

BLURRED LINES

The Gray Area Between Social Media And Privacy Faces A Head On Collision for the Nurse

Social Media engulfs our personal and professional lives and the lines between the two are often illusory. Although most nurses use social media with good intentions, an inadvertent mistake can cost a nurse their professional livelihood. Losses of work and licensure have occurred with the instantaneous click of a button.

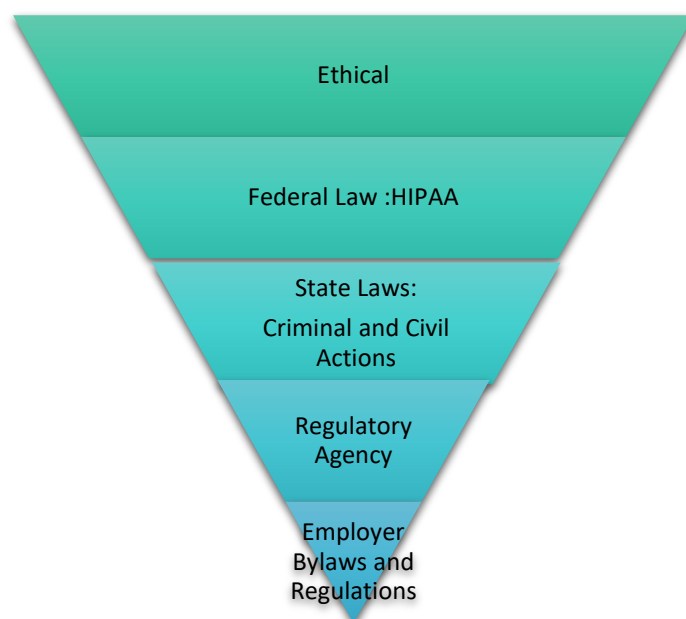
This article identifies common misconceptions and offers tools to protect your career. Today the escalated use of social media is at an all-time high and the risk of serious consequences for the nurse are severe. Most violations of the rules stem from innocent “communications” which leak the protected information either verbally or in writing. We examine the laws regarding privacy violations and illustrate problems and solutions using both fictional and true everyday examples.

CONFIDENTIALITY IS A BROAD CONCEPT

The core of the patient-nurse relationship is privacy and confidentiality, the two terms are used synonymously but hold slightly different meanings. Privacy is the right to control access to information pertaining to oneself and to control the circumstances, timing and extent to which information may be disclosed. (ANA Code of Ethics, 2018 Section 3.1). In plain speak, a patient’s right to privacy means they can be free from unwanted intrusion. The nurse has a duty to protect patient privacy. Confidentiality is the

promise by the nurse to keep information the patient tells us is secret. Without confidentiality, patients lose faith in their caretaker and the system. Both concepts involve duties to the patient and often require policies to ensure protection.

The laws and rules protecting patient privacy/confidentiality are rooted in the Hippocratic Oath. Governments, have long held establishing boundaries of the oath of confidentiality. Today, we identify the following bodies of rules and laws as controlling the limits of privacy: (1) ANA Nurse Code of Ethics (2) Federal law (3) State law (4) Administrative Law (5) Employer Rules and Regulations.



The NCSBN holds nurses have both ethical and legal obligations to maintain patient privacy and confidentiality at all times¹.

The Federal Law contains a nurse's constitutional rights allowing for the freedom of speech and the rights to hold a nursing license. Federal Law also regulates and enforces HIPAA. HIPAA violations include disclosures of patients' names, geographic information, dates, medical record identifiers, photographs (fingerprints, facial recognition) or any other unique identifying characteristics.

State laws always vary from jurisdiction to jurisdiction. A nurse may be liable either civilly or criminally. Civil laws include defamation and invasion of privacy. Under civil law, a provider's electronic communication could be the basis of civil or criminal misconduct including harassment, defamation or invasion of privacy. A violation of criminal law could include assault.

