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"I Hate My Doctor": Reputation, Defamation, and Physician-Review Websites

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“I HATE MY DOCTOR”: REPUTATION, DEFAMATION, AND PHYSICIAN-REVIEW WEBSITES

Sean D. Lee[†]

CONTENTS

INTRODUCTION	574
I. BACKGROUND	576
A. <i>Physician-Review Websites</i>	576
B. <i>Results of Physician-Review Websites</i>	577
C. <i>Why Are Physicians Uneasy about Online Reviews?</i>	578
1. Patient Privacy Protections under HIPAA	579
2. The Specialized Nature of Medical Care	580
3. Professional and Societal Considerations	582
II. PHYSICIANS’ LEGAL RESPONSES TO ONLINE REVIEWS	583
A. <i>Defamation Law</i>	583
1. Establishing a Cause of Action	583
a. <i>The Elements of Defamation</i>	583
b. <i>Defamation Per Se</i>	584
c. <i>Public v. Private Figures</i>	585
d. <i>The Challenge of Anonymous Reviewers</i>	586
2. Defenses to Claims of Defamation	587
a. <i>Immunity for ISPs under Section 230 of the CDA</i>	588
b. <i>Substantial Truth</i>	589
c. <i>Opinion</i>	590
d. <i>Unintended Consequences: Anti-SLAPP Suits and the “Streisand Effect”</i>	591
3. Summarizing Problems with Defamation Law	592
B. <i>Medical Non-Disclosure Agreements: A Contract- and Copyright-Based Approach</i>	593
1. How Do Medical NDAs Work?	594
2. Problems with the Medical NDAs	596
a. <i>Contract Law</i>	596
b. <i>Copyright Problems</i>	598
c. <i>Other Problems</i>	598
3. Recent Litigation over Medical NDAs	599
4. Summary of Problems with Medical NDAs	600
III. PHYSICIANS SHOULD VALUE PATIENT-REVIEW SITES	601
A. <i>Physicians Should Actively Establish a Positive Online Identity</i>	601
B. <i>Physicians Should Continuously Monitor Their Online Profiles</i>	603

[†] J.D., 2013, Case Western Reserve University School of Law; B.A., College of William & Mary. Sincere thanks to Professor Eric Goldman, Santa Clara University School of Law, for his advice while writing this Note and for inspiring my interest in the legal issues surrounding physician-review websites. I am grateful to Professor Sharona Hoffman, Amanda Maly, Ben Sattin, Christina Petersen Greer, and the *Health Matrix* Volume 23 staff.

C. Physicians Should Accept the Realities of Negative Online Reviews.. 604
CONCLUSION: THE CASE OF MEDICAL JUSTICE 605

INTRODUCTION

Imagine that you are Dr. X, a physician with a general practice. While doing an Internet search on yourself one evening, you discover the following anonymous comments posted on the website RateYourDoctor.com:

- “Dr. X is a quack. AVOID at all costs!!!”
- “Horrible bedside manner.”
- “Never sent me a follow-up on my tests.”
- “Office is filthy and the staff is rude.”

While you do have a smattering of positive reviews, your overall “score” according to the website is “1.8 out of 5.” Not only are your feelings hurt, you are certain that none of these allegations are true—and skeptical that real patients wrote these reviews. Above all, however, you are scared that these comments will hurt your business by deterring prospective patients who see this information.

Currently, more than forty websites like the hypothetical RateYourDoctor.com allow Internet users to review their medical care providers.¹ Many physicians are concerned that inappropriate negative comments on these sites can damage their reputations and practices.² Because physician-review sites usually allow anonymous reviews, a doctor might be maligned by her competitors, disgruntled ex-employees, or anyone else with an axe to grind. As one dermatologist lamented, any Internet user theoretically wields the power to “ruin the reputation of a business that takes decades to build.”³ Negative online reviews can be particularly harmful to a physician’s reputation because of the Internet’s global scope, the nearly effortless access to the medium, and the persistence of the comments.⁴

