

Social Media in the Long-Term Care Setting

David C. Marshall, Esq.
Latsha Davis & Marshall, P.C.

What is Social Media?

- ▶ “Social Media” includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else’s web blog or blog, journal or diary, personal web site, social networking or affinity website, web bulletin board or a chatroom, whether or not associated or affiliated with a facility, as well as any other form of electronic communication
- ▶ Ex. Facebook, Instagram, LinkedIn, Myspace, Snapchat, Twitter, YouTube, etc.
 - E-mail (everyone?)
 - Facebook (640 Million)
 - Twitter (175 Million)
 - LinkedIn (100 Million)
 - MySpace (100 Million)
 - Flickr (32 Million)
 - Google+ (20 Million)
 - Blogs (152 Million blogs as of 2010)
 - YouTube (490 Million unique users per month)

Social Media Myths

- ▶ What you post on social media is private and can only be accessed by the intended audience
 - False. Once a post is made, the author can no longer control how it is shared.
- ▶ Deleted posts, including pictures and videos, have been permanently destroyed.
 - False. Even deleted items likely still exist on servers. Individuals should assume anything they post is never truly gone.
- ▶ Sharing private information about a resident is harmless if only the intended recipient receives it.
 - This type of sharing is considered a breach of protected health information.
- ▶ Posting information about a resident is acceptable as long as that person is only identified by a nickname, room number, diagnosis, etc.
 - Even in the absence of a resident's name, a social media post still might violate resident privacy and confidentiality.
- ▶ Posting information that a resident has already disclosed about himself/herself is not a privacy or confidentiality breach.
 - Regardless of what a resident discloses about his/her medical status, treatment, or care, healthcare workers are still obligated to maintain privacy and confidentiality.

Use of Social Media By The Facility

- ▶ Facilities can create and monitor their own web pages.
 - Can also create and monitor their accounts on Facebook, Twitter, Instagram, etc.
- ▶ Social Media is a cost-effective marketing tool.
 - Advertise and promote programs and activities
 - Post employment opportunities
 - Educate people about various healthcare issues
- ▶ Facility may use Social Media to review job candidates (but be careful, as you may discover information that would not be permissible in making hiring decisions!)

Use of Social Media By The Facility

- ▶ Legal issues arise when Facility postings on Social Media sites include resident information:
 - Photograph, video or other protected health information which can be used to identify a resident
- ▶ HIPAA Privacy Rule
 - Unless allowed by an Exception, a Facility may not use or disclose resident PHI without a written authorization from the resident or his/her POA.
 - Does the posting on social media fit within the “Treatment, Payment or Health Care Operations” Exception?
 - Your default position should be that the use of any resident PHI in Social Media postings can only be allowed upon receipt of an Authorization.

Use of Social Media By The Facility

- ▶ Requirements for valid HIPAA Authorization:
 - Description of the PHI to be used or disclosed;
 - Name of the person or class of persons authorized to use or disclose PHI;
 - Name of the person or class of persons authorized to receive the PHI;
 - Description of the purpose of the disclosure;
 - Expiration date or event for the Authorization;
 - Statement that resident/POA may revoke the Authorization;
 - Statement on the risk of re-disclosure by the recipient;
 - Date and signature of resident or POA
- ▶ Authorization cannot be combined with another document
- ▶ Develop a “form” Authorization for use of photos/images/videos

Use of Social Media By Employees

- ▶ Many Facility employees have their own personal Social Media sites
- ▶ Scenarios:
 - Employee makes disparaging comments on personal Social Media sites about the Facility and its management
 - Employee posts pictures, videos or other comments about Facility residents on the Social Media pages
- ▶ NLRA Section 7 Employee Rights:
 - Would likely prevent a Facility from disciplining an employee for making “general” complaints about the Facility and management , or addressing the “terms of employment” for the employee
 - Would not prevent a Facility from disciplining an employee who posts inappropriate materials about a resident or who posts specific, defamatory information about the Facility or its management

Inappropriate Social Media Posts Can Also Lead To Resident Right Violations

- ▶ CMS released a Survey & Certification Letter noting that unauthorized photographs or video recordings of residents could result in violations of resident privacy, and could, in certain circumstances, be construed as abuse.
 - CMS provides that “[e]ach resident has the right to be free from all types of abuse, including mental abuse. Mental abuse includes, but is not limited to, abuse that is facilitated or caused by nursing home staff taking or using photographs or recordings in any manner that would demean or humiliate a resident(s).”

Inappropriate Social Media Posts Can Also Lead To Resident Right Violations

- ▶ CMS instructed state survey agencies to conduct a review of facility policies designed to prevent these unauthorized actions.
- ▶ CMS strongly recommends facilities to develop a “Social Media Policy” update to address issues regarding the use of cameras, cell phones and other devices, and the corresponding posting of resident pictures and videos.
 - Nursing facilities should also update their current policies on abuse prevention to account for these issues, and to provide training for staff.

