Medical Justice REPORT

www.medicaljustice.com

Avoid Being Defamed On The Web. Have You Googled Your Name Lately?

The first and only company with a patented process to prevent frivolous malpractice lawsuits.

Medical Justice REPORT
www.medicaljustice.com

Avoid Being Defamed On The Web. Have You Googled Your Name Lately?

Physicians spend "time and treasure" in medical school and residency training for their highly difficult and specialized profession. As such, a physician's most valuable asset resulting from the years of training and experience is his or her reputation. Along with technical expertise and improved judgment, physicians spend years and resources continuing to develop their reputation and their business. In a field where referrals are often based on word of mouth, reputation is everything to a good physician, and many spend years cultivating impeccable credentials and positive public perception. The bad news is that all physicians now face a new and potentially career-destroying risk as unhappy patients can easily bad mouth their doctor to an international audience via the Internet. The good news is that Medical Justice® has a solution.

While this has been going on for a few years, the trend has recently mushroomed with a slew of healthcare specific Blogs and review sites such as RateMDs.com, Vitals.com, DoctorScorecard.com, and others. RateMDs, the most popular site, boasts ratings for more than 145,000 doctors, roughly one out of every five physicians in the nation. These ratings are based not on statistically valid surveys, but on anonymous claims from patients. There is little to no regulation. Many doctors are afraid that those most motivated to post their opinions are those who actually were treated within the standard of care but who had bad outcomes and/or completely unreasonable expectations. Some sites even encourage patients to "vent" and express their anger.

What Is Defamation?

Defamation law is complex. But, it can be deconstructed into two categories based on whether the material is written or spoken. Written defamation is called libel and spoken defamation is called slander. Because the written word is "more permanent" than the fleeting spoken word, libel is treated as a more serious tort.

To prove libel, one must show that the person made a false statement causing damage to reputation. Such damage can span the gamut from shame or ridicule to diminished employment status or loss of earnings. Opinions can never be defamatory and truth of the statement is a defense to a charge of defamation. Further, to make understanding the law even more difficult to digest, who the plaintiff is determines the destiny of a case. For example, public figures are treated differently than private figures. [1] The reason is that public figures use the media all the

time to build their reputations. They have access to the media and can use such access to defend themselves. Private figures do not have that luxury. For a public figure to prevail, he must prove the defamer showed "malice"; that is, knowing falsity or reckless disregard for the truth. In other words, the fact that the statement was false is not enough to recover for defamation. A private figure, on the other hand, merely needs to show ordinarily negligence.

Further, to prevail as a public figure, the plaintiff must demonstrate malice by clear and convincing evidence. That standard is higher than "preponderance of evidence," the standard that plaintiffs must use to prevail in more common tort cases, such as medical malpractice. Hence, the bar is set quite high.

What Is Not Libel?

Generally, exaggeration and opinion are not considered libel. As examples:

- A talk-radio host labeled a participant in a reality television competition as "chicken butt," "skank," and "local loser."[2]
- Engineers at Apple Computer internally code-named the project for Power Macintosh 7100 as "Carl Sagan"; the in-house joke being it would net Apple billions and billions. Sagan sued, but lost. Apple engineers complied with Sagan's demand, renaming the project "BHA" for Butt-Head Astronomer. [3]
- Parody of customer testimonials on a web site for a water conditioning business alleging the product did more than soften water; it would make the ugly beautiful, the intellectually-challenged bright, and the infirm normal. "I had an IQ of 25. My mother traded for some Hamilt[o]n Water and started serving it to me without my knowledge. Soon I learned to read and ... after 30 days of drinking Hamilt[o]n Water, I was designing components for the space shuttle."[4]

Can Internet Service Providers Be Held Accountable?

Websites are permitted to post potentially libelous content with no fear of reprisal since, according to the law, they are only a vehicle for user-generated content and are thus not legally responsible for its creation. US legal precedent from decisions on online message boards and even media file-sharing services (Napster, etc.) has placed responsibility for the content on the user, not the website. In one recent decision[5], a California court ruled that physicians cannot hold websites accountable even when they notify the site about the defamatory quality of the content and request they take it down.

In that case, the defendant had posted messages to newsgroups labeling the physicians as "quacks." In addition, one of the messages suggested the doctor stalked women. The court

held that the Communications Decency Act ("CDA") granted immunity to sites that distribute potentially defamatory information.

