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LEGAL REMEDIES FOR ONLINE DEFAMATION OF PHYSICIANS⁺

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and Domingo J. Rivera, J.D.^{***}

INTRODUCTION

Physicians and other health care providers are often criticized on the Internet. Most physicians are unaware of these critiques lurking in cyberspace. The opinions may be rendered by those without special expertise. Physicians may be judged anonymously by present or former patients, and by others posing as patients—including disgruntled employees, competitors, or even ex-spouses. The list could include anyone who might hold a grudge for any reason. The cost to post critical comments is essentially nothing.

What does this criticism look like? RateMDs.com, for example, generates a smiley face to express approval of a health care provider and a frowny face to express disapproval. Comments are made about bedside manner, demeanor, personality, and appearance. What is noticeably lacking is objective statistical information relating to what matters the most: how well the provider stacks up in providing care and producing results. Once a demeaning message is posted, it achieves immortality and is easily found by anyone with limited skills. The damage is done.

Concern over the posting of libelous and unsubstantiated statements on the Internet is a growing matter worldwide. Posting of such content on the Internet presents a novel problem compared to libel in traditional print media. Given the massive number of Internet users, the global scope, and the effortless access to this medium, the audience, persistence of comments posted, and potential reputational damage are all greatly magnified.

⁺ Editor's Note: Publication of this article does not imply an endorsement of any company or product by the ACLM or JLM or its publisher.

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This is particularly problematic when the poster contributes content anonymously.

If John Doe is unscrupulous or merely reckless, however, he can use the power the Internet gives him to inflict serious harm on the corporation. He can pollute the information stream with defamatory falsehoods, which may in turn influence other investors to question the corporation's credibility or financial health. Moreover, once the defamatory information enters the information stream, it may have a greater impact than if it had appeared in print. Because the defamatory statements can be copied and posted in other Internet discussion fora, both the potential audience and the subsequent potential for harm are magnified. And, as the persistence of Internet hoaxes demonstrates, once a rumor takes hold in cyberspace, it may be almost impossible to root out. Thus, to view the rise of John Doe libel suits as merely an attempt by powerful corporations to intimidate their critics into silence is to substitute metaphor for analysis and to suppress the fact that the "speech" of ordinary John Does, both scrupulous and unscrupulous, has more power to affect corporate interests than ever before.¹

How can health care providers protect themselves? Most legal counsel and health care providers believe the proper response is an action based on defamation. However, as a civil action, defamation is a less-than-ideal tool to protect an individual's or business' reputation from attacks and aspersions premised upon false information. The very act of publicly prosecuting a defamation case in court brings more attention to an action that might have been noticed only by a scant few. In other words, the remedy may be worse than the problem.

Section I of this article discusses the deficiencies of modern defamation law. Specifically, it surveys how the law of privilege and other available defenses to a defamation claim make such claims inadequate to protect the rights of physicians who have been the subject of unfair postings by patients on online physician-rating Web sites. Section II explores a variety of reasons that current after-the-fact legal remedies are not satisfactory from the physician's perspective. Section III proposes and defends an alternative, contract-based approach in which patients, for consideration, prospectively agree not to post comments about their physicians on the Internet.

I. DEFAMATION LAW

A. Problems

The modern law of defamation is in need of substantial reform. A South Carolina Supreme Court justice observed:

¹ Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 884-85 (2000).

I am firmly convinced that the present status of our defamation jurisprudence is so convoluted, so hopelessly and irretrievably confused, that nothing short of a fresh start can bring any sanity, and predictability, to this very important area of the law.²

The Eleventh Circuit Court of Appeals has observed: “The law of defamation is by any test confusing and little has been done by the courts, trial or appellate, to fix understandable instructions.”³ The Illinois Supreme Court has stated: “The law of defamation has spawned a morass of case law in which consistency and harmony have long ago disappeared.”⁴

Some suggest that states should adopt uniform defamation codes, like the model codes implemented for commercial law and trust administration.⁵ It is argued that the confused and inconsistent interpretations of defamation law fail to provide an “adequate remedy for reputational harm” while simultaneously “allowing sufficient protection of speech.” Civil defamation actions fail to integrate case law interpreting constitutional free speech protections of the First and Fourteenth Amendments into an “archaic” body of state common-law decisions that arose from “medieval roots.”⁶

Even when harm to reputation because of false aspersions can be proved, defamation plaintiffs still are often unable to succeed because modern defamation law supplies a web of privileges, defenses, and practical hurdles that allow defamation defendants to escape liability. These hurdles are even higher when defamatory statements are made on the Internet.

B. Definitions

Defamation claims seek to rectify damage to reputation in the community attributable to false aspersions of a speaker or writer communicated to third parties. Defamation is an invasion of reputation and good name.⁷ The policy value favoring a defamation action is that all people have a right to maintain their good reputation in the community, unmarred by false accusations or assertions. As the Delaware Superior Court has held:

The law of defamation embodies the public policy that, generally, individuals must be protected so as to enjoy their good reputations unimpaired by defamatory statements. The general rule is that the publisher and republisher of defamatory matter are strictly accountable and liable in damages to the person defamed, and neither good faith nor honest mistake constitutes a defense, serving only to mitigate damages.⁸

² *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 514 (S.C. 1998) (Toal, J., concurring).

³ *Schafer v. Time, Inc.*, 142 F.3d 1361, 1368 n.4 (11th Cir. 1998) (quoting *Schafer v. Time, Inc.*, 1996 WL 720788, at *1 (N.D. Ga. June 5, 1996)).

⁴ *Mittelman v. Witous*, 552 N.E.2d 973, 978 (Ill. 1989).

⁵ Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 302 (1994).

⁶ *Id.* at 293.

⁷ *Badeaux v. Sw. Computer Bureau, Inc.*, 929 So. 2d 1211, 1218 (La. 2005).

⁸ *Kanaga v. Gannett Co.*, 687 A.2d 173, 181-82 (Del. 1996).

Libel and slander are the two forms of defamatory communication. Slander is a spoken defamation; libel is a written defamation or one accomplished by actions or conduct.⁹ In the present context, defamatory material posted to Internet Web sites constitutes libel.

In addition, there are two forms of defamation, depending on the subject matter of the statement(s). Defamation *per se* occurs when the speaker or publisher alleges: “(1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person’s trade, profession, office, or occupation; or (4) sexual misconduct.”¹⁰ Aspersions asserting or implying professional incompetence of physicians would constitute defamation *per se*.¹¹ At common law, defamatory words that prejudice a person in his or her profession or trade are actionable as defamation *per se*. Words falsely spoken are slanderous *per se* if they relate to a profession, occupation, or official station in which the plaintiff was employed.¹²

Other defamatory communications are deemed defamation *per quod*. Both types of defamation require proof of the same elements, but actions for defamation *per se* afford the advantage that the plaintiff may claim presumed damages as a natural and probable consequence of the defamation *per se*. By contrast, a *per quod* plaintiff must actually prove such damages.

C. Elements

To establish a defamation claim, most states require the plaintiff to prove several elements (usually four). A representative list of the elements of defamation is found in the common law of Nevada:

A defamation claim requires demonstrating: (1) a false and defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged publication of that statement to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.¹³

To present a *prima facie* case of defamation in Maryland, a plaintiff must establish the following: “(1) the defendant made a defamatory statement to a third person; (2) the statement was false; (3) the defendant was legally at fault in making the statement; and (4) the plaintiff thereby suffered harm.”¹⁴ In California, the tort of defamation “involves (a) a publication that is (b) false,

⁹ Erickson v. Jones St. Publishers, L.L.C., 629 S.E.2d 653, 664 (S.C. 2006).

¹⁰ Kelley v. Tanoos, 865 N.E.2d 593, 596-97 (Ind. 2007).

¹¹ Union of Needletrades v. Jones, 603 S.E.2d 920, 924 (Va. 2004).

¹² Saunders v. VanPelt, 497 A.2d 1121, 1124-25 (Me. 1985).

¹³ Pope v. Motel 6, 114 P.3d 277, 282 (Nev. 2005).

¹⁴ Offen v. Brenner, 935 A.2d 719, 723-24 (Md. App. 2007).

(c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or cause special damage.”¹⁵

Defamation requires that false and defamatory statements be made by a person or entity about the plaintiff. A “defamatory statement” is “a communication that tends to harm the reputation of another [so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹⁶

The defamatory statement must be communicated (or “published”) to at least one third party. “Defamatory language is ‘published’ when it is intentionally or negligently communicated to someone other than the party defamed.”¹⁷ Publication to even one other person is sufficient to maintain an action for libel. In the Internet context, it is well-settled that posting of written material to a Web site satisfies publication for defamation.¹⁸

The second element also requires showing that the communication does not fall under one of the traditional privileges extended to certain types of defamatory statements, protecting the speaker or writer from being held liable. Even if a plaintiff is able to prove all four of the elements of defamation, the publisher (or republisher) of a false and defamatory statement may be immunized from liability if he or she was privileged to make the statement.¹⁹

Privilege has been extended to defamatory statements for the purpose of advancing a public interest in, or protecting the constitutional right to, freedom of speech. The doctrine of privilege rests upon the idea that sometimes, to encourage the free communication of views in certain defined instances, one is justified in communicating defamatory information without incurring liability.²⁰

D. Privilege

There are two forms of privilege: absolute privilege and qualified (also called “conditional” or “common interest”) privilege. An absolute privilege differs from a qualified privilege in that it provides immunity regardless of the purpose or motive of the defendant or the reasonableness of the defendant’s conduct. Qualified privilege is conditioned upon the absence of malice (knowledge of the statement’s falsity) and is forfeited if it is abused.²¹

¹⁵ *Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2007); 5 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW: TORTS § 529 (10th ed. 2005).

¹⁶ *Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 763 (Conn. 2004); *see* *Bakal v. Weare*, 583 A.2d 1028, 1029 (Me. 1990).

¹⁷ *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 794 (Ky. 2004).

¹⁸ *Milum v. Banks*, 642 S.E.2d 892, 898 (Ga. 2007).

¹⁹ *Trainor v. Standard Times*, 924 A.2d 766, 770 (R.I. 2007).

²⁰ *Kennedy v. Sheriff of E. Baton Rouge*, 935 So. 2d 669, 681 (La. 2006); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

²¹ *See* *Kennedy v. Cannon*, 182 A.2d 54, 57 (Md. 1962).

Absolute privilege generally applies to statements made by judges and lawmakers in legislative or judicial proceedings. That privilege facilitates the effective performance of government. Absolute privilege is granted by constitution, legislative enactment, or case law to those who serve in a legislative, executive, or judicial capacity.²²

For qualified privilege, the speaker or writer must have a personal interest in the subject matter discussed, as well as a good faith unawareness of the falsity of the statements made. Qualified privilege generally extends to commentary or criticism on matters of public interest (including the character of public employees and candidates for public office), news reports, employer reviews of employees, and the like. When defamatory statements are made in good faith under either absolute or qualified privilege, such statements are not actionable by the defamed plaintiff.

