion*, *ONPOINTNEWS*, 12, <http://www.onpointnews.com/docs/Mckee-v-Laurion.pdf> (last visited July 24, 2011).

301. *Id.* at 12-13.

302. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984) (concluding actual malice had not been demonstrated and affirming the Court of Appeals reversal where district court found for petitioner's claim of product disparagement based on alleged defamatory statements made by respondent magazine).

vant.³⁰³ Even well-established, objective opinion leaders are not immune from suit, as became apparent in the Suzuki-Consumers Union litigation a decade ago.³⁰⁴

With regard to comments made on social media websites, the most important doctrine remains that introduced by the 1996 Communications Decency Act: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁰⁵ This provision has been interpreted to shield ISPs and web publishers who host the work of others from liability for, inter alia, defamation³⁰⁶ and unfair competition.³⁰⁷ For example, *Barrett v. Rosenthal*³⁰⁸ concerned defamation actions brought by two anti-quackery physicians. In *Barrett*, a publicist for alternative medicine allegedly sent defamatory emails about the doctors.³⁰⁹ The defendant reposted that email on an alternative medicine newsgroup site.³¹⁰ Most of the allegations were viewed as opinion or covered by California’s SLAPP law.³¹¹ However, a remaining factual statement republished with notice of its defamatory character was successfully defended under the federal safe harbor provision³¹² leading to the following sweeping conclusion:

The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to pro-

303. See generally *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999).

304. *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110 (9th Cir. 2003). The case was eventually settled without any payment to Suzuki. Earle Eldridge, *Consumers Union, Suzuki settle suit over tipping claim*, USA TODAY (July 8, 2004), http://www.usatoday.com/money/autos/2004-07-08-suzuki-cu_x.htm.

305. 47 U.S.C. § 230(c)(1) (2006).

306. *Ezra v. AOL, Inc.*, 206 F.3d 980 (10th Cir. 2000) (holding a plaintiff who sued ISP for defamation by allegedly providing access to inaccurate information about plaintiff, was immune under section 230 of the Communications Decency Act); *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding a customer, who sued ISP for alleged unreasonable delay in removing defamatory messages posted by an anonymous third party, was immunized under Section 230 of the Communications Decency Act). See generally David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997).

307. See, e.g., *Stoner v. eBay, Inc.*, No. 305666, 2000 Extra LEXIS 156 (Cal. Super. Ct. Nov. 7, 2000) (holding plaintiff who brought suit against company charging that use of eBay’s website by third parties to sell “bootleg” music, eBay was immune from liability under section 230 of the Communications Decency Act).

308. 146 P.3d 510 (Cal. 2006).

309. *Id.* at 513–14.

310. *Id.*

311. CAL. CIV. PROC. CODE § 425.16 (Deering 2011). See generally Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope*, 33 LOY. L.A. L. REV. 801 (2000).

312. 29 U.S.C. § 230 (2006).

tect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally. It does not permit Internet service providers or users to be sued as “distributors,” nor does it expose “active users” to liability.³¹³

Although courts have made it increasingly practical for plaintiffs aggrieved by the online conduct or speech of others to cut through anonymity or pseudo-anonymity and bring actions such as defamation,³¹⁴ the congressional decision to fully protect host sites and even re-posters has been consistently endorsed by the courts.³¹⁵

C. Social Media Gag Agreements

Opinion sites were one of the earliest forms of social media. For example, since 1999 Epinions³¹⁶ has provided aggregated reviews and TripAdvisor,³¹⁷ which rates travel-related services, was founded one year later. A new generation of opinion/rating sites that stress localization, such as Yelp,³¹⁸ CitySearch,³¹⁹ Judy’s Book,³²⁰ and Angie’s List,³²¹ are now moving aggressively into the online service review space. Increasingly, these sites include sections for medical and dental specialties.³²² In addition, some new physician-specific rating sites have emerged such as Avvo,³²³ DoctorScorecard,³²⁴ and RateMDs.³²⁵

Even a cursory examination of the reviews posted on these types of social media sites should attract skepticism. There seems to be no way to ascertain whether the anonymous posters are even patients of the rated physician, suggesting the potential for gaming.³²⁶ These sites also lack any discernible scientific basis, at the very least suggesting a lack of accuracy, at least until a relatively large number of posts have been made (increasing the sample size). Not surprisingly,

313. See *Barrett*, 146 P.3d at 529.

314. See, e.g., *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. Cir. 2009). See generally Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833 (2010).

