

Legal Concerns for Psychiatrists Who Maintain Web Sites

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Courts recognize three types of Web sites: passive, which provide basic information; business, on which business is conducted; and intermediate, which are somewhat interactive but conduct no business. Inviting contact from site visitors may lead to inadvertent doctor-patient relationships, with ensuing legal duties. Statements made may be considered explicit warranties, which are subject to lawsuits when not fulfilled. Providing services to out-of-state clients may amount to practicing without a license. The author reviews Federation of State Medical Boards guidelines for appropriate use of the Internet in medical practice and offers ethical principles to help guide decisions about structure and content of passive sites. (*Psychiatric Services* 57:450-452, 2006)

Many people search the World Wide Web for health information. Among adult Internet users, 50 percent use the Internet to obtain information about health or diseases (1), and 80 percent would like to communicate with physicians online (2). Many physicians also use the Web for medical information; one study found that 89 percent of doctors use the Internet and that 90 percent of those doctors have used it to find information related to patient care (3).

In psychiatry, the issues may be more complex. In 2003, 21 percent of

American Internet users had searched for mental health information online (4). Although some mental health providers maintain "passive" Web presences—for example, they may have a home page presenting their curriculum vitae (CV) and listing their credentials, others provide Web-site-based treatment methods, which are beyond the scope of this article. Because Web sites are a useful tool for doctors and patients alike, this column aims to inform psychiatrists about some of the associated legal concerns.

Three categories of Web sites

Behavioral health Web sites vary greatly. Some provide only information, while others invite the visitor to interact with a therapist directly through the site. The structure and content of a Web site determine its status under the law. In general, courts recognize three types of Web sites (5): "passive" sites (sometimes referred to as "business card" sites), business sites (sometimes called "interactive" sites), and intermediate sites (sometimes called "semi-interactive" sites). The categories classify Web sites according to levels of interactivity. The more interactive a site is the greater the likelihood of unforeseen consequences for the psychiatrist. The tripartite classification can also distinguish between educational and treatment-oriented Web sites.

Passive Web sites

Passive sites are typically home pages: advertisements or public relations material available on the World Wide Web. Many psychiatrists' home pages feature a brief biography, a CV, licensure, credentials, e-mail address, and other contact information. These business card Web pages are common on university Web sites. Passive sites

may also be slightly more interactive, featuring hyperlinks to resources available elsewhere on the Internet. Although physicians cannot control the content of hyperlinked information, they can control the links themselves. The more hyperlinks a Web site has, the less passive it appears.

Business Web sites

Business sites are highly interactive; through them, commercial transactions are conducted over the Internet (for example, Amazon and eBay). Advice Web sites fall into this category when a fee is charged for advice provided. A psychiatrist's Web site may also be considered a business Web site if he or she sells books or tickets to public speaking engagements through the site.

Intermediate Web sites

Intermediate Web sites are more interactive than passive sites, but unlike business sites, they do not involve financial transactions. Some interactive sites may offer advice without charging a fee. Scholars have regarded these types of Web sites as an element of mass-media psychology, such as radio psychologists, advice columnists, and television talk show hosts (6).

Legal issues

Web sites and e-mail

Web sites may facilitate communication through structural or content-based features. The structures of some sites offer secure, Web-based messaging through Internet browser interfaces: a patient logs in with a user name and password, whereupon he or she may compose a message and send it directly through the Web site's server to the psychiatrist's inbox. In contrast, passive Web sites often post hyperlinks that connect to the visitor's

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e-mail software and insert the psychiatrist's address in the "To" field. In this sense, such links may be analogous to phone numbers on a business card. However, the hyperlink method carries a greater risk of message misdirection and interception than does secure, Web-based messaging.

Inviting contact through a Web site may increase the risk of inadvertent doctor-patient relationships. Psychiatrists who wish to make their e-mail addresses available to colleagues but to discourage unsolicited "patient" e-mail may post a warning on the Web site next to the e-mail address—for example, "E-mail is not an appropriate way to conduct a professional relationship, and patients should not send messages by e-mail."

Advertising

Statements made on Web sites may be considered explicit warranties in a psychiatrist's fiduciary relationship with a client or client's family. Psychiatrists must strive to maintain consistency between statements made on a Web site and those made in the office to avoid problems associated with misleading claims or express warranties. As Web sites constitute advertising, they are subject to regulation by medical boards and other state agencies, as well as by the Federal Trade Commission, all of which prohibit deception, unfairness, and unsubstantiated claims in advertisements (7).

When designing a Web site's content, psychiatrists must be sensitive to advertising laws and anti-kickback statutes (8) and avoid defamatory or disparaging statements about others. A Web site's content can positively or negatively influence visitors' perceptions of the psychiatrist and his or her practice. For example, including references to one's own published research may enhance credibility, whereas hyperlinks to pharmaceutical companies' advertisements may detract from it.

Some courts allow breach of warranty or breach of contract claims when physicians' treatment falls short of their guarantees (9). In one case, a physician was liable for breach of express warranty when his hair transplant procedures failed to deliver the lifetime guarantee boasted in his advertisements on the radio and in the

yellow pages (10). Courts could impose similar liability on a psychiatrist for misleading claims on a Web site.

Copyright infringement may come into play if one embeds the trademarked brand name of a medication as visible text or even as an invisible meta-tag on the Web site (11). Psychiatrists must also be careful to avoid copyright or trademark infringement when selecting a domain name.