Fault is the third element a defamation plaintiff must establish. Proof that the speaker or publisher either knowingly or negligently communicated the defamatory statement(s) to a third party establishes fault. This fault standard is termed "malice." It is important to note that malice, in this context, does not necessitate ill will toward the injured plaintiff, but only a reasonable awareness or belief that the asserted facts may not be true.

The level of fault or malice a plaintiff must prove varies depending on whether the plaintiff is a public or a private figure. A private figure plaintiff need only show negligence regarding the falsity of the facts asserted. If the plaintiff is a public figure, though, actual malice must be shown. "The level of fault required varies between negligence (for statements concerning private persons) and actual malice (for statements concerning public officials and public figures)."²³ The United States Supreme Court has held:

Actual malice is knowledge of falsity or reckless disregard of truth.²⁴ [Regarding a public figure plaintiff,] mere negligence is insufficient; the plaintiff must demonstrate that "the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of . . . probable falsity."²⁵

The final element of a defamation claim is actual damage to one's reputation. Although actual damage must be established to a plaintiff's reputation, the showing of harm or damage may be slight. It must be proved that the defamatory statement(s) have been communicated to others and that the statements have detrimentally affected relations with those others.²⁶ The law does not require proof of any actual out-of-pocket expenses.

²² *Turner v. Halliburton Co.*, 722 P.2d 1106, 1112 (Kan. 1986).

²³ *Ravnikar v. Bogojavlensky*, 782 N.E.2d 508, 511 (Mass. 2003).

²⁴ *Masson*, 501 U.S. at 510.

²⁵ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

²⁶ *Northport Health Servs., Inc. v. Owens*, 158 S.W.3d 164, 172 (Ark. 2004); *see also Draghetti v. Chmielewski*, 626 N.E.2d 862, 866 (Mass. 1994).

Damages are limited to actual damages, that is, compensation for the wrong that has been done. Actual injury includes not only out-of-pocket expenses, but also harm inflicted by impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.

Although the successful *per quod* defamation plaintiff is entitled to compensatory damages, these damages must be proven. Otherwise, the plaintiff stands to fail in satisfying the damage or injury element of the defamation claim.²⁷ In contrast, a person maligned by defamation *per se* (in which the defamation impacted the plaintiff as a professional, for example) may recover compensatory damages for injury to reputation, humiliation, and embarrassment without demonstrating any financial loss.²⁸

E. Other Defenses

In addition to the absolute and qualified privilege defenses discussed above, there are several other affirmative defenses to defamation claims. A defendant who successfully proves such defenses may escape liability.

Fundamentally, a defendant cannot be held liable if he or she can establish that the controverted statement is substantially true. Truth is a complete defense to defamation. Absolute truth is not necessary. Any claim for defamation is defeated by showing that the published statements are substantially true. A statement is “substantially” true when, taken as a whole in context, the gist of the statement is demonstrably correct.²⁹

Some jurisdictions recognize that, when allegedly defamatory statements were made with the consent of the injured party, no cause of action exists. A person who consents to the publication of comments about himself or herself has no cause of action for defamation.³⁰

Opinion is also a defense. When a physician, for example, files a civil libel suit against a patient for posting allegedly defamatory statements maligning the physician’s competence or professional demeanor on Internet physician-rating Web sites, the defense of “opinion” poses a tough threshold. Notwithstanding that it is often very difficult for courts to separate fact from opinion in a given statement, “expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation.”³¹

Statements of opinion, no matter how egregious, cannot support a claim of defamation. As the United States Supreme Court has observed: “Under the

²⁷ See *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756, 772 (N.J. Super. Ct. App. Div. 2001).

²⁸ *Tronfeld v. Nationwide Mut. Ins. Co.*, 636 S.E.2d 447, 450 (Va. 2006).

²⁹ *Russin v. Wesson*, 949 A.2d 1019, 1021 (Vt. 2008); *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 813-14 (Sup. Ct. 2005).

³⁰ *Farrington v. Bureau of Nat’l Affairs, Inc.*, 596 A.2d 58, 59 (D.C. 1991); see also *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988).

³¹ *Mann v. Abel*, 885 N.E.2d 884, 885-86 (N.Y. 2008).

First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend, for its correction, not on the conscience of judges and juries but on the competition of other ideas.”³²

In the defamation context, opinion is deemed to include: (A) subjective or relative statements made from the speaker’s perspective; (B) speech that is not readily provable to be either true or false; (C) communications that a reasonable person would not interpret to be taken as objective and true; and (D) statements prefaced by “language of apparency,” that is, signaling that language so qualified is the speaker or author’s opinion. Statements that are preceded by qualifiers, such as “In my opinion” or “I think” signal to the reader that what is being said is the opinion of the speaker and strongly militate in favor of determining the statement to be opinion.³³

The New York Court of Appeals has offered the following list of factors to be considered in determining whether particular statements are assertions of opinion or fact:

- (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.³⁴

In weighing these factors, the court viewed the statements from the standpoint of a reasonable reader and did not consider the subjective intent of the author.

However, in circumstances where an opinion is expressed that necessarily implies the existence of defamatory facts not explicitly stated, the opinion statement may still be actionable. Courts make this determination on a facts-driven, case-by-case basis. Factual statements made to support or justify an opinion can form the basis of an action for defamation.³⁵

A particular assertion is deemed verifiable if “the author represents that he has knowledge or evidence that substantiates the statements, and there is a plausible method to verify the statements.”³⁶ The context of the disputed statement, as well as the identity of the source, are crucial factors in the analysis. For example, a court expressly held that derisive language warning

³² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

³³ *Fuchs v. Scripps Howard Broad. Co.*, 868 N.E.2d 1024, 1037 (Ohio App. 2006); *Raytheon Technical Serv. Co. v. Hyland*, 641 S.E.2d 84 (Va. 2007); *SPX Corp. v. Doe*, 253 F. Supp. 2d 974 (N.D. Ohio 2003); *Hammer v. Amazon.com*, 392 F. Supp. 2d 423 (E.D.N.Y. 2005).

³⁴ *Brian v. Richardson*, 660 N.E.2d 1126, 1129 (N.Y. 1995); *see also SPX Corp.*, 253 F. Supp. 2d at 980.

³⁵ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002).

³⁶ *SPX Corp.*, 253 F. Supp. 2d at 980-81.

a corporation's stockholders to "get ready for" an "FBI and SEC probe," and advising them to sell their stock, while unfounded, constituted opinion—and not statements of fact—when such remarks were posted by an anonymous message-board user calling himself "neutronb." The postings undermined the user's credibility as a reliable source of information and

were posted on an Internet message board . . . accessible to anyone of the tens of millions of people in this country (and more abroad) . . . no one exerts control over the content . . . [and] [p]seudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as "facts" when placed on such an open and uncontrolled forum.³⁷

In the quoted case, the plaintiff's claim was dismissed because the derisive comments and allegations appeared in an Internet message board, which the average reader would not assume to be truthful. On a related note, it is well-settled that subjective reviews constituting the writer's interpretation are not objectively verifiable. Therefore, they cannot support a defamation claim. Statements contained in book reviews are expressions of pure opinion and are therefore protected. The average person understands that such reviews are the reviewer's interpretation and not "objectively verifiable false statements of facts."³⁸

Similar to the treatment of a speaker's or publisher's opinions as privileged and nondefamatory, good faith use of rhetorical hyperbole also is nonactionable. Hyperbole has been described as "loose, figurative language that no reasonable person would believe presented facts."³⁹ "Exaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime."⁴⁰ Mere use by a speaker of general epithets, without alleging specific facts that an actual crime was committed, do not rise to the level of actionable defamation. Actionable statements include false statements of fact (those that state actual facts but are objectively provable as false) and direct accusations or implications of criminal conduct.⁴¹

The policy interest protected by this hyperbole protection is that of colorful free speech.

The First Amendment protects "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Courts have extended First Amendment protection to such statements in recognition of "the reality that exaggeration and non-literal commentary have become an integral part of social discourse." By protecting

³⁷ *Id.*

³⁸ *Hammer v. Trendl*, No. CV 02-2462(ADS), 2003 WL 21466686, at *3 (E.D.N.Y. 2003).

³⁹ *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002).

⁴⁰ *Hodgins v. Times Herald Co.*, 425 N.W.2d 522, 527 (Mich. 1988).

⁴¹ *Kevorkian v. Am. Med. Ass'n*, 602 N.W.2d 233, 237 (Mich. 1999).

speakers whose statements cannot reasonably be interpreted as allegations of fact, courts “provide assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.”⁴²

F. Opinion Defense

Applying the law of privileged opinion and hyperbole to defamatory statements made by patients toward their physicians, it is clear that some false allegations do not constitute protected opinion (such as claims that the physician billed both the patient and the insurer, as this fact is readily verifiable). Other allegations, however, cannot support a defamation claim (such as where a patient reveals his or her subjective assessment of the physician’s priorities, values, or demeanor, or when the patient relates an emotional reaction to treatment received).

Applying the opinion and hyperbole factors, an Ohio court held that a patient’s statement that a dentist’s office “billed my insurance company for the same thing they billed me for” was not privileged opinion, as this was a fact based upon firsthand knowledge, was readily verifiable, and a reasonable viewer would assume this statement was true.⁴³ Conversely, the same Ohio court simultaneously held other statements made by the patient alleging that the dentist’s office “doesn’t care about the customer or the patient,” and that “they care about their money” were protected opinion. This was because the statements were intended to elicit an emotional response from the reader, the characterizations were subjective and thus not readily verifiable, and a reasonable viewer would only have believed that these descriptions reflected a disgruntled patient’s opinion about the treatment received.⁴⁴

A surgeon sued the ABC television network over a hidden camera investigation into his surgical record that had been broadcast on the television program *20/20*. The physician argued that statements made during the program by a former patient concerning her subjective assessment of her pain and fear were verifiably unsupported, as medically she was never at risk of dying and her condition was typical of other similarly situated patients. However, the court ruled the statements were protected opinion.

Dr. Fowler argues that [his former patient]’s statements that she was “in such pain, I was just screaming. And my friends were concerned that I was not going to survive it” were false because [the patient] was not suffering more than other liposuction patients, she was not at risk of dying, and her friends were not concerned for her survival. Yet Dr. Fowler’s evidence does not demonstrate the falsity of the statements.

⁴² *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005) (citations omitted).

⁴³ *Fuchs v. Scripps Howard Broad. Co.*, 868 N.E.2d 1024, 1037 (Ohio 2006).