315. See *supra* notes 297–313 and accompanying text.

316. EPINIIONS, <http://www.epinions.com> (last visited July 25, 2011).

317. TRIP ADVISOR, <http://www.tripadvisor.com> (last visited July 25, 2011).

318. YELP, <http://www.yelp.com/c/chicago/health> (last visited July 25, 2011).

319. CITY SEARCH CHI., http://chicago.citysearch.com/listings/chicago/health_medical_services/58044_1790 (last visited July 25, 2011).

320. JUDY’S BOOK, <http://www.judysbook.com> (last visited July 25, 2011).

321. ANGIE’S LIST, <http://www.angieslist.com> (last visited July 25, 2011).

322. See ANGIE’S LIST, *supra* note 321; CITY SEARCH CHI., *supra* note 319; JUDY’S BOOK, *supra* note 320; YELP, *supra* note 318.

323. AVVO, <http://www.avvo.com> (last visited July 25, 2011).

324. DOCTORSCORECARD, <http://www.doctorscorecard.com> (last visited July 25, 2011).

325. RATEMDS.COM, <http://www.ratemds.com/social> (last visited July 25, 2011).

326. See generally David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for \$5*, N.Y. TIMES, Aug. 20, 2011, at A1, available at http://www.nytimes.com/2011/08/20/technology/finding-fake-reviews-online.html?_r=2&ref=technology.

counter sites have sprung up,³²⁷ and the subjects of opinion sites have filed class action lawsuits alleging dubious, even extortive marketing practices.³²⁸

Outraged physicians have filed several conventional defamation suits against patient reviewers who use these sites. For example, a California plastic surgeon brought defamation, invasion of privacy, and interference with prospective economic advantage claims against anonymous posters at Yelp and DoctorScorecard.³²⁹ An earlier California case ended badly for the aggrieved provider.³³⁰ A San Francisco patient had used the phrase “mouth torture” in a review of a dental visit she posted on Yelp.³³¹ The dentist apparently responded on Yelp that the bad review was posted after the dentist reported her to a credit bureau.³³² The dentist subsequently sued for defamation.³³³ However, a trial court applied the SLAPP law,³³⁴ dismissed the claim, and ordered the dentist to pay \$43,000 in costs.³³⁵

A relatively small number of doctors favor a quite different approach to such critical comments, attempting to preempt the posting of adverse reviews with what are described as “mutual agreements,” but in reality are better described as non-disclosure³³⁶ or social media

327. See, e.g., YELPSCAM, <http://www.yelpscam.com> (last visited July 25, 2011); YIP-PING AT YELP, <http://www.yelp-sucks.com> (last visited July 25, 2011).

328. Leena Rao, *Complaints Against Yelp's "Extortion" Practices Grow Louder*, TECHCRUNCH (Mar. 17, 2010), <http://techcrunch.com/2010/03/17/complaints-against-yelps-extortion-practices-grow-louder>; James Temple, *Business owners say Yelp extorts ad dollars*, SFGATE (Mar. 18, 2010), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/17/BU2O1CH68C.DTL>.

329. Gary Klien, *Greenbrae Plastic Surgeon Sues Online Critics*, MARIN INDEP. J. (July 5, 2010), http://www.marinij.com/marinnews/ci_15444079; see also Elinor Mills, *Yelp User Faces Lawsuit Over Negative Review*, CNET NEWS (Jan. 6, 2009), http://news.cnet.com/8301-1023_3-10133466-93.html (discussing defamation suit where patient, disgruntled over an alleged billing dispute, posted negative comments about the doctor, calling him “dishonest”).

