

Practice Management

The Role of the Internet in Doctor Performance Rating

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Historically, if a patient was dissatisfied with care, he or she could tell his or her friends and family. The criticism was limited to a small circle of people. If the patient was injured negligently, he or she could hire an attorney to prosecute a lawsuit. The threshold for finding an attorney and prevailing posed a significant barrier for the patient achieving redress. With the Internet, if a patient is unhappy he or she needs do little more than access a growing number of Internet physician rating sites. Such criticism can be rendered anonymously. The posts are disseminated worldwide, and once posted, the criticism rarely comes down. While transparency is a laudable goal, such sites often lack accountability. More formal sites run by authoritative bodies, such as medical licensing boards, also provide data about physicians, but such data is often unfiltered, making it difficult for the public to properly interpret.

Given how important reputation is to physicians, the traditional remedy of suing for defamation because of libelous posts is ordinarily ineffective. First, many patients who post libelous comments, do so anonymously. Next, the Internet Service Providers (ISPs) hosting such sites are generally immune from liability for defamation. Finally, the law has a very formal definition for libel, and a negative rating does not necessarily equate to "defamation."

A novel method of addressing un-policed physician rating sites in the Internet age is described. The system embraces the use of mutual privacy contracts to provide physicians a viable remedy to anonymous posts. In exchange, patients receive additional privacy protections above and beyond that mandated by law.

Key words: Defamation, libel, Internet, physician, rating sites, Section 230, Communication Decency Act, anonymous

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When the Internet exploded, few anticipated how it would be used. We can do almost anything online. From the comfort of our couch, we can order our groceries, check how fast our teenage kids are driving, and even analyze our DNA signatures to see what the future portends. Emerging as one of the fastest growing healthcare applications is doctor bashing — or as it is euphemistically described — physician ratings.

If done properly, what harm could there be in letting the ultimate "customer," the patient, describe his/

her experience? It is undeniable that patient access to transparent information on cost and outcomes would have a positive transformative effect on U.S. health care.

First, health care is not the same as buying a toaster. While many treatments can be reduced to reproducible processes, care is more often than not, complex. And, what patients value most, good health, isn't what patients often complain about.

Next, the United States has always placed a great premium on free speech. The antidote to offensive

speech is ordinarily more speech. But, physicians are bound by state confidentiality laws and the Health Insurance Portability and Accountability Act (HIPAA) to hold their tongues. Physicians are forbidden from defending against reputational assaults by posting the medical record as a correction.

And finally, most of the ratings sites have at most, a handful of posts. This sampling lacks statistical significance and is not actionable, or in other words, is of limited use to the consumer. If patients are seeking guidance on which doctor has the best outcome for a particular procedure, taking into account adjusted risk profile and cost, the current crop of rating sites offer limited, if any, guidance.

Nonetheless, such sites are proliferating. There are some sites dedicated to the destruction of a single physician's reputation. While the stated intent of that webmaster is to "warn the world," the site paints the doctor in the worst possible light. In a different venue, a courtroom, one would at least have the benefit of cross examination for balance. An example of such a site is www.mysurgerynightmare.com (1).

Next, general ratings sites such as www.ratemds.com and www.vitals.com allow individuals to vent anonymously. There is no quality control and it is impossible to tell if the rater is a patient or someone posing as a patient, such as a disgruntled employee, an ex-spouse, or a competitor. Further, even positive ratings have limited utility; the glowing comments might be the anonymous prose of the physician himself.

RATINGS OF INTERVENTIONAL PAIN PHYSICIANS

Which specialists are at greater risk for being portrayed in a negative light? While there are no good data on which to draw firm conclusions, it is axiomatic that the longer a patient has interacted with a physician, the less likely they are to sue that doctor. All other things being equal, the strength of the long-term relationship poses a barrier, increasing the threshold for filing a lawsuit. Similarly, the threshold for litigation decreases the less robust the interaction. Bedside manner does make a difference vis a vis litigation, an analogous venue for patients to vent their frustration. Interventional pain physicians may not generally have the benefit of forming multi-year relationships with patients. Accordingly, they are at somewhat greater risk for being on the receiving end of a physician rating site.

Further, interventional pain management is at the crossroads as an evolving specialty in terms of utilization, exponential growth, and evidence-based medicine (2-13).

THE TRADITIONAL REMEDY TO REPUTATIONAL ASSAULTS

While freedom of speech is cherished in our country, not all speech is protected and the right to speak freely is not absolute. It is common knowledge one cannot yell "fire" in a crowded theatre with impunity (14). Likewise, fighting words and obscenity are not protected (15,16). And, to give this concept color, in 2007, the Supreme Court ruled a school could suspend a high school student for displaying the cryptic banner "Bong Hits 4 Jesus" during an Olympic parade (17). And likewise, defamatory speech is also not protected.

Defamation is a complex area of law. Generally, when someone's reputation is bruised, the remedy is found in the tort of defamation. To prevail, the plaintiff (here the doctor) must demonstrate the defendant (the patient) made a false statement of or concerning the doctor to a third party, without privilege, and this statement damaged his reputation.