⁴⁴ *Id.*

First, [the patient]'s statement that she was "in such pain, I was just screaming. And my friends were concerned that I was not going to survive it" is a statement made by [the patient] *concerning her own condition*. Dr. Fowler does not provide any evidence that her statements are not true. Moreover, Defendants have submitted affidavits from two of [her] friends who attest to the fact that [she] was moaning and screaming in pain and that they were concerned she was not going to survive the infection.⁴⁵

An example of a situation in which patient opinion necessarily implies unexpressed facts, which can transform stated opinions into actionable defamation, is found in *Kanaga v. Gannett Co.*⁴⁶ In *Kanaga*, a patient presented to an obstetrician-gynecologist with severe menstrual bleeding. The physician found the woman had a uterine fibroid tumor blocking her cervix. Because of the position of the tumor, the physician was unable to determine the size of the tumor's pedicle. For that reason, myomectomy, a less invasive procedure, was ruled out in favor of hysterectomy. The physician also suggested that the patient obtain a second opinion.

Before seeking a second opinion, the patient's bleeding worsened and she went to the emergency room. The emergency department physician found the tumor had changed position, allowing observation of the pedicle, so he removed the tumor with the less invasive procedure—the myomectomy. Upon hearing that hysterectomy was no longer needed, the patient concluded that her original gynecologist had recommended an unnecessary procedure. She contacted the media to warn other women about physicians, such as hers, who recommend unneeded procedures to obtain higher fees. She also filed a complaint with the local medical society, which exonerated the obstetrician.

In a news article relating the patient's story, the patient was quoted as saying: "I can only conclude that [my doctor] . . . chose the treatment plan that was most profitable for her with no concern for me."⁴⁷ In a defamation action filed by the obstetrician, the physician claimed that this statement about her allegedly recommending an unnecessary treatment for pecuniary gain injured her reputation in the community. The patient, however, claimed her words constituted mere opinion. The court held that, even though the statements of the disgruntled patient were opinions, they necessarily implied facts that were defamatory in nature and thus were actionable.

Here, the ordinary reader could infer the existence of undisclosed facts which are capable of being proved true or false. Those facts include, for example, that (a) Dr. Kanaga knew or believed that the recommended hysterectomy was not necessary; (b) this conclusion is supported by the fact that [the emergency physician] was

⁴⁵ Fowler v. Capital Cities/ABC, Inc., 2002 WL 31230802, at *6 (N.D. Tex. 2002) (unreported).

⁴⁶ Kanaga v. Gannett Co., 687 A.2d 173, 176 (Del. Super. 1996).

⁴⁷ *Id.* at 176.

able to remove the tumor easily under emergency conditions; (c) [The emergency physician] was “incredulous” (which apparently is denied by him) at the suggestion that a hysterectomy had been recommended by Dr. Kanaga; and (d) Dr. Kanaga’s motive was the personal gain she would receive, without concern for the patient, by recommending the more expensive hysterectomy rather than the myomectomy.⁴⁸

The court remanded the case to the trial court to rule on whether these statements were defamatory.⁴⁹

II. ISSUES FOR PHYSICIANS ON THE WORLD WIDE WEB

A. Fact or Opinion

Patient characterizations of their physicians on physician-rating Web sites are often nonactionable for defamation because they express subjective reactions and non-literal exaggerations. The following statements, not alleging any specific verifiable facts or accusing the physicians of a specific crime, are probably nonactionable in civil libel suits under the opinion and hyperbole privileges:

- “I felt like I’d been raped when she finished with me.”
- “He is the worst Plastic Surgeon other than the New York butcher.”
- “This guy is a criminal.”
- “He is an outrageous, arrogant, horrible person who should be in jail.”
- “Dr. XXX is the ABSOLUTE WORST doctor there is.”
- “He probably got his degree from some foreign country. Stay away from [this] medical prostitute.”
- “He’s a rotten doctor and a liar and thief.”
- “The guy is definitely a money-grubbing scoundrel.”
- “A butcher indeed. Cuts things out, anything, sends them to his own lab, then tells you it was pre-cancer. Even my Family Doc said stay away. . . . He is in my opinion a greedy SOB treating each patient as a cash crop of opportunity spots, etc. . . . Rude too.”

Although many of the negative comments on physician-rating Web sites are subjective and general, not directly accusing the rated physician of specific malfeasance or criminal conduct, some comments cross the line and are sufficiently detailed to reasonably support a defamation action. For instance, the accusation “I went for a urinary tract infection. [The physician] took a urine specimen but did not send it out for a culture. That’s total incompetence

⁴⁸ *Id.*

⁴⁹ *Id.* at 181.

and a basis for malpractice” presents sufficient facts that are capable of being verified. The characterization of the physician’s omission as malpractice would amount to actionable defamation if either the specimen actually was sent to the laboratory by the physician or such an omission does not constitute medical malpractice under the relevant state law and accepted medical standards.

B. Private Versus Public Figure

In defamation suits, a plaintiff may be considered a public figure, so as to require a showing of actual malice (in other words, the defendant’s actual or imputed knowledge of falsity), rather than the normal fault standard of negligence, if (A) the individual achieves such pervasive fame or notoriety that he or she becomes a public figure for all purposes (such as a physician who regularly appears on television), or (B) he or she voluntarily injects himself or herself into, or is drawn into the “vortex” of a particular public controversy, thereby becoming a public figure for limited purposes. Public figures generally “enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”⁵⁰

Because private figures lack the same access to public arenas for rebuttal, they are more vulnerable to injury. The state, therefore, imposes on them a lower burden of proof regarding the defendant’s knowledge of the falsity of allegedly defamatory statements. The major policy concern addressed by this public/private figure fault distinction is that, to balance the rights of individuals to speak freely with the rights of defamed persons to protect their reputations, speech is protected to the greatest extent practicable.

[Reviewing courts] accord significance to the public or private status of an individual plaintiff in an effort to strike a balance between First Amendment freedoms and state defamation laws. “Under the taxonomy developed by the United States Supreme Court, private plaintiffs can succeed in defamation actions on a state-set standard of proof (typically, negligence), whereas the [federal] Constitution imposes a higher hurdle for public figures and requires them to prove actual malice.” This distinction flows, in part, from a recognition that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, given their assumption of “an influential role in ordering society.”⁵¹

Nationally, there is a split of authority on whether physicians are regarded as limited-purpose public figures for defamation purposes. The clear majority position is that physicians are not limited-purpose public figures unless they voluntarily inject themselves into a public debate regarding a specific medical

⁵⁰ *Gertz*, 418 U.S. at 344.

⁵¹ *Lassonde v. Stanton*, 956 A.2d 332, 339 (N.H. 2008).

issue or seek to develop and advance a new treatment option. For purposes of a libel suit, a physician ordinarily is not considered a public figure.

Physicians who hold themselves out to be “*pioneers*” or “*champions*” of new techniques and who affirmatively step outside of their private realms of practice to attract public attention by holding press conferences may, however, be public figures. They may also be public figures if they actively or vigorously place themselves in public controversies concerning public health issues by writing, lecturing, and acting as experts in litigation and hearings.⁵²

Engaging in publicly directed activities such as lobbying, lecturing, writing, testifying in judicial and administrative proceedings, and holding press conferences transform the normally private physician into a limited purpose public figure. Physicians also have been deemed limited purpose public figures in other contexts when they: direct the provision of medical services for a government facility;⁵³ work for a government-run medical facility;⁵⁴ or seek appointment to a state medical board.⁵⁵ In California, a facial plastic surgeon’s interaction with the media was enough to deem him a “limited purpose public figure.” His interactions with the media consisted of maintaining a Web site, appearing publicly on television, and writing articles about specific medical procedures.⁵⁶

Some states, however, follow the minority position that physicians may be considered limited-purpose public figures regardless of their voluntary or involuntary participation in public debate. The rationale is that the provision of medical care is vital to the public interest.⁵⁷

C. Internet Service Provider Immunity

The rise of the World Wide Web over the past two decades has further complicated the already convoluted law of defamation. The ease with which Internet users can publish content to the Web, or repost content created by others, has raised a host of concerns for both defamation plaintiffs and defendants. The most current figures regarding Internet usage highlight the problem. According to software engineers for the most popular Internet

⁵² Sparagon v. Native Am. Publishers, Inc., 542 N.W.2d 125, 135 (S.D. 1996); Bongiovi v. Sullivan, 138 P.3d 433, 445-46 (Nev. 2006).

⁵³ Green v. N. Publishing Co., Inc., 655 P.2d 736, 741 (Ala. 1982).

⁵⁴ Ferguson v. Watkins, 448 So. 2d 271, 277 (Miss. 1984).

⁵⁵ Moffatt v. Brown, 751 P.2d 939, 941 (Ala. 1988).

⁵⁶ Gilbert v. Sykes, 53 Cal. Rptr. 3d 752, 762 (Cal. 2007).

⁵⁷ See, e.g., Martinez v. Soignier, 570 So. 2d 23, 28 (La. App. 1990) (“[I]t cannot be denied that Dr. Martinez sought public patronage and that his venture into breast augmentation was a matter of public interest.”); Farnsworth v. Tribune Co., 253 N.E.2d 408, 411 (Ill. 1969) (“The fact that plaintiff’s personal contacts were presumably with only a small portion of the public does not militate against immunity where the publications concern a matter of such vital importance as the qualifications and practices of one who represents herself as qualified to treat human ills.”).

search engine, as of July 25, 2008, Google.com had indexed over one trillion unique Uniform Resource Locators (URLs—basically the address of a Web site).⁵⁸ Another Web site recently estimated that over 1.4 billion people use the Internet. This represents more than 21% of the global population, estimated to be 6.7 billion persons in mid-year 2008.⁵⁹

The Internet is hailed as a boundless democratic forum where ordinary citizens of any means may express their ideas to a wider audience than through traditional print media and participate in a global marketplace of ideas. “Through the use of chat rooms, any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders and newsgroups, the same individual can become a pamphleteer.”⁶⁰ This easy and widespread access also has the potential to carry harmful speech far and wide. “In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored.”⁶¹

Given the massive scope of the Internet, its uniqueness in contrast to traditional print media (which is substantially more limited in geographic and temporal scope), and the great ease with which users may add their own content:

[T]he publication of defamatory and private information on the web has the potential to be vastly more offensive and harmful than it might otherwise be in a more circumscribed publication. Accordingly, in search of cogent principles, we compare the Internet to other media with great care.⁶²

Criticism on the Internet is often so recklessly communicated that the harm to its targets, particularly in the financial arena, may extend far beyond what is covered by rules applicable to oral rhetoric and pamphleteering. When defamatory content is posted on the Web, its presence can have a much more deleterious and persistent impact than if the same statements had appeared in a newspaper. This is because Internet is ever-present and infinitely searchable, delivers content instantaneously, and other users may copy and distribute the comments into other forums.