330. *Our View on Free Speech: Want to Complain Online? Look Out. You Might be Sued*, USA TODAY (June 8, 2010), http://www.usatoday.com/news/opinion/editorials/2010-06-09-editorial09_ST_N.htm.

331. *Id.*

332. *Id.*

333. *Id.*

334. CAL. CIV. PROC. CODE § 425.16 (Deering 2011); see also *Gilbert v. Sykes*, 53 Cal. Rptr. 3d 752 (Cal. Ct. App. 2007) (finding respondent surgeon’s cross-complaint, in a medical malpractice action alleging defamation and loss of business due to false and misleading statements appearing on appellant patient’s website, qualified as a SLAPP, requiring surgeon to show statements were both false and published with actual malice, which he failed to do). See generally Tate, *supra* note 311.

335. *Our View on Free Speech*, *supra* note 330.

336. See generally Tobias J. Butler, *The Realities Of Relying On Doctor-Patient Non-Disclosure Agreements For Reputational Protection*, 22 HEALTH LAWYER 23 (2010).

gag agreements.³³⁷ These surfaced in 2007 and first attracted critical discussion in 2009.³³⁸

Some of these agreements apparently are the work of Medical Justice, an organization that previously had concentrated on defensive strategies regarding medical malpractice actions, particularly allegedly frivolous claims.³³⁹ Medical Justice now offers a rebranded service, eMerit, for “medical and dental reputation management.”³⁴⁰ In comments published in the *New York Times*, the CEO of Medical Justice described the function of these agreements as: “In the rare circumstance that a posting is false, fictional or fraudulent, the doctor now has the tool to get that post taken down.”³⁴¹

These agreements, which apparently are proffered before medical services are provided, are contracts that prospectively assign the copyright of any online review or commentary that the patient may post to the healthcare provider.³⁴² Furthermore, the agreement not only prohibits the patient from disparaging the physician but also holds the patient responsible for preventing the same by their family members.³⁴³ The assignment appears to be for a period of five years.³⁴⁴

Interestingly, Medical Justice has been countered by Doctored Reviews,³⁴⁵ a website created by two California law schools.³⁴⁶ Doctored Reviews refers to the mutual agreements as “anti-review contracts”

337. See generally Timothy B. Lee, *Doctors and dentists tell patients, “all your review are belong to us”*, ARS TECHNICA (May 24, 2011), <http://arstechnica.com/tech-policy/news/2011/05/all-your-reviews-are-belong-to-us-medical-justice-vs-patient-free-speech.ars>.

338. See, e.g., Daniel Simmons, *Company tries to stifle online reviews with patient ‘gag orders’*, ANGE’S LIST (May 1, 2009), http://magazine.angieslist.com/doctors/articles/patient-gag-orders_online-doctor-review.aspx.

339. MEDICAL JUSTICE, <http://www.medicaljustice.com> (last visited Jan 3, 2012). See generally Graeme McMillan, *Doctors Now Using Breach of Copyright to Quash Bad Online Reviews*, TIME (Apr. 14, 2011), <http://techland.time.com/2011/04/14/how-do-doctors-avoid-bad-online-reviews-legally> (discussing how numerous United States doctors use the services of Medical Justice to protect them from medical malpractice suites).

340. EMERIT, <http://emerit.biz> (last visited Jan. 3, 2012).

341. Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, NY TIMES (May 31, 2010), <http://www.nytimes.com/2010/06/01/us/01slapp.html>.

342. Rainey Reitman, *Medical Justice: Stifling Speech of Patients with a Touch of “Privacy Blackmail”*, ELECTRONIC FRONTIER FOUND. (May 4, 2011), <https://www.eff.org/deeplinks/2011/05/medical-justice-stifling-speech-patients-touch>.

343. Courtney Minick, *Medical Justice, or Doctored Reviews?*, JUSTIA.COM LAW, TECH. & LEGAL MKTG. BLOG (Apr. 15, 2011), <http://onward.justia.com/2011/04/15/medical-justice-or-doctored-reviews>.

