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Navigating the Legal Ramifications of Medical Online Reviews

By Ashlie Barefoot Malone

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) affords specific regulatory protections for certain patient health information, or PHI. Defamation laws protect the reputation of individuals and other entities from untrue and damaging statements, whether in written format as libel or the spoken word as slander. Both would seem to offer unique individual protections against reputational harm. But what if the very regulations created to protect concomitantly restrict the ability to defend?

The increasing use of online review websites in the consumer decision-making process brings unique challenges to the health care market. By its nature, HIPAA prevents medical providers from publicly sharing or discussing patient information, or even acknowledging a patient is under the provider's care. If a patient posts a review in a public forum about the care they received from a medical provider, the patient is sharing. They are the recipient of that care, and they are openly welcome to share their experience. But when a medical provider enters that same arena of sharing in response to a patient's online post, they may be in direct violation of HIPAA.

Doctors hold a unique position by the very nature of the services they provide. Long before HIPAA was enacted into law, the Hippocratic Oath from the late fifth century BC laid the foundation for confidentiality by commanding doctors to abide by the philosophy that "whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets."[1] From the earliest beginnings, the foundation for the doctor's duty of care is drenched in an equal commitment to a duty of confidentiality. As a re-

sult, "doctors feel like patients can criticize their medical advice but the doctor can't respond adequately due to confidentiality obligations."[2]

Criticism of current defamation law rests in a doctor's ability to defend against slanderous attacks that may damage his or her reputation. The concern, however, surrounds more than the doctor's reputation. A doctor is not simply a small business owner. A doctor is *the* small business itself. Without the doctor, there is no product. Without a product, there is no business. Without the business, there is no practice or clinic from which patients receive care. Defamation laws afford certain protections against libel and slander, but without bridging the chasm created by HIPAA, doctors are oftentimes left undefended and at the mercy of their online assailant.

HIPAA offers specific protections for the privacy and security of certain health information. The Standards for Privacy of Individually Identifiable Health Information, or "Privacy Rule," and the Security Standards for the Protection of Electronic Protected Health Information, or "Security Rule," were enacted by the Department of Health and Human Services in 1996 to encapsulate patient health information with privacy and security and protect it with the highest level of confidentiality possible. These standards for privacy and security quickly evolved into HIPAA and encompass the blanket expectation of confidentiality surrounding the provision of medical care in the American consumer health care system today. The Act's message is clear: protected health information is to remain private. Protected health information is to be protected by the medical provider at all costs. It is not to be shared, accessed or put at risk of access by any party at any time. Under HIPAA, privacy is not only an expectation, it is also a federal requirement that has become so ingrained into the fabric of the medical community that medical providers are often hesitant to even speak a patient's name without fear of unintentionally engaging in a breach of confidentially under the law.

In comes defamation . . .

By design, defamation law provides the legal framework to shield Americans against damage to their person or reputation by affording specific protections against false or malicious language between two or more parties. By requiring more than hurtful words, common law protections may be invoked, but only when false, malicious, and intentional or negligent defamatory comments result in damage to one's reputation. The four elements of defamation require (1) defamatory language; (2) publication to a third party; (3) falsity of the statement; and (4) damage to the plaintiff's reputation.[3] For public figures, or matters of public concern, the two additional elements of (5) falsity of the defamatory language; and (6) fault on the part of the defendant must also be met.[4] Further analysis of existing defamation law in today's web-based culture is not only appropriate, it is also imperative for continued application of common law theories to this dynamic and quickly evolving area of practice, especially in today's healthcare-blanketed marketplace.