The court wrote:

> Defamation law is complex, requiring consideration of multiple factors. These include whether the statement at issue is true or false, factual or figurative, privileged or unprivileged, whether the matter is of public or private concern, and whether the plaintiff is a public or private figure. Any investigation of a potentially defamatory Internet posting is thus a daunting and expensive challenge. For that reason, we have observed that even when a defamation claim is "clearly non-meritorious," the threat of liability "ultimately chills the free exercise of expression."… The great variety of Internet publications, and the different levels of content control that may be exercised by service providers and users, do not undermine the conclusion that Congress intended to create a blanket immunity from tort liability for online republication of third party content. Requiring providers, users, and courts to account for the nuances of common law defamation, and all the various ways they might play out in the Internet environment, is a Herculean assignment that we are reluctant to impose.[6]

The court was simply unwilling to hold internet service providers accountable. The doctors would have to find their remedy with the person who wrote the defamatory material and posted it on the web. Interestingly, the statute (CDA) that provides immunity to the internet service providers was actually intended to address online obscenity, holding people criminally liable for transmission of such obscenity to persons known to be under the age of 18. The import of this case: this opens the floodgates as website providers are not required to police their site content. This encourages the content most likely to generate web traffic: the sensational and inflammatory.

Are Doctors Considered Public Figures?

The answer is maybe. As stated previously, the bar to winning a defamation case is set high if the plaintiff is a public figure. The list of obvious public figures includes movie stars, candidates for office, and people famous for being famous such as Anna Nicole Smith. The law also recognizes another category: a limited-purpose public figure. A limited-purpose public figure is one who (a) voluntarily participates in a discussion about a public controversy, and (b) has access to the media to get his or her own view across.

In Gilbert v. Sykes, the court concluded that a surgeon was a limited-purpose public figure. In reaching its conclusion, the court noted that the relative merits of a particular surgery was a matter of general interest and was a subject garnering national attention. In addition, the surgeon thrust himself into the national debate by appearing on television shows, writing numerous articles in medical journals and general publications, advertising his services in the local media, and testifying as an expert witness on the subject.[7]

Medical Justice REPORT
www.medicaljustice.com

Just over a year earlier, a California court reached the exact opposite conclusion determining that a podiatrist was not a limited-purpose public figure.[8] There, a newspaper had written an article about the podiatrist. In court, the newspaper unsuccessfully argued that plaintiff dubbed himself "a very high-profile doctor who sort of stands alone," and submits that "[a] man cannot engage in ceaseless self-promotion as the 'go-to guy' in his field without inviting some attention as to his experience and credentials and whether prospective clients or customers really should 'go to' him." In short, facts will dictate whether a court labels a doctor as a limited-purpose public figure. If the determination is yes, the likelihood of prevailing in a case of defamation drops significantly.

The Solution:

To minimize the uncertainty associated with after-the-fact solutions, it is best to set the stage upfront. Medical Justice has extensive experience with using contracts to prevent frivolous lawsuits alleging professional negligence. This same paradigm is used to prevent defamation on the Internet. Further, if a patient does defame a doctor, the physician can use the pre-existing contract to force a website to take the material down.

Such a contract gives something to both the doctor and the patient. For the patient, the physician agrees to extra privacy protections, above and beyond that mandated by HIPAA and state confidentiality laws. For the doctor, the patient agrees that before disclosing information about his or her treatment into the public domain, the patient will seek the doctor's authorization. Nothing in the agreement precludes the patient from having discussions about health or treatment with other physicians, family members, or friends. Medical Justice members can contact our office to receive this patient-friendly contract language template to use in their charts.

Summary:

Being defamed on the web by a disgruntled patient is now an occupational hazard. Fixing the problem by relying on defamation law is expensive, uncertain, and likely to linger for years before resolution. Medical Justice has developed a Patient-Physician Contract Language Template to be used to prevent such mischief, maximizing the likelihood of success should action be required.

1 N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
2 Seelig v. Infinity Broadcasting Corp, 97 Cal. App.4th (2002).
3 Sagan v. Apple Comput., Inc., 874 F.Supp. (C.D. Cal. 1994).
4 Hamilton v. Prewett, 860 N.E.2d 1234 (Ind. App. 2007).
5 Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).
6 Id. at 525.
7 Gilbert v. Sykes, 147 Cal. App.4th 13 (2007).
8 Carver v. Bonds, 135 Cal. App.4th 328 (2005).

Medical Justice REPORT

www.medicaljustice.com

About The Authors

Jeffrey Segal, MD, FACS, Board certified neurosurgeon; Founder / CEO of Medical Justice Services, Inc.

Michael J. Sacopulos, Esq. is a partner of Sacopulos, Johnson and Sacopulos. His areas of practice include representing physicians involved in medical malpractice litigation.

This publication is intended for general educational use only and should not be relied upon for specific legal or tax advice.