344. Harley Geiger, *Medical Injustice*, CENTER FOR DEMOCRACY & TECH. (Apr. 26, 2011), <http://www.cdt.org/blogs/harley-geiger/medical-injustice>.

345. DOCTORED REVIEWS, <http://doctoredreviews.com> (last visited July 25, 2011).

346. Santa Clara University High Tech Law Institute and The Samuelson Law, Technology & Public Policy Clinic at the University of California Berkeley School of Law. *Id.*

and characterizes them as “poison pills.”³⁴⁷ In a 2009 interview with NPR, the CEO of Medical Justice defended the mutual agreements as being necessary because HIPAA privacy protection prevented physicians from responding directly to patient posts and noted the agreements “give the patient additional privacy protections above and beyond that mandated by law.”³⁴⁸ In 2011, the Electronic Freedom Foundation (EFF) weighed in with a critical blog post in which it noted that Yelp and Avvo refuse to honor these “agreements.”³⁴⁹ Indeed, RateMDs has added a “Wall of Shame” to its website that purportedly lists doctors who use social gag agreements.³⁵⁰

Doctored Reviews and the EFF apparently became interested because an assignment of copyright could create an end run around the federal safe harbor.³⁵¹ A doctor who owns the copyright in the forum post would demand a takedown of the adverse post and the web site would have little choice because leaving the post up would endanger its Digital Millennium Copyright Act (DMCA) safe harbor.³⁵² More generally, of course, the mere existence of such an agreement is likely to chill the patient’s speech.

More serious claims recently leveled at Medical Justice involved attempts to post positive ratings about its clients on RateMDs and Yelp.³⁵³ The posts were filtered out or taken down after website administrators discovered that the IP addresses used for the postings were registered to Medical Justice.³⁵⁴ Medical Justice argued they had been testing a new service for clients and the posts were real.³⁵⁵

If proved, such “sockpuppetry” (posting under multiple anonymous names)³⁵⁶ or “astroturfing” (posting propaganda disguised as grassroots support)³⁵⁷ may have serious legal repercussions.³⁵⁸ In 2009 the Federal Trade Commission issued its *Guides Concerning the Use*

347. DOCTORED REVIEWS, *supra* note 345.

348. *Doctor’s (Gag) Orders*, NPR (Mar. 24, 2009), <http://www.npr.org/templates/story/story.php?storyId=102297861&sc=emaf>.

349. Reitman, *supra* note 342.

350. *The “gag contract” Wall of Shame*, RATEMDS.COM, <http://www.ratemds.com/social/?q=node/35256> (last visited July 25, 2011).

351. See *supra* text accompanying note 306.

352. 17 U.S.C. § 512 (2006).

353. Timothy B. Lee, *Medical Justice caught impersonating happy patients on Yelp, RateMDs*, ARSTECHNICA (May 27, 2011), <http://arstechnica.com/tech-policy/news/2011/05/medical-justice-caught-impersonating-happy-patients-on-yelp-ratemds.ars>.

354. *Id.*

355. *Id.*

356. *Sock Puppet Definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=sock+puppet> (last visited July 25, 2011).

357. *Astroturfing Definition*, POLITICAL DICTIONARY, <http://politicaldictionary.com/words/astroturf> (last visited July 25, 2011).

358. See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53124-01, § 255.5 ex. 8 (Oct. 15, 2009).

of *Endorsements and Testimonials in Advertising* that requires, inter alia, disclosure of “material connections.” For example, a “poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.”³⁵⁹ The FTC clearly intends to apply this rule to social media. In 2010 a Public Relations firm entered into a consent agreement with the FTC after the firm caught its employees posting positive reviews for a video game client on the iTunes store.³⁶⁰ In 2011, the FTC fined the seller of an instructional guitar program \$250,000 when its affiliate marketers falsely posed as ordinary consumers and posted positive reviews.³⁶¹

