Health Care & Social Media

Best Practice Marketing Strategies

Drinker Biddle
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Jennifer is a partner in and the vice chair of the Health Care Practice Group. Her practice includes the general representation of health care providers including hospitals, long-term care facilities, multi-specialty physician groups and ancillary service providers, as well as the special representation of pharmaceutical companies and device manufacturers in fraud and abuse and privacy compliance matters. Jennifer focuses on hospital-physician relationships, including Stark Law and Anti-Kickback statute compliance, and regularly assists in developing and implementing legal compliance programs.

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Darren is a partner in the Intellectual Property Practice Group and chair of the Firm’s Advertising and Promotions practice. He counsels clients on a variety of matters ranging from trademarks, copyrights, rights of publicity and social media to parallel imports, advertising and promotion law. Darren’s practice is directed to assisting clients in better understanding the value of their intangible assets and building strategies for protecting those assets and capitalizing on their value. Darren is a published author on topics of politics and popular culture and posts regularly at www.legallysocial.com, his blog on social media, intellectual property and the law and @legallysocial on Twitter. He is also a regular contributor to Drinker Biddle’s Life Sciences blog www.LifeSciencesNow.com.

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Stephanie is a partner in the Labor & Employment Practice Group. She represents employers in defending administrative and federal/state court complaints involving equal employment opportunity discrimination, retaliatory discharge, harassment, whistleblower rights, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA) and state wage and hour claims. Stephanie devotes a significant portion of her practice to representing hospital and health care clients in labor relations and employment matters and regularly conducts EEO and wage and hour compliance and union vulnerability audits for health care systems and stand alone health care facilities.
Twitter — Live Coverage

Follow the conversation on Twitter at #dbrhealth
Best Practice Marketing Strategies

> Social Media Trends in Health Care Marketing
> Aligning your Social Media Strategy with your Organization's Mission
> Privacy and Other Regulatory Considerations
Social Media Trends in Health Care Marketing
Consumers value information and services that make healthcare easier to manage.

- Availability of doctors appointments: 72%
- Appointment reminders: 71%
- Referral to specialists: 70%
- Discounts/Coupons for services: 69%
- Continued support post-treatment or discharge: 69%
- Make complaints/check customer service: 68%
- Patient reviews of doctors: 68%
- Treatment reminders: 68%
- Check ER wait times: 68%

Source: PwC HRI Social Media Consumer Survey, 2012
Consumers **trust** information shared by providers, but are less likely to **share** information with them.

<table>
<thead>
<tr>
<th>Provider</th>
<th>Trust likelihood</th>
<th>Share likelihood</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctor</td>
<td>61%</td>
<td>41%</td>
</tr>
<tr>
<td>Hospital</td>
<td>55%</td>
<td>39%</td>
</tr>
</tbody>
</table>

Source: PwC HRI Social Media Consumer Survey, 2012
Consumer Concerns of Sharing Health Information Through Social Media

- Privacy – sharing health information in public: 63%
- Breach – information being leaked or hacked: 57%
- Making decision based on incorrect information: 52%
- Impact on insurance coverage: 41%
- None: 20%
- Other: 2%

Source: PwC HRI Social Media Consumer Survey, 2012
Evolution of Social Media Participation

- Actively participate in conversations
  - One-to-one
  - One-to-many
  - Many-to-many
- Freely exchange information
- Advance discussion

Engage

Listen

Participate

- Actively monitor conversations
- Analyze what is being said
- Determine what influence chatter has over users

- Post and publish content to communicate, but don’t necessarily engage users in conversation
Aligning your Social Media Strategy with your Organization's Mission
The Medium Is Your Message

> Systematic Introspection
> Ownable Distinction
Systematic Introspection

> What is your mission?
> How are you communicating it now?
> What do you want consumers and patients to think?
> What is in your “basket of associations”?
Systematic Introspection

> Actually be systematic
> Actually be introspective
> Not about hiring a consultant, but about talking to people within the organization
> How do your employees and patients use social media
> Not a one size fits all solution
Ownable Distinction

> More than just branding
> It’s what makes you different
> Your social media activities should be about recognizing and branding these differences
> And it should be the result of systematic introspection
Aligning With Your Mission

> Not a one time activity
> A process that continues
> Build mission sustainability
  – Regular reviews
  – Build a social media culture
Privacy and Other Regulatory Considerations
Top Legal Issues in Social Media

- Disclosure of Confidential Information
- Trademark Infringement
- Copyright Infringement
- Defamation
- e-Discovery
- Endorsements
- Privacy and Publicity Rights
- HR Issues
And those are before you get to legal issues specific to health care…

- HIPAA and More Stringent Health Information Privacy Laws
- Malpractice
- Unlicensed Practice of Medicine
- Creation of Physician-Patient Relationship
- Fraud and Abuse
And, don’t forget legal issues applicable to nonprofit entities….

