Responding to online defamation

By Clifford Warren Lober, MD, JD, October 2, 2017

Sarah: One of my patients just slammed me on the internet! He said I scarred his face so badly that he looks “like Frankenstein.” He called me “a butcher” and said he wouldn’t even send a dog to someone like me. I am fairly certain I know which patient made the comment and I want to sue him!

Bryan: Let’s take a deep breath and look at the situation. You’re an excellent doctor with years of experience. I know you care deeply about your patients. This makes such comments particularly hurtful, especially if they are baseless.

Sarah: You’re not kidding!

Bryan: First of all, you should forget about suing the patient. He has a First Amendment right to state his opinions, no matter how reprehensible or repugnant they are. His defense attorney would simply point out that the comments were his opinions. Only if there were factually incorrect statements, such as alleging that someone other than you did the surgery, would we have a basis for a defamation lawsuit.

If we were to pursue this matter through the courts, we would file for injunctive relief to have the comment removed and prohibit the website from re-posting it. Should we seek monetary damages, we would have to find the patient, succeed in getting a judgment against him, and then hope he was not judgment proof. Furthermore, filing suit might only bring far more attention to the matter as social media picks up on how an injured patient is now being sued by the doctor who “butchered” his face. This is known as the “Streisand effect,” named after Barbara Streisand who sued over unauthorized aerial pictures of her Pacific home only to bring incredibly more attention to the matter.

Sarah: All right, then let’s sue the website that posted his comments!
Bryan: The Communications Decency Act of 1996 likely precludes you from suing rating and review websites unless they substantially alter the content of the message. Section 230 of that Act states, in pertinent part, 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.” You are generally unable to sue a rating and review website for merely providing a venue for third parties to voice their unaltered opinions.

Sarah: I can have my friends and relatives write positive reviews so that the patient’s negative comments get buried under their glowing statements!

Bryan: “Astroturfing,” which is the creation of reviews not based on facts or actual experience, is fraud since it is specifically intended to mislead the reader into thinking the reviews were submitted by actual patients. Many of the physicians rating sites have “sniffing tools” which specifically look for astroturfing.

Sarah: O.K. But in the future I will have my patients sign an agreement either not to make negative comments about my practice or to allow me to review their comments before they are posted online. If they don’t sign the agreement I won’t accept them as patients.

Bryan: That is absolutely illegal under federal law! Congress felt that restricting consumers’ right to free speech was against public policy. The Consumer Review Fairness Act of 2016, which became law on Dec. 14, 2016, expressly prohibits you from restricting any “assessments” or “similar analysis,” “including by electronic means,” of the services you provide or requiring a consumer/patient to submit comments to you for your review or approval prior to publication.

Sarah: So that’s it? There is nothing I can do?

Bryan: Not necessarily! The best possible outcome would be to have the website remove the comment. The first thing you should do is review the website’s rules and guidelines for accepting posts. Do the patient’s offensive comments comply with the site’s regulations? Although many physician rating sites routinely review comments to be sure they are in compliance, not all do so and even those that do conduct reviews will usually screen a comment again if they get a request to do so. When you request that the site review the offending comment, remember to be polite since those running the site did not personally create or solicit the offensive comments.

Sarah: What if the site does not remove the comment?

Bryan: Try to spin the offensive post into a marketing tool by showing your concern and compassion for patients. Realizing that you are not certain which patient made the offensive comments and realizing that HIPAA precludes your discussing individual patients without their consent, you can say, for example, “I wish I knew who this patient was. None of my patients match the situation described. If you are this patient, please contact me so that we can address this situation together.” Anyone reading this response would know that you are a caring, compassionate doctor.

When responding to an offensive comment, never argue with the patient or appear condescending to him or her. This is an extremely counterproductive way to handle the situation.

Sarah: I understand that I cannot create fictitious positive reviews. What about soliciting positive reviews from patients who were pleased?
Bryan: You can certainly ask for feedback from your patients. The overwhelming majority of your patients certainly have a favorable or exceptionally favorable opinion of you or they wouldn’t be your patients. These positive ratings will certainly dilute the rare offensive comment.

Sarah: That may be true, Bryan, but the offensive comment stills hurts.

Bryan: It actually may not be as harmful as you may imagine. Potential patients realize that even the most outstanding physicians occasionally have a dissatisfied patient. The very best restaurants and hotels in the United States, for example, have had sporadic negative comments. Would a potential patient really believe that absolutely all of any physicians’ patients actually rate him or her “5.0”? In an odd way, a rare negative comment makes otherwise exceptional ratings believable.

Sarah: Thanks, Bryan!