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1. Sandra G. Boodman, *To Quell Criticism, Some Doctors Require Patients to Sign ‘Gag Orders’*, WASH. POST (July 21, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072002335.html>.
 2. *See id.*
 3. Amy Lynn Sorrel, *Negative Online Reviews Leave Doctors With Little Recourse*, AMERICAN MEDICAL NEWS (Oct. 4, 2010), <http://www.ama-assn.org/amednews/2010/10/04/prca1004.htm>.
 4. *See* Jeffrey Segal et al., *Legal Remedies for Online Defamation of Physicians*, 30 J. LEGAL MED. 349, 349 (2009) (“Given the massive number of Internet users, the global scope, and the effortless access to this medium, the audience, persistence of comments posted, and potential reputational damage are all greatly magnified.”); *see also* Cass R. Sunstein, *Believing False Rumors*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 91, 106 (Saul Levmore & Martha C. Nussbaum eds., 2010) (noting that individuals’ reputations are particularly vulnerable to

On the other hand, doctors must weigh these concerns against their patients' interests in freely expressing their impressions about the quality of their care. The Internet, through sites like Yelp and TripAdvisor, has allowed millions of consumers to share their experiences about an array of services like hotels and restaurants—with positive results for those industries.⁵ With the increasing characterization of the physician-patient relationship as a commercial one,⁶ it is unsurprising that patients have gone online to express their opinions of their healthcare providers. In the words of John Swapceinski, founder of physician-review website RateMDs.com, “Anything that people spend time or money on ought to be rated.”⁷ From a public health standpoint, several commentators have argued that increasing the amount of available information about physicians, hospitals, and insurance plans will allow consumers to “reward the good and avoid the bad, thereby turning the power of individual choice into a powerful tool of change.”⁸

Many doctors who are angry about these websites are increasingly suing or threatening to sue patients over their online reviews. For example, a dentist in Georgia sued over a Yelp review that his office was “old, dirty, and smelly.”⁹ Similarly, a Minnesota doctor sued the son of a patient who posted reviews alleging the doctor mistreated his elderly father.¹⁰ For all of the controversy that physician-review websites have sparked, surprisingly little has been written about them from a legal perspective. This Note is one of the few to consider physician-review websites through a legal lens.

In this Note, I will examine how some providers have used defamation law and a novel type of “gag contract” to limit patients' comments on physician-review websites. I argue that both of these legal

falsehoods on the internet because the technology “allows information to be provided to the world, in an instant, and it allows easy discovery, by anyone, of that information, also in an instant”).

5. Ron Lieber, *The Web Is Awash in Reviews, but Not for Doctors. Here's Why.*, N.Y. TIMES, March 10, 2012, at B1.
6. See generally Mark A. Hall, *The Legal and Historical Foundations of Patients as Medical Consumers*, 96 GEO. L.J. 583, 590–91 (2008); NANCY TOMES, THE “INFORMATION RX” in MEDICAL PROFESSIONALISM IN THE NEW INFORMATION AGE 40–41 (David J. Rothman & David Blumenthal eds., 2010) (exploring the belief that “individual consumers can reform the American health care system” with the help of “more and better information”); see Kristin Madison, *Patients as “Regulators?”: Patients' Evolving Influence Over Health Care Delivery*, 31 J. LEGAL MED. 9, 21–22 (2010).
7. Lieber, *supra* note 5.
8. Tomes, *supra* note 6, at 41.
9. *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411 (2010).
10. *McKee v. Laurion*, No. A11-1154, 2013 WL 331558 (Minn. Jan. 30, 2013).

approaches are largely ineffective ways to manage physicians' online reputations and propose that a better solution lies in using alternative, non-legal means. Part I of this Note provides an overview of physician-review websites: what they are, what they purport to rate, and how. This section explores why many physicians are wary of online reviews despite research indicating that they are overwhelmingly positive. Part II considers doctors' use of defamation law and patient "gag contracts" that use contract and copyright law to respond to unfavorable online reviews and concludes that these legal responses are largely ineffective. Finally, Part III argues that physicians' best course of action against unfavorable online reviews is primarily extrajudicial.