If [the anonymous Internet user] is unscrupulous or merely reckless . . . he can use the power the Internet gives him to inflict serious harm He can pollute the

⁵⁸ *We Knew the Web Was Big*, available at <http://googleblog.blogspot.com/2008/07/we-knew-web-was-big.html> (last visited Feb. 22, 2009).

⁵⁹ *1,463 Million Internet Users!*, available at <http://www.internetworldstats.com/blog.htm> (last visited Feb. 22, 2009).

⁶⁰ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

⁶¹ *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Mar. 2, 2001).

⁶² *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1129 (9th Cir. 2006).

information stream with defamatory falsehoods Moreover, once the defamatory information enters the information stream, it may have a greater impact than if it had appeared in print. Because the defamatory statements can be copied and posted in other Internet discussion fora, both the potential audience and the subsequent potential for harm are magnified. And, as the persistence of Internet hoaxes demonstrates, once a rumor takes hold in cyberspace, it may be almost impossible to root out.⁶³

The earliest cases addressing defamation claims based on Internet content applied the traditional legal doctrine developed for any other media. The most famous of the nascent Internet defamation cases was *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁶⁴

In *Stratton*, an anonymous Internet user posted defamatory content to a public message board administered by the Internet service provider Prodigy, accusing Stratton Oakmont, Inc. (a securities investment banking firm) of committing criminal and fraudulent acts related to its initial public offering of a certain stock. Stratton sued Prodigy as a publisher of this defamatory content. Following traditional defamation law, not only were the originators of the injurious content liable, but so were other publishers who maintained any editorial control of the defamatory statements. The *Stratton* court held in favor of the plaintiff, finding that Prodigy was a publisher of the defaming statements in that it actively chose the content that appeared in the message board and used automated filters to screen out objectionable language.

The following year (1996), Congress expressly abrogated the holding in *Stratton* and all like cases, citing two primary policy interests. First, Congress was concerned that if Web site operators were potentially liable for their negligent efforts to police the objectionable content posted by their multitudinous users, “then website operators and Internet service providers are likely to abandon efforts to eliminate such material from their site,” thereby vastly diminishing the store of information available online.⁶⁵ Second, Congress wished “to encourage [Internet] service providers to self-regulate the dissemination of offensive material over their services.”⁶⁶ Given the massive scale of content posted onto Web sites operated by service providers, a direct correlation was drawn between operators of Internet Web sites and passive communication channels that traditionally were not liable for the defamatory content flowing through their systems.⁶⁷ According to one court:

Prodigy’s role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers’ conversations.

⁶³ Lidsky, *supra* note 1, at 884-85.

⁶⁴ 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995) (superceded by statute).

⁶⁵ *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003).

⁶⁶ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

⁶⁷ *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

In this respect, an ISP, like a telephone company, is merely a conduit. Thus, we conclude that under the decisional law of this State, Prodigy was not a publisher of the e-mail transmitted through its system by a third party.⁶⁸

As the Fourth Circuit observed when discussing this topic in 1997 (during the infancy of the Web, when the Internet boasted only around 70 million users, approximately 5% of the users online today):

Interactive computer services have millions of users The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability [such as defamation] in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.⁶⁹

Because of these concerns, Congress enacted the Communications Decency Act of 1996 (CDA).⁷⁰ Sections 230(c)(1) and 230(e)(3) provide, respectively: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

In section 230(f)(2), the CDA defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” Section 230(c) thus immunizes Web site operators from defamation and other, non-intellectual-property, state law claims based upon content contributed by third-party users. This blanket immunity not only shields Web site operators and Internet service providers from defamation liability for third-party content, but also extends this immunity to other Internet users who may copy and redistribute third-party defamatory content.

Web site operators and users may no longer be held liable for exercising editorial control in deciding what third-party content to post or in editing the form or style of the contribution. Defamation liability attaches to non-originator Internet service providers and users only if they actively add defamatory content themselves. Lawsuits seeking to hold a service provider

⁶⁸ *Id.*

⁶⁹ *Zeran*, 129 F.3d at 331.

⁷⁰ 47 U.S.C. §§ 230, 560, 561 (1998).

liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred by the CDA.⁷¹

Despite the Congressional policy goal of encouraging Web site operators and Internet service providers to self-regulate the appearance of defamatory content posted by their third-party users, the CDA imposes no affirmative duty upon Internet service providers or Web site operators to remove defamatory content upon notice by a complaining party. Nor is the blanket immunity supplied under the CDA diminished even if an Internet service provider promises to take down defamatory content and then fails to follow through. As held in *Barrett v. Rosenthal*: “The immunity conferred by section CDA 230 applies even when self-regulation is unsuccessful, or completely unattempted.”⁷²

Congress could have made a different policy choice, but it opted (under the CDA) not to hold interactive computer services liable for their failure to edit, withhold, or restrict access to offensive material disseminated through their medium.⁷³

[An ISP] can[not] . . . be held liable for failing to keep any alleged promise to remove [defamatory content] from its directory. Deciding whether or not to remove content or deciding when to remove content falls squarely within [an ISP]'s exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity.⁷⁴

A Web site operator editing user-created content—such as by correcting spelling, removing obscenity, or trimming for length—does not forfeit immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a Web site operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user's message reading “([Name] did not steal the artwork”) in a manner that transforms an innocent message into a libelous one—is directly involved in the alleged illegality and thus is not immune.

Therefore, under the CDA, assuming they do not actively supply original defamatory content, neither Web site operators, ISPs, nor Internet users posting third-party-created content may be held liable for defamatory content created by third-party users.⁷⁵ This sweeping immunity supplied by the CDA, insulating from liability all ISPs and Internet users posting defamatory content so long as the content was not created by them, was recently described by the California Supreme Court as “disturbing.”

⁷¹ *Zeran*, 129 F.3d at 331.

⁷² *Barrett v. Rosenthal*, 146 P.3d 510, 523 (Cal. 2006).

⁷³ *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

⁷⁴ *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007) (citations omitted); *see also* Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C., 521 F.3d 1157, 1169 (9th Cir. 2008).

⁷⁵ *Novak v. Overture Servs.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004).

We share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity. The prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications. Nevertheless, by its terms section 230 exempts Internet intermediaries from defamation liability for republication. The statutory immunity serves to protect online freedom of expression and to encourage self-regulation, as Congress intended. Section 230 has been interpreted literally.⁷⁶

In hosting multiple users simultaneously and posting their consumer critiques of physicians, interactive consumer comment Web sites arguably fall squarely within the definition of an ISP under the CDA.⁷⁷ As a result, such Web sites would appear to enjoy the CDA blanket immunity from suit based on third-party user-supplied content. In fact, at least one company acknowledges this immunity from suit on its Web site.⁷⁸

There is little case law addressing the issue. Nonetheless, one federal court acknowledged that, although consumer comment Web sites are generally immune from suit for defamatory content contributed by third-party users pursuant to the CDA, when such Web sites pay for consumer content they may be liable as "originators" of the defamatory content.⁷⁹

In 2008, the Ninth Circuit rendered a decision that may be a step in the right direction.⁸⁰ At issue was Roommates.com's online questionnaires that new members filled out when signing up for the service. Members were required to provide a variety of information, including age, gender and sexual orientation, and whether they live with or without children. Users were also allowed to provide additional comments. Some of the content provided by the users was claimed to violate the Fair Housing Act.⁸¹

Roommates.com argued that it was immune from liability for violations of the Fair Housing Act by members by virtue of the CDA. Roommates.com claimed that the Web site was merely an interactive computer service allowing access to information provided by third-party information content providers, and therefore section 230 immunity applied. The court disagreed, stating:

Roommates . . . channels the information based on members' answers to various questions, as well as the answers of other members. Thus, Roommates allows members to search only the profiles of members with compatible preferences While Roommates provides a useful service, its search mechanism and email notification mean that it is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals. By categorizing, channeling and

⁷⁶ *Barrett*, 146 P.3d at 529.

⁷⁷ 47 U.S.C. § 230(f)(2).

⁷⁸ RateMds.com, *available at* <http://www.RateMds.com/social> (last visited Feb. 24, 2009).

⁷⁹ *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142 (D. Ariz. 2005).

⁸⁰ *Fair Housing Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1175 (9th Cir. 2008).

⁸¹ 42 U.S.C. § 3601 (2008).

limiting the distribution of users' profiles, Roommates provides an additional layer of information that it is "responsible" at least "in part" for creating or developing.⁸²

Probably the most interesting part of this decision was the holding that the CDA may not immunize those who operate gripe sites, which collect and publish the complaints of others, from potential liability arising from the statements. The court explained that immunity may not apply to a situation where defamatory private, or otherwise tortious or unlawful, information is provided by users in direct response to questions and prompts from the operator of the Web site. The court described a hypothetical Web site, www.harrassthem.com with the slogan "Don't Get Mad, Get Even," and explained that, by providing a forum designed to publish defamatory information and suggesting the type of information to be disclosed to best harass targets, this Web site operator might be held responsible for the content.

In the court's words:

We are not convinced that *Carafano* would control in a situation where defamatory private or otherwise tortuous or unlawful information was provided by users in direct response to questions and prompts from the operator of the website.

Imagine, for example, www.harrassthem.com with the slogan "Don't Get Mad, Get Even." A visitor to this website would be encouraged to provide private, sensitive and/or defamatory information about others—all to be posted online for a fee. To post the information, the individual would be invited to answer questions about the target's name, addresses, phone numbers, social security number, credit cards, bank accounts, mothers' maiden name, sexual orientation, drinking habits and the like. In addition, the website would encourage the poster to provide dirt on the victim, with instructions that the information need not be confirmed, but could be based on rumor, conjecture or fabrication.

It is not clear to us that the operator of this hypothetical website would be protected by the logic of *Carafano*. The date match website in *Carafano* had no involvement in the creation and development of the defamatory and private information; the hypothetical operator of [harrassthem.com](http://www.harrassthem.com) would. By providing a forum designed to publish sensitive and defamatory information, and suggesting the type of information that might be disclosed to best harass and endanger the targets, this website operator might well be held responsible for creating and developing the tortuous information. *Carafano* did not consider whether the CDA protected such websites, and we do not read the opinion as granting CDA immunity to those who actively encourage, solicit and profit from the tortuous and unlawful communications of others.⁸³

Despite the encouraging language contained in this decision, the fact remains that in the majority of circumstances, courts will continue to hold service providers immune from liability under the CDA. Until the CDA is

⁸² *Roommates.com*, 521 F.3d at 1166. However, the court found that, with respect to the "additional comments" feature, CDA immunity applied.