That is only half the battle. Truth is a complete defense to defamation. And a statement of opinion rarely rises to the level of "a false statement." 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" (18). Statements of opinion, no matter how egregious, cannot support a claim of defamation. The United States Supreme Court noted "under the 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" (19).

The New York Supreme Court has offered a list of factors to be considered when judges must determine 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” (20,21).

Hyperbolic speech is also protected speech. Hyperbole has been described as “loose, figurative language that no reasonable person would believe presented facts” (22). “Exaggerated language used to express an 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” (23). Calling a doctor a butcher, fraud artist, or thief, without more is unlikely to rise to an actionable claim. In contrast, stating that a doctor, as a “thief,” billed for procedures he never did, when he indeed performed all of those procedures, would be actionable.

If that were not difficult enough, physicians often have to prevail by a higher standard of proof. A private figure merely need prove damage to his reputation by a “preponderance of evidence.” Preponderance of evidence means “more likely than not.” On a scale from 1 to 100, such proof is found at 51 or higher. In the world of defamation law, public figures are actually held to a higher standard of proof. At least one appellate court has ruled if a physician uses the media, however minimally, to build his reputation, he is considered a “public figure” and must demonstrate actual malice. . .and more (24). In other words, a doctor with his own website or one who presents frequently to the general public or scientific audiences may be deemed a public figure. And, if that doctor is defamed, he will be limited to defamation causes of action based on a more challenging standard of proof.

Of course, one of the biggest challenges for physicians filing a lawsuit for defamation is the strategic calculation that a public lawsuit might cause even more reputational damage than the original insult. A defamation lawsuit, by its very nature, balances money damages for past “insults” with uncompensated reputational injury of future publicity.

THE INTERNET WORLD AND REPUTATIONAL CHALLENGES

Traditionally, suits related to libel focused on books, pamphlets, and billboards; in other words, works produced by a printing press. Under traditional legal principles, one who is defamed can sue not only the originator of the libelous comments, but also the distributor — such as a newspaper or a television sta-

tion. Using that analogy, another natural defendant for defamation would be the digital distributor, the Internet Service Provider (ISP). But, in 1996, Congress foreclosed that option by granting broad immunity to ISPs for the tort of defamation as articulated in Section 230 of the Communication Decency Act (CDA) (25).

Sections 230(c)(1) and 230(e)(3) provide that “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” (25), § 230(c)(1), and that “[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” (25). 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” (25). This definition closes the door for traditional defamation lawsuits against Internet-based physician rating sites.

The next challenge of Internet-based lawsuits for defamation is anonymity. Normally when an item is printed, the author is readily identifiable. In the Internet world, the majority of posts about doctors on rating sites are anonymous. And, the second natural target for a defamation lawsuit, the patient, is an elusive entity. That does not mean that anonymity makes it impossible to find a remedy. It does not. It merely raises the bar. “While Courts also recognized that anonymity is a particular 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” (26). The process for discovering the name of a defaming author varies, but can be summarized as follows:

The doctor-plaintiff requests that the court issue a subpoena duces tecum to the ISP hosting the offending material, ordering the web host to appear and produce documentation supplying the identity and contact information for the anonymous user defendant. The ISP ordinarily notifies the anonymous poster who may then challenge the propriety of subpoena through a motion to quash it. In weighing whether to issue a subpoena duces tecum, the court balances the relative weight of (1) the right of the defendant-speaker to retain his right to engage in anonymous speech, versus (2) the right of the defamation plaintiff to redress the injury.

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 (27).

Anonymity on the web does not mean that identity is not traceable. Often e-mail addresses must be presented before authors are allowed to post. Further, ISPs track Internet protocol addresses, allowing the machine from which the message was sent to be traced. That does not mean that a person cannot take great pains to protect his identity and make it hard to trace the source. They can. But, 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 their information on the source of a post.

In short, anonymity poses a technical, but not insurmountable challenge to pursuing a successful defamation lawsuit. But, the process is more involved than merely sending a letter to the ISP. One must file a subpoena and make a prima facie case demonstrating defamation.

As difficult as it is to prosecute lawsuits for defamation in the traditional print world, the obstacles are higher in the Internet world. Most of the individuals who post hide behind a cloak of anonymity. And, ISPs are immune from defamation liability.

KEEPING UP WITH CHALLENGES IN THE ERA OF THE INTERNET

The challenges of finding a remedy against negative online posts are daunting; but challenging problems require novel solutions. A better option is to treat the problem before it is a problem; a reputational vaccine. The preventive model embraces contract law to tackle the problem.

Patients, when first seen, are asked to sign a contract of mutual privacy. The patient and the doctor agree to maintain reasonable confidences. The doctor agrees to extend privacy protection to the patient above and beyond that mandated by HIPAA and state confidentiality laws. In return, the patient agrees to

not post any commentary on the web about the doctor's care without the doctor's permission.

