Social networking among adults 65 and older is rapidly increasing thanks to the introduction of computer classes, software programs and support blogs tailored to assist the aging demographic navigate the internet. According to the Pew Research Center's Internet & American Life Project, social networking among adults 65 and older grew 100% between April 2009 and May 2010, with a reported one in four internet users over 65 utilizing social networking sites. For this reason, many nursing homes and long term care facilities are working to incorporate policies that better accommodate their growing number of tech savvy residents, while simultaneously struggling to handle the legal risks that follow. Further still, such facilities must also be wary of employee social media use, as reports of patient privacy violations are surfacing in courtrooms nationwide.

Despite the fact that many legal risks remain unclear, the benefits of this trend are becoming increasingly apparent. Social media platforms, such as blogs, wiki team spaces, or personalized web sites are changing the way we are communicating by providing new ways to engage in dialogue, provide and exchange information, and build rapport. For long term care facility residents, social networking has become an easy way of maintaining contact with the outside world.

One popular example of a resident active in social networking is 104 year old Ivy Bean from Branford, England who was considered the “world’s oldest Twitter user” when she passed away in July 2010. Ms. Bean lived in a residential care home and at the time of her death had over 50,000 followers on Twitter. Her Twitter page remains available for the public and indicates that during her final hospital admission, the care home staff became active in maintaining her Twitter page, keeping the world up to date as to Ms. Bean’s health status.

It has been reported that social networking by seniors, like Ms. Bean, decreases their depression level by allowing them access to the outside world to which they otherwise feel isolated and disconnected. In response to these findings, many long term care facilities are making great attempts to increase their residents’ access to computers and the web. Some facilities offer computer courses to residents, teaching residents how to easily communicate with the public. This allows residents to keep up to date with their families through social media sites, including Facebook, Twitter, and even Skype video chat. This is especially helpful to communicate with relatives who do not live nearby the facilities.

Long term care organizations are also utilizing social media to advertise, inform and update residents, residents’ families and potential residents. Even more significant than the growing number of participants is the claimed benefit of these practices. By making information available online, organizations are able to keep families informed, educated and involved in the course of resident care, which in turn generates higher overall resident satisfaction. Increased social networking at long term care facilities inevitably brings additional security risks and the potential for additional information that could be used in future litigation.

Risks Involved with the Use of Social Media
Unlike other industries, healthcare providers are uniquely constrained by the patient privacy laws, which restrict the manner and method by which they may utilize available social media tools. For this reason, the American Medical Association Council on Ethical and Judicial Affairs, The American College of Physicians’ Center for Ethics and Professionalism and other organizations are all actively engaged in creating policies to help guide medical providers through this delicate area. In the interim, it is important that health care providers familiarize themselves with the risks of social media, and adjust their policies accordingly.

The legal risks of social media in the healthcare industry stem largely from potential disclosure of private patient information, which is federally protected through the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Under HIPAA’s privacy and security standards, health care providers have an ongoing obligation to protect all individually identifiable health information, known as protected health information (PHI), both during and after treatment of a patient. The 2009 Health Information Technology for Economic and Clinic Health Act (HITECH) then strengthened and extended HIPAA’s privacy provisions by tightening regulations for protecting PHI, enhancing civil and criminal penalties for HIPAA violations, and creating new patient breach requirements.

A breach under HITECH occurs by impermissible use, access or disclosure that compromises the security or privacy of PHI such
that the use or disclosure poses a significant risk of financial, reputational or other harm to the affected individual. Thus to comply with HIPAA and HITECH, health care providers must refrain from disclosing any personally identifiable information about their patients through social media outlets.6

The risks of inadvertent disclosures are dramatically increased when medical providers and residents communicate on public platforms such as Facebook or personal blogs. For example, in December 2011 officials at the Providence Holy Cross Medical Center began investigating one of their employees for allegedly making fun of a patient’s medical condition on Facebook. According to a printout obtained by the Los Angeles Daily News, the post contained a photo of the patient’s medical record, accompanied by the caption, “[j]unty but this patient came in to cure herVD and get birth control.”7 Responders were quick to point out the privacy violations involved but the employee defended his post, writing, “[p]eople, it’s just Facebook…If some people can’t appreciate my humor than tough. And if you don’t like it too bad because it’s my wall and I’ll post what I want to. Cheers!”8 Though the investigation is ongoing, the Medical Center issued a statement ensuring that the individual will not be working at any Providence facilities in the future.