Curtis Publishing Co. v. Butts[5] challenged the Court to consider the preparation of a defamatory article published in The Saturday Evening Post as the foundation for an affirmative claim for libel under the law. By departing from standards of good investigation and reporting, the plaintiff contended the article's assertions "amount[ed] to reckless and wanton conduct"[6] and that the newspaper's malicious portrayal of the plaintiff warranted a favorable judgment for both compensatory and punitive damages. In a 5-4 decision by the U.S. Supreme Court, the majority reasoned that public figures who are not public officials may recover damages for libel stemming from false reports based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[7] The *Purcell v. Westinghouse Broadcasting Co.*[8] Court explored the same concept a few years earlier in 1963 when it held that "[t]he failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication."[9] The *Curtis* and *Purcell* Courts take an interesting approach to assigning liability to the publishers of malicious content when the publication of the content itself is not properly vetted through responsible investigative reporting standards and techniques. The publishing landscape at the time of the *Curtis* decision in 1967 is archaic by today's technological standards, but even without the use of cell phones, home computers and Internet-based research, the Court recognized the need to retain a process of integrity and honesty in the publishing process.

By applying the *Curtis* standard for the responsible publishing of potentially damaging content, courts must consider the ownership of responsibility often lacking in today's online culture. Social media platforms such as Facebook, Instagram and Twitter encourage users to post unedited and often unfiltered content without any formal process to properly vet the accuracy of the content or the potential harm to one's reputation the publishing of that content may cause. Online review websites take these concerns a step further by encouraging online users to rate or comment on their personal medical experience, often anonymously or without a formal process for ensuring the post is accurate or true. If the *Curtis* Court commands recognition of libelous standards from lack of accuracy in reporting, it is worth consideration if similar standards must also apply to the spontaneous, unverified, first person publication of highly subjective content that comprises the online library of content available today.

Where the *Curtis* Court favors protections against libelous content by considering the integrity of the publication process itself, the

New York Times Court maintains a more conservative approach to assigning liability when the content is directed against persons in the public forum.[10] This landmark case applied a malice standard, prohibiting public figures from recovering damages for libelous comments related to their public position unless actual malice by the publisher is proven. This actual malice standard was subsequently extended to include private persons involved in matters of general or public interest as well under *Rosenbloom v. Metromedia, Inc.*[11] By justifying the balance for First Amendment speech protections with limitations for recovery, proponents of the *New York Times* standard argue the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open . . . ."[12] Proponents for the *Curtis* standard share consideration for deeper analysis under *Associated Press v. National Labor Relations Board*,[13] however, by recognizing that a business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel."[14]

To what extent should courts apply the public figure standard to private individuals offering services in the public arena? The *Dairy Stores, Inc. v. Sentinel Publishing Co.* Court[15] held that by marketing its product, "a business voluntarily exposes itself – or at least its product or service – to public examination in much the same fashion as does a public official or public figure."[16]

W.J.A. v. D.A.[17] offers further consideration for the application of defamation law in an online culture by recognizing that "one's good name can too easily be harmed through publication of false and defaming statements on the Internet. Indeed, for a private person defamed through the modern means of the Internet, proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable."[18] What if the "product" offered is the services of a licensed professional? What if that licensed professional is also protected by confidentiality standards, such as HIPAA, or the oath of confidentiality as with attorney-client privilege? Does a physician or hospital qualify as a limited public person? Does an attorney? Does the provision of health care to an open community limit defamatory protections under the law? If not, then shouldn't a licensed professional who is regulated by other federal privacy protections be afforded the same rights to properly defend defamatory attacks on their character when those attacks are made in on online forum? Doesn't the state's legitimate interest in providing individuals an effective remedy for defamation, as well as compensation for persons experiencing actual, measurable harm[19] warrant further consideration? It is only through a similar analysis surrounding libelous Internet posts in today's online culture that medical professionals

may challenge the court to bridge the gap between First Amendment protections and the harm created by defamatory activity online and to re-balance the protections offered by the victims both sides may create.