I. BACKGROUND

A. *Physician-Review Websites*

Health care quality reporting is not a new phenomenon, and information about patient experiences and satisfaction is available in many forms.¹¹ For example, as part of its "Hospital Compare" initiative, the federal government publishes hospital patient experience ratings based on criteria like "nurses' and physicians' communication skills, pain control, cleanliness, and whether the patient would recommend the hospital to friends and family."¹² Some state governments, nonprofit organizations, and health insurers publish similar reports of patient satisfaction based on a variety of subjective and objective criteria.¹³ According to one commentator, this trend toward quality reporting has increased due to factors like greater attention to health care quality concerns and cheaper, more widespread access to technology.¹⁴

Consumers are increasingly going online to inform their health care decisions.¹⁵ As of 2009, more than forty websites like Angie's List, Yelp, and RateMDs offer reviews of medical care providers.¹⁶ Even Zagat, best known for its travel and leisure guides, entered the business of physician reviews in 2008.¹⁷ In addition to providing basic information about a

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11. Kristin Madison, *The Law & Policy of Health Care Quality Reporting*, 31 CAMPBELL L. REV. 215, 215 (2009).
 12. Madison, *supra* note 6, at 19.
 13. Madison, *supra* note 11, at 215.
 14. *Id.* at 217.
 15. See Boodman, *supra* note 1.
 16. *Id.*
 17. Milt Freudenheim, *Noted Rater of Restaurants Brings Its Touch to Medicine*, N.Y. TIMES, Feb. 16, 2009, at B8; see also Tomes, *supra* note 6, at 41.

provider's licensure, office locations, and disciplinary record,¹⁸ these physician-review websites allow patients to rate their experiences—often anonymously—on criteria like the physician's punctuality, knowledge, bedside manner, and even staff friendliness.¹⁹ Based on these categorical ratings, review sites calculate an overall “score” for the provider, usually represented numerically (e.g., “8/10” or “four stars out of five”). Some review sites allow patients to supplement their grades with comments or narratives while others compile only numerical data.

Commentators debate the usefulness and legitimacy of physician-review sites. For example, while one analyst argues that these websites can improve standards of care by providing timely and detailed feedback to providers, another responds that the anonymous and unscientific data gleaned from these sites is worthless or even detrimental.²⁰ The American Medical Association (AMA) and some states' attorneys general have expressed concerns that these ratings merely reflect disgruntled patients' venting and can be misleading.²¹ Similarly, the American Academy of Family Physicians has warned that “choosing a physician only according to consumer ratings can deprive patients of high quality medical care, particularly if those ratings are based on unrecognized and unvoiced anger or unjustified allegiance.”²²

B. Results of Physician-Review Websites

So how do physicians fare on these websites? For all the wrath these sites have provoked, the result is surprising: studies show that doctor ratings are overwhelmingly positive.²³ For example, one study of thirty-

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18. Tara Lagu et al., *Patient's Evaluations of Health Care Providers in the Era of Social Networking: An Analysis of Physician-Rating Websites*, 25 J. GEN. INTERNAL MED. 942, 942 (2010).
 19. See, e.g., RATE MDS, <http://www.ratemds.com> (last visited Sept. 10, 2013); HEALTH GRADES, <http://www.healthgrades.com> (last visited Sept. 10, 2013); VITALS: WHERE DOCTORS ARE EXAMINED, <http://www.vitals.com/doctor/rate> (last visited Sept. 10, 2013).
 20. Neil Bacon & Margaret McCartney, *Will Doctor Rating Sites Improve Standards of Care?*, 338 BRIT. MED. J. 688, 688–89 (2009).
 21. GUODONG GAO ET AL., A DIGITAL SOAPBOX? THE INFORMATION VALUE OF ONLINE PHYSICIAN RATINGS 27 (2011), available at https://server1.tepper.cmu.edu/seminars/docs/Agarwal_paper.pdf. But see Pamela Lewis Dolan, *Satisfied Patients More Likely to Leave Online Review*, AMERICAN MEDICAL NEWS (July 19, 2011), <http://www.ama-assn.org/amednews/2011/07/18/bisd0719.htm>.
 22. See Tomes, *supra* note 6, at 40–41.
 23. Eric Goldman & Jason Schultz, *Why Online Reviews Help*, DOCTORED REVIEWS, <http://www.doctoredreviews.com/doctors/why-online-reviews> (last visited Sept. 10, 2013) (“Doctors often fear negative patient reviews, but negative reviews are actually rare. The vast majority of patient reviews are positive or neutral, not negative.”).