⁸³ *Id.* at 1166-67 (citing *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002)).

repealed or at least amended, the Internet will be full of defamatory content, many times with no possible legal recourse.

Perhaps Congress could look close to home for a smart, practical way to amend the CDA. There is no reason for not adopting the takedown procedures mandated by the Digital Millennium Copyright Act (DMCA).⁸⁴

Under the DMCA, if a copyright owner discovers that contents are posted online in violation of the copyright owner's rights, the copyright owner has the opportunity to either have the allegedly infringing Web site removed from a service provider's network or have access to an allegedly infringing Web site disabled. To accomplish this, the copyright owner must provide notice to the service provider. Once proper notice is given, the service provider is required to expeditiously remove, or disable access to, the material. The safe harbor provisions do not require the service provider to notify the individual responsible for the allegedly infringing material before it has been removed, but they do require notification after the material is removed.

Upon receiving notice that the allegedly infringing material has been removed, the person responsible for posting the contents has an opportunity to send a counter-notice to the service provider stating that the material has been wrongly removed. If a subscriber provides a proper counter-notice, the service provider must then promptly notify the copyright owner. If, after receiving the counter-notice, the copyright owner does not bring a lawsuit in federal court within 14 days, the service provider is required to restore the material. Additionally under the DMCA, if it is determined that the copyright owner misrepresented the claim, the owner becomes liable to the individual who posted the contents for any damages that resulted from the improper removal of the material.

A similar approach can be utilized for defamation claims. Under this approach, a person discovering defamatory contents would be able to send a sworn notification to the service provider. Upon receipt, the service provider would remove the contents or disable access to the contents. At that time, the person posting the contents may serve a counter-notice. If after a period of time the defamation victim has not filed a lawsuit, then the contents could be restored. This approach would allow for free truthful expression on the Internet, while at the same time fairly providing a method that allows those defamed to protect their reputations online.

D. Screen Names and the First Amendment

The majority of Internet users conduct their online activities using anonymous screen names, or pseudonyms. This is characterized both as a major asset, encouraging robust debate unfettered by preconceived notions of class,

⁸⁴ Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

race, gender, or nationality, and simultaneously as troubling in contexts where individuals or entities seek to redress tortuous injuries caused by anonymous Internet users.

On the one hand, the ability of individual users to log onto the Internet anonymously, undeterred by traditional social and legal restraints, tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society. On the other hand, the ability of members of the public to link an individual's online identity to his or her physical self is essential to preventing the Internet's exchange of ideas from causing harm in the real world.⁸⁵

In weighing the relative weight of these opposing interests, the sweeping immunity afforded ISPs and Internet users supplied under the CDA errs on the side of encouraging robust communication.

Judicial holdings on this subject are clear. "Speech on the Internet is . . . accorded [constitutional] First Amendment protection."⁸⁶ "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas [;] . . . the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded."⁸⁷ This protection also extends to anonymous speech online.⁸⁸ The policy choice to protect the anonymity of Internet users as an element of free speech comports with a long tradition in American society of encouraging anonymous debate as a tool for social change.

Inherent in the panoply of protections afforded by the First Amendment is the right to speak anonymously in diverse contexts. This right arises from a long tradition of American advocates speaking anonymously through pseudonyms, such as James Madison, Alexander Hamilton, and John Jay, who authored the Federalist Papers but signed them only as "Publius."⁸⁹

The right to communicate anonymously is certainly an important interest, but it is limited. Speakers who engage in tortuous speech cannot hide behind constitutional protections to escape liability.⁹⁰ Judicial decisions have been consistent in this respect. Anonymous postings are protected, but the law requires a remedy for those who are deliberately wronged or have an agreement violated through the Internet.

⁸⁵ *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001).

⁸⁶ *Krinsky*, 72 Cal. Rptr. 3d at 239.

⁸⁷ *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092-97 (W.D. Wash. 2001).

⁸⁸ *Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008).

⁸⁹ *In re Subpoena Duces Tecum to Am. Online, Inc.*, No. 40570, 2000 WL 1210372, at *6 (Va. Cir. Ct. Jan. 31, 2000).

⁹⁰ *Immunomedics, Inc. v. Doe*, 775 A.2d 773, 777-78 (N.J. 2001).

Although anonymous speech on the Internet is protected, there must be an avenue for redress for those who are wronged. Individuals choosing to harm another or violate an agreement through speech on the Internet cannot hope to shield their identity and avoid punishment through invocation of the First Amendment. While Courts also recognized that anonymity is a particularly common component of Internet speech . . . the right to speak anonymously, on the Internet or otherwise, is not absolute and does not protect speech that otherwise would be unprotected.⁹¹

“Those who suffer damages as a result of tortuous or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.”⁹² Therefore, when a party has been defamed by Internet content created by an individual utilizing an anonymous screen name, the plaintiff should request that the court issue an order to comply with a *subpoena duces tecum* to the ISP or Web site operator hosting the offending material, ordering the Web host to appear and produce documentation supplying the identity and contact information for the anonymous user defendant. Once alerted by the ISP or Web site operator of the subpoena demanding the release of the anonymous speaker’s identity, the anonymous user may challenge the propriety of the subpoena through a motion to quash it.

In deciding whether to issue an order to comply with a *subpoena duces tecum*, the court must weigh the right of the defendant-speaker to engage in anonymous speech versus the right of the defamation plaintiff to redress the injury allegedly caused by the defendant’s tortuous conduct.

Ultimately, this Court’s ruling on the Motion To Quash must be governed by a determination of whether the issuance of the subpoena duces tecum and the potential loss of the anonymity of the John Does, would constitute an unreasonable intrusion on their First Amendment rights. In broader terms, the issue can be framed as whether a state’s interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on this ever-expanding medium.⁹³

A handful of cases have sought to establish standards for courts to determine whether compelled release of an anonymous Internet user’s identity through a *subpoena duces tecum* is warranted. One of these authorities is *Dendrite International, Inc. v. Doe No. 3*.⁹⁴ The standard advanced in *Dendrite* is that a court should compel an ISP served with a *subpoena duces tecum* to comply when: the defamation plaintiff has first undertaken efforts to notify

⁹¹ *Doe I*, 561 F. Supp. 2d at 253.

⁹² *In re Subpoena Duces Tecum*, 2000 WL 1210372, at *6.

⁹³ *Id.* at *5.

⁹⁴ 775 A.2d 756, 760-61 (N.J. 2001).

the anonymous defendant that he or she is subject to the subpoena, including posting the notice on the message board where the defamatory material was posted so that the defendant has the opportunity to file an opposition to the subpoena; the defamation plaintiff has supplied the court with each of the allegedly defamatory statements made by the defendant; the defamation plaintiff has established a *prima facie* defamation case against the defendant sufficient to survive a motion to dismiss; and the court determines, in weighing the relative rights of the plaintiff to redress tortuous speech against the defendant's right to engage in anonymous speech, that the balance swings in favor of the plaintiff.

By comparison, another opinion offers a slightly different list of elements to be considered by courts assessing the propriety of a plaintiff's *subpoena duces tecum* seeking ISP disclosure of an anonymous Internet user-defendant's identity. *Columbia Insurance Co. v. seescandy.com* is interesting in that it supplies the policy rationale behind each of the enumerated factors:

First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court This requirement is necessary to ensure that federal requirements of jurisdiction and justiciability can be satisfied.

Second, the party should identify all previous steps taken to locate the elusive defendant. This element is aimed at ensuring that plaintiffs make a good faith effort to comply with the requirements of service of process and specifically identifying defendants.

Third, plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss The requirement that the [plaintiff] show probable cause is, in part, a protection against the misuse of *ex parte* procedures to invade the privacy of one who has done no wrong Thus, plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act.⁹⁵

In sum, once defamation plaintiffs bring an action against anonymous Internet user-defendants, they can petition for an order enforcing a subpoena compelling the ISP or Web site operator hosting the offending content to disclose the identity of the defendant. However, this may be done only after proper notice to the defendant (through the ISP), granting the defendant an opportunity to defend against disclosure, and only so long as the plaintiff has set forth each of the elements of the case.

Anonymity on the Web does not mean that identity is untraceable. Often, e-mail addresses must be presented before authors are allowed to post. Further,

⁹⁵ *Columbia Ins. Co. v. seescandy.com.*, 185 F.R.D. 573, 579-80 (N.D. Cal. 1999).

ISPs track Internet protocol addresses, allowing the machine from which the message was sent to be traced. A person may take great pains to protect his or her identity and make it hard to trace the source. However, most people who post anonymously do so from the comfort of their home or business. Hence, under the proper circumstances, an ISP can be compelled to disclose its information on the source of a post.

E. Recapping Difficulties with the Tort of Defamation

Civil defamation actions against Internet users, especially anonymous users, are problematic for a number of reasons. The traditional law of defamation is complex and arcane, ill suited to addressing false online comments injurious to a plaintiff's profession. The law of defamation offers an array of privileged speech and defenses, through which a defendant may escape liability. So long as the comments posted by users of physician-rating Web sites do not allege any specific acts of wrongdoing or present verifiable factual inaccuracies, posted subjective and general assessments—no matter how egregious and inflammatory—are nonactionable under defamation law.

Also, the forum where allegedly defamatory comments are made may skew the defamation analysis in the defendant's favor. There is authority stating a reasonable reader, viewing commentary posted by anonymous Internet users operating under frivolous screen names to an unsupervised message board, would see such commentary as subjective rather than truthful.⁹⁶ The biggest hurdle faced by defamation plaintiffs fighting online content, though, is presented by the CDA. Under this statute, ISPs, Web site operators, and even other Internet users are wholly immune from suit regarding tortuous postings so long as the defamatory material was not created by them. Despite some courts recently taking steps in the opposite direction, this problem will continue until the CDA is repealed or amended.

Finally, to obtain the identity of anonymous Internet-user-defendants, plaintiffs must obtain a court order to enforce a subpoena against the ISP. Such an order will be granted only after the plaintiff sufficiently proves each element of the claim so as to survive a motion to dismiss the action.

The traditional litigation process is costly and time consuming. Additionally, a court may not be able to provide the necessary remedy on a timely basis. While the case is pending in the court system, there is a great potential that the defamatory comments will remain posted, sometimes for a year or more. During that time, the plaintiff's reputation will continue to suffer. If a plaintiff has to wait over a year to obtain redress from a court, one may question whether the remedy is adequate. Given the complexities and difficulties presented in attempting to address Internet defamation of physicians on

⁹⁶ Timo Salmi, *Anonymous Usernet Posting, Another View*, available at <http://lipas.uwasa.fi/~ts/http/anonpost.html> (last visited Feb. 21, 2009).

physician-rating Web sites after the fact, it would be easier to prospectively contract with patients to prevent such defamatory content from ever being posted.