In November 2011, the Center for Democracy and Technology (CDT)³⁶² filed a complaint with the Federal Trade Commission “to investigate the recent business practices of Medical Justice Corp.”³⁶³ CDT argues that Medical Justice contracts and posts are violative of section five of the FTC Act³⁶⁴ as constituting “unfair or deceptive practices.”³⁶⁵ In a statement posted on its website, Medical Justice claimed that its services were “honest, ethical, and legal” but that “we are going to use this situation as an opportunity to retire the written doctor/patient agreements we have had since 2007.”³⁶⁶

Commentators have ridiculed the Medical Justice claims that additional privacy rights are being given by providers to patients and have suggested various contractual and consumer protection remedies against their enforcement.³⁶⁷ To that list perhaps should be added the substantive unconscionability principles that provided a founda-

359. *Id.*

360. *Public Relations Firm to Settle FTC Charges that It Advertised Clients' Gaming Apps Through Misleading Online Endorsements*, FED. TRADE COMM'N (Aug. 26, 2010), <http://www.ftc.gov/opa/2010/08/reverb.shtm>.

361. *FTC Approves Final Order Settling Charges that Firm Used Misleading Online Reviews*, FED. TRADE COMM'N (June 10, 2011), <http://www.ftc.gov/opa/2011/06/legacylearning.shtm>. State consumer protection agencies are pursuing similar cases. See, e.g., *Attorney General Cuomo Secures Settlement with Plastic Surgery Franchise that Flooded Internet with False Reviews*, ST. N.Y. OFF. ATT'Y GEN. (July 14, 2009), http://www.ag.ny.gov/media_center/2009/july/july14b_09.html.

362. CENTER FOR DEMOCRACY & TECHNOLOGY, <http://www.cdt.org> (last visited Jan 3, 2012).

363. Fed. Trade Commission, *In the Matter of Medical Justice Corp.*, CDT.ORG, at 1, http://www.cdt.org/files/pdfs/20111129_medjustice_complaint.pdf (last visited Jan. 3, 2012) (Complaint and Request for Investigation, Injunction, and Other Relief).

364. 15 U.S.C. § 45 (2006).

365. Fed. Trade Commission, *supra* note 363, at 9.

366. *Statement regarding FTC complaint*, MED. JUST. (Nov. 30, 2011), <http://www.medicaljustice.com/feature-det.asp?feature-id=628899120>.

367. See, e.g., *Myths: True or False: A closer look at some of Medical Justice's key claims*, DOCTORED REVIEWS, <http://doctoredreviews.com/medical-justice-myths> (last visited Nov. 11, 2011).

tion for *Tunkl v. Regents of the University of California*,³⁶⁸ in which the California Supreme Court voided a release from liability in a hospital admission:

In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.³⁶⁹

The rating experience is frequently unpleasant, although one study of online reviews of 300 Boston-area physicians found that 88% of reviews were positive (with only 6% negative and the remainder neutral).³⁷⁰ Three other findings from that survey are notable. First, the number of reviews was quite small, suggesting considerable immaturity in the physician-rating space.³⁷¹ Only 30% of the randomly generated physician sample had any reviews at all, and the overall number was low (66 reviews across 33 sites).³⁷² Second, some of the reviews appeared to be written by the physicians themselves or their agents,³⁷³ suggesting the FTC's sockpuppetry rules may not be generally understood. Third, as noted by the researchers "many of the patient's complaints (e.g., 'not enough parking,' 'didn't spend enough time,' 'waited too long') could be addressed without violating patient confidentiality."³⁷⁴

Most powerfully, however, it is difficult to see physician gag orders surviving ethical scrutiny. The AMA code's very first ethical principle requires "compassion and respect for human dignity and rights."³⁷⁵ The fourth principle includes the requirement that the "physician shall respect the rights of patients."³⁷⁶ Other AMA reports and opinions are supportive of such a position. For example, one ethics opinion

368. 383 P.2d 441 (Cal. 1963).

369. *Id.* at 446–47; see also Butler, *supra* note 336, at 24 (2010) (discussing unconscionability, state consumer protection statutes, and other grounds for denying enforceability of such agreements).