CMS Recommendations for Social Media Policy

- A Social Media Policy should:
 - Define social media.
 - Explain how the policy applies to all employees using social media while at work and at home, when away from work, when the employee's Facility affiliation is identified, known, or presumed.
 - Lay out the HIPAA Privacy Rule and explain how photographs, images, videos, and recordings of residents are considered PHI under HIPAA.
 - Note consequences for violations of the policy and explain what results in, and what does not result in, a violation of the policy.
 - Provide that individuals identifying themselves as employees, consultants, contractors, or volunteers of the Facility should include a disclaimer on their social media accounts that explains that their opinions and views do not represent the Facility.
 - Provide that all employees keep personal social media accounts separate from Facility accounts.
 - Require all employees to acknowledge that they have received and read the policy.

Use of Social Media By Residents, Families and Visitors

- ▶ While there are some risks, Social Media can be beneficial for residents:
 - Decreases depression levels in residents because it allows them access to the outside world
 - Is an easy way to connect with family and friends
 - Forges new friendships and reconnects old friends
 - Is educational and allows Residents to learn about current events, and
 - Provides entertainment to Residents through videos, games, reading articles, etc.

Use of Social Media By Residents, Families and Visitors

- ▶ Does the Facility offer web access to residents and visitors?
 - Are there any restrictions placed on access?
- ▶ Providing access to the internet and Social Media sites invariably leads to residents and visitors posting information and pictures on those websites
 - What do the various regulations governing different levels of care say about:
 - Whether the Facility can “control” or “prohibit” any content posted by a resident, family member or visitor?
 - What rights does a resident have to post content, take pictures/videos, and install “granny cams” in their rooms?

Regulatory Framework

▶ Nursing Facility Setting

- §483.10(g)(9) provides that “The resident has the right to have reasonable access to and privacy in their use of electronic communications such as email and video communications and for internet research. (i) If the access is available to the facility (ii) At the resident's expense, if any additional expense is incurred by the facility to provide such access to the resident. (iii) Such use must comply with State and Federal law.” Section §483.10(h)(2) provides that residents have the right to privacy in their communications
- Also note that the interpretative guidance under the SOM related to resident rights (see F550) provides that the following could be construed as a violation of resident rights: “Requiring residents to seek approval to post, communicate or distribute information about the facility (for example, social media, letters to the editor of a newspaper)”.

Regulatory Framework

- ▶ §483.12 Freedom from Abuse, Neglect and Exploitation
 - Mental abuse includes abuse that is facilitated or enabled through the use of technology, such as smartphones and other personal electronic devices. This would include keeping and/or distributing demeaning or humiliating photographs and recordings through social media or multimedia messaging. If a photograph or recording of a resident, or the manner that it is used, demeans or humiliates a resident(s), regardless of whether the resident provided consent and regardless of the resident's cognitive status, the surveyor must consider non-compliance related to abuse at this tag. This would include, but is not limited to, photographs and recordings of residents that contain nudity, sexual and intimate relations, bathing, showering, using the bathroom, providing perineal care such as after an incontinence episode, agitating a resident to solicit a response, derogatory statements directed to the resident, showing a body part such as breasts or buttocks without the resident's face, labeling resident's pictures and/or providing comments in a demeaning manner, directing a resident to use inappropriate language, and showing the resident in a compromised position. Depending on what was photographed or recorded, physical and/or sexual abuse may also be identified.

Regulatory Framework

▶ Personal Care Setting

- 55 Pa.Code §2600.42(o) provide that “a resident has the right to freely associate, organize and communicate with others privately”.
- RCG does not specifically address the use of social media in connection with this resident right.

▶ Independent Living Setting

- The Pennsylvania Insurance Department regulations do not address this issue at all

Regulatory Framework

- ▶ So, what restrictions can a Facility put on residents?
 - When can a Facility “disable” the resident’s access to the internet?
 - Harm to the resident or others?
 - Harassment?
 - Violation of Facility policies?
 - Could the facility involuntarily discharge a resident for violations?
 - Does the violation fit within the parameters of the Requirements for Participation or the Personal Care Home Regulations?
 - As always, should provide residents/POAs with “warning notice” of conduct that violates policy, so that you can document failure to abide by policies, should you seek to discharge the resident

Self-Installed Cameras

- ▶ Residents in a licensed personal care facility or assisted living residence have a regulatory right to install a video camera in their room
 - DHS is in the process of developing additional policies with respect to photographs, videos, cameras and social media beyond what is in the RCG.
- ▶ Residents in a licensed nursing facility currently do not have a regulatory right to install cameras in their room
 - Accordingly, the Facility can adopt a policy prohibiting such cameras installed by either the resident or family, and can demand removal if discovered
 - If the Facility chooses to allow a resident/family to install a camera, then we recommend that you develop a “use” agreement to govern

Self-Installed Cameras

- ▶ Suggested terms of Agreement
 - Conditioned upon execution of HIPAA Authorization
 - If resident in a semi-private room, the roommate must execute a HIPAA Authorization, or the camera won't be permitted
 - Require the camera to be visible, not hidden
 - Require the resident to bear all costs of installation
 - Camera should record video/images only – no sound
 - Facility should be entitled to unedited copy of the recording upon request
 - Visitors, staff and other residents will be notified of the camera
 - Facility may revoke permission for use of the camera should resident/family breach the terms of the Agreement

Tablets, Smartphones, and Voice-Activated Devices

- ▶ Tablets, Smartphones and Voice-Activated Devices are all tools which enable residents to communicate with others, and access the “outside world.”
- ▶ Are devices that enable users to access the Facility’s Wi-Fi and internet network
 - Today, virtually all visitors to the Facility will come with some sort of “smart” device (likely a phone) that is capable of accessing the Facility’s network
- ▶ The policy required by CMS should also address accessibility issues with respect to these devices

What is a “Voice Activated Device?”

