

## SPECIAL ARTICLES

# Legal and Ethical Issues Regarding Social Media and Pharmacy Education

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Submitted June 17, 2010; accepted August 23, 2010; published December 15, 2010.

Widespread use of social media applications like Facebook, YouTube, and Twitter has introduced new complexities to the legal and ethical environment of higher education. Social communications have traditionally been considered private; however, now that much of this information is published online to the public, more insight is available to students' attitudes, opinions, and character. Pharmacy educators and administrators may struggle with the myriad of ethical and legal issues pertaining to social media communications and relationships with and among students. This article seeks to clarify some of these issues with a review of the legal facets and pertinent court cases related to social media. In addition, 5 core ethical issues are identified and discussed. The article concludes with recommendations for pharmacy educators with regard to preparing for and addressing potential legal issues pertaining to social media.

**Keywords:** social media, law, ethics, professionalism, technology

## INTRODUCTION

The popularity of new social media applications such as YouTube, Facebook, Twitter, and Blogger has increased rapidly in recent years. Younger generations were primarily the early adopters of these technologies; however, older generations are quickly becoming part of the social media user population.<sup>1</sup> Facebook alone has 400 million users, with the 35 years of age and older demographic growing the fastest.<sup>2</sup> Due in part to the popularity of these applications, the social communication paradigm is changing from the traditional face-to-face or telephone model to one that uses a variety of Web-based social media applications. These technologies are so commonplace that they have begun to disrupt elements of our social fabric. In 2008, Duncan stated:

The last 2 decades, in particular, have been characterized by exponential advances in technology, especially by personal access to ever more sophisticated electronic devices for information retrieval and communication. Concomitant changes in cultural mores relative to the use of such devices have widened the intergenerational gap, affecting all institutions, including law and education.<sup>3</sup>

While these disruptions have spread across society as a whole, there are some specific issues of particular

relevance to professional education. Most of these issues were introduced in a review article in the *Journal* in 2008,<sup>4</sup> but subsequently, a number of lawsuits pertinent to this area have been decided. In addition, research literature and discussions at professional conferences have helped further refine many of the nebulous issues. Because this area of research is still relatively new, many students, faculty members, and administrators are not yet fully aware of the complexities thrust upon schools because of the aforementioned paradigm shift. In this article, the authors review and clarify the legal and ethical issues associated with social media use, and conclude with recommendations for pharmacy faculty members and administrators, with the goal of helping them understand this evolving area of concern and preventing potential legal entanglements.

## LEGAL ISSUES

A number of basic rights arising under the US Constitution can be implicated in cases involving use of social media – freedom of speech, search and seizure issues, right to privacy, and denial of due process. A brief review of these areas may provide a foundation for discussion of the issues in the context of social media.

The First Amendment to the US Constitution creates 6 separate rights for citizens with freedom of speech among them:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>5</sup>

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Freedom of speech issues only exist when governmental action is involved. In one of the leading US Supreme Court decisions in this area, the rule was laid down that student speech may be restricted only when it causes a material disruption or substantial interference with a school's operations.<sup>6</sup>

The Supreme Court said in the *Tinker* case that "...conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."<sup>6</sup> This is the standard to be applied when an educational institution is alleging that a student engaged in disruptive speech that the institution would like to halt.

In the later case of *Bethel School District v. Fraser*, the Court ruled that a school was not violating a student's rights when it suspended a student for the use of crude language in a speech to a school assembly. The Supreme Court said, "It does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>7</sup>

Search and seizure issues related to cases based on use of social media involve the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>8</sup>

Such issues might materialize when institutional officials attempt to gain access to a student's social media communications or the equipment used for such exchanges.

