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MEDICO-LEGAL SOCIETY OF NSW INC.

SCIENTIFIC MEETING

WEDNESDAY, 11 MARCH 2015 AT 6.15 P.M.

THE TOPIC:

SOCIAL MEDIA

SPEAKERS: DR BENJAMIN VENESS
MR MICHAEL SWAN

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DR MICHAEL DIAMOND: Our next speaker is Michael Swan. Michael is a senior solicitor with Avant Law, where he has been involved in civil litigation, professional conduct matters and providing legal advice to medical practitioners about social media. So there is another aspect to place of social media in our professional lives, particularly in the medical world. Michael has been a solicitor for 13 years and before that he was a clinical nurse specialist in the emergency department at Sydney's Royal Prince Alfred Hospital. He has been an instructing solicitor in a number of important cases, including the *Idameneo v Gross* [2012] NSWCA and *Harvey v PD* [2004]NSWCA; both in the NSW Court of Appeal. The latter case addressed legal issues surrounding disclosure and follow up of HIV test results.

Michael is clearly not a one dimensional man and his weekend duties involve attending various sporting and social commitments with his children. Recently he completed the 2014 Oxfam 100 km trail walk event with his team called Avantuality in just under 33 hours. I am told they would have done it in under 32 hours had they all not stopped to tweet along the way but perhaps next year they will improve. In his spare time Michael is the president of a swimming club, loves riding his bike, running in the park and late nights in July watching Le Tour de France. Michael will now address us to give a legal perspective on social media.

MR MICHAEL SWAN: Thank you very much. Before I start I would like to thank Ben Veness for his presentation. It was awe inspiring and hopefully I can do my presentation justice now after that.

The topic tonight is Social Media. I have my Twitter handle on the title slide, for those of you who would like to interact with me on Twitter.

Where do we start when we think about social media? In terms of being a doctor or a lawyer, there are some basic documents you can go to, to work out how you are supposed to act and interact with people. Some of these documents have been mentioned tonight by Dr Veness.

There is the AHPRA Social Media Policy which was announced in March 2014. I am going to speak a little bit about that policy including testimonials. There are also advertising guidelines, announced in May 2014, because even though you are networking, some people might say that you are advertising your own services. Then

there is the Good Medical Practice - Code of Conduct for medical practitioners also announced in March 2014. For legal practitioners there are the New South Wales Professional Conduct and Practice Rules (2013) for solicitors and for barristers the NSW Barristers' Rules in terms of general professional conduct. There are also the AMA guidelines, which were mentioned in Dr Veness' talk previously.

The main issue that we see in our role, as lawyers working for a medical indemnity provider, is confidentiality. There is a separate way people think about themselves in terms of social media. There is a public self and a private self in the sense they should be separate. I have with me my two phones to demonstrate that point. There is a phone for my private self and another for my public self. There are things that you do and say in private that you would not necessarily do or say in public. There are some inappropriate and other postings to be considered. I had fun getting these today with a fair bit of input from the people at work - about what I should be posting or not. I will say a little about security settings and will conclude with a little about defamation.

In terms of the definition of social media in the AHPRA Policy (2014), Dr Veness has discussed this, and it is fairly wide. It encompasses most things out there in the digital age such as sharing opinions, information, experiences, images, video, audio online or through applications and social networking sites. There is a whole range of different things for which Dr Veness showed the symbols earlier. The basic take home message from tonight is that the same rules apply whether it is in person or it is out there in the Twitter-verse or whatever you are doing out there. If you cannot do it to someone's face, you should not do it out there online.

In terms of professional obligations on practitioners, both medical and legal, the main ones are maintaining confidentiality, obtaining someone's informed consent to post or disclose any information, maintaining your professional boundaries with your clients or patients and upholding the standards of professional conduct in terms of trust, integrity, truthfulness and dependability. This may seem quite straight forward in day to day conduct. However I do receive many requests for advice in relation to those sorts of things that you might think are basic. In reality it is not so easy in the digital age.

Dr Veness spoke about AHPRA Action, a group that helped change the advertising guidelines in relation to testimonials. Testimonials we all know are prohibited. They are not to be used and that includes any positive comment or recommendation in relation to yourself or your services. In relation to advertising guidelines, there was not only a prohibition on using any testimonials but there was also a positive duty for you to go out and take down or get rid of any testimonials about yourself or your services what so ever that were "out there". This applied not only sites under your control but also to those not under your control. As a result of AHPRA Action, the Medical Board of Australia released a statement in March 2014 to clear up any misunderstandings or lack of clarity that the guidelines only applied to testimonials that you had control over. The Revised Guidelines for Advertising Regulated Health Services were published in May 2014 and remain current.

