



Chiropractical Episode 16: We bring an expert to look at the dangers of technology in chiropractic practices.

[00:00:00] **Chick Herbert:** Reviews are everywhere for just about everything: Amazon, Facebook, Yelp. What would happen if there was a negative review about you or your practice on one of these social sites? It's happening a lot. Hi, I'm Chick Herbert.

[00:00:15] **Melissa Knutson:** Hi, I'm Melissa Knutson. And today we're talking about digital dangers chick pretend you're a chiropractor, and one of your patients comes in to see you and as you're doing the adjustment, he says, Hey, I saw this Google review about. And it's not so great. What do you do?

[00:00:32] **Chick Herbert:** The emotional side of me would want to react. I'm guessing that's not the right thing to do. And so I'm excited to learn and I would recommend that people listen to this episode about how to avoid those things.

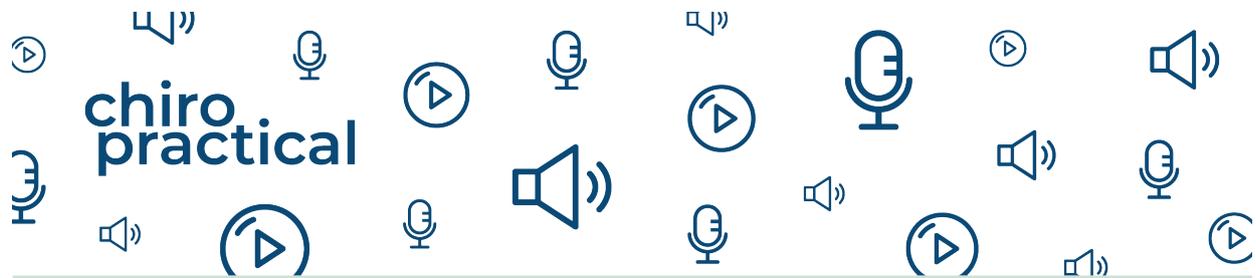
[00:00:43] **Melissa Knutson:** To help us out on this topic, we've invited Jennifer Herlihy to tell us some enlightening stories. Jenn is a highly credentialed and successful trial attorney that handles a variety of litigation matters. Today. We will have her focus on her experience defending providers in malpractice cases. We also have Mike Whitmer with us. Mike is a long-time employee at NCMI and currently serves as vice president of chiropractic. So welcome Jenn and Mike.

[00:01:14] **Jennifer Herlihy:** Honored to be here.

[00:01:14] **Mike Whitmer:** Thanks.

[00:01:16] **Chick Herbert:** Jenn, we're really excited to have you. Why don't we start with the example that we teased up and the opener about a negative review on a social.

[00:01:25] **Jennifer Herlihy:** I think this has happened to just about every chiropractor where a patient might come in and say something a little



unexpected, but this involved a male chiropractor and a male patient who was obviously quite embarrassed, but felt it was important to make sure that he knew about this post and my chiropractor did not.

[00:01:42] **Jennifer Herlihy:** And after of course, a very anxious session, he ran to his computer, looked up Yelp and was horrified to see words involving private parts and the rubbing of genitals, including his erect genitals and that the patient felt that he had done this intentionally and was absolutely flabbergasted and had no idea what to do.

[00:02:04] **Jennifer Herlihy:** except I guess my memory is that he called NCMIC who immediately thankfully provided counsel to him because also this patient had filed a board complaint. So that made it very easy. And the first thing we wanted to do was make sure that he didn't respond out of anger to the post, but unfortunately he already had, so now we had to take down that post and decide how we were going to appropriately address the situation.

[00:02:26] **Jennifer Herlihy:** That's what I worked with him to work with the board and to make sure also that criminal charges did not.

[00:02:33] **Chick Herbert:** To summarize the doctor, read the post, responded to the post in frustration and anger and an emotional response, which I think is natural and highly likely to happen in a lot of cases. If you don't pause and take a breath and that further complicated the issue.