The Fifth Amendment could be drawn into such cases when institutional officials question a student regarding the content of social media communications. Due process rights are also created by this Amendment. That addition to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>9</sup>

The Fourteenth Amendment expands coverage of Constitutional due process rights by extending them to non-citizens when there is a threat that a state government or an entity that is part of it, eg, a public university, may take action described in the Amendment:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>10</sup>

## LEGAL CASE DECISIONS

A number of cases presenting issues related to use of social media, some from higher education institutions and some from secondary schools, have come before the courts. A review of approaches taken by the courts in dealing with these cases may help institutional administrators and faculty members address future issues in a legally informed way, which will enhance the chances of reaching a decision that will withstand judicial scrutiny. In legal matters such as these, it is critical to coordinate closely with institutional legal counsel.

### *Yoder v. University of Louisville*

The case of Nina Yoder is reviewed first because it parallels the kind of situation that could arise in pharmacy education. Early in 2009, Ms. Yoder was a nursing student on an experiential education rotation when she made caustic and profane observations on race, sex, and religion when commenting in MySpace postings about patients she had encountered. The School of Nursing expelled her for violating their honor code, which provided in part: "As a representative of the School of Nursing, I pledge to adhere to the highest standards of honesty, integrity, accountability, confidentiality, and professionalism, in all my written work, spoken words, actions and interactions with patients, families, peers and faculty."

While the institution viewed this as an honor code case, Ms. Yoder considered it a case of her First Amendment freedom of speech rights being violated by a public institution. The student also raised procedural due process arguments. She alleged that while she was given the right to appeal her dismissal, which was denied, she was offered no hearing to present evidence and witnesses in her defense.

When the case reached the US District Court both sides moved for summary judgment based on filings with

the court. The federal trial court judge sidestepped both the freedom of speech and due process arguments, ruling that both the honor code and a confidentiality agreement signed by nursing students governed the situation. He concluded that the wording of those documents and the way they were explained to the students was so ambiguous that they could not be used as a basis for the expulsion.<sup>11</sup>

### ***Snyder v. Millersville University***

The second case for discussion also involved a university student engaged in experiential learning. A student teacher had posted pictures of herself dressed as a pirate and apparently drunk on MySpace. The school district, classifying her as an employee rather than as a student for purposes of evaluating her, barred her from the classroom prior to her completing the semester. The university where she was enrolled reclassified some credits, issuing her a degree in English rather than the education degree that would have qualified her to seek credentialing. The student teacher argued that being classified as an employee narrowed her freedom of speech rights compared to what they would have been under a student category.

Filing a lawsuit against the university in 2008, Ms. Snyder alleged that university administrators violated her First Amendment right to freedom of expression. Following a 2-day non-jury trial, the judge ruled in favor of the university defendants.

The judge focused on the fact that as part of the orientation discussion for the student teaching course, Ms. Snyder was instructed not to post information about her students or supervising teacher on her personal Web page. Nevertheless, she maintained a MySpace Web page on which she later posted the following.

First, Bree said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?

The plaintiff who filed the \$75,000 federal lawsuit was a 27-year old mother of 2 and had posted this text next to the photograph that showed her wearing a pirate hat and holding a plastic cup. The caption beneath the photo read "drunken pirate." She did not prevail in court.<sup>12</sup>

### ***Layshock v. Hermitage School District***

The third case arose during 2007 and was based on a high school senior's MySpace postings regarding his high school principal that resulted in his suspension for

10 days. The postings were not composed on a school computer; they were done at his grandmother's house. Initially, the student also was ordered to complete his high school work in an Alternative Education Program and forbidden to attend graduation ceremonies. Eventually the school board relented and permitted him to attend regular classes. The US District Court ruled that the suspension and assignment to the Alternative Education Program violated his freedom of speech. On appeal, the school district contended that there was no free speech right because the postings were "vulgar, defamatory, and plainly offensive school-related speech."<sup>13</sup>

The school district appealed to the regional US Court of Appeals and there a 3-judge panel ruled against the educators, upholding the lower court's ruling that the student's First Amendment rights had been violated.<sup>14</sup> Given the apparently opposite decisions in this case and the one discussed immediately below, on April 9, 2010, the US Court of Appeals granted a hearing on the matter before the full court.<sup>15</sup>

### ***J.S. v. Blue Mountain School District***

The fourth case involves a 14-year-old girl who was an eighth grade student at Blue Mountain Middle School, Orwigsburg, PA, during 2008. J.S. (initials are used because the student was a minor) and a fellow student created a profile for their school principal on MySpace. The profile they created for the principal included a number of vulgarities and crude references and made disparaging comments regarding his wife and children. The profile contained the principal's photograph copied from the school district's Website.

