The Ethics of Communication Between Doctor and Patient

The role of social media in facilitating best patient outcomes

Introduction

The Social Media Landscape Report for 2018 indicates that over 16 million South Africans are Facebook users, 8 million use Twitter, 6.1 million use LinkedIn and Instagram has 3.8 million users.1 Medical professionals should be free to take advantage of the many personal and professional benefits that social media can offer, with the awareness that the personal and the professional can’t always be separated.2 A presentation on the ethical challenges related to the increasing use of social media by health care professionals was among proceedings at the Cipla Respiratory Symposium (Spier, 17 March 2018), with practical, South African, legal advice from Ms Gundo Nevhutanda, Attorney.

KEY MESSAGES

- The same laws that apply to the corporeal world also apply to the online world
- Maintain separate private and professional social media accounts
- Your personal conduct can still affect your profession and professional reputation
- Maintain appropriate boundaries of the patient-physician relationship in accordance with professional ethical guidelines
- Adopt a conservative approach when disclosing personal information
- Provide factual and concise information, declare any conflicts of interest and adopt a sober tone when discussing professional matters.
It is important to note that the same laws that apply to the corporeal world also apply to the ‘online’ world. To understand the law in the context of social media communications between doctor and patient, the moral obligations and legal duties of medical practitioners must be considered. These include upholding human rights through respect and tolerance for patients and their beliefs, values, preferences and informed choices; acting in the best interest of the patient with confidentiality and informed consent; and acting with integrity, truthfulness and justice for the betterment of the greater community. Guidelines for the ethical regulation of social media interactions, such as those of the World Medical Association (WMA) and the South African Medical Association (SAMA), can provide specific context to complement the law of the land.

World Medical Association guidelines for the use of social media

In October 2011, the following guidelines were adopted by the WMA General Assembly in Uruguay:

• To maintain appropriate boundaries of the patient-physician relationship in accordance with professional ethical guidelines
• To study and understand the privacy provisions of social networking sites
• To routinely monitor their own Internet presence to ensure that the personal and professional information on their own sites and content posted about them by others is accurate and appropriate
• To consider the intended audience and assess whether it is technically feasible to restrict access to the content to predefined individuals or groups
• To adopt a conservative approach when disclosing personal information
• To ensure that no identifiable patient information be posted in any social media by their physician as breaching confidentiality undermines the public trust in the medical profession
• To consider the inclusion of educational programmes with relevant case studies and appropriate guidelines in medical curricula and continuing medical education
• To bring their concerns to a colleague when observing his or her clearly inappropriate behaviour
• To provide factual and concise information, declare any conflicts of interest and adopt a sober tone when discussing professional matters.

Social media and South African law

There is no specific South African law governing social media, which urgently requires development. Applicable South African laws are the Constitution, POPI, ECTA and the Code of Ethics and Conduct for South African Print and Online Media.

The Constitution

Chapter 2 of the Constitution contains the Bill of Rights, which affords every South African citizen the right to equality (Section 9), human dignity (Section 10), freedom and security (Section 12), privacy (Section 14), health care (Section 27) and access to information (Section 32). All rights are equal. However, a medical practitioner must balance the above-mentioned rights against his/her own right to freedom of expression (Section 16).

The Protection of Personal Information Act 4 of 2013 (POPI)

This Act is directly linked to the right to privacy and regulates the processing of personal information by public and private bodies in a manner that secures this right to privacy, with exceptions. POPI is of importance to medical practitioners, as clinical practice involves the collection, processing and storage of personal
information. Any person convicted of an offence in terms of POPI is liable to a fine and/or imprisonment of up to ten years, depending on the offence committed.

The Electronic Communications and Transactions Act 25 of 2002 (ECTA)

Section 11 of ECTA provides that information contained or referred to in a data message has legal force and effect. This, by implication, includes any data generated, sent, received or stored by electronic means. A data message is considered ‘in-writing’. In any legal proceedings, data messages must be given due evidential weight and are admissible evidence.

Section 51 of ECTA sets out the principles for electronically collecting personal information and Section 77 provides for Take Down Notifications (e.g. Hello Peter). Any person convicted of an offence in terms of ECTA is liable to a fine and/or imprisonment for a period not exceeding five years, depending on the offence.

Code of Ethics and Conduct for South African Print and Online Media

Any conversation or sharing of information, pictures and videos that takes place on any social media platform is classified as User Generated Content (UGC) and is considered to have been published. The same laws that would apply to publishing an article in a newspaper are applicable, regardless of how many (or few) followers or online friends. Under the Multiple Publication Rule, each publication gives rise to a separate cause of action: legally, you are published where the post is viewed, so a single post could be subject to countless different legal regimes.

Using social media as a medical professional

Doctors should consider adopting conservative privacy settings where these are available. However, not all information can be protected on the web. It is inappropriate to post informal, personal or derogatory comments about patients or colleagues on public forums. Doctors who post material online are obliged to declare any financial or commercial interest in healthcare organisations or pharmaceutical and biomedical companies.