There are many situations where such permission would be reasonably and readily granted. This contract is implemented as a matter of policy for most, if not all, patients. The contract-based remedy does not mandate a total waiver of a patient's rights of free speech. Patients are free to report inappropriate medical care or treatment to a variety of authorities including, but not limited to, state licensing boards, professional medical societies, or third party payers, or even file a malpractice action. What the agreement does seek to prevent is web-based publication, either positive or negative, about the physician. Web-based commentaries are most often written under anonymous names by people without medical training commenting upon their physician's medical abilities. Patients that are legitimately concerned for the general public or wish to seek a remedy against a physician have multiple alternative venues to air their issues constructively.

If an anonymous posting does appear on a ratings site, the next step involves sending a template of such a contract to the site. An accompanying letter explains that the poster represents that he or she is your patient. Like all patients, this patient signed an agreement to maintain confidentiality. If the ratings site does not remove the posting, the site may be at risk for interfering with a pre-existing contract. Anonymous posts have been attacked successfully by companies enforcing prior confidentiality agreements with their now ex-employees (28).

If the post is not removed, the physician can then file an action against the ISP for interfering with a pre-existing contract. And, the doctor can also file a subpoena, as outlined earlier, to release the name (or identifying information) of the anonymous poster. Once known, an action can be filed against the patient. The legal theory underlying that action is breach of contract. Here, one does not have to prove that a false statement was made to another causing damage to another. Those are the elements that must be proved in a defamation case. The task is much simpler. One must merely show that a contract to maintain confidentiality on a very limited matter was breached.

Will First Amendment rights prevent enforcement of such contracts? The First Amendment protects against state action to limit speech. Such protection is not absolute. As noted earlier, there are catego-

ries of speech that are not protected at all. Next, the First Amendment only applies to state action limiting speech. The United States Supreme Court has held that

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 (29,30).

Private citizens are free to contract to limit such rights. And, private physicians cannot be deemed "state actors" except in limited circumstances, as where doctors contract with the state to supply state-mandated medical treatment in a state-run facility (like a prison) or where doctors work in a state-owned facility. This is because the provision of medical treatment is premised upon exercise of each physician's independent medical discretion, not coerced decision-making according to statutory mandates. Even when a private health care provider accepts public money, such as Medicare or Medicaid, he is not temporarily transformed into a "state actor" (31-36). While First Amendment rights are sacred, contracts with private citizens to enhance privacy for both doctor and patient should be enforceable.

THE INTERNET AND THE POSITIVE SIDE TO PHYSICIAN TRANSPARENCY

While this paper takes the position that anonymous ratings of physicians by patients, or those posing as patients, does little to enhance patient care, not all Internet evaluations are valueless. On the contrary, if the posting source of the information is recognized as authoritative and the physician is given an opportunity to defend against an allegation, such data is informative. For example, in many states, licensing boards will publish whether a person has a license, where he or she trained, and whether any actions have been taken to restrict the licensee's privileges. Here, although not always perfect, the Board is presumed to be an authoritative source, well versed on the subject matter. If a practitioner has been disciplined for any number of reasons and the doctor received due process and an opportunity to present a defense to balance, it seems reasonable that a patient should have access to that information.

But, authoritative sources can overstep, providing

data that might be difficult to interpret. For example, a number of state licensing boards post data on medical malpractice settlements and judgments. Given the frequency of litigation and the fact that a not insignificant number of cases are settled to avoid the expense of further litigation, the public is ill-equipped to analyze the meaning of such data. A caveat posted on such sites stating that a medical malpractice settlement does not necessarily correlate with quality of care puts the burden of interpretation squarely with the consumer. And if medical malpractice litigation is associated with quality of care, then the Board can and should take action. In that case, posting on a website would make sense, being more in line with a Board's role of protecting the public. But, providing raw, unfiltered data to a public lacking the resources to interpret the data likely confuses more than clarifies.

SUMMARY

The Internet has made it easy to post commentary about physicians, whether such posts are grounded in fact or not. The damage such posts can cause is extensive. Once posted in cyberspace, they are accessible 24/7 to anyone with minimal computer literacy. And once posted, the messages do not come down.

Over the next decade, physicians will likely be held accountable on measures that matter; for example, infection rates, mortality, and length of time to return to work. One challenge, among many, is adjusting for different risks to make such measures meaningful. And when we eventually understand how to define true outcomes, talented physicians will welcome being graded fairly.

The traditional remedy for defamation, the tort of libel, is inadequate and ineffective in the Internet world. A contract-based system works to balance the interests of all parties by imposing a degree of mutual privacy. To the extent patient speech is limited, it is channeled to appropriate venues where everyone is properly accountable for their words and deeds.

CONCLUSION

Proliferating Internet physician rating sites are a fact of life. The Internet sites range from the ones dedicated to the destruction of a single physician's reputation to general ratings sites allowing individuals to vent anonymously. Overall, there is no quality control. The traditional remedy for defamation, the tort of libel, is inadequate and ineffective in the In-

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