III. AN ALTERNATIVE THEORY: CONTRACT LAW

A. Introduction

How, then, to protect the physician? Perhaps by contract.

In one example of an effort to assist physicians in dealing with Web-based defamation, Medical Justice Services, Inc. assists its members to create contracts with patients. Medical Justice has drafted, copyrighted, and offers for license model physician-patient contracts purporting to limit, through mutual agreement, the patient's physician-rating commentary on the Internet.

This strategy encourages a contract term that seeks to prevent signing patients, absent the physician's written consent, from posting to the Internet any anonymous or attributed comments about the physician who has provided health care to the patient. This contract term is intended to prevent patients from contributing to online physician care-rating Web services. As ISPs, care-rating Web services claim to be immune from suit under federal communications statutes for any unverifiable and defaming comments posted by their third-party users. The contract steers patients to resolve any complaints against the treating physician by resort to administrative medical review boards and, when meritorious, a civil suit against the physician for medical malpractice.

This type of contractual relationship offers legal tactical advantages. A Web site administrator will be more likely to remove content because it violates an existing contractual relationship than merely because it is offensive to someone. Should the need for litigation arise, a claim of breach of contract may be more sustainable than a claim for defamation, as the traditional defenses to defamation claims are generally inapplicable to contractual claims. Additionally, one of the elements necessary to prevail on a request for a preliminary injunction or a temporary restraining order mandating the removal of the defamatory contents while the litigation is pending is the probability of prevailing on the merits. The existence of a valid and enforceable contractual relationship may, therefore, bolster the possibility of obtaining the preliminary removal of the posting. This is extremely important, as it serves to keep the defamatory contents from further spreading throughout the Internet.

Is a contract between a physician and a patient seeking to prospectively limit the right of the patient to post comments on the Internet rating the physician's treatment enforceable? As physicians have considered adopting use of this type of contract into their standard practice, some have questioned whether they are legal or even ethical. There are no reported legal decisions directly

addressing the enforceability of contract provisions seeking to prospectively limit the right of medical patients to post anonymous or attributed comments concerning the treatment they received to a physician care-rating site. However, the validity or enforceability of such a provision may be analyzed under well-established contract law principles.

B. Enforceability of Patient Contracts

Contracts between physicians and patients that seek to limit the right of patients to post comments concerning treatment received to online physician-rating Web sites appear to be enforceable. Although on first blush it might seem that such an agreement would pose an unconstitutional limit on free speech, that is not the case. In many circumstances, private parties voluntarily waive constitutionally protected rights, such as free speech, and this type of waiver is valid. Also, only governmental actors are liable for infringements upon freedom of speech; therefore, only physicians working for publicly owned or managed facilities would even be potentially limited. Mere receipt of Medicare or Medicaid revenues by a practice does not transform the physician into a state actor.⁹⁷ Arguments that contractual “no online comment” provisions are contrary to public policy, and thus unenforceable, seem similarly untenable. Neither a patient’s access to administrative and professional board review of physician conduct, nor right to file a meritorious malpractice claim, are impacted by such a contract provision. It would be difficult to argue that patient access to consumer complaint Internet boards is a public policy interest strong enough to trump the traditional protections of citizens’ rights to freely contract.

Opponents of such contracts could argue that “no online comment” provisions stifle important public debate on physician treatment. However, at least one court decided on analogous facts (involving the right of opponents of a certain therapy to protest outside practitioner offices) that, where potential speakers voluntarily contracted to not participate in that particular forum, such contract terms were fully enforceable.⁹⁸

A third argument against enforceability of “no online comment” provisions is that, given the disparity of bargaining power between physicians and patients, such terms are unconscionable. However, so long as these contracts are entered into with terms clearly presented and patients are given ample opportunity to review the contract with independent legal counsel, procedural unconscionability should not be an issue.

Substantive unconscionability (one-sidedness) also is absent. Although the “no online comment” necessarily applies only to patient conduct, the

⁹⁷ *Chrupcala v. Chester County Hospital*, 2003 WL 21088476 (E.D. Pa. 2003).

⁹⁸ *State v. Noah*, 9 P.3d 858 (Wash. 2000).

contract when viewed as a whole shows mutuality of application. The physician is obligated by the contract to provide privacy protections to the patient above and beyond those mandated by the Health Insurance Portability and Accountability Act (HIPAA)⁹⁹ and state confidentiality laws. This valuable consideration levels the playing field, so that each side has obligations. In other words, the mutuality of obligation creates a balanced contract, which is not substantively unconscionable.

Finally, physicians and patients may freely contract, just like any other private parties. Thus, there appears to be no good argument that “no on-line comment” contractual provisions violate any physician-patient fiduciary duties of confidentiality or good faith in treatment.

C. First Amendment Considerations

1. State Action Requirement

There has been little public or judicial reaction to the physician-patient “no online comment” contract provisions offered presently. The primary objection advanced by some commentators to the enforceability of these contract terms is that such contracted-for restrictions could constitute an illegal restriction upon the constitutionally protected right of free speech. Thus, RateMDs.com cofounder John Swapceinski has stated that Medical Justice, through such contracts, is “forcing patients to choose between healthcare and their First Amendment right to freedom of speech. I highly doubt the courts would uphold such a contract, nor do I think they should.”¹⁰⁰

Alan Howard, professor of law at St. Louis University, believes there are potential problems associated with asking patients to sign the contract, especially if they are beneficiaries of publicly funded health care programs. It is illegal, he contends, to ask individuals to give up their First Amendment rights to receive goods or services paid for by the government.¹⁰¹

Objective analysis reveals that it is unlikely the contractual “no online comment” provision would run afoul of the United States or state constitutional protections of freedom of speech. Constitutional limitations on the restraint of free speech apply solely to state actors or, differently stated, governmental entities. The United States Supreme Court has held:

⁹⁹ See generally HIPAA Privacy Rule, 45 C.F.R. § 164.502 (2009).

¹⁰⁰ A *Contract's Out on Rating Docs*, MODERN HEALTHCARE, June 25, 2007, at 84; see also Dmitriy M. Kruglyak, “Medical Justice” Patient Gag Contracts: Not Just Dumb, but Illegal, TRUSTED.MD BLOG, June 9, 2008, available at <http://trusted.md/blog/hippocrates/2008/06/09/medical.justice.patient.gag.contracts.not.just.dumb.but.illegal> (last visited Feb. 21, 2009).

¹⁰¹ Pamela Lewis Dolan, “Vaccine Against Libel” Could Have Some Side Effects, AM. MED. NEWS, June 9, 2008, available at <http://www.ama-assn.org/amednews/2008/06/09/bica0609.htm> (last visited Feb. 21, 2009).

It is fundamental that the First Amendment prohibits governmental infringement on the right of free speech. Similarly, the Fourteenth Amendment, which prohibits the states from denying federal constitutional rights and which guarantees due process, applies to acts of the states, not to acts of private persons or entities.¹⁰²

Although a First Amendment violation requires state action, a private activity may constitute state action when the state is significantly intertwined with the acts of the private parties.¹⁰³ However, state enforcement of a contract between two private parties is not state action, even when one party's free speech rights are restricted by that agreement.¹⁰⁴ Similarly, mere state regulation of medical facilities and practices does not transform the regulated private entities into state actors.¹⁰⁵

Traditionally, private physicians are not deemed state actors except in limited circumstances, as where physicians contract with the state to supply state-mandated medical treatment in a state-run facility (like a prison) or they work in a state-owned facility. This is because the provision of medical treatment is premised upon the exercise of each physician's independent medical discretion, not coerced decision making according to statutory mandates. Private hospitals and their personnel are not state actors for purposes of a section 1983 civil rights action¹⁰⁶ even when physicians detain patients pursuant to state involuntary commitment statutes. This is because state statutory schemes are permissive, not mandatory, and grant private physicians medical discretion in determining whether an individual should be involuntarily committed.¹⁰⁷ However, there is common-law authority standing for the proposition that private physicians may potentially be deemed state actors in situations where they work in a state-owned facility, or where the state directly imposes mandatory patient admittance criteria upon a particular private facility (as opposed to a regulation of general application to all medical facilities within the state).¹⁰⁸

It is perhaps not surprising that the mere acceptance of Medicare, Medicaid, or other government funds by a private physician or medical facility is insufficient to render that physician or medical facility a state actor. As observed by the United States Supreme Court: "A State normally can be held responsible for a private decision only when it has exercised coercive power

¹⁰² *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 (1982).

¹⁰³ *Noah*, 9 P.3d at 870.

¹⁰⁴ *Id.* at 871.

¹⁰⁵ *Bottros v. Park Ridge Hosp., Inc.*, 482 N.Y.S.2d 629, 629 (N.Y. 1984).

¹⁰⁶ 42 U.S.C. § 1983 (1996).

¹⁰⁷ *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 265 (4th Cir. 1998); *Koulikina v. City of N.Y.*, 2008 WL 463726, at *15 (S.D.N.Y.) (unreported); *Vazquez v. Marciano*, 169 F. Supp. 2d 248, 253-54 (S.D.N.Y. 2001).

¹⁰⁸ *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194, 1197 (10th Cir. 1988); *Clair v. Centre Cmty. Hosp.*, 463 A.2d 1065, 1067 (Pa. 1983).

or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹⁰⁹

A private nursing home was held not to be a state actor despite extensive state regulation and receipt of funding from the state.¹¹⁰ A group home is a private corporation and the fact that it receives Medicaid funds does not convert it into a state actor.¹¹¹ A medical center’s receipt of Medicaid and Medicare funds and licensing by the state does not transform the private entity into a governmental actor.¹¹² Neither does acceptance of patients receiving Medicare and Medicaid benefits make the accepting hospital’s actions attributable to the state, because the benefits are paid to the patients and not the hospitals.¹¹³

Absent state ownership of, or direct control over, medical treatment decisions at a private medical facility or over a particular physician’s practice, there is no state action. The actions of private medical providers are not subject to attack as unconstitutional infringements upon citizens’ free speech rights.

2. Voluntary Waiver

It is well established that individuals benefitting from state or federal constitutional protections may voluntarily waive such rights. In *D.H. Overmyer Co. of Ohio v. Frick Co.*, the United States Supreme Court held that constitutional protections, such as due process rights, are subject to waiver.¹¹⁴ In *In re George F. Nord Building Corp.*, the Seventh Circuit held: “The right of free speech guaranteed by the Constitution of the United States . . . and the Constitution[s] of [individual states], is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and it may be waived by the party for whose benefit it was intended.”¹¹⁵

Other cases are in accord. “Knowing and voluntary waivers of constitutional rights are valid.”¹¹⁶ “Constitutional rights to free speech and assembly . . . are not absolute, as citizens may waive or otherwise curtail their

¹⁰⁹ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

¹¹⁰ *Id.*

¹¹¹ *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999).

