

*Anatomy of an
Internet Defamation
Case 2017*
Social Media & The Law



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welcome



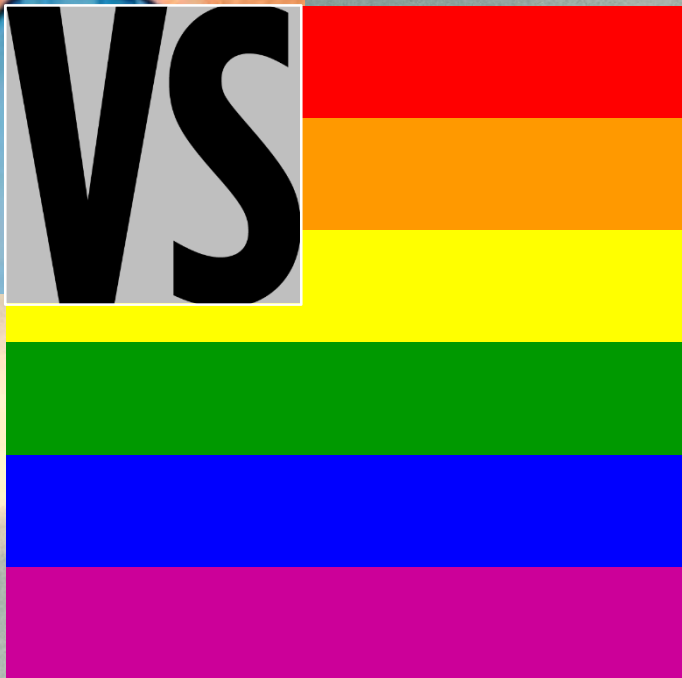
Christopher Hopkins is a trial and appellate lawyer at McDonald Hopkins, LLC.

- Data breach
- Defamation
- E-discovery and retention
- Internet crimes
- Privacy
- Social media discovery

Christopher Hopkins
McDonald Hopkins LLC



VS



The Case of...

Christian Doctor & LGBTQ Patient

Use of Social Media

In real cases



01 Issue Spotting - Social Media Torts

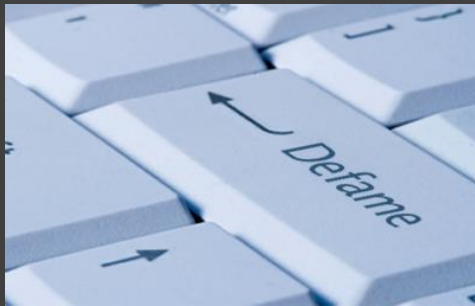
02 Work the Case

03 Use Social Media - even if the case doesn't seem to call for it

04 Doctor's Response (using social media)

05 Recap / Discuss

Social Media Torts



Defamation

- ✓ False & Defamatory Statement
- ✓ Unprivileged publication to third party
- ✓ Defendant knew / should
- ✓ Actual damages



Publication of Private Fact

- ✓ Publication of private fact
- ✓ Offensive
- ✓ Not of Public Nature



IIED

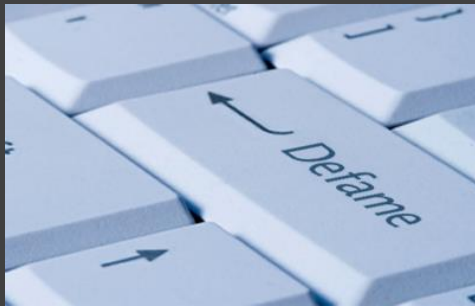
- ✓ Reckless / intentional conduct
- ✓ Outrageous, utterly intolerable in civilized society
- ✓ Causation / emotional distress
- ✓ Severe emotional distress



Security of Communications Act

- ✓ Oral communication "intercepted" or disclosed
- ✓ Actual / liquidated damages (\$100 per day or \$1k)
- ✓ Punitives /Attorney's fees

Social Media Torts **Defenses**



Defamation

- ✓ *Per se* OR *per quod*
- ✓ Opinion
- ✓ Truth
- ✓ Privileged disclosure
- ✓ 1st Amendment



Publication of Private Fact

- ✓ Consent
- ✓ Already public
- ✓ Reasonable not for hypersensitive
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IIED

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- ✓ Severe emotional distress



Security of Communications Act

- ✓ Two party consent
- ✓ No subjective belief
- ✓ Subjective belief is not reasonable