The student sought a temporary restraining order and preliminary injunction against the school district to forestall sanctions. That was denied in US District Court. The same court later granted summary judgment to the school district, ruling that the school could discipline lewd and vulgar off-campus speech that had an effect on campus, even if this effect did not amount to a "substantial disruption," as defined in the Tinker case decision.<sup>16</sup>

This case reached the US Court of Appeals for the Third Circuit in Philadelphia and was heard by a panel of 3 appellate judges. By a 2-1 vote, the panel rejected both the arguments of the parents that their daughter's freedom of speech had been violated as well as their parental rights to raise their daughter as they saw fit.<sup>17</sup> This case also will be re-heard by the full court.<sup>18</sup>

## **RELEVANT PROVISIONS IN THE NABP MODEL PHARMACY ACT**

A review of provisions in the statutes and regulations of the 50-plus jurisdictions in the United States that

license pharmacists and recognize student pharmacists as pharmacy interns is beyond the scope of this undertaking. Nonetheless, some light may be shed on relevant statutory provisions by reviewing selected elements of the National Association of Boards of Pharmacy (NABP) Model Pharmacy Act.<sup>19</sup>

The first provision of possible relevance in the Model Act appears in Article III: Licensing. Among the Qualifications for Licensure by Examination is the expectation that the “applicant for licensure by examination shall. . .be of good moral character;. . .”<sup>20</sup>

Commentary on this provision addressing good moral character includes the following:

State legislatures have generally agreed that “good moral character” is a proper requirement for licensure of pharmacists. Defining precisely what constitutes good or bad character has caused health regulatory Boards and courts considerable difficulty, however. A review of applicable case law reveals a considerable variance in the judicial opinions concerning the interpretation of good character requirements. Nevertheless, the courts have uniformly enforced such requirements, reasoning that because health regulatory boards are primarily composed of members of the profession being regulated, they are capable of applying such standards to their respective professions with specificity and exactness.

Thus, requirements of good moral character for licensure can be expected to be sustained by the courts so long as their enforcement is reasonably related to protection of the public health, safety, and welfare. While specific character requirements for pharmacists may vary from state to state, and may even appear to vary from case to case, the purpose of these character requirements does not vary. The public has the right to expect the highest degree of integrity from members of the pharmacy profession. Boards of Pharmacy have a duty to make such expectations realized. Thus, pharmacy act provisions that bear a reasonable relationship to the purpose of protecting the public welfare will generally be sustained as constitutionally acceptable by most courts, so long as their enforcement by Boards is reasonably related to protection of the public.<sup>21</sup>

The Model Act specifies that this expectation applies not only to those seeking initial licensure as a pharmacist but also to those seeking to transfer a license from jurisdiction to jurisdiction.<sup>22</sup> Moreover, under the Model Act this would apply to pharmacy technicians as well.<sup>23</sup>

Finally, when addressing the grounds for disciplinary action, the Model Act includes “being guilty of. . .any act involving moral turpitude or gross immorality.”<sup>24</sup> Obviously, whether a particular act by a pharmacist, pharmacy intern, or pharmacy technician rises to the level specified in the wording of the Model Act would initially be de-

termined by the relevant board of pharmacy and perhaps subsequently by the courts.

## MISCELLANEOUS LEGAL ISSUES

New social media can create a host of potential legal entanglements for those who decide to use the technology. A brief description of some of the issues is presented here merely to alert the reader to this potential, not to exhaustively, or even fully, discuss all facets of the potential challenges. Such issues are best discussed with institutional counsel in the context of specific circumstances.

