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**Send all inquiries, address changes and correspondence to:**

National Business Association for Chiropractors  
6919 Vista Drive  
West Des Moines, IA 50266

**Toll-Free** 1-800-932-9340  
**Website** [www.nbac.com](http://www.nbac.com)  
**Email** [nbac@egroupmanager.com](mailto:nbac@egroupmanager.com)

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A publication of the National Business Association for Chiropractors

# MESSENGER

BUSINESS TIPS FOR YOUR PROFESSIONAL PRACTICE AND PERSONAL LIFE

## Social Media Legal Issues and Why You Should Have a Conduct Policy

By Ben Roach and Catherine Anderson Skotzke

*Social media is a powerful tool for growing business, educating patients and engaging with current and potential patients. Organizations that use and engage with social media are responsible for the messages they post. At a minimum, organizations need to be able to show they make a reasonable effort to make sure no one at their organization engages with social media inappropriately. Chiropractors, as health care providers, need to be mindful of some potential legal pitfalls that can arise through social media use.*

*Legal issues can arise from using social media. Here are three key areas of concern, as well as tips for developing a social media policy that is effective and tailored to chiropractic practice.*

### Breaching Patient Privacy

Chiropractors are covered by HIPAA as modified by the Health Information Technology for Economic and Clinical Health (HITECH) Act. These laws govern the permissible disclosure of patient information by covered entities and parties, including chiropractors and their practices. Most chiropractors are aware of the requirements and civil and criminal penalties for violations of HIPAA/HITECH. Using social media without proper care can put a chiropractor or their practice at risk for violations.

Anything posted on social media must comply with HIPAA/HITECH. Neither of these laws have exemptions for social media/internet disclosure. No protected health information or information that can be used to identify a patient can be shared on social media. This includes a patient's name, address, insurance or social security number, date of birth and photos of patients. Even a photo that is not focused on a patient but includes a patient in

the background could be a violation of HIPAA/HITECH. The patient's prior written consent must be obtained before posting any photos or other identifying information.

There are several social media and online activities that can give rise to inadvertent privacy violations. Some include examples of patient encounters on a blog, posting photographs of patients, or posting promotional content with patient information. It could even be a HIPAA/HITECH violation to describe a patient's condition if it could lead the patient, family member, or acquaintance to identify the patient. Therefore, it is best to avoid specific descriptions of rare medical problems, or descriptions of the time or locations of patient visits without first obtaining written consent from the patient to use their name and information.

Lastly, if a practice is going to use social media to engage with patients and potential patients, it is important to warn patients and potential patients not to share their personal information using chat,

direct messaging or commenting features on any social media platform. Some platforms have access to those messages, even if they appear to be private. Providing personal information of a patient through these social media features could be a HIPPA/HITECH violation.

## Copyright Infringement

In addition to potential HIPPA/HITECH violations, posting on social media can subject chiropractors or chiropractic practices to copyright infringement liability. Generally, the holder of a copyright has exclusive rights to publish his or her work. If a social media post uses content created by someone else (such as a picture, graphic, or chart), it could be an infringement of a copyright. Posting someone else's content and providing credit is not sufficient to avoid an infringement. Reposting content requires the permission of, not just the notice to, the copyright holder. The copyright holder has exclusive rights to use the material and to decide how or whether to distribute it. Posting against their wishes or without their consent could be an infringement on their copyright.

Additionally, when a social media account is created, users agree to the particular terms of use for the app or website. These terms will often include a certification that the poster holds all copyright or trademark rights to the content that he or she is posting. By agreeing to such terms, social media users take on the liability for an infringement claim. Often the social media platform obtains an "intellectual property license" on the materials posted to their platform. This means that when someone posts any of their own (or someone else's copyrighted) materials, the social media company obtains a

broad license to share it worldwide without further permission unless and until the content is deleted from the social media site.