[00:02:50] **Jennifer Herlihy:** Absolutely. Of course there's the concern for immediate business impact. There were already likes on it. So other people had already seen it. Yeah. Responded to it and absolutely failed. It was credible. It was an allegation of criminal assault. And so he had that concern. Of course, he immediately wanted to do damage control and unfortunately his first response, although understood wasn't appropriate.

[00:03:14] **Jennifer Herlihy:** And then we had to deal with an inappropriate response, which is now, also in the media.

[00:03:19] **Melissa Knutson:** What would have been the right thing to do in that?



[00:03:23] **Jennifer Herlihy:** Anything, but what he did. I don't blame him. It was a very upsetting situation. But what you need to do is be thoughtful about it. You want to make sure that you are safe, anyone's fears about it.

[00:03:33] **Jennifer Herlihy:** Of course you want to contact the media to see if you can take it down before you even have to respond to it. You're going to want to engage someone an outside expert consultant attorney. To assist with the proper response, knowing that it also might go to the board and you want to make sure that you have the perfect response for them as well.

[00:03:53] **Mike Whitmer:** One thing that this doctor did right was he called NCMIC. Now I wish he would have called sooner before he posted a reply to the review, but I always encourage doctors whenever they have any questions about something that's happened in practice, it could be a patient encounter, something like this, a bad review posted anything that they aren't quite sure how to handle appropriately, call NCMIC, talk to our claim staff. They've seen it all. We would much rather talk to a doctor early, rather than after they've done something to mess up the road that they're now on. We would have advised them to not react and post a response. Rather we would connect them with somebody like Jenn Herlihy to help them through that process.

[00:04:42] **Jennifer Herlihy:** Unfortunately, I think that some doctors think it has to be a complaint, either a lawsuit or a board matter before they can seek counsel. NCMIC is very good about giving initial information out. As Mike said, they've seen these things nationwide so many times they already have information and neither the examiner or available online, just to give some of those.

[00:05:04] **Jennifer Herlihy:** So that should be their first call and then NCMIC will help them decide if council is also necessary.

[00:05:11] **Chick Herbert:** It would be very unsettling to read something like that about yourself. I would think that would cross people's mind is to contact the patient. Does that happen? I have to believe that's not a very good path either.



[00:05:24] **Jennifer Herlihy:** This happened here too. So you've hit the nail on the head. Argument was he just wanted to discuss with her if perhaps she would consider taking it down, but that made the poster, a female, feel even more uncomfortable and threatened. And that was part of the complaint to the board. A doctor who has treated patients for a period of time feels like they have a certain relationship.

[00:05:48] **Jennifer Herlihy:** Unfortunately, the patient didn't feel that way as is obvious by the post. But of course the thinking that you can be rational and that you might be able to get the patient to be rational and reasonable, they don't see it the same way. Certainly based on this language, these allegations, I never would have counseled my client to contact the patient directly.

[00:06:09] **Melissa Knutson:** What were the ultimate consequences?

[00:06:11] **Jennifer Herlihy:** The really important thing was after the doctor described exactly how he performs his technique and it couldn't have occurred as she perceived it, the case was dismissed. Every state's different, of course, but generally my experience is, they will give the chiropractor the benefit of the doubt on either he said, she said contest, but you have to be able to describe your care and treatment.

[00:06:33] **Jennifer Herlihy:** This is where great records also come into play in assisting you in that defense. But in this case, thankfully after hearing his explanation, the matter was dismissed. However, he had to hire outside consultants and an effort to assist him with bettering his social media profile so that good reviews from his other clients came up to the forefront.

[00:06:55] **Melissa Knutson:** This reminds me of a [previous podcast](#) that we did, where we talked about patient boundaries and the importance of explaining what you're doing in a procedure, because as a chiropractor goes into the treatment and they do different things that they're used to doing, the patient may not feel comfortable with some of those things. So that's another good reminder of that, that bedside may make a difference.

[00:07:18] **Mike Whitmer:** That's a great point, Melissa. The patient communication is such a powerful risk management tool. Doctors of



chiropractic touch their patients every day and they take for granted that the patient understands why they're being touched in that manner.

[00:07:34] **Mike Whitmer:** They may not necessarily understand how chiropractic treatment works, how they're going to be touched in that process. It's always good to over-communicate, especially with a new patient and they may not be that familiar with chiropractic care.