Recent Social Media Cases

Florida 2016

Bollea v. Gawker

Invasion of privacy / IIED: \$140m verdict / \$31m settlement

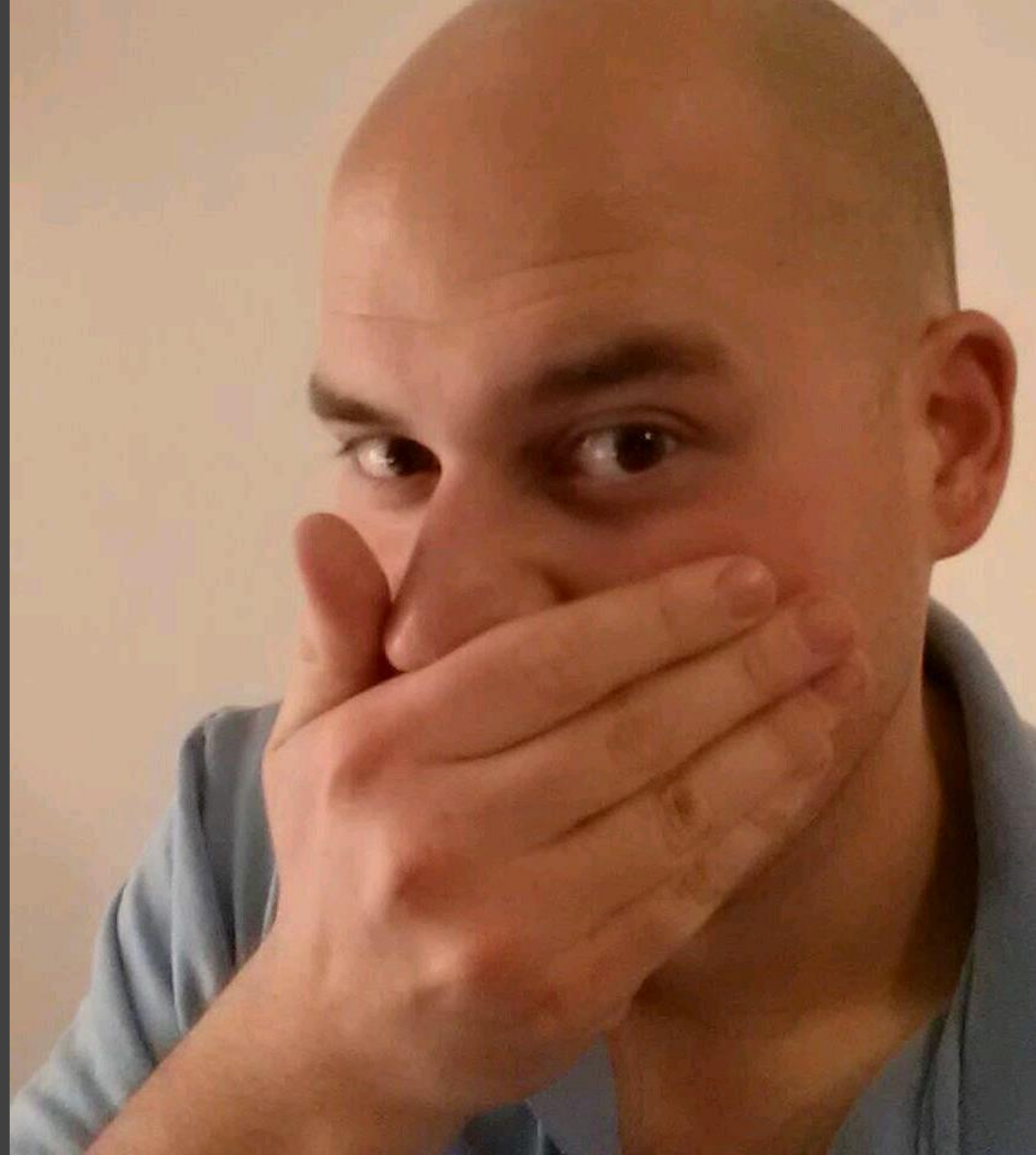


U.S. Supreme Court 2015

Elonis v. United States

Defendant must (a) intend to issue threat or
(b) know that communication would be viewed as a threat

Postscript – lower court convicted him anyhow!



Work the Case

First Reaction to Demand Letter?

ABC LAW FIRM, P.A.