The simplest way to avoid potential copyright problems in social media use is not to post content (text, images, sounds) created by someone else without their permission. There are some complex exceptions to infringement, such as "fair use," but they only apply in limited specific circumstances.

There are a lot of misconceptions about when fair use does and does not apply. Fair use does not mean giving credit or attribution to the creator. It's complicated and needs to be evaluated on a case-by-case basis, but it commonly applies to situations involving commenting on or criticizing original content, or involving content created for nonprofit, educational, or personal purposes. If the original content is imaginative, unpublished or commercial in nature, it most likely does not fall under the fair use exception.

If you are planning to rely upon the fair use exemption to post someone else's content on social media, you should seek the advice of an attorney knowledgeable in the area. Otherwise, the safest course of action is to only post content that you create or have explicit permission to post.

## Evidence for Professional Discipline or Liability

Beyond the legal consequences that can arise from the protections, content posted on social media such as HIPPA/HITECH violations or copyright infringements, the content posted on social media can cause problems for professionals when it

becomes evidence of misconduct or inappropriate behavior.

First of all, state chiropractic boards have the authority to discipline chiropractors for unprofessional behavior. The punishments can include licensure restrictions or suspensions. Social media posts can serve as important evidence for drug use, harassment or breaches of patient privacy.

Secondly, social media posts are discoverable in court, which means parties to a lawsuit can obtain copies of social media profiles. The content on social media platforms could be used against the chiropractor or the practice in litigation.

Importantly, these evidentiary concerns apply to both the chiropractic practice's business social media pages and the personal social media pages of the chiropractor and the practice's employees. As discussed below, it is vital to educate employees on the perils and pitfalls of using social media in private and professional areas of life. An inappropriate post on a private personal page could end up in a professional disciplinary proceeding or court room just as easily as a post on the business page, so post with great caution.

## How to Create a Social Media Policy

Chiropractors can educate employees and avoid potential pitfalls by developing an internal social media policy. A policy can hold employees accountable and decrease the likelihood that a practice or employee inappropriately engages on social media. A good policy will not only explain what employees can or cannot post on their own and on the practice's social media, but

it will educate them on the risks associated with using social media in their private and professional lives and provide them with the necessary guidance to use it appropriately.

Some things to keep in mind:

- A good policy should clearly state what employees are allowed and not allowed to post on social media regarding the practice. It should describe the consequences of sharing private or confidential information and that even posts on their personal social media accounts can be traced back to them by the nature of their employment with the practice.
- Private or confidential information about patients or the practice must not be shared on any social media. Anything that could be used

against the practice or any employees should not be shared.

- The policy should outline clear guidelines for how employees can use social media to achieve the practice’s goals, whether those are marketing or promoting health and wellness initiatives.
- The policy could designate a spokesperson to be responsible for responding to online inquiries. It should also explain the organization’s social media oversight to educate employees on whom they should direct their issues and questions related to social media.
- Have a process in place for when efforts fail and confidential information is shared or someone otherwise engages inappropriately on social media.

It is vital that employees are educated on the perils and pitfalls of social media and the legal repercussions explained, whether in the policy or in another educational program.

## Conclusion

Despite some risks, social media can be a valuable tool for many businesses, including chiropractic practices. As long as you make an effort to protect yourself and your clients’ privacy, you can use social media in a safe and effective manner.

## BEN ROACH & CATHERINE ANDERSON SKOTZKE



**Ben Roach** is a shareholder in the Litigation and the Labor and Employment Departments at Nyemaster Goode, P.C., in Des Moines, Iowa. His practice focuses on Employment Law where he both consults and is continuously involved in litigation for employers involving drug testing, wage and hour, discrimination, harassment, whistle-blower, retaliation, wrongful termination and non-compete issues.

**Catherine Anderson Skotzke** is an associate attorney in the Litigation department at Nyemaster Goode, P.C. in Des Moines, Iowa. Her practice includes litigation involving employment, labor, and discrimination matters.