### Liability Issues for Administrators and Faculty Members

Some issues for faculty members have been addressed in a prior publication.<sup>25</sup> One issue related to the development of social media that engenders potential liability concerns among faculty members and administrators is what duty to act exists if information comes to one’s attention that indicates potential harm to the student or others? The volume of postings and other communications emanating from a student body makes it virtually impossible to monitor all of the content. One question that many academic leaders have is, “How do I respond if a specific posting, be it offensive or threatening, is called to my attention?”

As noted above with the lawsuits to date, attempts to regulate students’ social networking information raises liability concerns related to freedom of speech and privacy that can result in negative publicity and a trip to court. Balancing those concerns against an institution’s obligations to ensure student safety and security can be quite challenging and is dependent on the facts of each situation. Differences in rights of students at public and private institutions, varying and sometimes conflicting laws and court decisions, and complications related to regulating “cyberspace” blur the boundaries in which schools can and/or should operate.<sup>26,27</sup>

If college officials take steps to monitor social networking sites to ensure that students abide by codes of conduct or act in accordance with the college or school’s mission, they could be creating a “duty of due care” toward the students. In the legal sense, this heightens the responsibility of the college or school to prevent harm and increases the likelihood of lawsuits.<sup>28</sup> In most instances, this duty flows from the actions of an individual or an institution’s peers, ie, the law will expect behavior to conform to that of others knowledgeable and active in the field. This results in the necessity of academicians in pharmacy communicating with colleagues to ascertain what approaches are being used at other institutions. Communicating with institutional legal counsel also can serve to avoid entanglements in this area.

### **Privacy-Related Issues**

The right of privacy is an additional consideration. This constitutionally protected right is not expressly stated in the document but has been inferred by the US Supreme Court. A central issue in communication using social media is whether the individual dispatching the message or information had an expectation of privacy regarding the information. One parallel is the expectation of privacy associated with sending a sealed letter versus a postcard where the message is open to be read by all who handle it. Courts have ruled that there is a limited expectation of privacy in some e-mails<sup>29</sup> and that an e-mail message, like a letter, cannot be afforded a reasonable expectation of privacy once that message is received.<sup>30</sup> Some may interpret that social media communications are similar to those by e-mail.

### **Search and Seizure Issues**

Closely related to privacy issues are those under the rubric of search and seizure. "There is a two-fold requirement for reasonableness of Fourth Amendment search and seizures – first, that a person has exhibited an actual expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." This has both subjective and objective dimensions.<sup>31</sup> Consent is an exception to the expectation of privacy in the realm of search and seizure. The US Supreme Court has consistently ruled that a person has no legitimate expectation of privacy in information turned over to a third person. In the health care environment, an additional consideration is the privacy expectations included in the Health Insurance Portability and Accountability Act of 1996<sup>32</sup> and the Health Information Technology for Economic and Clinical Health Act.<sup>33</sup> Disseminating patient-specific information using social media can be fraught with potential problems.

### **Other Legal Issues**

The ability to electronically "cut-and-paste" from Web-based materials has raised new concerns of plagiarism by students. This is exacerbated by the ability of social media to broadcast copied material to a large audience. In the process of doing so, there is a clear possibility of violating the copyright of the author or owner of the original work.

For pharmacists, student pharmacists, and pharmacy technicians an additional consideration may be the limitations on use of social media for promotion of products subject to FDA regulation.<sup>34</sup> Even though social media communications tend to be less formal than traditional print-based promotions, the same rules of disclosure apply. Similarly, an individual considering starting

a business should avoid soliciting investments that could make the communication a security offering and activate jurisdiction by the Securities and Exchange Commission. Both federal and state anti-fraud laws prohibit the use of false or misleading statements in the sale of securities and apply to every offering for sale.