In addition, inappropriate use of electronic media can be reported to the State Board of Nursing. Although there is no Arizona² statute directly pertaining to social media and communications, the following are considered "unprofessional conduct³":

- Any conduct or practice that is or might be harmful or dangerous to the health of a patient or the public;
 - Intentionally or negligently causing physical or emotional injury⁴;
 - Failing to maintain professional boundaries and/or engaging in a dual relationship with a patient, resident, or

any family member of a patient or resident⁵;

- Committing an act that deceives, defrauds or harms the public;
- Being mentally incompetent or physically unsafe to a degree that is or might be harmful or dangerous to the health of a patient or the public.

Additionally, in Arizona, anyone can make an anonymous complaint against a nurse.

Employer rules vary, however contact your HR to see if your company has specific social media policies and procedures.

We analyzed several examples of potential privacy violations and examined whether the specific conduct was proscribed or addressed by these bodies. Finally, we offer some recommendations for best practices based on the governing laws and rules.

SOCIAL MEDIA AND THE FRIEND REQUEST

"Meredith" a current patient finds Eli, the night nurse, on Facebook and extends a friend request. Eli doesn't really want to be Meredith's friend but is worried that Meredith will not give him a good reference or complain about his care if he refuses⁶.

The Code of Ethics holds that social media friend requests from patients crosses ethical boundaries. There are no Federal and State laws specifically against accepting a friend request. In Arizona, there are no specific statutes, policies or rules

¹ See NCBSN Nurses Guide to the Use of Social Media.

² Each State Board holds their own policy or statute; Another example is the Texas Board of Nursing Position Statement on Social Media. (See 15.29 Professional Boundaries including Use of Social Media by Nurses).

³ The conduct can occur in or out of state. The entire list of "Unprofessional Conduct" is listed in A.R.S. 32-1601(26).

⁴ A.A.C. R4-19-403.

⁵ *Id.*

⁶ Fictional Scenario.

against accepting social media friend requests from patients⁷.

Our Recommendation: Eli should refuse a request with a polite but firm reply that states; I am honored at your friend request. However, the nursing code of ethics discourages social media communication between any nurse and patient during treatment. My duty is to protect your privacy and social media communication regarding your care is a privacy violation.

Maintain no communication about the patient-provider relationship and the friendship is ethical. Because of the high potential for inadvertent violation a nurse should refuse any request made during current treatment period. Instead the professional boundaries should be maintained, and friendships confined to professional gatherings.

SOCIAL MEDIA AND THE CRY FOR HELP

A former patient Turk initiates contact through Facebook messenger to Nurse Carla and explains he is contemplating suicide. A Facebook message does not require both parties to consent to a friendship; a message can be sent unilaterally to a user even when no connection or “friendship” is made. What should the Nurse Carla do⁸?

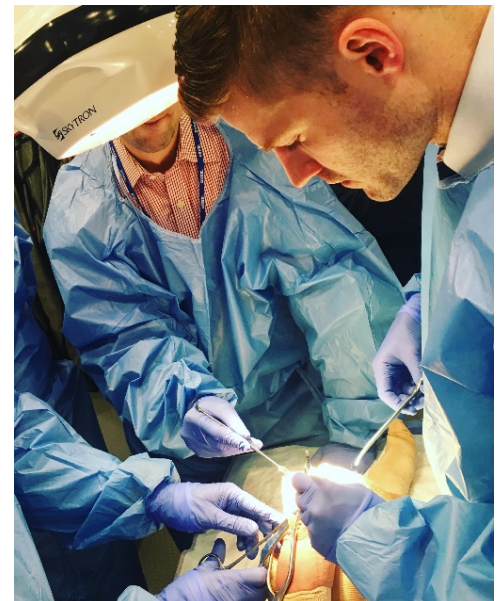
Under the Code of Ethics, Carla must maintain professional boundaries in the use of electronic media no matter how the connection is made. It is a Federal violation to communicate or offer treatment outside formal treatment record. Under state law the nurse does not owe any specific

duties to a non-patient. However, keeping a level of professionalism is paramount.

Analysis: First, this is no longer a patient and the nurse has not consented to contact. However, ethically it would be appropriate to call 911. All healthcare providers have a duty to ensure patient safety and avoid harm. The provider may contact authorities about the communication to protect the former patient.

SOCIAL MEDIA AND PHOTOGRAPHS

Example: Nursing student assists in his first surgery and posts a photo with the caption: “First day rotating in the med-surg department at KLGH!”