Prohibited conduct, that is the things you cannot do, is fairly straight forward as well you would expect. It obviously includes false and misleading conduct. Another prohibition is the use of gifts, discounts or other inducements without the terms of the offer being clearly stated. For example having discount vouchers for breast augmentation, or having things like Botox as prizes in competitions are all prohibited unless the terms of the offer are clearly stated. The use of testimonials is clearly prohibited. They are defined in the guidelines as "a positive statement about a person or thing - recommendations or statements about clinical aspects of a regulated health service." There is also creating unreasonable expectations of beneficial treatment with statements on your blog or on your website such as "I am going to change your life" and "Have this treatment and you'll feel so much better". Similarly statements encouraging the indiscriminate and unnecessary use of health services are prohibited.

A lot of the issues that we see might be prohibited by a couple of different things or a combination of things. For example, what does it mean offering consultations for free? Does it mean free or we will claim Medicare for it and you do not have to pay anything? What then if you are not eligible for Medicare? Those sorts of things may offend using gifts, discounts or other inducements, or saying it is free without the terms being clearly stated, or it might encourage indiscriminate or an unnecessary use of health services. These are the sorts of issues that we come up against.

The situation for advertising their services is fairly similar but there are a few differences. The rules talk about false, misleading or deceptive advertising which can be about pricing or what you are going to do for your services. You cannot hold yourself out as a specialist or offering specialist services unless you are appropriately accredited which is straight forward again. There is a general prohibition on personal injury advertising. For people like me, where that is what I do, I cannot advertise my services. It is just the same for Slater & Gordon which cannot advertise its services for personal injury matters. Advertising in contravention of the *Trade Practices Act* or the *Fair Trading Act* - that is unconscionable conduct. For example "bait advertising" where you advertise that something is a certain price but when the person gets there it is like "oh no, we do not have any of those left and you will have to upgrade to this".

In terms of confidentiality, I show this picture of a hospital Emergency Department (ED). If you type in words such as hospital or ED or emergency into something like Instagram, you will get thousands of pictures just like this one where you really have to work out what is going on. This is a picture on Instagram taken by the patient, who has given you their consent. However there are two people in the background. I assume they are medical practitioners or a nurse or family. They are talking to someone else there. Can I identify who that other person is? Do I know where it is? I it is probably John Hunter Hospital just from the look of it. Hence there are all those issues that arise from photos such as this one and there is a whole vast range of different photos out there. In this picture does anyone know who Jaytee Hazard is? He is an Australian hip hop artist - a turntable guy - about whom I will talk later.

I spoke earlier of the concept of a public and private you. You have professional obligations such as trust, confidence, boundaries and public expectations in your job. You might think you go home, get onto Twitter and let loose, doing what you like on social media. However there are a few restrictions on that. In terms of when you are at work, there is your employment contract, with all its terms that you signed up to for your work. Also different local health districts are now implementing social media policies and as well there are the professional rules that apply. What you have to consider is that information you might post or comments that you

might make in your private capacity will be judged in your professional capacity to a certain extent.

Examples of things that you might want to consider before you do posts in your private capacity are the repercussions of perhaps joining an online forum with extremist views such as ISIS, putting up abusive posts about your boss or anyone else, and friending/following patients or clients. This last is something that you really do not want to do. You might have a relationship for a legitimate reason, and you might want to find out what they are up to in the sense of stalking them for a legitimate reason, but it is not a good look. Also there are a lot of lonely people out there. Finding a patient or client on RSVP.com and going out on a date with them is almost certainly something you should not do.

One particular aspect of social media is a proliferation of notice boards and areas where you can go and put your comments about your medical practitioners or the particular law firm that you went to see, and were given some advice or treatment with which you were dissatisfied. Then instead of going back to that practitioner or firm and saying you did not like that or were not happy with what happened, you could either go straight to the ACCC or you could write about it and post it on a noticeboard. There is a lot of disparagement "out there" about different practitioners. As an example consider the following and then tell me what you do about it?