[00:07:49] **Jennifer Herlihy:** Whenever I do a presentation on boundary crossings, if you will, or perceive boundary crossings, I included entire slide just entitled "PSOAS" right. The psoas muscle has got to be the one that I see the most. I think the problem is because most likely a male chiropractor has not explained to the female patient, why this is so important and how delicate an area it can be. And I truly believe that what you've said, the miscommunication is the problem, not what the chiropractor was actually doing.

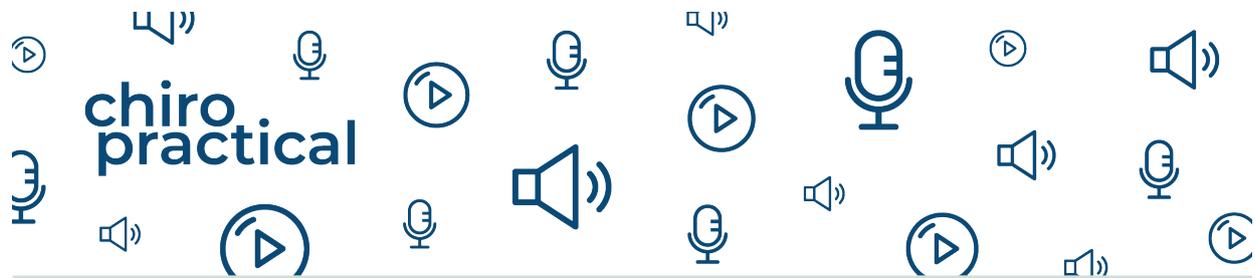
[00:08:21] **Mike Whitmer:** One other point because I'm not going to miss the opportunity to plug good record-keeping. As Jenn said, the record keeping was very important so that we could tell what happened with this patient. And without that record, even in a case like this, where it's a social media post versus a board complaint or a malpractice claim, that's being litigated, the records are important. They're your frontline of defense.

[00:08:49] **Chick Herbert:** Mike does that record include what we just talked about explaining the procedure is that included in the notes?

[00:08:55] **Mike Whitmer:** With records more is more, and I encourage more.

[00:08:59] **Jennifer Herlihy:** Certainly if your issue is that you needed to adjust the PSOAS muscle, then you better have it listed in your records because I've seen that case.

[00:09:08] **Jennifer Herlihy:** So it is a strong defense, but can also show that your defense is not accurate because you certainly would have documented the need to adjust that muscle or to work on that muscle documentation is key.



[00:09:20] **Chick Herbert:** Jenn, you mentioned the bad review, quote, unquote, moving down. Can you talk a little bit more about that?

[00:09:27] **Jennifer Herlihy:** Sometimes calling Healthgrades or calling one of the websites and explaining that this isn't true, that it's defamatory, and in fact, it's going to cost business, they might take it off themselves without the need for court intervention. Yelp and Google are certainly more different than some of the other doc based reviews, but certainly it's worth a try.

[00:09:47] **Chick Herbert:** Do you recommend that be done by the doctor or do you recommend talking to counsel first?

[00:09:52] **Jennifer Herlihy:** A negative review is something that doctor can handle one that is alleging sexual assault that is sure to be a board complaint or a malpractice case should be the time to contact NCMIC and if they feel counsel is required, they often refer them right out.

[00:10:08] **Melissa Knutson:** We'll head to our next story here. Jenn, can you tell us a little bit about posting on public facing pages? I know from a personal standpoint, people do this a lot, but as a chiropractor, how does that impact or change things for you?

[00:10:23] **Jennifer Herlihy:** I don't want to infringe on any chiropractor's personal beliefs, but once it's placed onto their public website or a blog or Facebook, that becomes the issue.

[00:10:34] **Jennifer Herlihy:** I always tell my chiropractic, what would your board think of the posting that you're putting on there? Could it be seen as unprofessional? Could it be seen as giving out advice that you should not be giving at that point, or it's not really in your realm of expertise? Really the unprofessional part of that is where I get concerned, because we do see members of the public print, those posts out and contact their board for that exact purpose. They don't think it's appropriate.