Other potential legal entanglements arising from use of new social media include civil liability for defamation, most likely libel, fraud, employment law issues, identity theft, and in the context of students, issues related to the Family Educational Rights and Privacy Act of 1974.<sup>35</sup>

### **ETHICAL ISSUES**

The American Pharmacists Association (APhA) Code of Ethics for Pharmacists<sup>36</sup> and APhA-ASP/AACP Pledge of Professionalism<sup>37</sup> are 2 documents that traditionally have provided guidance for appropriate ethical and professional behavior. However, they were both adopted before the onset of social media, and hence are somewhat open to interpretation when it comes to personal attitudes and behavior in the virtual sense. Social media use runs the gamut from purely personal communication with friends and family to purely professional communication with colleagues and clients. Sometimes contexts (eg, student pharmacist, sorority sister, high school friend) overlap, and when viewed through social media, are rendered inseparable.<sup>38</sup> Because of this blending of public/private lives, discussions pertaining to ethical use of social media can quickly disintegrate into a seemingly unending web of controversies. The initial set of ethical issues identified in the earlier review<sup>4</sup> still have not been resolved entirely and more have arisen. However, identification and comprehension of the base ethical issues have increased due in part to research on the topic and attention from the media.

The crux of social media ethical dilemmas is that social media was designed for social communications, which for most adults traditionally has been considered a private and protected space. However, the inherent nature of social media makes those communications available to a wider public. Once information becomes public, then the way it is used is no longer under the control of the presenter. This root dilemma is central to the ethical debate from which several other ethical questions develop. Those ethical questions can be categorized according to 5 primary criteria: (1) who is viewing the social media information; (2) how is the social media information accessed; (3) for what purpose is the social information used; (4) what are the criteria one uses for making judgments about social media information; and (5) what is the nature of "relationships" in social media. In order to provide the reader with a succinct understanding of

the ethical issues, the following sections provide a brief synopsis of those issues, including some of the primary questions being asked by pharmacy and other educators.

### **Who Is Viewing the Information?**

One of the core ethical questions is, “Is it acceptable for someone outside an individual’s social network to view that person’s social media information?” Although one can argue that information placed online can be considered “public,” there is still an ethical issue of whether that “public” is an “open public.” Much of the conversation occurring through social media is directed at a select group of friends, colleagues, and cohorts. According to some, anyone outside of that intended audience who views social media may violate the basic concept of individual privacy.

### **How is the Social Media Information Accessed?**

How someone becomes privy to the social media information of another is an important ethical issue. It is one thing to view social media information of someone who specifically granted access to it. However, it is a different matter to access that information if presented by a third party, such as a fellow student, colleague, or competitor for an award, honor, or job. Philosophically, many feel that information freely and voluntarily provided to the public is open for scrutiny regardless of how it is exposed. Others believe that only information to which one has specifically been granted access should be open for judgment and interpretation. The ethical question for faculty members and administrators to consider is, “If a student actively attempts to keep his or her online persona private from those in authority, should that information be used if brought forth by someone else who has access to it?”

### **What is the Purpose of Viewing Social Media?**

The issue of the ethicality of using online social media information for other than social reasons still exists. Because most of these applications were designed for socializing, many are uncomfortable with viewing social media information for purposes of anything except social communication. The central question is, “Is it right to use social media to make judgments related to school admissions, employee selection, disciplinary matters, or any other decisions of a non-social nature?”

Using social media information for consideration in admissions and employment decisions is a frequent topic for discussion. One can argue that this information may be more revealing than what is discoverable through transcripts, applications, and interviews. Perhaps this information might lead admissions committees to make better decisions about candidates who present similar scores or ratings on the above-listed criteria. Questions that counter

that perspective include, “Is it fair to judge some individuals’ information if the information of others is inaccessible due to privacy features?” and “Unless stated in admissions or employment criteria, is it ethical to use this information?” Some address this question by citing that how one chooses to present oneself publicly in an online environment is an indicator of judgment and attention to detail. Individuals who are not careful with the information they provide online or who are not sufficiently diligent in protecting access to it may not possess the appropriate skills or judgment necessary to work in a professional environment.