¹¹² *Sarin v. Samaritan Health Ctr.*, 813 F.2d 755, 759 (6th Cir. 1987).

¹¹³ *Modaber v. Culpeper Mem’l Hosp., Inc.*, 674 F.2d 1023, 1026-27 (4th Cir. 1982); *Mendez v. Belton*, 739 F.2d 15 (1st Cir. 1984) (mere receipt of Hill-Burton Act construction funds did not make a private nonprofit hospital’s every act “state action” for purposes of the Fourteenth Amendment); *Hodge v. Paoli Mem’l Hosp.*, 576 F.2d 563, 563 (3d Cir. 1978) (receipt of Medicare, Medicaid, and Hill-Burton construction funds fails to transform an otherwise private hospital into a “State actor”); *Avallone v. Wilmington Med. Ctr. Inc.*, 553 F. Supp. 931, 933-34 (D. Del. 1982) (receipt of Medicare, Medicaid, and Hill-Burton construction funds, tax exempt status, and licensing by the state does not convert a private nonprofit hospital into a governmental actor).

¹¹⁴ 405 U.S. 174, 185 (1972).

¹¹⁵ 129 F.2d 173, 176 (7th Cir. 1942).

¹¹⁶ *Noah*, 9 P.3d at 871 (holding that a defamation settlement agreement between patient and physician was enforceable against the patient, as the patient had validly waived her free speech rights with regard to the defamatory comments).

rights.”¹¹⁷ “A person may waive all rights and privileges to which that person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the constitution.”¹¹⁸ “There is no doubt that an individual may waive the personal protections and privileges provided by the United States [or Mississippi] Constitution Waiver may be accomplished by a specific written agreement or by a course of conduct which indicates an intention to forego the privilege.”¹¹⁹ “Ordinarily, an individual may waive any right provided for his benefit by contract, by statute or by the constitution.”¹²⁰

It is a general rule that any right or privilege to which a person is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the constitution, may be waived by him; provided it is intended for his sole benefit, and does not infringe upon the rights of others, and such waiver is not against public policy.¹²¹

Private physicians, medical groups, and hospitals are not liable for infringement of patient free speech. Even when a publicly employed physician or medical facility seeks to contractually limit a patient’s posting to physician-rating Web sites, so long as the contract is enforceable under ordinary contract law, any mutually agreed-to provision limiting the use of such Web sites should constitute a valid waiver of the patient’s constitutionally protected free speech rights.

D. Public Policy Objections

The right to contract is fundamental under state law. Therefore, reviewing courts are loath to void contract terms on public policy grounds, unless it is firmly established that a contractual provision is contrary to some fundamentally important societal interest.

Contracts voluntarily made between competent persons are not to be set aside lightly. As the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations on the pretext of public policy or illegality.¹²²

Courts are hesitant to invalidate contracts on public policy grounds. Nonetheless, public interest in freedom of contract is sometimes outweighed by other public policy considerations. In those rare cases, the contract will not

¹¹⁷ Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n, 929 A.2d 1060, 1063 (N.J. 2007).

¹¹⁸ Paulson v. Paulson, 694 N.W.2d 681, 685 (2005).

¹¹⁹ Morgan v. U.S. Fid. & Guar. Co., 222 So. 2d 820, 829 (Miss. 1969).

¹²⁰ Brown v. State, 37 N.E.2d 73, 77 (Ind. 1941).

¹²¹ Hittson v. Chi., R. I. & P. Ry. Co., 86 P.2d 1037, 1039 (N.M. 1939).

¹²² Zeitz v. Foley, 264 S.W.2d 267, 268 (Ky. 1954).

be enforced.¹²³ “The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and . . . should be exercised only in cases free from doubt.”¹²⁴

We must inquire whether limiting a patient’s ability to post specific content on the Internet is contrary to public policy. An analogous case from Washington State is instructive.

In *State v. Noah*, the court addressed the issue of whether a specific settlement agreement was enforceable.¹²⁵ There, the relatives of two different patients picketed in front of the office of a repressed memory therapist, protesting against the therapy generally. They did so after the patients became alienated from their relatives, supposedly because of recovered memories of alleged sexual abuse. Because of these protests, the therapist brought defamation and anti-harassment claims against the relatives. Eventually, the parties entered into a mediated settlement barring the defendants from picketing the therapist’s office. A relative then continued to protest, arguing:

The settlement agreement is unenforceable under basic contract law because it is against public policy. [The relative] contends that the general public interest in free speech and her individual interest in speaking out against repressed memory therapy outweigh the public interest in enforcing the settlement agreement. Finally, [the relative] argues that it is against public policy to relinquish First Amendment rights.¹²⁶

In holding the settlement agreement valid and not against public policy, the court observed that the strong policy presumption favoring contract validity outweighed this limited, knowing, and voluntary restriction of one forum of speech:

[The relative] concedes that she knowingly and voluntarily entered into the settlement agreement. The Supreme Court recognizes that knowing and voluntary waivers of constitutional rights are valid. [The relative’s] First Amendment rights are not all gone. [She] is free to picket at the county courthouse, federal building or the state capitol, for example. [She] may also present her ideas in other mediums such as published articles, the Internet, and radio. A balancing of competing public policies favors the interests furthered by settlement. We therefore affirm the settlement agreement between [the therapist] and [the relative].¹²⁷

The public policy challenge articulated in *Noah* failed because an individual is free to voluntarily and knowingly waive his or her rights to speak in

¹²³ A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000).

¹²⁴ City of Santa Barbara v. Super. Ct., 161 P.3d 1095, 1115 n.53 (Cal. 2007).

¹²⁵ *Noah*, 9 P.3d at 858.

¹²⁶ *Id.* at 871.

¹²⁷ *Id.*

a particular forum. The court did not find a free speech public policy interest sufficient to overcome the competing policy interest in freedom of contract.

Regarding a “no online comment” contract provision, the same analysis would support the validity of the contract term. The contract does not deprive the patient of entering any complaints against the treating physician, nor does it release the physician from liability. It merely restricts patients from resorting to one forum of potential dialogue concerning the quality of physician care, namely, online physician-rating Web sites. The patient is free to file complaints with licensing boards and may initiate any type of meritorious medical malpractice lawsuit. Therefore, the restriction on speech under the contract is very limited in scope and has no real bearing on the patient’s access to administrative and judicial review of treatment received.

Posting to physician-rating Web sites, especially anonymously, is not even a remedy to resolve conflicts between the physician and patient. Such Web sites may have cathartic value to the patients, allowing them to voice complaints in a very public forum. Additionally, proponents of such Web sites argue that the averaged ratings are a fair indication of patient satisfaction with physician care, thus supplying a useful tool for health care consumers to locate suitable physicians. However, it would be difficult to persuade a court that patient access to consumer complaint Internet boards is a public policy interest strong enough to trump the traditional protections of citizens’ rights to freely contract.

E. Unconscionability and Adhesion

Another potential argument against the enforceability of a physician-patient “no comment” provision is that it constitutes an unconscionable adhesion contract. An adhesion contract is defined as:

A standardized contract form offered to consumers of goods and services on essentially a “take it or leave it” basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract.¹²⁸

“[T]he essence of an adhesion contract is that bargaining position and leverage enable one party ‘to select and control risks assumed under the contract.’”¹²⁹

However, merely because a contract is one of adhesion does not render it automatically void or unenforceable. Adhesion contracts are *prima facie*

¹²⁸ Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996) (quoting BLACK’S LAW DICTIONARY 40 (6th ed. 1990)).

¹²⁹ Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1016 (Ariz. 1992) (quoting Stanley Henderson, *Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 988 (1972)).

enforceable and valid. It is only when terms of the adhesion contract are found to be unconscionable that such terms become unenforceable.¹³⁰

To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned. Thus, a contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules legislative or judicial operate to render it otherwise.¹³¹

The prevailing view is, that to render an adhesion contract or its terms unenforceable, both types of contract unconscionability must be present: substantive and procedural.¹³² Substantive unconscionability exists when the contract executed between the parties unfairly and unreasonably favors the more powerful party over the weaker one.¹³³

Substantive unconscionability refers to whether the terms of a contract are unreasonably favorable to the more powerful party. The analysis of substantive unconscionability requires looking at the contract terms and determining whether the terms are "commercially reasonable," that is, whether the terms lie outside the limits of what is reasonable or acceptable.¹³⁴

"Disparities in the rights of the contracting parties must not be so one-sided and unreasonably favorable to the drafter . . . that the agreement becomes unconscionable and oppressive."¹³⁵

Thus, the analysis of substantive unconscionability looks to whether the terms of the contract are unreasonably favorable to the stronger party or oppressive to the weaker party, in light of the commercial standard for the industry. Regarding contractual provisions purporting to limit the remedies available to the contracting parties (such as arbitration clauses), substantive unconscionability or one-sidedness has been found by reviewing courts when the more powerful party alone reserves the contractual right to seek judicial review, limiting the weaker party to arbitration.¹³⁶ Additionally, a provision in a nursing home contract granting only the facility access to the courts but restricting patients to arbitration was held to be one-sided, oppressive, and

¹³⁰ *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001); *Kosmicki v. State*, 652 N.W.2d 883, 893 (Neb. 2002); *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 858 P.2d 245, 257 (Wash. 1993).

¹³¹ *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981).

¹³² *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 164 (Wis. 2006); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

¹³³ *Hughes*, 254 F.3d at 593-94; *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006).

¹³⁴ *Wis. Auto Title*, 714 N.W.2d at 166.

¹³⁵ *Iwen v. U.S. West Direct*, 977 P.2d 989, 996 (Mont. 1999).

¹³⁶ *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott ex rel. Johnson*, 2006-CA-01053-COA, 2008 WL 73682 (Miss. App. July 17, 2008).

unconscionable.¹³⁷ Similarly disapproved was a contract provision requiring a patient unsuccessful in a suit against a physician to reimburse the physician for costs, as well as \$150 per hour for any time spent defending the lawsuit.¹³⁸

The contractual terms espoused by Medical Justice, as one example, expressly limit the patient's access to physician-rating Web sites. As noted, posting online (often anonymous) comments about the quality of medical treatment on a consumer-rating Web site cannot be characterized as a remedy for the patient. It is more equivalent to a business comment card.

The physician supplies valuable consideration by agreeing to grant additional privacy protections to the patient above and beyond those mandated by law. This exchange of consideration helps form an enforceable agreement.