Today's prevalent use of online review websites

Consumer use of online review websites has grown exponentially since the first three online review websites first appeared in 1999 to the hundreds of online review websites available today. Consumer review websites rating doctors and medical providers first entered the market with www.RateMDs.com in 2007 and have grown to a combined 11.6 million people each month visiting online portals owned by www.vitals.com and www.healthgrades.com today.[20] As a comparison, the popular *Consumer Reports* magazine was first published in 1936 by a nonprofit organization committed to fair and unbiased product review. As of 2018, *Consumer Reports* reported an annual subscriber base of approximately 6 million paying members.[21] To put this subscriber base into perspective with today's online culture, if even half of the monthly 11.6 million online visitors to the www.vitals.com and www.healthgrades.com web portals were calculated as annual subscribers, the online consumer review subscriber base would equate to a more than 10:1increase in online reviews versus traditional printed media. Compounded by popular platforms such as Facebook with a reported 1.9 billion monthly users,[22] Google capturing approximately 70% of all search engine users,[23] and Yelp enjoying more than 102 million customer online reviews to date with 6% in the health care arena,[24] the use of online reviews has grown into a major influencer on the consumer market.

Fact or fraud?

Online review web sites are valuable. Their prevalence and use are undeniable, and high user demand has secured their position at the forefront of the American economy. But are they reliable? In 2013, the New York Attorney General's office "ordered 19 companies to pay more than $350,000 in fines for flooding various review sites with phony endorsements."[25] In October, 2015, Amazon sued more than 1,100 people for offering to create fake reviews for a nominal fee.[26]

Where there is opportunity there can be fraud. But one must question whether a system that so heavily influences the consumer market and free trade opportunities as established under the U.S. Constitution also be entirely unregulated with no system for compliance or process for fairness for the subjects of such reviews. Websites enjoy immunity from legal action under Section 230 of the Communications Decency Act, which makes it impossible to sue a web-based platform for defamation.[27] But the authors of negative or defamatory claims, published publicly via the Internet, will most likely prevail in a defamation lawsuit so long as the comments hold some small sem-

blance of truth or opinion.

Reliable or not, consumers are using online reviews to influence their decision-making. In a 2011 working paper, Michael Luca, an assistant professor at Harvard Business School, found that "a one-star increase in a restaurant's average Yelp rating can boost revenue by between 5 and 9 percent."[28] Nielsen's 2015 "Global Trust In Advertising" report mirrors this finding, stating that "around two-thirds of respondents indicated that they trust consumer opinions posted online, and that they were either always or sometimes willing to take action based on those opinions."[29] As of 2004, Janet M. Morahan-Martin, Ph.D., reported that approximately 4.5% of all Internet searches worldwide were for health-related information; however, research has found that the quality of online health information is mixed, raising serious concerns about the impact of this information.[30] In 2013, 72% of American Internet users reported looking online for health information of one kind or another within the past year.[31]

So why are online shoppers relying so heavily on the word of unidentified, and potentially biased, reviewers? According to BrightLocal 2017 data:[32]

- Consumers are likely to spend 31% more on products/services from businesses that have excellent reviews;
- 86% of consumers read reviews for local businesses;
- A negative review can drive away 22% of potential customers;
- For every star that a business gets, chances are that a business' revenue will increase by anywhere between 5%-9%, and 57% of consumers won't use a business that has fewer than 4 stars;
- A single negative review could cost a business 30 customers.

For businesses catering to the consumer marketplace, embracing online reviews is not only popular, it is quickly becoming a requirement for proper exposure and participation in the online medium.

Bridging the gap

Are things changing? The general recommendation for doctors dealing with defamatory online postings has been to bury the post with other positive online reviews. It is not uncommon for openly defamatory online attacks to be met with comments such as it is "too difficult to fight" or the effort is simply "not worth it." Healthgrades.com offered advice to physicians in February 2019 on how to respond to negative patient reviews that included 10 tips.[33] Even seasoned attorneys may advise doctors that getting a defamation claim to court could easily take two to three years and cost thousands of dollars in legal fees. And then what? Does a doctor continue trying to recoup money from a patient who doesn't have it to begin with? The few defamation cases that have gone through the court process with claims against patients have been overwhelmingly disappointing. *McKee v. Laurion*[34] is representative of most outcomes with the court ruling that either the author's comments were opinion, and therefore protected, or too vague to cause damage to the doctor's reputation.

