Specifically, websites like Healthgrades, Yelp, Facebook, and WebMD offer users the opportunity to “like” or “dislike” their providers; they also allow users to post typed comments and reviews and these posts/comments are often unfiltered. This is clearly riddled with issues implicating potential Health Insurance Portability and Accountability Act (HIPAA) violations, free speech, and damage to the providers both in their personal and professional capacities. Questions arise like what if the review/comment about a health care provider was posted by a non-patient? What if the review/comment is negative or adverse to the health care provider? What if the review/comment was posted by a competing health care provider who obviously has his or her own economic interests at heart or maybe by someone who may have received excellent care with a positive outcome, but was compelled to post a negative review for other reasons? How are false negative reviews or comments about health care providers prevented? Do the aggrieved health care providers have recourse? Should health care providers respond? What are the HIPAA concerns and how may those be avoided? This article explores these issues, discusses the jurisprudence, and offers recommendations to providers and their counsel.

An investigation conducted in early 2016 by ProPublica in association with The Washington Post analyzed over 1.7 million patient reviews on Yelp and the most common issue found was that of breached patient privacy. As any health care provider or health care attorney knows, any breach of protected health information (PHI) creates exposure for that provider and must be avoided. In one particular case, a patient posted a negative review of her dentist on Yelp. The dentist responded, but didn’t limit his response to an apology or request to speak in person to address the aggrieved patient—the dentist responded with releasing the patient’s PHI on Yelp. The patient complained to the Office for Civil Rights (OCR), which enforces HIPAA violations, and OCR issued a warning to the dentist. In another incident out of Washington state, a dentist responded inappropriately on Yelp to a patient complaint regarding the dentist’s care and treatment that involved the loss of the patient’s molar. In this particular situation, when the patient complained on Yelp, the dentist responded “due to your clenching and grinding habit, this is not the first molar tooth you have lost due to a fractured root. This tooth is no different.” The dentist released specific information that might be considered PHI regarding the patient and their health issues. The
dentist’s response in this case was inappropriate, unprofessional, and a violation of HIPAA. Releasing PHI online for the world to see is not the most optimal method a provider could use to respond to negative press about his or her professional services and should be avoided.

No one likes to have their professional work criticized in any way, particularly physicians. When a physician has been the object of a bad review, especially a public one that reaches the entire World Wide Web, the first thought is usually to pursue legal recourse. Defamation is the cause of action most often cited as the appropriate legal response.4 Defamation is utilized by aggrieved providers to remove negative reviews as defamation “attempts to balance a plaintiff’s interest in an un tarnished reputation against a defendant’s First Amendment right to freedom of speech.”

The elements of defamation vary from state to state, but generally require:

1. a false and defamatory statement concerning another;
2. an unprivileged communication of that statement to a third party;
3. fault amounting to at least negligence on the part of the speaker; and
4. either actionability of the statement irrespective of social harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod).5

In analyzing a defamation claim one must first consider whether the content complained of meets the definition of defamatory. A communication is considered defamatory if it “tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from association or dealing with him.”6

In determining whether a communication fits in the above definition of defamation, “courts consider the circumstances surrounding the communication and evaluate its effect upon the average reader or listener.”7 The specific cause of action hinges on whether the statement at issue was made orally, which is “slander,” or whether it was written, which is “libel.”8 Whether the statement is slander or libel dictates what the plaintiff must prove because libel claims typically do not require proving the plaintiff suffered economic harm.9 The rationale and policy behind such a burden speaks to the permanence of written statements, which is why negative reviews on websites such as Facebook or Healthgrades carry such weight as well as spark such a response from the targeted physicians.10 If the defamatory comments were made about a private person versus a public figure, plaintiffs generally have to prove their case by a preponderance of the evidence.11 For public figures, plaintiffs must additionally prove the defendant acted with actual malice by clear and convincing evidence.12

In the past when dealing with negative ratings or reviews, physicians have tried to sue the rating websites with no success. The lack of success is due to the fact that most rating websites are protected from civil litigation pursuant to § 230 of the Communication Decency Act (CDA) codified in 47 U.S.C. § 230. The CDA provides in 47 U.S.C. § 230(c):

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The CDA has been utilized by most content hosting sites to avoid litigation exposures with great success.

