

HANDLING NEGATIVE REVIEWS IN THE INTERNET AGE

Respond, ignore it, or call your attorney? It depends.



BY MARK J. ROSENBERG, JD

Mark J. Rosenberg is a Partner at Tarter Krinsky & Drogin's Intellectual Property Group and a Co-Chair of the firm's Reputation Management practice. He has more than 25 years of experience assisting clients in protecting their reputations from defamation and violations of their publicity and privacy rights as well as representing clients in acquiring, protecting, enforcing, and licensing intellectual property rights. mrosenberg@tarterkrinsky.com

Nearly every physician has received at least one negative review on an Internet review site such as Healthgrades, Vitals, or Yelp. These reviews can damage a doctor's reputation and can have significant ramifications for his or her practice. Unlike non-medical service providers who can unreservedly respond to negative reviews, a healthcare practitioner has restricted ability to respond, due to HIPAA and other privacy laws. Although a physician can attempt to prevent bad reviews by requiring patients to sign contracts prohibiting patients from posting reviews or by requiring patients to assign their reviews to the doctor, courts often rule that these types of contracts are unenforceable. Moreover, even if these contracts were enforceable, they don't prevent false reviews posted by competitors or situations where a patient mistakenly reviews the wrong physician, something that can happen when two or more doctors have identical or similar names.

REVIEWS CONSISTING OF OPINION

Reviews that reflect patient opinion are often grating. Claims that a physician has "poor bedside manner," "is the Attila the Hun of the operating room," "has bad breath," "is inattentive," or is "not worth the fees," are understandably annoying. While a doctor may want to respond to this type of review, he or she should think twice before doing so, for two reasons. First, opinions, however wrongheaded, are protected by the Constitution's First Amendment.

Forcefully responding to a review that is merely patient opinion can make a physician look thin-skinned or like a bully and is unlikely to result in the review being revised or removed. Also, an online response can exacerbate the situation. Because of privacy laws, healthcare providers' online posts cannot reference specifics of the case (e.g., procedure, patient health status, body habitus, etc.), making the response necessarily nonspecific and anodyne. This lack of a personalized response may further upset the patient, resulting in additional (and possibly more outlandish) negative reviews. In other words, no online response is sometimes the best response. If a physician strongly believes that a particular online review must receive a public response, they may want to consider stating something along the lines of, "We strive to provide the best patient experience and invite the reviewer to contact our office to discuss their concerns." Or, if the doctor is able to identify the reviewer, the physician can take a more personal approach by calling the patient or sending a letter or an email to the patient. If this resolves the issue, the doctor can then gently ask the patient to remove or edit the review.

Words of empathy coming directly from the physician can sometimes resolve the underlying issue and result in the patient removing the review after a period of reflection. This is particularly true when a negative review stems from a misunderstanding or from hurt feelings. But even in this case, the doctor remains at a disadvantage. While a retailer

or other non-medical service provider can offer replacement products, repairs, or credit, a physician has a limited set of tools beyond words of understanding. Because of this, before initiating contact with a reviewer, the doctor should carefully consider whether words alone will be sufficient, or if they would simply be adding fuel to the fire. This involves an analysis of both the personality of the patient who posted the review, as well the nature and substance of the review. Again, sometimes the best course of action is to do nothing. In time, a physician's many positive reviews will outweigh the rare and seemingly random negative ones.

REVIEWS CONSISTING OF FALSE STATEMENTS

While negative reviews that reflect patients' opinions can be annoying, reviews that contain false statements of fact can be career threatening or even spawn law enforcement issues. False allegations of malpractice, improper prescriptions for pain-killers, or insurance fraud can be devastating. When a physician encounters this type of review, immediate action must be taken. Does the doctor respond online? Be careful, as privacy laws will circumscribe any online response. If the online response appears weak, it could be construed as a non-denial or even a tacit admission that the patient is telling the truth.

If the reviewer can be identified, the physician or the practice's attorney should send a cease and desist letter demanding that the patient take down their post. The letter should be drafted while considering the possibility that the patient might post the letter on the Internet to mock its sender. Because of this, the letter needs to be forceful, while not appearing heavy handed or bullying. The letter should also acknowledge the reviewer's free speech rights and explain that by posting false statements of fact, the patient's review exceeds the bounds of protected speech.

Even with these types of reviews, consider whether sending a letter will only make things worse. For example, I recently counseled a surgeon whose patient posted several reviews complaining of having received poor post-surgical care. In reality, the post-surgical care was deficient because the patient either canceled or failed to show up for every one of her post-surgical appointments. Because of privacy laws, the surgeon could not state these facts in an online response. Nevertheless, despite having a strong argument, this surgeon decided that sending a cease and desist letter would likely provoke the patient into posting additional negative reviews. And so, the surgeon sent no letter, deciding that she could tolerate a few negative, albeit false, reviews among her many positive ones.

Another option is for the physician or the practice's attorney to contact the website on which the review was posted. By law, websites are largely immune from liability for defamation based on a third-party's postings. Thus, websites

typically refuse to remove reviews that constitute opinion, such as "my doctor is incompetent" or even reviews containing false statements of fact. However, some websites may be willing to remove a problematic review if the doctor can demonstrate that it is patently false or that the review violates the website's terms of service (or terms of use), many of which require any reviews to be posted only by a doctor's patient or the patient's parent or guardian.

The obviously false review is most likely taken down when the physician can demonstrate to the website that it was posted by a person who couldn't possibly be his or her patient. For example, a review citing a "poor job repairing a torn ACL" wouldn't belong among the reviews for a plastic surgeon. I was able to get several negative reviews removed where reviewers accused a plastic surgeon of poorly performing procedures that he had never performed during his entire career. Interestingly, these reviews appeared to have been posted by the physician's competitors, because the reviewers used technical medical terms, as opposed to layperson's terms, when describing procedures performed.

For some reviews, a cease and desist letter is not enough. If the review is extremely damaging and the patient refuses to remove the review or the reviewer is anonymous, a lawsuit may be necessary. Lawsuits can be brought seeking a court order requiring the patient to remove the false post or pay damages. In the case of anonymous reviews, a "John Doe" suit can be brought in order to ascertain from the website the identity of the reviewer (i.e., obtain discovery as to the poster's identity). Once the website provides the reviewer's identity, the case proceeds against the reviewer. While litigation can be expensive and time consuming, in certain circumstances it's all that stands between a damaged reputation and vindication. And, where the false review or its other ramifications (such as a DEA raid) have received attention in the media, a well-publicized lawsuit can help stem the negative publicity caused by the review and its aftermath.

KEEP YOUR EAR TO THE GROUND; MAYBE SOMETHING NEEDS TWEAKING

While negative reviews can be exasperating, they sometimes provide insight into a physician's practice, operations, or patient interactions. While many reviews undoubtedly contain exaggerations, even the worst can sometimes contain kernels of truth. When multiple reviews share a common criticism of office staff, scheduling, bedside manner, and the like, the way to fight back may not be to post an online rebuttal (or to lawyer up), but to use these reviews as an opportunity to gain perspective and improve the patient experience. Today's physician cannot be everywhere at all times, so negative internet reviews might come with a silver lining. ■