Hope may be brewing. As far back as October 2006, a Florida jury awarded $11.3 million when a Louisiana woman posted defamatory Internet messages accusing the plaintiff of being a "crook," "con artist" and "fraud."[35] The jury agreed with the plaintiff that it wasn't "just somebody's feelings are hurt; it's somebody's reputation is ruined"[36] and awarded damages.

In 2012, anonymous posters were ordered to pay $13 million for defamatory comments when plaintiffs successfully pleaded their case for defamation. Plaintiff Mark Leshner's post-verdict proclamation was insightful and appropriate when he stated that "[y]ou can't post anonymous lies on the Internet without suffering the consequences."[37] The plaintiff's attorneys agreed, stating "[the] victory . . . evidences the pricelessness of our reputations, the fundamental importance of free speech, and the relationship of each to the other."[38]

Perhaps the most promising win came in February 2017 when a judge awarded a $500,000 settlement to a Facebook user who endured reputational and emotional harm when false comments were made about her on the defendant's Facebook page. The plaintiff pursued the suit, in part, because "you can't get on social media and run your mouth without consequences."[39] The plaintiff offers a pertinent perspective, stating that "[a]s you well know, in the past when things got published, there was an editor or there was some sort of filter. You don't have that anymore, because now everybody is free to be their own sounding board out to the community."[40]

Online defamation targeted at medical providers is not an issue of freedom of speech. Instead, it concerns allowing unverified, unsolicited, anonymous attacks to one's business and reputation without offering some equal forum to respond and defend oneself as needed. As stated by Stanford Law School professor Ryan Calo, "[e]veryone knows people say crazy things on the Internet, especially when they do it anonymously."[41] For healthcare providers in particular, the additional regulatory restrictions under HIPAA make it legally unwise to respond to posters since the act of response itself could trigger a confidentiality violation.

Freedom of speech builds the very foundation of our great country and is the standard all other standards are measured against. Freedom to act, freedom to speak, freedom to defend, freedom to protect and freedom from harm empower Americans and challenge the legal system under which we live. Without the legal framework to balance freedom, however, segments of our population are left with skewed protections by trading one set of regulatory criteria for another. If the root of the First Amendment is to protect free speech, the root of defamation law is to protect from harm

one's person or reputation, and the root of HIPAA law is to protect the complete privacy of patients and their identifying health information, then how can medical providers effectively respond to attacks to character or reputation without violation? When the First Amendment clashes with tort law, which then clashes with federal regulation, who prevails? Until proper consideration is given to all players, the answer is nobody.

Have doctors finally had enough? One of the more aggressive defense campaigns from 2018 involves a gynecologist in New York who did. Dr. Joon Song decided to defend himself after a patient submitted online commentary accusing the doctor of "crooked" business practices after she was billed for her new patient exam. Dr. Song's attorney summarized the doctor's position by stating "while everyone is entitled to their opinion, outright lies masquerading as reviews can inflict serious damage to a medical practice or small business."[42] Successful claims for online defamation may be the beginning of changes to come. It is hopeful that courts are paying attention to libelous attacks online and that the grossest of offenders are starting to be held accountable for their actions.

But more is needed

Whether changes include different standards for anonymous postings, uniform standards for online media that require the disclosure of the author's identity, or a formal system for rectifying libelous attacks, solutions are possible. Until medical providers are able to effectively respond and defend themselves via the same forum used by their attacker, however, they have no recourse other than legal action, which has been disappointing at best. At a minimum, new regulations should allow the subject of a published commentary to effectively respond without violation of privacy protections. As Dr. McKee, a neurologist with Northland Neurology and Myology, after losing his own defamation suit against a patient aggressively attacking him online so appropriately stated, "We need to change the law so someone with a personal vendetta who is going to use the Internet to make defamatory statements can be held responsible."[43]

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Endnotes

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