First surgery came after that crazy car accident holding up the 101 this morning! 38 stitches later and a lesson to always wear a seatbelt!!⁹”

Analysis: The photo alone is appropriate as there is no patient identifying information. However, this is part of a patient record and therefore cannot be disclosed outside the formal record. In addition, the commentary contained too many details to infer the patient identity.

⁷ However Unprofessional Conduct includes the “failure to maintain professional boundaries or engaging in a dual relationship that is avoidable” See R4-19-403 (B)(3) Unprofessional Conduct.

⁸ Fictional Scenario.

⁹ Fictional Scenario.

Compare to:

Example: Four nursing students took a photograph of a placenta specimen during their obstetrics and gynecology clinicals¹⁰. They asked permission from their supervisor and later mentioned the photograph was taken to be uploaded to social media the students uploaded the photo to their respective pages¹¹.

Analysis: The group had it all right; there were no patient identifiers, no violation of privacy yet, they were expelled from the nursing program¹². Fortunately, the students were later readmitted to the program as the court found a violation of due process rights during the appeal process¹³. The simple photograph could have detrimentally affected their ability to apply for nursing schools, board applications and job opportunities.

Under the Code of Ethics there is always a potential to violate ethical boundaries when posting photographs if proper nursing judgment is not utilized before posting. Under federal and most state laws there is a potential breach of HIPAA through patient identifiers in photographs given that any such photographs are part of a patient record. The bottom line is, if you want to post a photograph for teaching purposes you should request the patient's permission in writing and maintain confidentiality regarding the person.

SOCIAL MEDIA AND COWORKER INTERACTIONS

Example: After work a nurse sends threatening and harassing Facebook Messenger to a co-worker¹⁴.

The Code of Ethics holds that threatening messages cross the line of professional boundaries. In addition under Federal law, harassment can be a form of employment discrimination that is in violation of the Equal Employment Opportunity Commission (EEOC).

Under state law, depending on the severity of the harassment this can rise to the level of criminal charges. Additionally, failing to maintain professionalism, including physical and emotional injury, may be a violation of a Nurse Practice Act¹⁵.

Always refer to your employee handbook regarding communication between providers or employees.

Analysis: There is no relationship between the nurse's actions and her ability to function as a registered nurse. This event occurred outside of the scope of employment as an RN. However, online comments and direct messages to or about co-workers, even if posted from home during non-work hours have been scrutinized and sanctioned¹⁶.

SOCIAL MEDIA AS AN OUTLET FOR OPINIONS

Example: A Nurse becomes morally and ethically torn after hearing about an abortion performed at the hospital during her shift. She posts to her Facebook: "My employer and I do not share the same values regarding abortions. A 16-year-old mother at four weeks should not be able to choose a child's fate when they can't even decide what college to go to. How can her parents who are both doctors condemn this!?! #prolifeforlife"

¹⁰ *Byrnes v. Johnson County Cmty. Coll.*, CIV.A. 10-2690-EFM, 2011 WL 166715, at *1 (D. Kan. Jan. 19, 2011)

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Factual Scenario.

¹⁵ See Arizona's Nurse Practice Act at A.A.C. R4-19-403.

¹⁶ See also ARS 32-1601.

Sharing concerns or beliefs is different than deciding whether or not to participate in the medical procedure - ethically her conduct could be scrutinized. Ultimately, the commentary here provides too much context leading to a HIPAA violation. Thus, the post itself was improper. A general statement about a political or religious issue is acceptable if not connected to a specific patient. Under both Federal and State laws there is a potential violation of HIPAA the following information was disclosed: (1) the nurse's place of employment found on her page, (2) the age of mother/patient and (3) the age of the fetus. In addition, many states hold that Nurses must respect a patient's rights, concerns, decisions, and dignity; despite disagreement¹⁷.

Analysis: A nurse's right to free speech does not outweigh patient privacy concerns. Her right to her opinion and point of view is personal and she is entitled. However, the publication in conjunction with the patient identifiers alluding to the care and treatment is considered a breach of privacy.