- ▶ Amazon’s “Alexa,” Apple’s “Home Pod” and Google’s “Home” are virtual assistants which are capable of:
 - Voice interaction
 - Music playback
 - Making to-do lists
 - Setting alarms
 - Streaming podcasts
 - Playing audiobooks
 - Providing weather, traffic, sports, and other real-time information, such as news
 - Controlling several smart devices using itself as a home automation system
 - Interacting with users via voice command and other methods
- ▶ VAD’s can be medically appropriate for some residents, to enhance their quality of life (e.g. paraplegic residents)

Voice Activated Devices

- ▶ Risks include:
 - Potential HIPAA violations
 - Blurs boundaries between ones personal and professional life
 - Thus, social media policies should advise against these social connections and remind providers and staff of their professional roles in resident care and their obligations to protect residents' privacy.
 - Can result in malpractice
 - Providers and staff should be mindful of the dangers of posting online information that may be construed as giving medical advice.
 - Voice activated devices (like Alexa) learn a lot of information about you, including your health information based on the things you have it search or buy for you.
 - Making information susceptible to improper use by third parties.

Voice Activated Devices

- ▶ Agreement for Use of Voice Activated Device
 - Residents wishing to install a voice activated device in their rooms must execute a HIPAA Authorization form granting permission for the installation of the voice activated device.
 - If a Resident occupies a semi-private room and has a roommate, the roommate must also agree to sign a HIPAA authorization granting permission for the voice-activated device. If Resident's roommate does not agree to such use, and/or refuses to sign the HIPAA Authorization, then Resident is not permitted to use the voice activated device.
 - Voice activated device requirements
 - Must be visible to persons entering Resident's room
 - Costs of installation and maintenance are the responsibility of the Resident
 - Facility Administrator may revoke permission at any time upon just cause.

Voice Activated Devices

- ▶ Authorization for Use and Disclosure of Resident Protected Health Information Through Use of VAD
 - Resident may sign an Authorization form consenting and authorizing the use, disclosure, and dissemination of PHI through VAD.
 - Resident must understand that such PHI will result in a disclosure of information and that such information may be viewed by an undetermined class of persons, including, but not limited to, Amazon/Apple/Google programmers and data collection systems.
 - Resident must also understand that PHI could be accessed improperly by third parties through the usage of a VAD.

Facility Enforcement/Disciplinary Measures

- ▶ Suspension or termination
- ▶ Other serious consequences of social media violations should also be discussed
 - Civil penalties, criminal charges, board investigations, licensure actions, and negative media coverage
- ▶ When social media violations occur, senior care facilities should ensure that disciplinary measures are implemented promptly and consistently across the organization
- ▶ Monitoring and oversight
 - Very difficult to monitor workers' social media presence b/c federal and state laws
 - Assign an appropriate individual or contract with a vendor to monitor social media sites for inappropriate postings
 - Ensure that social media policy is applied consistently across the organization

Employee Training is Vital

- ▶ Comprehensive training on the Facility's social media policies should occur during orientation and periodically thereafter
 - Should include a thorough review of the facility's social media, privacy, and confidentiality policies
 - Obligations under HIPAA and state privacy laws
 - Consequences for violations of resident privacy and confidentiality
 - Including disciplinary actions on behalf of the organization, state board investigations and sanctions, and civil and criminal penalties
- ▶ Remind providers, staff, volunteers, and others of their duty to report any breaches of resident privacy/confidentiality or other social media violations for which they are aware
 - Proper protocols for reporting
- ▶ Comprehensive training on the Facility's social media policies should occur during orientation and periodically thereafter
 - Should include a thorough review of the facility's social media, privacy, and confidentiality policies
 - Individuals obligations under HIPAA and state privacy laws
 - Consequences for violations of resident privacy and confidentiality

Conclusions and Recommendations

▶ DO

- Know and follow the rules
- Be respectful
- Be honest, and accurate when posting on social media
- Keep personal social media accounts separate from facility accounts
- Understand that HIPAA personal identifiers must remain private
- Report any breach of privacy or confidentiality

▶ DON'T

- Use social media at work
- Retaliate on social media
- “Friend” residents or families
- Share any form of a resident’s information on their personal pages even if a resident posts such information
- Take any unauthorized photos of a resident (w/o written authorization)
- Transmit any electronic media image or recording of a resident
- Post any protected information about the facility on social media

Contact Information

David C. Marshall, Esq.
Latsha Davis & Marshall, P.C.
1700 Bent Creek Blvd., Suite 140
Mechanicsburg, PA 17050
Phone: (717) 620-2424
Email: dmarshall@ldylaw.com