[00:11:03] **Mike Whitmer:** This is a topic I deal with a lot when I'm talking to students, because students are in that position where they're transitioning from student life to professional life. They probably have a lot out there on their page



that doesn't reflect on them professionally. So I encourage them to clean that up and let's be Frank, Facebook, social media, the internet wasn't around when I was in college. And I'm grateful for that, because there probably would have been things out there that would not reflect well on me now that I am many years into my career. They're transitioning from that student life to professional life and they need to rethink how they use social media.

[00:11:46] **Mike Whitmer:** It's no longer, all fun and games. It now has a business purpose for them. It has a communication purpose for them, with their patients and with their communities. And when posting on social media run it through the same filter you would, if you were doing a print ad in the local newspaper, how is your board going to feel about this? How are your patients going to take this? And how's your community going to perceive this as well? Because all of those things factor into the doctor's social media presence.

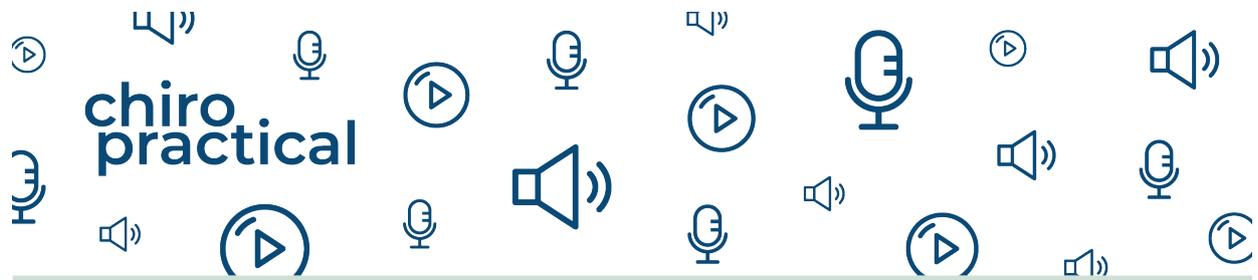
[00:12:16] **Jennifer Herlihy:** I see a lot of problems with our older chiropractors who are trying to use it as a medium, that aren't actually as used to it. And sometimes will just go on what I'll call a rant and they don't understand the reach of that information. So I agree with you for the younger people, but also for the older chiropractors, I've seen it on both sides.

[00:12:37] **Chick Herbert:** Jenn, were you looking at Mike, when you said older?

[00:12:39] **Mike Whitmer:** I'm used to it, Chick.

[00:12:40] **Chick Herbert:** You mentioned blogs. What are some of the other common places?

[00:12:44] **Jennifer Herlihy:** Any type of marketing, so using Facebook to send out posts, posting videos on Tik TOK, or other social media sites, anything that puts you out into the stream of commerce, if you will, of social media, holding yourself out as a chiropractor and doing. For example on Tik Tok, when I see videos on how to do adjustments, that also say this is very dangerous, that concerns me because why are you putting out into social media, how to do something that they are not licensed to do. Show the benefits of chiropractic care through video or posts, but not something that may be considered either



unprofessional or may scare some people away from chiropractic. If they're afraid they're going to be injured, they may not be interested in coming to try it.

[00:13:29] **Mike Whitmer:** There's a lot out there these days with videos of doctors adjusting patients, doing various techniques, demonstrating them with real patients in their real practices that they're putting out on social media. And there needs to be caution with that process.

[00:13:48] **Mike Whitmer:** You've got real patients here that have the right to privacy. So are you getting releases signed? Are you doing your due diligence with those patients to make sure that they're okay with their image being posted out on social media? I think that we've all had the experience where our picture is taken and then it turns up on social media without your knowledge.

[00:14:11] **Mike Whitmer:** That's not very comfortable position to be in as the subject of that image. I think doctors need to be very cautious with how they're doing that.

[00:14:21] **Jennifer Herlihy:** Some of the ones that I've seen, they're more the exception to the rule. Like the really loud cavitation. It's more of a shock value than it is. Look at this very happy patient that I just assisted with an adjustment.