370. Tara Lagu et al., *Patients' Evaluations of Health Care Providers in the Era of Social Networking: An Analysis of Physician-Rating Websites*, 25 J. GEN. INTERNAL MED. 942, 943 (2010).

371. *Id.*

372. *Id.*

373. *Id.* at 944.

374. *Id.* at 943–44.

375. *Principles of Medical Ethics*, AM. MED. ASS'N, § I, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page> (last visited July 25, 2011).

376. *Id.* § IV.

on the physician-patient relationship notes, “The relationship between patient and physician is based on trust and gives rise to physicians’ ethical obligations to place patients’ welfare above their own self-interest”³⁷⁷ The AMA recognizes the following:

From the numerous internet-based websites that are available to patients to rate physicians, it is clear that patients are searching for outlets to provide feedback on their doctors. However, these sites often have an unscientific and biased approach, collect small samples and fail to validate that the patient actually had an encounter with a rated physician. Additionally, these sites rarely provide dispute resolution procedures and almost never provide useful feedback to physicians for quality improvement.³⁷⁸

As a result, the AMA makes available to its members a commercial patient satisfaction survey tool, “RealTime,” and encourages its members to “proactively measure and respond to patient satisfaction data.”³⁷⁹ And, in April 2011, HealthGrades introduced a new physician portal through which physicians or practice administrators may verify and modify the information the service places in its physician profiles.³⁸⁰

Railing against a minority of critical patients, or worse, expending energy on trying to gag all patients misses the point of our information society. Writing in the *New England Journal of Medicine* Dr. Shaili Jain said the following:

What I find most striking . . . is the democratizing potential of the Internet. These sites, though virtually useless for meaningful evaluation of an individual physician, seem to hold promise in the aggregate weight and significance of the stories they contain. These stories are nuggets of qualitative data on patients’ attitudes regarding the quality of care and their needs and preferences in their relationships with their doctors. The Internet has allowed patients to have their unfiltered voices heard in a collective and powerful way.³⁸¹

The prologue to the AMA’s *Professionalism in the Use of Social Media* policy notes how “[p]articipating in social networking . . . can support physicians’ personal expression” and “provide opportunity to widely disseminate public health messages and other health commu-

377. *Opinion 10.015*, *supra* note 279; see also Herbert Rakatansky, *Report of the Council on Ethical and Judicial Affairs*, CEJA REPORT 1-A-01, Am. Med. Ass’n, <http://www.ama-assn.org/resources/doc/code-medical-ethics/10015a.pdf> (last visited July 25, 2011) (discussing ethical issues emerging in “patient-physician relationship[s]”).

378. *RealTime: A patient satisfaction solution: Why collect patient satisfaction data?*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/advocacy/current-topics-advocacy/private-sector-advocacy/patient-experience-survey-tool.page?> (last visited July 25, 2011).

379. *Id.*

380. *HealthGrades Announces Launch of New Physician Web Portal*, HEALTHGRADES (Apr. 13, 2011), <http://www.healthgrades.com/business/news/press-releases/physician-web-portal-2011.aspx>.

381. Shaili Jain, *Googling Ourselves—What Physicians Can Learn from Online Rating Sites*, 362 *NEW ENG. J. MED.* 6, 7 (2010).

nication.”³⁸² The patients’ rights to personal expression are no less important.

VI. CONCLUSION

A social media savvy physician recently opined the following:

I can split my physician colleagues into two camps. There’s one camp that would not dream of being on Facebook. The mere mention of the F-word sends shivers down their spines: It is too personal, too much potential risk, a frivolous time-suck. Then, there’s the other camp of colleagues who are on Facebook and either: a) have awkwardly dealt with a patient who added them as a friend or b) actively dread having a patient add them as a friend. . . . Having a so-called dual relationship with a patient—that is, a financial, social[,] or professional relationship in addition to the therapeutic relationship—can lead to serious ethical issues and potentially impair professional judgment. We need professional boundaries to do our job well.³⁸³

In the last two or three years there has been a marked increase in the discussion of social media risks in professional journals, the welcome publication of ethics-based guidelines, and signs of increasing rigor in employer social media use policies. Social media has continued its relentless march into all aspects of our lives. As we expand our circles of friends and acquaintances, inevitably professionals will have to confront ever more challenging boundary issues. Equally, as we spend more hours on social media sites we will record and disclose more health-related information and post more opinions of our health-care providers.