123456 ACME WAY
CENTRAL FLORIDA, FL 12345
PHONE: (561) 555-1212
FAX: (561) 555-1213

Date

By Certified Mail/Return Receipt Requested

Doctor
Medical Facility
Address
Central Florida, Zip

Re: My Client, Patient

TIME SENSITIVE ONE-TIME DEMAND LETTER

Dear Doctor:

This law firm has the pleasure of representing Patient ("Patient" or "My Client"). If you are represented by legal counsel, please direct this letter to your attorney immediately and have your attorney notify us of such representation.

Demand is made upon you to cease and desist your activities that include violations of My Client's privacy rights. Specifically, do not discuss My Client's private sexual orientation preferences with third persons as this is a violation of My Client's privacy rights, a violation of HIPAA laws, a violation of doctor-patient confidentiality, and Florida's Patient's Bill of Rights and Responsibilities.

Demand for Social Media / Privacy Torts

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torts

Be on Lookout for these Torts

 Defamation

 HIPAA / DR - Patient

 Publication of Private Fact

 Medical Malpractice

 IIED

Context: 1st Visit

My Client relates to me that she saw you as a patient for a medical opinion. My Client was concerned when she came to your office as she was experiencing some medical issues. During the course of the examination, your office directed Patient to arrange to have her blood drawn for the purpose of testing. At the initial consultation in which you saw Patient as her doctor, My Client met with you in the presence of My Client's partner, Partner. Apparently, you find My Client's sexual orientation offensive as you advised My Client that she should seek God for healing. You did not elaborate at this consultation. My Client, although taken aback by the statement, decided to move forward with the blood work to resolve concerns she had as to her medical condition. She made an appointment with Testing Center ("Center") for her blood draw.

Statement: 1st Visit

My Client relates to me that she saw you as a patient for a medical opinion. My Client was concerned when she came to your office as she was experiencing some medical issues. During the course of the examination, your office directed Patient to arrange to have her blood drawn for the purpose of testing. At the initial consultation in which you saw Patient as her doctor, My Client met with you in the presence of My Client's partner, Partner. Apparently, you find My Client's sexual orientation offensive as you advised My Client that she should seek God for healing. You did not elaborate at this consultation. My Client, although taken aback by the statement, decided to move forward with the blood work to resolve concerns she had as to her medical condition. She made an appointment with Testing Center ("Center") for her blood draw.

Patient's Action: 1st Visit

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Phone Call

abnormalities, yet your office refused to discuss with Patient in a phone call. My Client was misled that there was an issue with the tests performed. Instead of relating that the blood work was satisfactory, your office insisted on scheduling an appointment. As a result of the phone call, Patient became worried and suffered emotionally as to what could be wrong. On [date], My Client went to your office for her appointment, which was presumably to discuss the blood work. It appears that your intention was to conduct a religious intervention and not to counsel a patient.

Second Visit

After the results were provided, you made inquiry into how My Client was feeling. She stated that she was doing well. She was relieved that the tests did not reveal any serious medical issue. You then proceeded to discuss how Patient needed church and God in her life. You continued by stating that you did not know what Church would accept My Client because of her sexual orientation. You stated to Patient, her mother, and her brother that My Client's homosexuality is a sin in the bible. My Client reacted by standing up as she did not come to your office to be lectured on religious tenets that are personal to her doctor. My Client's mother directed you to stop which should have ended the consultation and this matter. You decided to continue despite My Client's rights and protestations. You made a medical diagnosis that My Client needed to see a Psychiatrist for her mental health because she is committing sin. The medical diagnosis you provided is baseless and exposes you to a medical malpractice claim. My Client and her family attempted to leave your office without further incident. But, you followed My Client and her family out of your office while you continued to hurl hateful speech at My Client in front of her family members. You indicated to My Client that "you know that it is wrong" (that My Client is gay).

Parking Lot

emotionally distraught, in tears. As she tried to leave, your wife, Wife, joined in your crusade that homosexuality is wrong. Thereafter, the City Police Department arrived. At some point, you further stated to Officer that My Client's lifestyle of being homosexual is a "sin in the bible, that My Client is living in sin, and My Client is a sinner for the life she is living." It is clear that you freely offered private information about My Client's sexual orientation to your wife and City Police Department Officer in violation of Florida law, HIPAA, and My Client's rights.

torts

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You Rep the Doctor:
What Do You Want
From Him?