Despite the various social media platforms’ use of the CDA to insulate themselves from liability, the individuals who post the content receive no such protection. Of note, most social media sites have some requirements members must meet to join that limit a member’s anonymity. However, in the age of fake news and bogus accounts, members who are posting negative comments on physicians have the upper hand if they are able to do so anonymously. However, if the commenter can be identified, the physician may sue them individually. Instagram, Facebook, and Yelp have numerous fake accounts, which may prove identifying the poster extremely difficult. Creating a fraudulent/anonymous account is as easy as creating an email account and fabricating a name.

While physicians have sued patients or commenters individually, there’s a pattern of unsucces in the jurisprudence. The threshold of proving defamation is high. In Courtney v. Vereb, Dr. John Courtney, a psychologist, alleged that Dr. Bartholomew Vereb, a psychiatrist, “intentionally and maliciously posted false and defamatory comments” about Courtney on Angie’s List, which is a website where professional services are rated and reviewed.13 Both Courtney and Vereb practiced in Louisiana. Courtney named both Vereb and Angie’s List as defendants in his suit filed in federal court in the Eastern District of Louisiana. However, Courtney didn’t immediately resort to litigation. Prior to filing suit, Courtney “contacted Angie’s List via its online internal complaint form to request that it not disseminate Vereb’s comments; however, Courtney received no response from Angie’s List.”14 Courtney alleged that he repeatedly reported to Angie’s List that the comments were false and that he wanted them removed. Despite filing claims against Vereb’s comments, on the grounds that Angie’s List does “not allow businesses to report on themselves or competitors.”15 It was after all of these steps had occurred that Courtney then decided to file against Vereb individually and Angie’s List in federal court. Despite filing claims against Angie’s List, his suit was dismissed based on the immunity provisions contained in the CDA. The application and analysis of the CDA hinges on three factors: (1)
whether the defendant qualifies as an interactive service provider; (2) whether the defendant made the alleged defamatory statements; and (3) whether the claim against the defendant treats the defendant as the publisher of the alleged defamatory statements. Finding that the CDA applied to Angie’s List in this particular matter, the judge thus dismissed all claims against Angie’s List, leaving Courtney free to proceed against Vereb individually.

In another case involving negative comments on physician-rating websites, the case of McKee v. Laurion, the Minnesota Supreme Court ruled against Dr. David McKee after he sued a patient’s son for defamation. McKee, a neurologist, treated the father of the defendant, Dennis Laurion, after his father suffered a stroke. Laurion found McKee’s bedside manner rude, and upon his father’s discharge, he posted the following comment on various physician-rating websites:

My father spent two days in ICU after a hemorrhagic stroke. He saw a speech therapist and a physical therapist for evaluation. About 10 minutes after my father transferred from ICU to a ward room, Dr. McKee walked into a family visit with my dad. He seemed upset that my father had been moved. Never having met my father or his family, Dr. McKee said, “When you weren’t in ICU, I had to spend time finding out if you transferred or died.” When we gaped at him, he said, “Well, 44 percent of hemorrhagic strokes die within 30 days. I guess this is the better option.” My father mentioned that he’d been seen by a physical therapist and speech therapist. Dr. McKee said, “Therapists? You don’t need therapy.” He pulled my father to a sitting position and asked him to get out of bed and walk. When my father said his gown was just hanging from his neck without a back, Dr. McKee said, “That doesn’t matter.” My wife said, “It matters to us; let us go into the hall.” Five minutes later, Dr. McKee strode out of the room. He did not talk to my mother or myself. When I mentioned Dr. McKee’s name to a friend who is a nurse, she said, “Dr. McKee is a real tool!”

In response, McKee sued Laurion for libel. Truth is a complete bar to defamation claims, thus the Supreme Court of Minnesota’s analysis of McKee substantially looked to the veracity of the statements allegedly made. The court ultimately determined whether viewed individually or as a whole, Laurion’s statements were not actionable either because they were true or because they were pure opinions, which could not be proven true or false. For example, regarding the “real tool” comment, the court established that “referring to someone as ‘a real tool’ falls into the category of pure opinion because the term ‘real tool’ cannot be reasonably interpreted as stating a fact and it cannot be proven true or false.” However, the court analyzed the phrase “real tool” separately from Laurion’s allegation that a nurse told him that McKee is a real tool. The insult is one of pure opinion, which has no veracity or falsity, but the allegation that somebody else made this statement to him could be proven true or false (i.e., either Laurion fabricated that he was told McKee was a real tool or he did not). However, as determined by the court, neither the phrase or the accusation that it was told to Laurion by the nurse were defamatory since “the assertion that a nurse made the statement only has the potential to cast McKee in a negative light when combined with the second part of the statement—that McKee is a ‘real tool.’” Accordingly, after four years of litigation, the Supreme Court of Minnesota dismissed McKee’s lawsuit.