[00:14:34] **Jennifer Herlihy:** Of course we want to market, and we want to talk about the amazing results that you can have, but that doesn't seem to be what the views are or about what people are posting and I do have some concerns.

[00:14:45] **Chick Herbert:** Jenn, are there any guidelines that you can offer just generalities of where you begin to cross that line or that line gets blurry?

[00:14:53] **Jennifer Herlihy:** I would say every state, you should read your board guidelines on advertising and professional conduct. That's probably the easiest way. If you have a question, don't post it.

[00:15:03] **Chick Herbert:** I want to go back to something that you said earlier around stating opinion on social media. Can you elaborate on that and what the risk and danger is?



[00:15:13] **Jennifer Herlihy:** Sure. During the pandemic, we saw some people that felt very strongly about masks, for example. What was critical to me is what were the guidelines of the state. If on your blog, you happen to be of a different opinion and stated that opinion, and it was brought to the attention of the board, they considered that unprofessional conduct.

[00:15:35] **Jennifer Herlihy:** Because you're reaching your patients, plus others, holding yourself out in a position as a chiropractic physician, that people are going to read your post and take the information. Seriously, you have a right to your opinion, but not if it's adverse to the regulations of the state. That's exactly what I've seen happen in several cases recently.

[00:15:54] **Mike Whitmer:** There's also been issues through the pandemic with chiropractors posting advice about vaccines. I'll go back to what Jenn's been saying. Look at your state regulations because on some states that's considered out of scope for a chiropractor. So something that you need to be very careful about.

[00:16:15] **Mike Whitmer:** I agree, chiropractors of course have the right to their opinion, but what they post, what they put out there as a doctor, they need to make sure that it's square with the board.

[00:16:26] **Jennifer Herlihy:** If you can't give a vaccine, then you don't have an opinion on its efficacy on a website that is out to the public as a chiropractic physician. If you privately want to feel a certain way, you're entitled to it, but that is the way I define scope of practice. Can you do it? You can't, so you shouldn't be talking about it. At least not in the states that I practice in.

[00:16:46] **Chick Herbert:** Jenn, how about if I do that on my personal social media handle, not on my practice social media?

[00:16:51] **Jennifer Herlihy:** You have every right as an individual to express your opinions. I would be cautious though, because sometimes there seems to be an overlap on Facebook between the doctor's facility and the doctor's personal. When you're holding yourself out, even if it's on your personal site, for example, your Facebook, if you have the fact that you are a chiropractor listed, as well as perhaps the college that you went to, but you're wearing



lingerie, some people would consider that unprofessional. And that was something that I have to weigh. Yes, it's your personal page, but you've now identified yourself as a chiropractor and your school. And so that was something that some people would feel unprofessional. I think that every board appreciates the right of one of their own licensed members to have opinions it's holding themselves as a chiropractor with such opinions, that's the problem.

[00:17:42] **Chick Herbert:** And being careful not to commingle those messages on platforms. Jenn, is there anything in that area that we haven't talked about that you've seen that is noteworthy for our listeners?

[00:17:53] **Jennifer Herlihy:** The pandemic post opinions have been what I've seen the most complaints about one way or the other. Those go out to your local community and people within the community, such as the department of health or the police. If they see something that also might be the subject of a report, if they don't feel it's appropriate. So again, it's just a reminder. If your board is looking at this, how would they see it? It's the responsibility that comes with being a professional. And that's the benefit of being a chiropractor.

[00:18:22] **Chick Herbert:** Jenn, for some of the doctors that may not be as social media savvy or digitally savvy. Do you recommend that they do some searches to look for reviews?

[00:18:31] **Jennifer Herlihy:** That's a really great point. I always recommend to my clients every month, if it's not you, somebody at your front desk put in your name. And they will immediately of course come up with Google, Yelp health grades. Just make sure there's no outlier. There's no one star that jumps out and or says something like, yeah, I've sued them at the board and they lost. And we can figure out if they can either take it down or then help craft a rebuttal that I provide to doctors.

[00:19:00] **Jennifer Herlihy:** I think most people who are looking as soon as they see something outrageous on a post, they know that it most likely isn't true. And I think they give a lot of deference to the chiropract.