Doctor Notes – 1st Visit

27 yrs old female accompanied by her female partner. She comes in for severe anxiety. She states she does ~~not have any PCP, She just sees her GYN.~~ She has had anxiety for years, about 4 years ago she was evaluated by therapist "who wanted to start her on Xanax but she declined, she did not want to take meds." Currently she is very anxious. ~~She was involved in a MVA last week. She went to XYZ ER, she was~~ evaluated and discharged with no consequences from MVA. She does have some weakness in her legs. No low back pain, but she has had anxiety so bad that it has lasted even for 6 hrs because she is afraid that something might be pinched in her nerves going to her legs. She does not feel paresthesias, just weakness, no sciatic symptoms, no low back pain, she is able to walk normally. She does not have any other medical problems, She does not take any prescribed meds. The last time that she had BW was around 5/2015 and that was normal as she states. Right now she would like to take something because the anxiety is interfering with her activities including her Job. She works as sales manager in automotive field .

Doctor Notes – 1st Visit

muscle weakness of lower extremity [ICD-10: G55.10], [ICD-9: 720.07], [SNOMED: 102503007]

PLAN

Today I advised her that she needs to be seen by a psychiatrist. She stated that she does not because she was told before" that she just had worries I told her that there has to be a reason for anxiety. If she does not want to see psychiatrist I probably will not be able to help her because I will just give her alprazolam 0.5mg 1/2 -1 tablet only of the anxiety gets really bad. I will give her only 2 weeks.

We had a conversation; I provided advice about analyzing her life and see if she could find the reason for her anxiety. I did share my faith as Christian and that I believed that God created us Body mind and spirit. I draw my strength and peace from God.

If she has any spirituality she should seek peace in her own believes and spirituality.

No follow up appointment, We will call her to see how she is doing and to see if she wants the referral to psychiatrist.

Doctor Notes – 2nd Visit

After reviewing the blood work, informing her and reassuring her that she was very healthy, they asked me what would be the reason and treatment for her anxiety.

I asked her specifically if I could speak 100% openly and share her intimate information In front of her mother and her brother. She said “yes that they knew everything about her.”

I again expressed that I profess the Christian faith and in my experience as physician I have seen emotional issues including anxiety develop in homosexual patients.

I told them that the Bible speaks about homosexuality as a sin.

At that point her mother said, "How is it possible that you can say that God does not-love my daughter!"

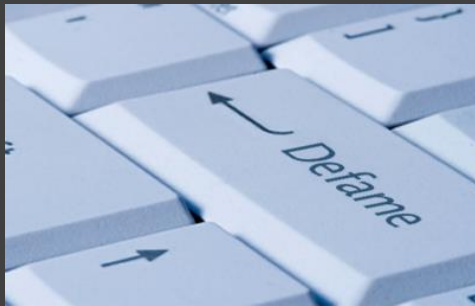
I clarified and told mom 3 times that I never said that God did not love her daughter. I told her in fact that "God loves sinners but he hates sin."

Doctor Notes: Parking Lot

This escalated in such away that I had to direct them to the back door to the parking lot where he and Ms. Kanata continued to insult me, and by that time my wife had arrived to the office and they continued yelling profanities and even screaming that I "had discriminated against a lesbian patient and that Nobody should come to be seen."

I really felt that he was making life threatening comments and I decided to call 911 to send the police because her brother was so aggressive that even his mother had to hold him back and kept pushing him

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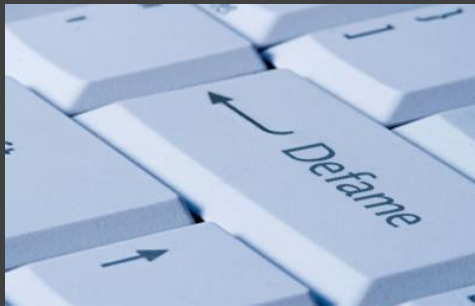
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HIPAA / Patient Privacy & Med Mal

- ✓ Disclose patient information without consent
- ✓ Breach of Medical Standard of Care
- ✓ Damages?