Physician-patient relationship

As case law demonstrates, advice given over the telephone may be sufficient to establish a physician-patient relationship; responding to e-mail may also give rise to a legal duty (12). Payment does not seem to be a factor in determining the existence of a physician-patient relationship in telephone consultations, but payment of a fee for "education" or advice on the Internet may be more likely to be seen as acceptance of a physician-patient relationship.

Licensing and jurisdiction

Although the Internet features many legitimate health resources, "rogue pharmacies" have provoked increased regulatory scrutiny of physicians on the Web. If a psychiatrist writes a prescription for a patient in a different state, or perhaps even if he or she merely provides advice, licensing and jurisdiction issues could arise. Some states have revised their licensure regulations to tighten the reins on cybermedicine (13). Many states define the practice of medicine in statutes, reserving the right to practice medicine to those who hold state licensure. For example, Texas law states the following (14): "A person who is physically located in another jurisdiction but who, through the use of any medium, including an electronic medium, performs an act that is part of a patient care service initiated in this state . . . is considered to be engaged in the practice of medicine in this state and is subject to appropriate regulation by the board."

Some statutes might not specifically address the practice of electronic medicine but may nonetheless contain open-ended wording from which one can deduce that cybermedicine does constitute the practice of medi-

cine (8). A psychiatrist who uses a highly interactive Web site to provide services to out-of-state clients may be unwittingly practicing medicine (without a license) in the visitors' home states. Furthermore, the psychiatrist's malpractice insurance may restrict coverage to states in which he or she holds licensure.

Jurisdiction issues may also arise with respect to nonmedical Internet activity, such as selling one's books online. The mere existence of a passive Web site is unlikely to subject the site's owner to another state's jurisdiction, but business Web sites and even some noncommercial sites may be sufficiently interactive to subject their owners to other jurisdictions (15). As the court in *Zippo Manufacturing Company v. Zippo Dot Com* explained (5), "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The *Zippo* decision and its "sliding scale" test have influenced numerous other courts in similar disputes. The creation of an interactive site that solicits information from visitors has the potential to establish a physician-patient relationship, thus inviting a malpractice action.

Disclaimers and click-wrap agreements

Presumably aiming to preclude the development of a physician-patient relationship and a duty of care, many Web sites post disclaimers. Some mental health Web sites assert that the service is merely educational and is not intended to be a substitute for traditional psychotherapy. Such disclaimers attempt to characterize the service as informal discussion, analogous to cocktail party conversation, which is unlikely to trigger a professional duty (16). One can find numerous examples of these "information, not advice" disclaimers on the Web.

Another feature on many sites is the click-wrap agreement, which prompts a visitor to read through terms and conditions of the service and to click on an icon stating either "I agree [to these terms and conditions]" or "I disagree." Click-wrap agreements are enforceable (17) and may assist courts in deciding whether

a psychiatrist owes a duty of care to a Web site user. Users may allege a breach of contract (18) when terms of a click-wrap agreement have been violated. If the agreement promises a response within 48 hours, and the psychiatrist fails to respond for a week, he or she could be liable for breaching the contract's terms. Physicians can be sued or disciplined for failing to respond to patients' phone calls (19) and now, perhaps, e-mails.

Click-wrap contracts are not substitutes for informed consent procedures (20). Although agreements and disclaimers provide an opportunity to reiterate that Web site users are not patients, psychiatrists should not assume that statements on a Web site will insulate them from liability.

Regulatory considerations

Psychiatrists' Web sites are an extension of their professional work; as such, they should be consistent with the prevailing standard of care toward patients in clinical practice. The Federation of State Medical Boards (FSMB) has developed guidelines for the appropriate use of the Internet in medical practice (21). These guidelines distinguish between medical practice sites and general health information sites. Medical practice sites include interactive and business Web sites, which the FSMB considers practice locations. General health information sites are passive, offering non-patient-specific information or education to the public.

The FSMB guidelines call for specific disclosures for Web sites (their ownership, intended applications and limitations, and fees and payment arrangements), their providers (contact information, qualifications, licensure, financial interests, and expected response times), and patients' rights (what information is collected and how, as well as information about disclosure of patient information to third parties). The guidelines prohibit advertisements on medical practice Web sites, including any hyperlinks that a physician may be paid to post. Additionally, the FSMB indicates that medical practice sites should allow patients to gain access to and amend their records, to offer feedback on the site, and to file complaints. The

FSMB guidelines recommend providing information to patients about how to file complaints with the appropriate state medical board.

The Drug Enforcement Administration cited the FSMB guidelines in a press conference after the arrest of 20 individuals on criminal charges associated with Internet pharmacies (22). Providers who are considering the use of highly interactive Web sites should consult the full FSMB guidelines as well as other ethical guidelines for mental health on the Web; they may also seek professional legal counsel. Providers who are considering treatment-oriented Internet activity, such as e-mail prescriptions, online appointments, and e-therapy, should contact their professional organizations and state licensing boards for ethical opinions and guidelines to address concerns about HIPAA and similar issues.

For psychiatrists who use passive Web sites, I have drawn up a list of ethical principles from existing literature (21,23,24) to help guide decisions about Web site structure and content. It is available in the online version of this column at ps.psychiatryonline.org.

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