Topic Notes 8

Social Media

Facebook, Twitter, MySpace, texting, sexting. What kind of problems can social media pose for IT professionals in health care?

**Hacking and Deliberate Release of Information**

If all health records are online imagine what havoc can be done by hackers or even someone with a grudge.[[1]](#footnote-2) We have talked a lot about privacy. With all health records stored electronically, records can be released either intentionally or unintentionally through negligence by staff. These releases will violate the patient’s privacy. When that privacy is violated, the victim has different options available in the legal arena. All of them, though, involve bringing lawsuits against the perpetrators. The legal mechanism for seeking redress is a civil proceeding for a tort action.

Tort: A civil wrong recognized by law as grounds for a lawsuit. The lawsuit gives the victim the ability to “punish” the wrongdoer and recover monetary damages.

Intentional Torts: One in which the wrongdoer intended to do the harm. To establish an intentional tort, the plaintiff must prove that the act was a willful act.

Example: A patient visits the hospital complaining of stomach pain, and an X-ray shows that there are coins in his belly. The X-ray technician, on a lark, posts the image on her Facebook page.

Negligence Torts: One in which the tort was committed through the wrongdoer’s negligent actions.

Example: A doctor takes some medical records home, but accidentally leaves the files on a subway train.

**Intentional Torts to be considered for privacy claims in health care cases**

Defamation: Written or spoken words that damage someone's reputation.

There are two kinds of defamation.

* + 1. Slander – spoken false statement about another;
		2. Libel – written false statement about another.

One example could arise if a newspaper columnist wrote that Mayor Menino of Boston needs speech therapy. In order to win a libel suit, Mayor Menino would have to show that the statement caused him economic harm. The columnist, in defense, would have to prove that it is the truth. Just find a video of Mayor Menino and you will be able to decide for yourself.

For a complete description of defamation please see the link below.

<http://www.expertlaw.com/library/personal_injury/defamation.html>

If you want to sue for defamation, you have to prove the following four elements:

(1) That someone used defamatory language (2) in describing or discussing you, which was (3) written or said to a third party and which (4) causes damage to your reputation which results in economic harm.

There is a category called per se defamation. This means that there is no defense to the charge, the defendant is automatically guilty. The following kinds of statements are automatically considered defamation:

1. Statements that adversely reflect on someone’s conduct in a business or profession.
2. Statements that someone has a loathsome disease.
3. Statements that someone is or was guilty of a crime involving moral turpitude.
4. Statements that an unmarried woman is unchaste.

Examples:

* A disgruntled patient posts a strongly negative review on HealthGrades.com for one of the doctors in your hospital, and as a result, other patients begin canceling appointments with him.
* A file containing records of HIV status for patients tested at your clinic is inadvertently indexed by Google because of a misconfigured firewall.
* A nurse in a hospital is accused of stealing syringes for his drug habit and reusing the dirty needles for patients. The nurse's name is posted on the hospital web site and spread widely in press coverage.
* Someone scrawls a message to “Call Janie for a good time” on the wall in the men's bathroom and includes the phone number for one of the female aides in your hospital.

The First Amendment guarantees people the right to free speech. How does this reconcile with defamation? The caveat to free speech is that you cannot harm anyone or incite violence. This is summarized in the advice that “you can’t shout fire in a crowded theater”. There are certain barriers to free speech. Justice Oliver Wendell Holmes articulated the “clear and present danger” test.[[2]](#footnote-3) If the words cause imminent harm that would not occur if they were not spoken, then the speech is not protected.

Defenses to a charge of defamation: The most commonly used defense to a charge is “opinion”. The defendant claims that the statements were just his opinion. An absolute defense to the charge of defamation is that the statement is the truth.

The hardest part of proving a defamation charge is that there was damage to your reputation which caused economic damage.

Defamation cases are hard to prove. An example of a defamation suit that was successful is *Carol Burnett v. National Enquirer*.[[3]](#footnote-4) An article in one of the gossip columns stated that the comedienne Carol Burnett had gotten drunk during dinner at restaurant and got into an argument with former Secretary of State Henry Kissinger. She sued for defamation and won. Even though she was regarded as a public figure, she was able to prove actual malice in the publication of the story. There were several eyewitnesses who testified on her behalf. The story proved to be false and published simply for sensational value. [UPDATE FOOTNOTE]

In the age of social media defamation has become a hot topic. Defamation is no longer a matter of me telling my neighbor that the guy who owns the corner deli is a drug addict. With the advent of Facebook, chat groups, and online business review sites, I can tell the whole world what I think of the deli owner. This opens a whole new world for defamation charges. Now there are companies that, for a charge, will attempt to repair your online reputation.

Another facet of this improper use of social media is **cyberbullying**. Cyberbullying has taken on a life of its own and is now a crime in some states including Massachusetts. Cyberbullying occurs when:

Sending hurtful, hateful, derogatory, harassing or threatening messages to others;

Spreading rumors; and/or

Sending personal or embarrassing information about or pictures of others – all with the intention of intimidating, frightening, ridiculing, or harming someone else.[[4]](#footnote-5)

Cyberbullying is specifically aimed at minors. However, if the chance arises, I expect someone will challenge the law and try to expand it to cover adults.

Example: Phoebe Prince, a freshman student at South Hadley High in Massachusetts, committed suicide after being bullied at school and online. Her notorious case[[5]](#footnote-6) was the genesis of Massachusetts's anti-cyberbullying law and an anti-bullying curriculum required in every public school in the Commonwealth.