### **What are the Criteria for Judging Online Personas?**

Interpreting character, professionalism, and other personal characteristics from information contained on social profiles is a complex task. While online personas may provide clues to a person’s true personality, they may or may not be a completely accurate reflection. The primary ethical questions are, “Who decides the criteria on which an online persona is evaluated and what exactly are the criteria?” For example, how would someone determine from a Facebook profile if an individual showed signs of alcohol or drug abuse; what on the profile would reflect that? What defines an indication of alcohol abuse? Is it the number of photos with alcohol, affiliation with alcohol-related groups, a specific combination thereof, or some other criteria? Another question that is almost impossible to answer with any degree of certainty is, “To what extent does an online persona reflect professional ability and attitudes?”

### **How Appropriate are Social Media Relationships**

A final category of social media ethical issues pertains to the nature of social networking relationships. Faculty members becoming Facebook “friends” with students is a somewhat controversial issue. Does this blur the line of professional relationship between a faculty member and student? Even if a faculty member is very conscientious in what is posted, he or she may be made privy to personal information from student “friends” who engage in illegal acts, commit eprofessionalism transgressions,<sup>39</sup> or exhibit signs of depression or rage that could ultimately result in harm to that particular student or others. Although there may be benefits to social media relationships, overexposure to each other’s private lives may result in negative outcomes for one or the other. Every faculty member should at least consider the implications of connecting with students via social media.

## **DISCUSSION AND RECOMMENDATIONS**

Because this topic pertains to legal and ethical issues, it inherently lends itself to a somewhat negative

and critical nature. However, social media tools can be excellent means for creating and sustaining relationships among faculty members, staff members, schools, students, and alumni. They have the potential to increase communication and enhance ties with the college “family.” At the same time, the openness of social media presents the potential for ethically and legally challenging confrontations when one or more members of the “family” provide inappropriate information. Educators need to take certain steps to safeguard themselves as well as the reputation and well-being of their students.

All members of the student body, faculty and staff members, and administration should be educated concerning the legal and ethical issues surrounding social media. Understanding the issues may prevent negative incidents related to social media.

College and school honor codes need to be examined to determine whether they adequately attend to professionalism issues. Most codes were developed prior to social media, therefore they may lack appropriate languages to address problems occurring in or revealed through social media. In the unfortunate circumstances that serious problems arise with a student and the honor code is invoked, the code should clearly refer to professionalism concepts. Otherwise, the college or school’s invoking of the honor code may be legally challenged because the code is not inclusive of professionalism issues. As with other matters of a legal nature, due process protections should be considered. Consultation with institutional counsel on this issue can prove to be beneficial.

Colleges and schools should be consistent with regard to how they use social media information of students. Treating student information differently may place the school in a position in which it must defend why irregularities in use occurred. Staying abreast of this topic is necessary to understand the evolving landscape of legal and ethical issues. This area is so new that society is still figuring out how to respond to the myriad of questions raised by social media. As more cases result in court rulings, the picture of the legal landscape will become clearer, but it may be several years before most/all of the controversies are resolved.

Like many areas of the law, not all of these issues have hard and fast answers. While this often frustrates student pharmacists, the observation is equally applicable here. This discussion sought to increase awareness of the issues among pharmacy and other health professions faculty and administrators and guide further debate on the legal and ethical issues. Broad scale discussions still need to occur in order to guide faculty members and administrators through the decisions related to social media use by pharmacy faculty members and students.

## ACKNOWLEDGEMENT

The authors would like to thank those who attended our special session at the 2009 American Association of Colleges of Pharmacy (AACP) 110<sup>th</sup> Annual Meeting entitled “Ethical and Legal Issues Regarding New Social Media (Facebook, Blogs, Wikipedia, etc) and Pharmacy Education.” The discussion during that session helped us further comprehend the questions, concerns, and issues related to this topic. In addition, Dr. Peggy Piascik provided valuable input and review of the manuscript, which is greatly appreciated.

It is important and obligatory to note that this discussion is for educational purposes only and not intended to constitute legal advice.

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