The Providence incident is not an isolated one, as terminations as a result of unauthorized or inappropriate social media postings are occurring across the country. In 2011, a certified nursing assistant was fired from her job and criminally charged with voyeurism after posting a picture of a 51 year old paraplegic male’s buttocks on Facebook.9 Likewise in 2010, four staff members were fired from the St. Mary Medical Center for uploading dying photos of a stab-wound victim to their private Facebook accounts.10 An ER physician at the Waverly Hospital in Rhode Island was terminated after posting information on Facebook about a trauma patient. Though the post did not include the patient’s name, the doctor was fired and fined because she provided sufficient information to enable others in the community to identify the patient.11

The HIPAA and HITECH protections apply to all medical providers, including long term care facility staff. Photographs depicting residents inside a long term care facility or receiving treatment cannot be disclosed without resident consent in hard copy offline, nor can they be posted online. Similarly, resident privacy prevents organizations who maintain medical blogs from writing about any particular resident in detail sufficient to enable readers to identify that resident. Here the hypothetical online scenarios clearly parallel a familiar offline HIPAA breach.

Many long term care organizations have Facebook pages, which are often open to the public and offer information regarding the facility or organization. Residents and their families can also “like” the page, subscribing to receive updates posted by the facility. The facility will often post pictures of facility events, which with consent of each resident, can feature residents enjoying and participating in life at the facility. However, online interactions become more troublesome when they are between residents or residents’ families and long term care staff members. Information posted by disgruntled staff members can be used against the long term care organization in litigation.

**Guidelines for Using Social Media in Long Term Care Organizations**

In the context of long term care organizations, Facebook or MySpace pages of the organization itself or the organization’s staff members can be used to impeach witnesses at trial. Accordingly, long term care organizations should take a cue from major hospitals and medical providers and create clear guidelines for staff members’ use of social media.

Organizations cannot limit or restrict staff members’ personal use of social media. Guidelines should stress that all staff members, residents and resident families are personally and legally responsible for the content of the commentary they post and can be held liable for unlawful activities, including defamatory, libelous, obscene or discriminatory statements or posting material that violates intellectual property laws or improperly discloses confidential information. Staff members should be reminded that residents, residents’ families, competitors and colleagues may have access to the online content they post. As such, information originally intended just for a small group can be forwarded on to a much wider audience. Such warnings would have been useful at the Mount Royal Towers, an Alabama nursing home where a staff member performed a lap dance on a 97 year old Alzheimer’s patient. The incident was recorded and posted on YouTube without the knowledge or consent of the resident or his family. Members of the resident’s family are now suing the facility, alleging invasion of privacy, negligence, wantonness, and negligent hiring of personnel.12

Clearly the above incident represents egregious conduct evincing poor judgment on all levels. It is, hopefully, an isolated incident, and as such, guidelines should specify that staff members should not make unauthorized disclosures regarding their employer or residents on personal or public social media sites. These disclosures include information regarding residents, residents’ personal information (including medical con-ditions or treatment), residents’ families, and other personal information about other individuals without their consent. Staff members should not post photos, videos or other media on any social media site without the consent of all those exhibits in the media. Moreover, staff members should not tag, identify, or comment on anyone in any social media without the individual’s consent.

Staff members should also be strongly discouraged from “ friending” residents or resident family members. Facebook friends gain access to one another’s private and social lives, including access to the other’s interests, personal photographs, political/religious views and relationship status. “ Friending” residents and their families gives access to personal information about the staff member, which would otherwise not be
shared with these individuals. Accordingly, staff members should be encouraged to keep their social media sites for personal use and to not communicate with residents and resident families via social media.

Staff members should be instructed that when posting on external social media sites or other public forums, they must make clear that the views expressed are their own personal views, and not that of the medical facility. An example of such a disclosure is “I am an employee of [enter organization name]. Statements or opinions expressed on this site are my own and do not necessarily represent those of [enter organization name].”

Moreover, staff members should not post on company public pages private information about residents. Social media sites should be closely monitored by the long term organization and inappropriate postings or information should be promptly deleted. This is important to ensure the best face of the organization is presented for public viewing as many organization web and social media pages are open to the public and can be easily accessed by opposing parties during litigation. Damaging posts on social media sites can potentially undermine the ability to successfully defend these matters.