**Invasion of Privacy**

4 Kinds:

1. Appropriating Someone's Picture or Name: Using someone's image or name for commercial gain without their consent.
2. Intrusion upon Someone's Affairs or Seclusion: Act of prying or intruding into something that a reasonable person[[6]](#footnote-7) would find objectionable. The matter must be considered private.
3. Publication of Facts Placing Someone in False Light: A person attributes to someone else views that the person does not hold or actions he did not take. This must be objectionable to our reasonable person.
	1. First Amendment Limitation: If the matter is of public interest, plaintiff must prove that defendant acted with malice.
4. Public Disclosure of Private Facts About Someone: Private information must be publicly disclosed. The disclosure must be objectionable to the reasonable person. This can happen even if the information is true.[[7]](#footnote-8)

Examples:

* A four-year-old girl was photographed by her uncle in images which were later sold world-wide in collections of child pornography.[[8]](#footnote-9)
* A student at Rutgers used a webcam to take videos of his roommate having sex and displayed the videos on the Internet.[[9]](#footnote-10)
* A woman working with a swimming pig at a Texas amusement park had her picture published in an explicit men's magazine in a way that implied she participated in bestiality.[[10]](#footnote-11)
* A mail carrier suffered a heart attack and was taken to the hospital. When a co-worker called to check on him, the co-worker's wife – a nurse at the hospital – disclosed that the man was HIV-positive. This story was later spread around the victim's workplace.[[11]](#footnote-12) The final decision went against the victim, however; this tort is extremely difficult to prove.

**Intentional Infliction of Emotional Distress**

The elements necessary for this tort are:

1. Extreme and outrageous conduct, that is
2. Done intentionally or recklessly, which
3. Causes emotional distress, and
4. Results in damages.[[12]](#footnote-13)

Extreme and outrageous behavior is one that goes beyond the bounds of common decency. An example of extreme and outrageous conduct is the Rutgers student who recorded his roommate having sex with another young man. The victim's resulting suicide proves just how severe the emotional distress was.

**Negligent Infliction of Emotional Distress**

The elements of this tort are:

1. The defendant must owe the plaintiff a duty to conform to a specific standard of conduct that protects the plaintiff from unreasonable risk of injury.
2. The defendant must be shown to have breached that duty.
3. The defendant’s breach was the actual and proximate cause of the plaintiff’s injury.
4. As a result, the plaintiff was damaged.[[13]](#footnote-14)

**Constitutional Right to Privacy of Medical Records**

The Supreme Court has found an individual interest in avoiding disclosure of personal matters.[[14]](#footnote-15) This includes medical records. In addition to tort actions and civil actions under HIPAA, a person whose medical records have been released also has a federal cause of action (reason to sue). People have the right to bring a civil rights suit under 42 U.S.C. 1983 for a violation of their Constitutional right to privacy in their medical records.[[15]](#footnote-16) 42 U.S.C. 1983 allows individuals to sue each other for violation of Constitutional rights.[[16]](#footnote-17)

**Employee Disciplinary Actions**

Even if a person does not choose to bring a lawsuit against a person who has deliberately released private medical information, the person’s employer may choose to discipline the person. In one example in June 2010, five nurses were terminated from Tri-Medical Center in Oceanside, California, for discussing patients on Facebook.[[17]](#footnote-18) In October 2007, hospital personnel were terminated for releasing medical records for actor George Clooney after a motorcycle accident.[[18]](#footnote-19)

Employers are now searching future employees on the Internet and social media sites to see if they are “appropriate” for hiring. Did your friends post pictures of you smoking a bong or chugging beers at a party? They might torpedo your admission to school or that new job.

1. http://www.stopthehacker.com/2012/04/20/ten-scariest-hacking-statistics/ [↑](#footnote-ref-2)
2. *Schneck v. U.S.*, 249 U.S. 47 [↑](#footnote-ref-3)
3. http://law2.umkc.edu/faculty/projects/ftrials/communications/burnett.html [↑](#footnote-ref-4)
4. http://www.mass.gov/ago/about-the-attorney-generals-office/community-programs/bullying-and-cyberbullying/cyberbullying.html [↑](#footnote-ref-5)
5. http://www.boston.com/news/local/massachusetts/articles/2010/01/24/the\_untouchable\_mean\_girls/. Retrieved 2012-10-05. [↑](#footnote-ref-6)
6. Reasonable Person is a legal term of art that refers to a hypothetical person who uses average skill, care and judgment in conduct. He is used as a standard to determine liability. [↑](#footnote-ref-7)
7. BarBri Review, Conviser Mini Review, 2005 [↑](#footnote-ref-8)
8. http://www.abajournal.com/mobile/article/pricing\_amy\_should\_those\_who\_download\_child\_pornography\_pay\_the\_victims Retrieved 2012-10-05. [↑](#footnote-ref-9)
9. http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716 Retrieved 2012-10-05. [↑](#footnote-ref-10)
10. http://openjurist.org/726/f2d/245/braun-v-c-flynt. Retrieved 2012-10-05. [↑](#footnote-ref-11)
11. http://law.justia.com/cases/indiana/supreme-court/1998/123103-rts.html. Retrieved 2012-10-05. [↑](#footnote-ref-12)
12. BarBri Review, Conviser Mini Review, 2005. [↑](#footnote-ref-13)
13. ibid. [↑](#footnote-ref-14)
14. *United States v. Westinghouse Electric Corporation*, 638 F.2d 570, 577 (3rd Cir. 1980) [↑](#footnote-ref-15)
15. *Doe v. Delie*, 257 F.3d 309, 314-315 (3rd Cir. 2001) [↑](#footnote-ref-16)
16. http://www.law.cornell.edu/uscode/text/42/1983 [↑](#footnote-ref-17)
17. Terry, Nicolas P. “Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers”. **Nebraska Law Review**. 90 Nebraska L. Rev. 703. [↑](#footnote-ref-18)
18. http://www.people.com/people/article/0,,20151481,00.html [↑](#footnote-ref-19)