"After reading the reviews about Dr X online I know I know most were negative, but his website looked so professional (Total deception). I made an appointment to see Dr X to have some acne scars on my cheeks removed. He was very nice and suggested I have the fraxel repair laser. Unfortunately Dr X was not honest about the side effects, or the recovery time required. I was told one week recovery time. It is almost 10 weeks now since I had the procedure, and my cheeks are still flaming red and I have developed hyperpigmentation in those areas. When I confronted Dr X about this he gave me a cream and brushed the whole thing off. My cheeks are now being repaired by a dermatologist who has treated other patients of Dr X. Apparently Dr X is well known for his bad practices. Do not make the same mistake as I did. - Anon

AUDIENCE: Send Google a take-down notice so no one can find it.

MR MICHAEL SWAN: You can do that. There are a lot of these sites appearing now, such as "doctorinspector", They do not have a report inappropriate conduct button or a mechanism for you to report it to anyone. You have to go through five pages of legal "things" to find out what is their actual address. It is usually somewhere in the United States where the freedom of speech laws are fairly rigid. However you are correct you can ask them to take it down. When I have heard everyone's comments I will explain what happened in a similar case.

AUDIENCE: In some cases other practitioners are writing similar things about their competitors.

MR MICHAEL SWAN: Yes, that is right.

AUDIENCE: Can I just ask, that statement is not identifying any doctor but just says Dr X, so how can he be identified

MR MICHAEL SWAN: My apologies. I should explain. On these sites it says rate MD or whatever. They will have the name of the doctor and you are able to put your comment under that doctor. I have taken that out because I needed to de-identify the material and I have also changed various things.

AUDIENCE: But is it defamation if it is true?

MR MICHAEL SWAN: If it is true, that is a good defence.

AUDIENCE: It is just like going out in public and saying it to your friend on the street. That is saying it in public.

MR MICHAEL SWAN: That is right, and everyone else as well as your friend.

AUDIENCE: Who do you sue?

MR MICHAEL SWAN: I had a fairly good idea who it was because of something else they had done previously. You can do a couple of different things. You can ask for it to be taken down. So you need to find the contact details of the webhost and complain that you believe it is defamatory, that you are very upset by it. It is helpful if you can identify the parts of it that you believe are defamatory. So for parts that say for example "Dr X is well known for his bad practices, do not make the same mistake I did". You would quote that bit and

say you are very upset by that and where it says you are not honest.

Another thing that some people do is to engage with it. They will say something generic like "Thank you for your feedback. Please make an appointment to come back to our practice and discuss any concerns that you have". This is a positive and good way of dealing with it. The downside to that is if they are stark raving crazy, they will just reply to it and make the problem worse. They might say, "I'm never coming back to you." or "I'm not happy to come back to you." You can make the problem worse by engagement but you can also use it as a positive way of dealing with the problem. There is that way.

What I found useful in this particular case was contacting the webmaster and they did take the review down - not this review but something along the lines of it. That is probably the only time one been taken down in the 25 to 30 times I have asked different webmasters to take postings down. So we have had limited success with getting webmasters to take postings down.

The other approach is to ignore it and just doing nothing. People find that approach quite useful, in the sense it will go down the Google search list. Six months later you will not be able to find it.

AUDIENCE: Tar sticks.

MR MICHAEL SWAN: It does. However you cannot put up positive reviews yourself in relation to your practice because you will get caught out. It does stick out if people do that.

AUDIENCE: You remove it as quickly as possible. You do not really want it to sit there for six months to go down the Google trail.

AUDIENCE: Why not just take the website down?

MR MICHAEL SWAN: That is too expensive and it is also illegal. This seems to be a main concern of practitioners. They are concerned about their reputation and they are concerned about this posting sitting out there "in the ether".

In terms of inappropriate and other posts, it is about taking a breath before you post something to be able to say; why am I posting this?; do I really need to post

it?; and what is it saying about whatever I am talking about and myself? Certainly in terms of your professional and other obligations that you might have, you must ask yourself; how long is it going to be there? The answer is it is likely to be there forever. Will it be there in five or 10 years' time? That is particularly something that I talk about to medical students and younger doctors. I have had interns and medical students come up to me and say to me things such as "about five years ago I just started using social media and I had this picture taken of me lying naked on the beach. How do I get rid of it? Is that going to follow me around for the rest of my career?" These are the sorts of issues that social media throws up in the sense of things remaining for a very long time.

AUDIENCE: You mentioned earlier the posting goes down the Google trail. Does that mean it never really goes away?