> Prohibition against political endorsements
  – Content on social media sites needs to be vetted for political activity, especially when commenting on State and local issues
Top Legal Issues: Disclosure of Confidential Information

> Ease and speed of conversation may lead to disclosure of confidential information, including trade secrets and other proprietary information.

> Such disclosure may result in loss of intellectual property rights.

> Policies and training are required to prevent inadvertent disclosure of confidential information.
Top Legal Issues:
Trademark Infringement

> Use of third-party marks without permission may result in liability for trademark infringement, dilution or unfair competition

> Must take care not to create the impression of third-party endorsement, affiliation or sponsorship
Top Legal Issues: Copyright Infringement

> Pictures, text, music and videos are easily copied to social media sites

> If such transfer is without the permission of the content owner, copyright violation can occur

> Obtain permission before using content created by others – even if that means paying for it
  - The cost of content is likely cheaper than defending against allegations of copyright infringement

> Register under Digital Millennium Copyright Act
  - Create procedure for handling complaints
  - Incorporate in Terms of Use
Top Legal Issues: Defamation and e-Discovery

> Defamation
  - Liability varies depending on who creates content; third-party vs. host

> e-Discovery
  - Content on social media sites is discoverable to the extent the communications are deemed public (not private)
  - Like emails, content is easily misconstrued
  - The best defense against e-discovery is implementation of a comprehensive document retention policy
  - But, like emails, getting rid of electronic content is difficult
Top Legal Issues: Endorsements

> 15 USC 45 prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"

> FTC Endorsement Guidelines for Bloggers
  - Disclose compensated relationships
    - Including instances in which bloggers get use of free products or services
  - Paid endorsements are deceptive if they make false or misleading claims
  - Advertisements featuring a consumer’s personal experiences with a product or service must disclose the results that consumers generally should expect
    - Stating “results not typical” is not enough
Top Legal Issues: Privacy and Publicity Rights

> Federal and State laws recognize an individual’s right to privacy

> State laws also recognize an individual’s right to publicity
  - Individuals may control and to choose whether and how to use his or her identity for commercial purposes

> Thus consent is often required before posting an individual’s likeness or other identifying information on a commercial site
Health-Specific Legal Issues: HIPAA and More Stringent Privacy Laws

> It’s easy to inadvertently disclose PHI through social media – whether the disclosure is of a name or other individually identifiable information.

> E.g., After holiday party on hospital floor, nurse posts pictures of the event on social media site, one of which includes a photo of a patient in the hallways.

> E.g., Nurse posts a photo of a child in a hospital bed on her Facebook page, along with a request for prayers, disclosing the child was soon to undergo surgery.
  - Posting included child’s first name
  - Nurse alleged the child’s mother provided the photo and verbal consent to post on page.

> Even so:
  - Need HIPAA-compliant, signed authorization
  - Without authorization, nurse bound to safeguard the child’s PHI, whether or not nurse had a direct treatment relationship with child.
Health-Specific Legal Issues: HIPAA and More Stringent Privacy Law

> February 22, 2012: Memorial Hermann Hospital “live tweeted” double coronary artery bypass
  - One surgeon tweeted, posted photos to Hospital’s Facebook page and responded to questions
  - Another surgeon performed the surgery
  - 4000 twitter followers
  - 100 tweets, photos and videos

> Was PHI disclosed?
> Was patient authorization obtained?
Health-Specific Legal Issues: Malpractice

> With live transmission of event, what if something goes wrong?

> Tweet and post process allowed for delay in “real time” posting

> Performing surgeon was expert and surgery was considered routine
Health-Specific Legal Issues:
Malpractice

> But, what if patient wants family member to record a surgery or other procedure – to share with other family members (lawyers?) who could not be present?
Health-Specific Legal Issues: Licensure and Patient Relationship

> Blogs, FAQs about specific medical conditions and “Ask the Professional” chats also create risk for health care providers

> Consider:
  - Are you creating a physician-patient relationship?
  - What is the appropriate standard of care?
  - Could there be an issue with the unlicensed practice of medicine?
  - Could a communication result in a claim of malpractice?

> To reduce risk, do not provide specific medical advice via social media
  - Providing links to published studies or other online resources may be ok
Health-Specific Legal Issues:
Fraud and Abuse

> OIG AO-12-02
- Coupon site where health care providers could offer discounts for health care items and services
- Providers would pay flat fee to post on site; consumers would print and use (no pre-payment for service permitted)
- Discount would apply to whole service, not just patient’s co-pay or deductible
- OIG found two activities implicate AKS; also may implicate CMP Statute:
  - Selling ad space on site to health care providers that bill federal health care programs
  - Posting coupons for health care items and services
- OIG concluded low risk of violation of AKS or CMPs:
  - Site sponsor not a health care provider
    - “White coat” marketing subject to closer scrutiny
  - Payments from Providers do not depend on coupon use
  - Customers not required to provide any personal information – no targeted ads
  - Not pre-paid coupons – no risk of overutilization
  - Terms of Use require compliance with Discount Safe Harbor
Please contact us for more information.

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