The first step in this ongoing project exploring the ethical and legal impact of social media on health care was to identify the riskiest activities that patients and physicians faced on social media.³⁸⁴ The next step in the inquiry, has been to examine the private ordering or risk management steps taken by those immediately and seriously affected by healthcare providers behaving badly or foolishly online. It has analyzed social media policies and other constructs and suggested some legal boundaries that will control their application. The next stage in the development of the domain will likely be public regulation and the attendant speech and other challenges that will no doubt follow. States are already experimenting with regulatory models dealing with, for example, social network privacy³⁸⁵ and boundary issues.³⁸⁶

382. AMA Policy, *supra* note 65.

383. Katherine Chretien, *A doctor’s request: please don’t ‘friend’ me*, USA TODAY (June 9, 2010), http://www.usatoday.com/news/opinion/forum/2010-06-10-column10_ST1_N.htm.

384. Terry, *supra* note 1, at 288.

385. *California Legislation SB No. 242 (Corbett): Social networking Internet Web sites; privacy; minors*, AROUNDTHECAPITOL, <http://www.aroundthecapitol.com/billtrack/text.html?bvid=20110SB24296AMD> (Aug. 9, 2011). SB 242 was defeated after extensive lobbying by social networking companies. See generally Patrick McGreevy, *Online privacy bill fails to pass California Senate*, L.A. TIMES (May

For physicians (at least some generations of whom have been slow to comprehend, let alone adopt, information technologies) and health-care entities, the expansive growth of social networking has disrupted relationships and long-term practices. As a result, healthcare professionals and entities have been faced with a new bundle of indeterminate risks requiring management. Some traditional risk management models will continue to enter this space. For example, the Doctors Company, the large, California-based medical malpractice insurer has recently added complementary coverage for its insureds against regulatory and liability claims arising from the theft, loss, or accidental transmission of confidential patient data.³⁸⁷

The private ordering phase detailed in this Article has seen a few aggressive risk management models such as social media gag orders developed by physicians. However, most of the private ordering has been developed by professional bodies and healthcare institutions and has been imposed on physicians and other healthcare workers. This somewhat contractual phase in the evolution of social media risk management is reactive. Indeed, some professional organizations and providers may be guilty of overreaction and many of their policies likely will be refined in the years ahead. But, it will be only one of the techniques employed as healthcare providers and patients re-craft their relationships in this new and evolving context.

28, 2011), <http://articles.latimes.com/2011/may/28/local/la-me-social-networking-20110528>.

386. S.B. 54, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011), available at <http://www.senate.mo.gov/11info/pdf-bill/tat/SB54.pdf> (regulating social media relationships between teachers and students and mandating school district policies for same); see also Dave Helling & Steve Kraske, *Missouri Alters Policy on Social Media in School*, KANSASCITY.COM (Oct. 21, 2011), <http://www.kansascity.com/2011/10/21/3221888/missouri-alters-policy-on-social.html> (discussing Governor Jay Nixon's signing of SB No. 54 and his views on the bill). In August 2011 the Missouri State Teachers Association won an injunction against the social media aspects of SB No. 54. See *MSTA Wins Injunction Against Social Networking Bill*, MSTABLOG (Aug. 26, 2011), http://mostateteachers.typepad.com/missouri_state_teachers_a/2011/08/msta-wins-injunction-against-social-networking-bill.html.

387. *CyberGuard*, THE DOCTORS COMPANY, http://www.thedoctors.com/Coverages/MedicalMalpractice/ID_010509 (last visited July 25, 2011).