Ms Nevhutanda advises that medical practitioners maintain separate professional (Box 1) and private accounts (Box 2).

Box 1. Guidelines for managing a professional account on social media

- Decide which social tool is most suitable for you and understand the user terms and privacy settings
- Use discretion about who you allow to ‘follow’ or ‘friend’ you
- Develop a social media policy for your practice and circulate this to your employees and patients
  - Promote and uphold the rights of patients
  - Avoid debates relating to politics, sex, race or religion
- Promote the integrity of your profession
  - Maintain professional boundaries
  - Keep advice factual and scientific in communicating developments and new technologies to patients
  - Do not share confidential patient information
  - Be cautious! Always ensure a first consultation with the patient; once this is done, electronic platforms can be used to the extent that you are satisfied that the patient’s condition is manageable via such a medium
- Remember that HPCSA rules on advertising apply to social media platforms
- Be alert to comments made on your posts, as you are legally responsible for these.
THE ETHICS OF COMMUNICATION BETWEEN DOCTOR AND PATIENT

Box 2. Guidelines for managing a personal social media account

• Use disclaimers and make it expressly clear that this is not your professional account (your biography is a good place to do this)

• Do not post, share or engage in discussions related to your profession

• Be mindful that your personal conduct can still affect your profession and professional reputation

• Avoid ‘friending’ patients

• Understand the privacy settings and control comments and ‘tags’ on your wall or ‘retweets’.

Hosting social media platforms

Positive aspects of social media in the medical profession include promotion of a healthy lifestyle and empowering patients. However, the doctor needs to be alert to any advice posted in a personal or professional capacity, as in the recent case of Tim Noakes (Case study 1); as well as to be aware of what others may be posting about him/herself (Case study 2).

Furthermore, the doctor also needs to be aware of and regulate the content others are posting on the hosted platform. In the case Dutch Reformed Church Vergesig Johannesburg Congregations v Rayan Sooknanan t/a Glory Divine World Ministries, the legal duty of the creator of a Facebook page or administrator of a WhatsApp group (or other social media platforms) was iterated by Judge Satchwell. A property dispute led to media and Facebook lobbying on the part of Glory Divine, with an urgent interdict by the DRC. Judge Satchwell stated that the account creator/administrator is capable of regulating access to and censoring postings and therefore has an obligation to take down unlawful postings, “much as a newspaper takes responsibility for the contents of its pages”.

Case study 1. Advice posted: The Tim Noakes case

Facts:

• A mother tweeted "@ProfTimNoakes is LCHF eating ok for breastfeeding mums? worried about all the dairy and cauliflower = wind for babies?? [sic]"

• Tim Noakes advised weaning onto LCHF foods, a complaint was lodged and the HPCSA conducted a hearing into allegations of misconduct

• It was argued that the advice given was unconventional and that Dr Noakes is not an expert in infant nutrition. Further, it was argued that Twitter is like a one-on-one conversation, akin to a doctor-patient relationship.

Findings:

It was highlighted that advice cannot be given without consultation or background knowledge and, even if acting in good faith, the results could have been devastating for the mother and baby. Dr Noakes was found Not Guilty, primarily because:

• It could not be proven that he had acted in his capacity as a doctor
• It could not be proven that he had given unconventional advice
• It could not be proven that he had given medical advice.
### Case Study 2. Defamation: Dr Rush and Pretty Petty

**Facts:**

- Dr Rush has a personal Facebook and Instagram account which he uses with caution
- Pretty Petty is a longstanding patient of Dr Rush
- On Friday afternoon, Pretty Petty telephones the consulting rooms for an appointment, is advised they are fully booked and only able to assist on Saturday morning
- Pretty Petty demands to speak to Dr Rush, she is informed he is unable to answer as he is with a patient
- Enraged and overcome with emotion, Pretty Petty posts on Dr Rush’s Facebook page: “@DrRush, You are a horrible doctor, with no respect for patients, you are after the money. I’m done with you”
- Dr Rush is alerted to this post by a colleague on Saturday morning.

**How should Dr Rush deal with this matter?**

- Dr Rush must save the post as proof for any claim on defamation he may pursue; thereafter delete immediately
- Dr Rush should only befriend patients on a professional account and set privacy settings to block friends from posting without permission
- He should monitor his Facebook account frequently, use disclaimers and circulate his social media policy to patients and employees
- Considering Pretty Petty is a long-standing client, it is advisable that they meet to discuss and resolve the matter. Pretty Petty should delete the post and publicly apologise to Dr Rush
- Should Pretty Petty refuse to delete the post and Dr Rush pursues a legal claim for defamation, there are three elements that would need proving: publication, reference to Dr Rush and defamatory words or conduct. The test is whether a reasonable person would think less of Dr Rush because of the statements or allegations made by Pretty Petty.

### Conclusions

There is no blanket approach to using social media. Be cautious and treat social media as you would the real world. If you would not say it publicly, don’t say it on social media.

“It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently”

Warren Buffet
References


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