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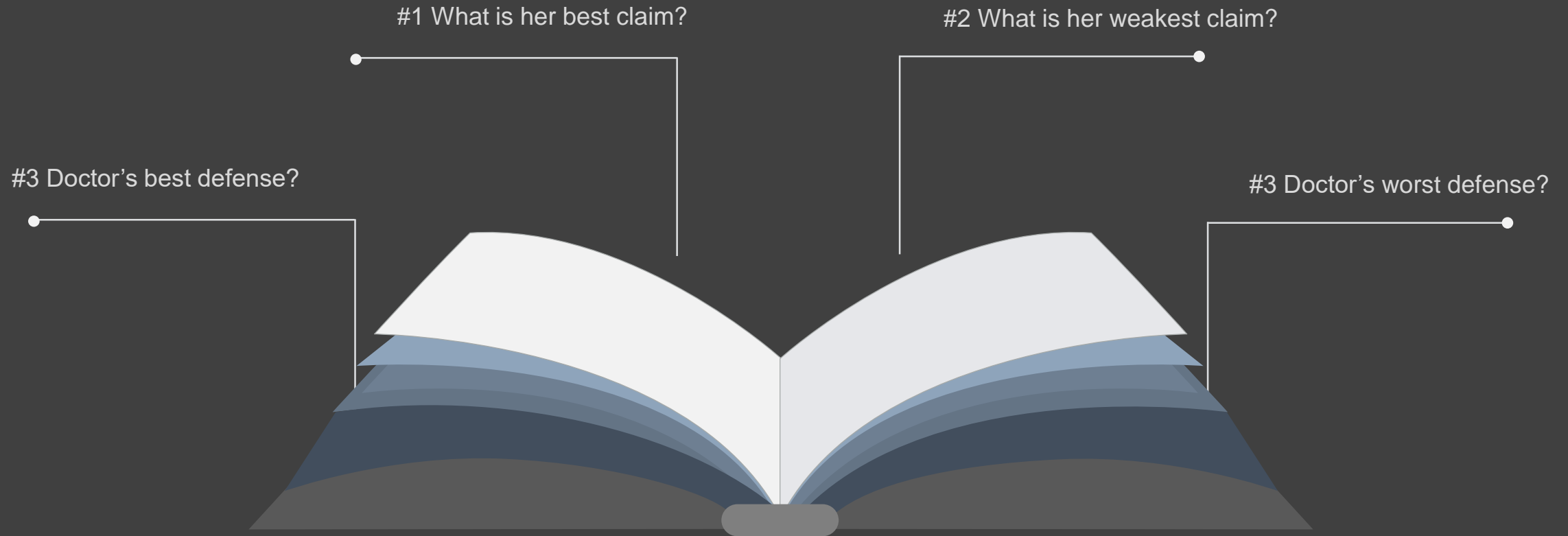


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Analyzing_

Social Media / Privacy Torts



What Does Counsel for
Doctor Do in Face of Demand
Letter to Client?

Response to Demand

NO DAMAGES

Publication of Private Fact:

- Partner / Family knew
- Wife – heard it from brother
- Cop – immunity in reporting
- Is it highly offensive?
- Even if wife or cop, how are you damaged?

Defamation:

- Truth (she is gay)
- Opinion (religious belief)
- 1st Amendment?

No HIPAA / Privacy:

- Partner invited
- Mom / Brother invited
- Wife = employee
- Wife = learned from brother
- Police – immunity

IIED:

- Christian beliefs are not likely “beyond all decency... intolerable in the community”
- Spirituality is OK in DR office
- He asked to be open
- No “severe” emotional distress

Medical Malpractice:

- Same intervention as the therapist before
- Referral to psych is not a diagnosis
- Plaintiff never relied on it / damaged