[00:19:11] **Melissa Knutson:** One thing that I've done is set up Google alerts. So that's something that our listeners can do. You can set up a Google alert for



your name or any topic that you want to read more about, and you'll get a message to your inbox that says, Hey, your name was posted in XYZ. That might be another way to go about it as well.

[00:19:30] **Jennifer Herlihy:** Great idea. I wish Yelp. I wish all of them had that option, but certainly diarying it just to do it every two weeks, once a month and asking your current patient if they have a nice experience to please post, because it really is important to you. So I don't see any downside to asking your patient population, if they had a good experience to go ahead and tell you.

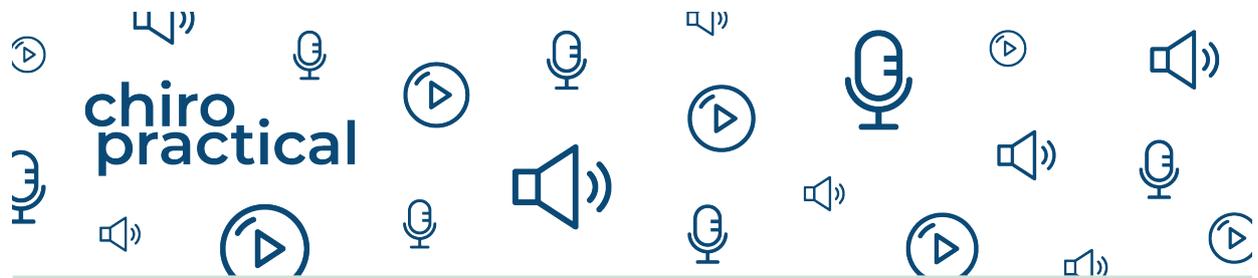
[00:19:53] **Chick Herbert:** That's a good point and be proactive about that one area that we haven't covered. Jenn and I'm interested in your opinion would be communication with patients via.

[00:20:00] **Jennifer Herlihy:** Yes. Thank you. Don't do it. No one ever wakes up and says, I'm going to commit a boundary violation today. What happens is it starts out with an appointment and suddenly they're asking if they can come after hours and suddenly they're sending pictures from their vacation and suddenly those vacation pictures are in a bikini and then suddenly things go awry.

[00:20:21] **Jennifer Herlihy:** I know a lot of people saying I use this for scheduling only if that is truly the only thing you do, fine. But besides that absent, literally your appointment is this time and this date, anything further than that, I have seen it numerous times. Please listen for what I say for once. Do not text clients.

[00:20:41] **Jennifer Herlihy:** I'll tell you I have clients who try to text me and I immediately tell them I'm not going to respond. You have to email me because I can't capture texts to prove exactly what was discussed. I want to be able to see, of course, what they're asking me and what I'm telling. That is another reason not to have texts, because if they disappear from your phone, they may or may not disappear from the other phone.

[00:21:03] **Jennifer Herlihy:** You really want to make sure that everything on there is totally appropriate and supports what your memory of the texts.



[00:21:09] **Mike Whitmer:** I agree. How do you keep that in your records? I'm going back to documentation. If we don't have documentation of the patient encounter, we've got a problem. If you're dispensing advice, if you're taking questions from patients and you're dispensing healthcare advice, that's a patient encounter.

[00:21:25] **Mike Whitmer:** How do we then get into the patient's record. If we end up in a malpractice claim board issue and text messages, people are pulling out their phones and they're showing we'll look at the text, we don't have it in the actual patient record and it presents a real challenge in the defense of a claim.

[00:21:43] **Jennifer Herlihy:** Even when I screenshot them, the patient is going to misperceive the information or the inference. That's exactly another reason not to use text.

[00:21:53] **Melissa Knutson:** In your example, Mike, documentation is something that you want to last forever, but with digital communication, there's metadata. So if you posted something and try to say, oh, no, that didn't happen, or you have it removed, there's still a life out there.