Social Media in the Courtroom: Discovery and Litigation

Given its growing prevalence in all other aspects of the health care industry, it is not surprising that social media is making its way into the courtroom as well. One of the most significant examples is the use of social media information during discovery. Under New York State law, there is no right to privacy for information contained in and posted on social networking websites. This ruling was handed down in Romano v. Steelcase, Inc., a personal injury action in which plaintiff alleged that defendant’s negligence caused her to sustain injuries that prevented her from participating in various activities and depreciated her enjoyment of life. In response, defendants sought access to the plaintiff’s personal Facebook page, arguing that there were reasonable grounds to believe it depicted an active lifestyle inconsistent with the claims asserted by the plaintiff in her complaint. More specifically, Steelcase reported that plaintiff’s Facebook profile showed her “smiling happily in a photograph outside the confines of her home, despite her claim that she...is largely confined to her house and bed.”

Existing case law prevents plaintiffs who place their physical condition in controversy from withholding material related to the extent of the injuries claimed, and the damages resulting therefrom. Applying this line of reasoning to the social media context, the Romano court granted the defendants access to plaintiff’s Facebook and MySpace pages, on the ground that the websites may contain photographs of plaintiff engaging in activities that she claimed her injuries prohibited.

The Romano court further reasoned that the value and need for such information during discovery outweighs a plaintiff’s right to privacy in same. MySpace, Facebook and related social media platforms are inherently public forums; by creating these accounts, plaintiffs are consenting to the fact that their personal information will be shared with an online audience. For this reason, plaintiffs lack a reasonable expectation of privacy in any user-posted content, notwithstanding privacy settings, and cannot later prevent defendants from accessing social media information reasonably related to the claimed injuries. Holding otherwise, wrote the judge, “would be in direct contravention to the liberal disclosure policy in New York State.”

Yet the discoverability of social media information is not without limit. Cases following Romano emphasize relevance as a threshold issue, denying requests for access to Facebook accounts where it was not properly established that the information contained therein would be relevant to the action. Moreover, the New York State Bar Association (NYSBA) has issued an opinion on the ethical considerations of lawyers using Facebook or MySpace during litigation. The NYSBA opinion provides that “[a] lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not ‘friend’ the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements or fact or law), or Rule 5.3(b) (1) (imposing responsibility on lawyers for unethical conduct by non-lawyers acting at their direction).”

The NYSBA opinion confirms that information obtained by residents and their families via social media can be used during discovery. Thus any information obtained from a staff member’s Facebook page can be used to impeach the witness during deposition or trial. Further, where a staff member has “friended” a resident on Facebook, any postings the staff member made, including postings on the day of any alleged incident, photographs, or negative comments concerning the facility or job position can be used to damage the individual’s credibility at trial. Such examples are becoming increasingly common; in fact, we recently discovered a certified nursing aide (CNA) making personal posts to her employer’s public Facebook page. In clicking the CNA’s own personal Facebook profile, which was open to the public, several posts were found stating that the CNA was going in to work on 2 ½ hours sleep, that she was about to take a nap at work, that she did not like working in certain buildings at the facility, and that she continued to be on probation with the facility for prior incidents. Each of the CNA’s personal posts was linked to the facility’s public Facebook page, thus making the posts accessible to, among other members of the public, the residents of the facility, their families, and opposing counsel. Thus once the posts are made, they can be printed, blown up and used as an exhibit in support of any hypothetical allegations of negligence, negligent hiring/supervision, and Public Health Law claims. As such, it is important that facilities take a proactive stance and institute clear guidelines regarding the use of social media by employees and staff members.
Conclusion
As social media continue to permeate the healthcare industry, medical facilities must adjust their current policies, rather than avoid the growing trend. The best advice is to approach online worlds in the same way we do the physical one, with common sense, sound judgment and clearly delineated social media policies. Take the time to educate employees on the legal risks involved with social media use, and the fact that patients’ privacy extends even to their personal Facebook or Twitter accounts. Facilities themselves must remember to maintain the same level of professionalism online as they would in any other medical context, by protecting patient health information at all times. Though there are many benefits from participating in social media, long term care facilities need to be vigilant and take an active role in monitoring and shaping their online image in order to reap the benefits of social media and networking.

Endnotes
8 Id.

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