Potentially the most notorious and interesting case regarding a physician suing a patient for defamation comes out of Arizona. In Carlotti v. Petta, Drs. Carlotti and Cabret-Larcot, a husband and wife cosmetic surgery team, successfully sued former patient Sherry Petta and received a jury verdict of $12 million in December 2011. However, the judgment was vacated and remanded for a new trial. In essence, the suit claimed that Petta, who was unhappy with the results of her various cosmetic surgeries, both voiced her discontent with other patients in person and on a website she launched dedicated to lambasting the cosmetic surgery practice. Petta made erroneous claims such as that one of the surgeons was not board certified and that one of them was being investigated by the Arizona Board of Medical Examiners. Petta even took her anger so far as getting phone numbers of other patients, contacting them, and sharing her baseless allegations. Although the plaintiffs had success at the trial court, the judgment was vacated and trial remanded with no additional comments as to what occurred post remand.

Although hosting social media platforms where reviews are posted are protected by the CDA, it’s interesting to note that some of the platforms provide disclosures on what their ratings actually mean and how reliable or unreliable they may be. For example, WebMD provides users the following information:

- These sites use only patient reviews to rank doctors. This means the ratings are based more on opinion than actual data showing how well a doctor provided treatment or care.
- Some of these rating website[s] may promote physicians who have a paid rather than a free profile.
- If you have questions, ask your health care providers. They can help explain what the rankings may mean—and what they don’t mean.
- Use the information to help you decide. But don’t rely on it entirely. Consider what else you know, too.

Although this explanation doesn’t do much to prevent negative reviews, it does inform potential users that what is posted is based on opinions—not objective facts.

If you, as a professional, or your physician/health care client is subject to a negative online review, there are options to consider when responding. First, the provider should consider meeting with the aggrieved patient or commenter in person to resolve the conflict. Personal contact often results in the patient removing the review or the patient posting an additional review, but one that’s positive. Pursuing this course of action establishes the provider in the patient’s mind as taking the time to be considerate and to evaluate their practice. It’s a plain and simple common-sense concept—people just want to be heard. Moreover, while it’s easy to instinctually respond with offense, the provider should objectively evaluate their practice—are there areas where the provider could improve? Negative reviews may serve as an opportunity to resolve some problematic areas of a provider’s practice, which may preclude medical malpractice litigation.

However, if the provider chooses to respond online, it is of the utmost importance to never use patient information/PHI in the response. Releasing PHI online in any format puts providers at risk for HIPAA violations, and as outlined above, patients have responded by pursuing a claim through OCR. By posting PHI online, a physician will also suffer setbacks with other potential patients who might view
the physician as reckless. Most people know it’s not only unprofes-
sional and inappropriate to share patient information, but also a vi-
olation of HIPAA regulations as well as potential state regulations on
patient privacy. A negative review may be somewhat damaging in the
public eye, but violating patient privacy and the risk of prosecution
is far more concerning to a provider with whom patients put their
trust. Accordingly, public responses should adhere to only disclosing
general policies and standard protocol.25 The provider should ask
themselves if what they’re posting is applicable to all patients or
the aggrieved patient specifically. If the information is specific, do
not post it. This is why it’s best to meet with the aggrieved patient
individually. Not only does it exemplify personal attention and care,
the risk of violating HIPAA and other state privacy regulations are
avoided.

Rather than responding directly to the negative review, providers
should consider establishing their own online presence. Websites
like Healthgrades, RateMDs, Doximity, and Facebook allow users to
create profiles for commercial entities. If the provider has a mutually
respectful relationship with their patient base, they should consider
kindly asking some of their patients if they’d feel comfortable posting
a review of the provider’s services online.26

Lastly, if the website where the negative post appears has a policy
like Angie’s List and the poster is another physician in the same
specialty and whom the targeted physician has not treated, it’s worth
the provider’s time and effort to pursue reporting a violation of the
website’s terms of service and requesting for the comments’ removal.
This is a cost-effective and efficient way to remove baseless posts
from other competing practitioners. ♦

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