[00:22:10] **Mike Whitmer:** It's still a footprint and still discoverable. I want the record to maybe not last forever, but at least last, as long as the record retention laws in your state and that's really difficult with texts. I would also echo what Jenn was saying that text is not an ideal form of communication. I've had things that I have sent on text that missed the tone, missed the inflection and was misunderstood. That can definitely happen with patient encounters to through text.

[00:22:40] **Melissa Knutson:** Jenn, has a chiropractor ever compromised their defense in any way?

[00:22:45] **Jennifer Herlihy:** Unfortunately I've had a chiropractor that thought it was appropriate to not only place attorney, client communications onto their blog, but to also post the details and information of a confidential release, which actually made it so that it was no longer confidential. I know most of the



listeners here would know better than that, but it really was a significant detriment to his defense.

[00:23:08] **Melissa Knutson:** So confidential means confidential and most definitely confidential from anywhere on digital.

[00:23:13] **Jennifer Herlihy:** That's pretty much the definition of confidential.

[00:23:14] **Chick Herbert:** Do you have any idea what that doctor was trying to accomplish? That just seemed so farfetched to me. I can't even believe it's real.

[00:23:23] **Jennifer Herlihy:** I think he was upset about litigation in this country, which he has every right, as a personal opinion, but the whole point was is that it was confidential for his benefit.

[00:23:34] **Melissa Knutson:** Jenn, do you have any stories about HIPAA violations and how that might impact this?

[00:23:39] **Jennifer Herlihy:** How long as the program? I've had every example of HIPAA, including posting videos of patients to their website; sending out a mass marketing email, but instead of listing everyone as a BCC, as a CC so every person of this plastic surgeon knew who his other patients were. I've seen incorrect information given out about addresses. I've seen wrong medical records sent to wrong people, sent to wrong attorneys. I've seen every possible example. And so often it could have been avoided with just a little more caution. It's a majority probably of the board complaints that I see.

[00:24:16] **Mike Whitmer:** I think we've all done that - send an email to a recipient we didn't mean to. When you're handling patient information, you need to be extremely careful about that because they do have a right to privacy and that is protected. If there's a violation, it's going to end up in a board complaint. It's going to end up in a HIPAA violation.

[00:24:36] **Jennifer Herlihy:** And Mike, what you said earlier about if you're going to use the likeness of a patient, either in social media or on your website or in a print advertisement, you have to have written authorization from that



patient and it has to be very specific that you are allowed to utilize it and for what time period. And it really is the only way to protect you from a future. Complaint of a HIPAA violation. There's a lot of patients out there that are thrilled to be asked and they are thrilled to talk about what they've gone through in a testimonial or allow their photos or video to be taken and that's great. It's really just to protect both sides so that both sides know that is going to be used in the future in a way that involves social media.

[00:25:17] **Chick Herbert:** How about written testimonials that would have a patient name?

[00:25:20] **Jennifer Herlihy:** I prefer Noelle L. I prefer a first name and last initial. There is no reason that you have to have the full last name. With respect to these HIPAA violations or errors, it's not usually intentional. It was a mistake of the marketing director or the staff member, but you're ultimately responsible for what goes out of your office.

[00:25:41] **Chick Herbert:** You're absolutely right. It's often not with bad intention, but there also may be a lack of awareness or understanding of the nuances that you need to adhere to.

[00:25:52] **Chick Herbert:** Jenn, it's been great to get your insight. Thank you for sharing. I'm sure we could talk to you all day and hear more scary stories, but thank you for your time and insight.

[00:26:02] **Melissa Knutson:** Thank you for joining us. I know for me some takeaways, pause when you see something on digital. Call your carrier, call your representation, uh, make sure you're documenting and remember that everything you put out there on digital channels, it's public, it's trackable. So write it like your grandma's reading or your board

[00:26:23] **Jennifer Herlihy:** The grandmas would be probably more forgiving than the board.

[00:26:25] **Melissa Knutson:** That's true.

[00:26:27] **Chick Herbert:** Another great episode and a great guest.



[00:26:29] **Melissa Knutson:** If you liked what you heard today, go ahead and like, and follow the podcast that will help other colleagues to be more aware of this podcast and they can learn from it as well. Take care and be well.