MR MICHAEL SWAN: If I was looking for a specific thing, and I put search criteria that were specific enough to find it, it would come up. In any event if I had enough time I could always find it but I might have to go through 500 other hits of similar stuff. However most people doing a Google search look at page one and if it is not there do not go looking. How much control do you have over it once it is posted? It is quite easy to steal photographs and to share those sorts of things. Often people will say I am in a closed group and we just share this information amongst ourselves. What if someone else in the group shares it with their friends, who are not necessarily in the group? Those are the sorts of issues that social media raises.

You have to be careful what you post, because you do not know where it might end up. Here is something that came through my feed one Saturday night, so I thought I would use it for the presentation. It shows just two people smoking a bong.

In terms of security settings, particularly if you're just starting out with social media, you need to be sure about what you are doing. Practise, by all means. It is important to practise. However if you are trying to do something tricky, or speak to someone in private about something that might be a bit sensitive, that you do not want to tell the whole world about it, you might prefer to revert to your more traditional methods of communication for that type of thing rather than have it

on your Facebook page. Review your security settings regularly because Facebook about every three to six months will change something. So you want to have a look at what is publicly available out there about you.

I will not cover the topic of the type of information that is "out there" about people. However there is a lot of information about people and there are people who may or may not be interested in that information for various reasons. There is a site called "doctorinspector" that has been taking information from the AHPRA website, and you might have all heard about. There is a recent statement by AHPRA about that website and the real persona. What can be done about it? That is a work in progress I believe.

There are rules you should consider. You must know your audience and know your security settings. Consider who are your friends or who you share information with and be prepared to block and un-friend and un-follow if you need to. There are a great many people who have friends and followers that they might have gone to primary school with, but whether they actually have anything in common with those people is another matter. You might want to consider what you are posting about yourself and whether you do want the whole world to know it. Remember your post will be in existence forever. Also remember what you do in private will always be judged by your public persona.

The potential consequences of the use of the internet and social media, are actions for breach of confidence. You are more likely to get a complaint to the Privacy Commission or the ACCC in the sense of having to respond to a breach of confidence. These are not easy things to defend as you have either done it or you have not. It is more a matter of trying to mitigate the circumstances. Civil actions such as defamation claims are expensive to run and you do have to revisit the actual defamation multiple times. Whether this is a good thing for you is another matter. Another consequence is the generation of complaints to AHPRA/OLSC about unprofessional behaviour. Finally a court may impose a penalty of up to \$5,000 for an individual or \$10,000 for a company for breaching advertising guidelines. Obviously you can then have to face a professional standards committee in relation to any breaches of the advertising guidelines.

Here are my take home messages for you for tonight. Consider what you are posting before you post.

Consider deleting friends or unblocking followers.
Review your publicly available profile regularly.
Consider having your own rules about social media - for example no drinking and posting, no friending work colleagues.
Keep your public and private life separate.
Practise before you go out and try and use Social Media for any professional purpose.

In terms of confidentiality, you see all manner of things on social media. A picture of a female torso was posted by a doctor. The main issue is consent, and whether this has been obtained from this patient. The caption reads, "Here is my patient, post augmentation, three weeks post-surgery, despite the rain" while the whole picture shows a pole in the background, suggestive of a club at Kings Cross. When I phoned the doctor he told me he had obtained the necessary consent. This is an example of things to be considered before making a post.

In terms of context, I was looking at another female torso on my computer at work today when my boss came up to me and said, "Swannie, what are you doing?" I told her about my talk for tonight and what I was doing. It was all a matter of context. Are you doing it for your own personal gratification or are you doing it for some clinical reason or are you doing it for some sort of legal reason? It is also a matter of context where you are using it. If it is at work, then why are you using it and what are you doing on there? People will ask these questions.

Another example of context is this selfie of a scantily clad Stephanie Rice. She is an Olympian who is very fit and has modelled underwear before. The main message here is if you are an Olympian or other professional athlete, it is permissible to post pictures such as this. However it would not be if you are a medical practitioner or a lawyer.

In relation to the future will Social Media be used in evidence? In a matter involving a rural general practitioner, a lot of the evidence came from social media about the communications between her and the patients and what they doing to after hours. This evidence was used in the disciplinary proceedings. In family law it is becoming a huge source of very useful evidence in terms of divorce proceedings. In the ACT it has been used for serving process, such as statements of claim. Finally SM has a potential use for education and

information sharing.

Thank you very much.