Compare to:

Example: A nurse paramedic posted on her private and personal Facebook page:

"An 88 yr. old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr. old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guardsgo to target practice."¹⁸

To defame a fellow healthcare provider is unprofessional under the code of ethics. Under Federal law there is a potential to violate or breach HIPAA because there is a disclosure of the patient's place of work, age, and children. If the HIPAA related items are omitted, then the nurse has a first amendment right to this speech. Under State laws the paramedic could even bring a civil lawsuit for defamation against the nurse. In Arizona, "committing any act that deceives, defrauds or harms the public" is a State Board of Nursing Violation. If the Nurse's Facebook page was public and the post infers the paramedics were not doing their job, then the post could be seen as deceiving the public.

Analysis: In this case, The New Jersey Board of Nursing took action against the nurse stating the posed a risk to public safety¹⁹. On appeal the court reversed reasoning privacy concerns are analyzed on a fact-sensitive case by case basis; in this case Plaintiff's Facebook page was private and posted to a limited number of people²⁰. Therefore, she had a reasonable expectation that her post would remain private considering she took active steps to protect her page from public viewing²¹.

Compare to:

Example: A nursing student blogged about her participation in mother-baby clinicals including several medical, personal and employment pieces of information about the patient including: the date the patient was in labor, the patient was an employee of the hospital the student was participating in clinicals, the number of children the patient had, medications the patient received, symptoms the patient had during labor, about of

¹⁷ See Arizona's Nurse Practice Act at A.A.C. R4-19-402

¹⁸ See *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 872 F. Supp. 2d 369 (D.N.J. 2012).

¹⁹ *Id.*

²⁰ *Id.* at 373-374.

²¹ *Id.* at 374

time patient was in labor, gender of the patients newborn and the patients marital status²².

Analysis: The blog resulted in expulsion for the student. The Sixth Circuit Court of Appeals found the school action was appropriate because the school had a legal and ethical obligation to protect patient confidentiality and nursing students are trained with regards to these ethical obligations²³. The school justified the expulsion by stating student's inability to keep patient information confidential was an important consideration in determining suitability as a future nurse.

SOCIAL MEDIA AND YOUR “PRIVATE” LIFE

Example: On a day off, Nurse Jackie posts photos on Snapchat of herself drinking and heavily intoxicated. Her last post to Snapchat is at 2:30am where she is visibly intoxicated. Jackie’s shift begins at 6am the same morning. An anonymous report is made to the nursing board²⁴.

Although Nurse Jackie was not working at the time of her posts, the public display could be an ethical issue of professional conduct or concern for substance abuse. Under state law, if Jackie was impaired while caring for a patient the following morning she could be subject to civil and criminal penalties.

If a nurse attends work with effects of last night’s alcohol use still on board, most State Regulatory Agencies find those actions put the public safety at risk, thus violating the state statute. Remember, most states hold “any conduct that *might* be harmful to the health of the patient or public” is a violation of the law.

These actions would more likely than not result in a breach in an employment code of conduct. However, refer to your Employment Handbook and Policies and Procedures.

Analysis: Personal time remains personal until it is published on a medium such as Snapchat. Although the design and idea behind the platform is short stories that last less than 24 hours, someone can screenshot or save the context of the posts. The complainant was concerned with patient safety and Nurse Jackie’s capacity when she was likely still inebriated when she began her shift.

SOME QUICK TIPS:

1. First, err on the side of caution and although work is part of your life, it is the part, that under the law, must remain private.
2. Consult your Human Resources representative as hospitals, agencies and or employers or if you are a student consult the Student Code of Conduct. Each have unique guidelines for their facilities. If there are no specific guidelines the legal and ethical obligations still apply.
3. Avoid social media communication with patients altogether. Make a policy for yourself and use it often.
4. View all posts and comments as if your mother, priest or boss were reading it.

²² See *Yoder v. Univ. of Louisville*, 526 Fed. Appx. 537, 546 (6th Cir. 2013).

²³ *Id* at 545.

²⁴ Fictional scenario.

5. Forget the idea that you have certain freedom of speech rights. As a health provider your rights are limited.

CONCLUSION

Social media is a wonderful tool to connect with others. Allow social media to harness meaningful connections within your personal and professional networks while being cognizant of the overlap between your professional and personal life. Be cautious of the gray area that blurs the ethical boundaries of nursing when utilizing electronic media.

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