Unlike substantive unconscionability, which examines the relative fairness of the terms to both parties, procedural unconscionability scrutinizes the process by which the contract was executed to determine whether there was a meeting of the minds. "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."¹³⁹ Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he or she was agreeing to it, and also takes into account a lack of bargaining power.

Procedural unconscionability requires consideration of the factors bearing on a meeting of the minds.¹⁴⁰ The factors reviewing courts examine to establish procedural unconscionability relate to the weaker party's awareness and understanding of the terms being agreed to, factors directly related to the weaker (or non-drafting) party's opportunity to read the contract language without time pressure, the stronger (or drafting) party's use of easy-to-understand language, and the conspicuousness of important contract terms. Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties, or a lack of opportunity to study the contract and inquire about the contract terms. It may be proved by complicated, incomplete, or misleading language that fails to inform a reasonable person of the contractual language's consequences.¹⁴¹

¹³⁷ *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996).

¹³⁸ *Iwen*, 977 P.2d at 989.

¹³⁹ *Broemmer*, 840 P.2d at 1017.

¹⁴⁰ *Razor*, 854 N.E.2d at 622; *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 264 (Ill. 2006); *Deminsky v. Arlington Plastics Mach.*, 657 N.W.2d 411, 422 (Wis. 2003).

¹⁴¹ *Russell*, 826 So. 2d at 725; *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2000); *D.R. Horton*, 96 P.3d at 1162-63.

As summarized by Idaho's high court, these indicia of procedural unconscionability may be grouped into the following two broad categories:

Indicators of procedural unconscionability generally fall into two areas: lack of voluntariness and lack of knowledge. Lack of voluntariness can be shown by factors such as the use of high-pressure tactics, coercion, oppression or threats short of duress, or by great imbalance on the parties' bargaining power with the stronger party's terms being nonnegotiable and the weaker party being prevented by market factors, timing, or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all. Lack of knowledge can be shown by lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language; the lack of opportunity to study the contract and inquire about its terms; or disparity in the sophistication, knowledge, or experience of the parties.¹⁴²

The Washington Supreme Court, in examining an adhesion contract for potential procedural unconscionability, held that no procedural unconscionability was present under the circumstances. In that case, the drafting party: did not demand immediate signing of the contract but instead allowed the weaker party a reasonable opportunity to review it; allowed the signing party the opportunity to contact independent counsel prior to execution; encouraged the signing party to ask questions about the terms; did not hide important terms among fine print, but rather placed such language in the same typeface, or even bolded and underlined it; wrote the contract so it was easy to understand and only one page long; and did not pressure the weaker party to sign.¹⁴³

The fact that there is a weaker party and a stronger party (usually the drafter) does not by itself create procedural unconscionability. Use of form contracts drafted by a party with greater bargaining power is a common occurrence in modern business. Absent indicia that the drafting party pressured the weaker party to sign without a reasonable opportunity to review the contents of the agreement, unequal bargaining power alone does not render the contract unenforceable.

In the end, [the weaker party] relies solely on her lack of bargaining power to assert that we should find the agreement procedurally unconscionable. This will not suffice. At minimum, an employee who asserts an arbitration agreement is procedurally unconscionable must show some evidence that the employer refused to respond to her questions or concerns, placed undue pressure on her to sign the agreement without providing her with a reasonable opportunity to consider its terms, and/or that the terms of the agreement were set forth in such a way that an average person could not understand them. Indeed, as the Fourth Circuit aptly reasoned, if

¹⁴² *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 882 (Id. 2003).

¹⁴³ *Zuver v. Airtouch Comm'ns, Inc.*, 103 P.3d 753, 757 (Wash. 2004).

a court found procedural unconscionability based solely on an employee's unequal bargaining power, that holding "could potentially apply to [invalidate] every contract of employment in our contemporary economy."¹⁴⁴

The final element of the procedural unconscionability analysis is whether the weaker party lacked a meaningful choice in signing the proffered contract because of an absence of reasonable alternate sources of the same services elsewhere in the marketplace.¹⁴⁵ Whether a person signing a contract has any reasonable market alternatives is relevant to whether the contract is oppressive, as required for procedural unconscionability.¹⁴⁶

In the context of contracts between physicians and patients, the "reasonable marketplace alternative" analysis is complicated. Even when there are a number of similarly situated physicians offering the same treatment options as the contracting physician, patients who have already established physician-patient relationships with a particular physician may not view switching physicians as a reasonable alternative.

The agreements, by [physician] Eyring's own admission, were offered to the patients on a "take it or leave it" basis. Had these patients refused to sign the agreements, Eyring would not have continued rendering medical care to them. Although the patients could have refused to sign the arbitration agreements and sought out another physician in the area, that action would have terminated the physician-patient relationship (ordinarily one of trust) and interrupted the course of the patient's treatment. To make any choice would be difficult; but to choose not to sign would result in the loss of the desired service—medical treatment from Eyring.¹⁴⁷

An obvious way to counter this potential procedural market alternative unconscionability issue as it relates to arbitration agreements is to assure that the issue of arbitration is contained in a separate agreement apart from the admission contract and not to premise the physician's treatment decision on whether the patient agrees to arbitration. The court in *Buraczynski* held:

Our examination of the arbitration agreements at issue in this case reveals no . . . oppressive provisions. The agreements were *not contained within a clinic or hospital admission contract*, but are *separate*, one page documents Most importantly, the agreements did not change the doctor's duty to use reasonable care in treating patients, nor limit liability for breach of that duty, but *merely shifted the disputes to a different forum*.¹⁴⁸

¹⁴⁴ *Id.* at 761.

¹⁴⁵ *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 475 (Mich. 2005); *Wis. Auto Title*, 714 N.W.2d at 165-66.

¹⁴⁶ *Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 412 (Cal. App. 2008).

¹⁴⁷ *Buraczynski*, 919 S.W.2d at 320.

¹⁴⁸ *Id.* at 321 (emphasis added).

According to a different court:

While the arbitration agreement at issue is a form contract proposed by Defendants [private hospital and physicians], the party with arguably stronger bargaining power, no patient benefits are conditioned on signing the arbitration agreement. In fact, the express language of the agreement makes its execution wholly voluntary. Additionally, even if the agreement were one of adhesion, the proper remedy would not be to invalidate the agreement. North Carolina courts, recognizing insurance contracts as those of adhesion, have not invalidated them, but merely subject them to greater scrutiny.¹⁴⁹

In that case, a physician-patient arbitration agreement was held enforceable when procedural unconscionability was found but the agreement was not substantively unconscionable.

The fact that there is a pre-existing physician-patient relationship does not automatically mean that any new contract provision must fail. For example, physicians join and leave managed care networks on a regular basis. This may change the patient's financial obligation. If the patient becomes fully responsible for a much larger bill because the physician will not continue an existing contract with the patient's carrier, is that patient's financial obligation void? Certainly not. If a physician decides to institute "narcotic contracts" with patients on prescription methadone to clarify the terms and conditions for requesting refills, will those terms be rendered void? Again, no.

In other terms, the fact that there is a pre-existing physician-patient relationship does not preclude any changes to that relationship. Future contracts can be implemented, even if it means that the relationship might terminate.

"No online comment" contract provisions are not substantively unconscionable because they do not unilaterally reserve any special review remedy exclusively to the contracting physician, practice, or facility. The grievance procedures remain unaffected. Patients are free to file complaints with appropriate licensing boards and are similarly free to file all medical malpractice claims warranted. The contractual limitation on patients posting to online physician-rating Web sites does not impact any malpractice review or oversight process.

Negative comments posted by patients to online physician-rating Web sites have no professional licensing or legal consequences for the denigrated physician. Such Web sites instead only function as a consumer review service, allowing browsing potential patients to choose medical practitioners with a demeanor or treatment philosophy to their liking. If "no online comment" contract language clearly lays out what is being agreed to, patients are given ample opportunity to review the terms individually (and with legal counsel

¹⁴⁹ *Wilkerson ex rel. Estate of Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005).

if desired), and treatment of the patient is not contingent upon the patient signing the contract, no substantive or procedural unconscionability hurdles appear to prevent the enforceability of such agreements.

F. Physicians' Confidentiality Duties

The fiduciary duty owed by a physician to a patient is twofold. The physician who agrees to treat a patient is duty-bound, first, not to disclose to third parties without patient consent information obtained by the physician about the patient in the course of treatment. Second, there is an obligation to employ skill, care, and good faith in making all treatment decisions regarding the patient.¹⁵⁰

The physician-patient relationship arises out of an express or implied contract which imposes on the physician an obligation to utilize the requisite degree of care and skill during the course of the relationship. The relationship of patient and physician is generally considered a fiduciary one, imposing upon the physician the duty of good faith and fair dealing and confidentiality.¹⁵¹

The duty of physicians to maintain confidentiality makes it difficult to even defend themselves against online postings. Ordinarily, the antidote to offensive speech is more speech, but a physician cannot post the medical record to argue the facts. It is unclear whether a patient who posts information about his or her medical history online has implicitly waived the right to privacy.

The confidentiality aspect of the physician-patient relationship is not implicated when a physician seeks to have a patient sign a "no online comment" contract provision. With online comments, it is not the physician, but the patient, who is divulging treatment information. The only potential issue presented by the physician-patient fiduciary relationship is whether the contractual bar on patient posting to online physician-rating Web sites constitutes lack of physician good faith in treating the signing patient.

Despite the fiduciary relationship, physicians and patients enjoy the freedom to contract like any other private parties. Courts have held, for example: "A physician and a patient are free to contract for the physician's services on any terms they choose . . . as long as their agreement does not contravene public policy;"¹⁵² and "The relation of physician and patient is, in its inception,

¹⁵⁰ Tracy v. Merrell Dow Pharm., Inc., 569 N.E.2d 875, 879 (Ohio 1991).

¹⁵¹ Black v. Littlejohn, 325 S.E.2d 469, 482 (N.C. 1985); State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 566 (Mo. 2006).

¹⁵² Tex. State Bd. of Med. Examiners v. Birenbaum, 891 S.W.2d 333, 336 (Tex. App. 1995); Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., Inc., 415 S.E.2d 341, 346 (N.C. 1992).

created by contract either express or implied. The contract may be . . . limited by special terms.”¹⁵³

CONCLUSION

Any inquiry into the impact of a “no online comment” contract provision should follow the public policy and contract enforceability analysis discussed above. It appears that “no online comment” contract provisions are enforceable. Patients have numerous avenues to report physicians’ poor conduct and treatment off line. Patients’ comments and criticisms should be directed into appropriate venues. The voluntary restriction of patients’ rights to post comments online is not unconstitutional or excessive. By contracting for limitations to online comments, physicians may maintain a degree of privacy and professionalism while still being held accountable for their actions.

¹⁵³ *McNamara v. Emmons*, 97 P.2d 503, 507 (Cal. 1939).