

Risk Management



What Can I Do About a Negative Online Review?

by Donna Vanderpool, MBA, JD

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This ongoing column is dedicated to providing information to our readers on managing legal risks associated with medical practice. We invite questions from our readers. The answers are provided by PRMS, Inc. (www.prms.com), a manager of medical professional liability insurance programs with services that include risk management consultation, education and onsite risk management audits, and other resources to healthcare providers to help improve patient outcomes and reduce professional liability risk. The answers published in this column represent those of only one risk management consulting company. Other risk management consulting companies or insurance carriers might provide different advice, and readers should take this into consideration. The information in this column does not constitute legal advice. For legal advice, contact your personal attorney. Note: The information and recommendations in this article are applicable to physicians and other healthcare professionals, so “clinician” is used to indicate all treatment team members.

QUESTION

I just searched my name online and was horrified to find a former patient’s very negative review on an online physician review site. How can I get the review taken down?

ANSWER

Unfortunately, online reviews of healthcare providers are a fact of life today. The good news is that most online reviews are very positive. The bad

news is that you have very limited recourse related to negative reviews. Confidentiality precludes you from responding—even though your patient has already told the world that he or she was in treatment with you. You cannot confirm the poster was a patient. This reality has caused frustration that resulted in some very creative, but costly, responses.

What you should not do. You should not “astroturf” by paying your staff to

pose as customers and create false positive reviews to counteract negative reviews. One plastic surgeon learned this lesson the hard way, as the New York Attorney General found this practice to be “cynical, manipulative, and illegal” and fined him \$300,000.¹

You should not have patients sign an agreement stating that in exchange for not talking negatively about you and/or your practice, you will grant your patients confidentiality rights, which they already have under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). One practice learned this after being investigated by the Office of Civil Rights (OCR). The practice had patients sign an agreement prohibiting patients from “directly or indirectly publishing or airing commentary about the physician, his expertise, and/or treatment in exchange for the physician’s compliance with the Privacy Rule.” OCR stopped this agreement from being used, noting that “a covered entity’s obligation to comply with all requirements of the Privacy Rule cannot be conditioned on the patient’s silence.”² At least one lawsuit has been brought by a patient against a provider who required this agreement. In that case, the court found the agreement to be null and void for unconscionability and a deceptive act or practice in violation of New York law.³ And, the Consumer Review Fairness Act of 2016 is a federal law that prohibits non-disparagement clauses in contracts with consumers.

You should not retaliate against a former patient who posted a negative review by posting a video of the patient in her underwear on YouTube and Facebook, as one plastic surgeon did. The surgeon also reportedly sent the patient an email that said, “I will damage your professional reputation, and you will be humiliated!”⁴ The patient filed a licensing board complaint; the physician was able to resolve the investigation by agreeing to 24 hours of continuing medical education, including eight hours of education on HIPAA and eight hours

on physician-patient communication; a \$2,000 penalty; and having to pass the Board's Medical Jurisprudence Examination. Additional consequences are likely, as the patient has filed a lawsuit against the physician.

What you should consider very carefully before doing. *Contacting the patient.* You should think very carefully about contacting a former patient based on a negative online review. In at least one situation when this was done, it led to an even angrier post by the former patient, who, outraged that she was contacted by her former physician, asserted legal and ethical violations by the physician.

Filing a lawsuit. There have been several lawsuits involving online negative reviews—some involve the healthcare professional suing the patient, others suing the review site, and still others suing other healthcare professionals. Consider the following:

- When patients are sued for negative reviews, the vast majority of courts find for the patient, typically viewing the posts as opinions and not defamation. In light of this, some physicians have gotten creative in their allegations and have sued for other alleged wrongdoings. In one recently decided case,⁵ a patient sued a plastic surgeon for malpractice and won a \$5.1-million jury verdict, which was reduced to a \$600,000 judgment. After prevailing in court, the patient posted an unfavorable review online of the plastic surgeon. Claiming the negative review resulted in the cancellation of a scheduled procedure by a different patient, the plastic surgeon sued the patient, claiming tortious interference with business relations and tortious interference with contracts. The trial court found there was no support for either of the two allegations by the physician, and ruled in favor of the patient. The

appellate court affirmed the trial court's decision.

- Several healthcare professionals have sued the review sites, including Yelp and Google, on which the negative reviews were posted. Most, if not all, of these cases were dismissed.
- And there have been a few lawsuits where a healthcare professional sued another healthcare professional over allegedly defamatory comments online.^{6,7} These cases tend to be dismissed or not pursued.

What you can do. The first thing you should do is really think about the patient's complaint to rule out that it is a valid one. For example, just because you and your front office assistant always communicate professionally with each other does not mean that a patient's complaint of rudeness on the part of the office assistant is, *per se*, false.

Next, if the negative review was posted by a current patient, you should discuss the concerns privately with the patient.

And finally, if there is no confirmation that the poster is or was a patient, you can also ask the hosting site to remove the post if the post is false and violates the site's own policies and terms and/or if removal is allowed (e.g., some sites will give physicians a set number of "take downs" per year, no questions asked).

CONCLUSION

While the vast majority of online reviews about healthcare professionals are positive, it can be very frustrating to see false, negative, and/or unfair comments posted about one's professionalism and/or treatment practices or that of one's clinic. Keep in mind that there are very few options in terms of response, and some responses, such as filing a lawsuit against the poster, will likely not benefit the healthcare professional, and will very

likely generate more attention to the accusations in the post.

REFERENCES

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