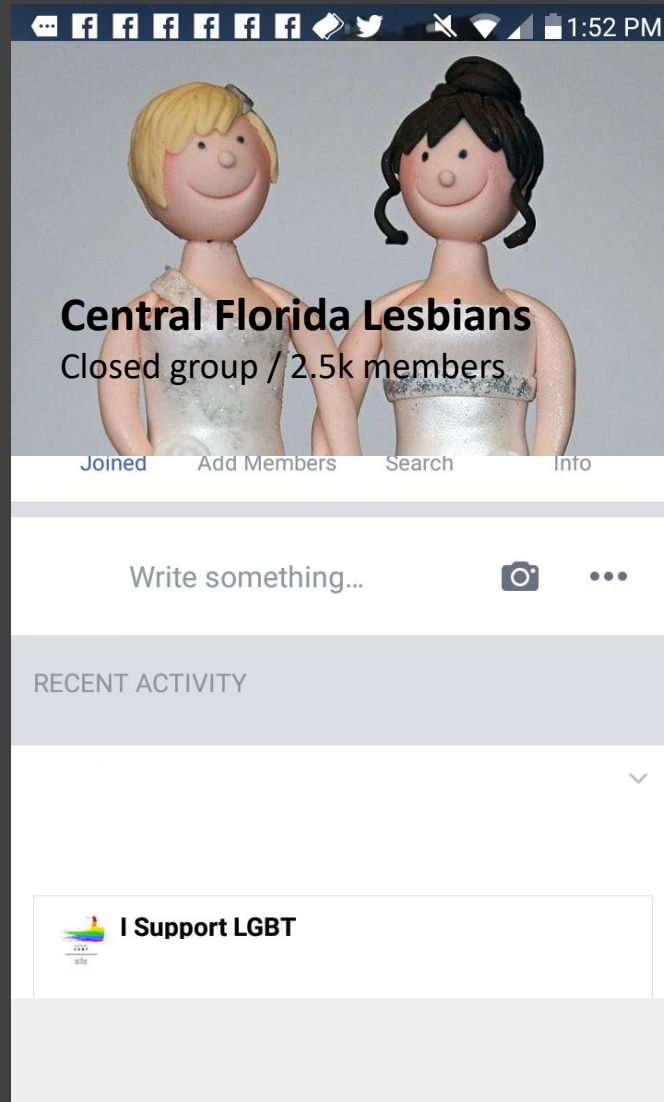


Response does not need to
just be a defensive letter...

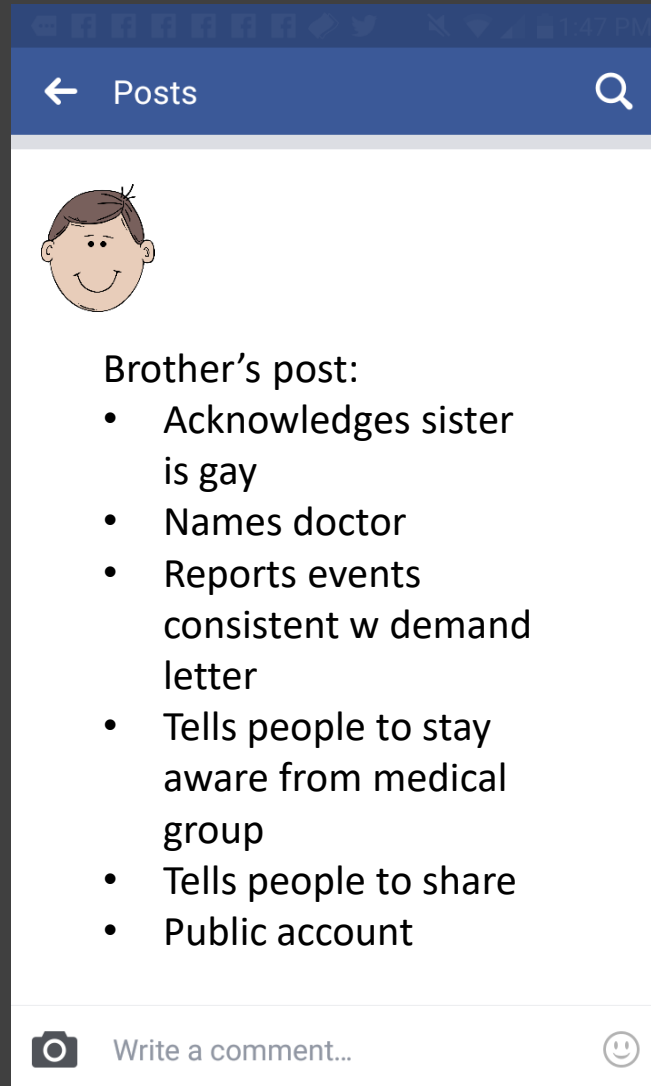
Investigate Claimant



Investigate Claimant



Investigate Claimant



Doctor's Response to Demand....
Just got STRONGER

- 1.He has his own cease and desist claim**
- 2.Sister is “open” online... (no longer a “private fact” / damages)**
- 3.Brother reveals his sister's orientation on his public account**

Use of Social Media

In real cases



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Thank you

Christopher Hopkins



McDonald Hopkins LLC

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Attorneys at Law



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