three physician-rating websites found that 88 percent of reviews were positive, while 6 percent were negative, and 6 percent were neutral.²⁴ Another study analyzing 15,000 reviews from 2004–2010 on the site DrScore.com found the average doctor rating was 9.3 out of 10, with an astonishing 70 percent of reviewed physicians receiving perfect scores.²⁵

Although review sites are increasingly popular, they may not yet factor significantly in consumers' health care purchasing decisions. A 2011 study conducted by the Pew Research Center's Internet & American Life Project concluded that physician-review sites "have not yet become health care decision-making tools for most consumers."²⁶ Indeed, only 16 percent of Internet users have consulted online rankings or reviews of doctors or other providers, while 4 percent of Internet users have posted an online review of a doctor.²⁷ Another study, however, reports higher figures: that 37 percent of adults have consulted physician-rating sites, and 7 percent of people who sought information about their provider posted a review online.²⁸

C. *Why Are Physicians Uneasy about Online Reviews?*

Based on these findings, it seems strange that doctors and medical organizations have reacted so strongly to online reviews. There may be several explanations for their discomfort. While provider reviews on the whole are positive, individual doctors may still dislike negative ratings. Obviously, no one wants to be criticized, especially on such a public and enduring forum as the Internet. Reviews of individual doctors also tend

24. Lagu, *supra* note 18, at 943.

25. Joey Holleman, *Online Doctor Reviews Mostly Positive*, THE STATE (Jan. 25, 2012), <http://www.thestate.com/2012/01/25/2126584/online-doctor-reviews-mostly-positive.html>.

26. SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, THE SOCIAL LIFE OF HEALTH INFORMATION, 2011 8 (2011), available at http://www.pewinternet.org/~media/files/reports/2011/pip_social_life_of_health_info.pdf; see also KAISER FAMILY FOUNDATION, 2008 UPDATE ON CONSUMERS' VIEWS OF PATIENT SAFETY AND QUALITY INFORMATION 3 (2008), available at <http://www.kff.org/kaiserpolls/upload/7819.pdf> (reporting that only 12 percent of Americans say that they have seen information comparing the quality of doctors); Pamela Lewis Dolan, *Patients Rarely Use Online Ratings to Pick Physicians*, AMERICAN MEDICAL NEWS (June 23/30, 2008), <http://www.ama-assn.org/amednews/2008/06/23/bil10623.htm> (discussing the results of a 2007 California HealthCare Foundation poll finding that only 5 percent of the 1007 surveyed Californians considered changing their physicians because of online reviews and only 2 percent actually did make a change).

27. FOX, *supra* note 26, at 8.

28. Bassam Kadry et al., *Analysis of 4999 Online Physician Ratings Indicates That Most Patients Give Physicians a Favorable Rating*, 13 J. MED. INTERNET RES. 4, 9 (2011).

to be spread out over different websites.²⁹ For example, a physician who has four ratings on RateMDs—two of which are negative and neutral—may feel that his practice is unfairly represented to those who consult only that website. And the subjective nature of review sites may particularly rankle scientifically minded medical professionals.

But there may be more intriguing practical and philosophical issues at play: online reviews might present harms and challenges that uniquely affect the medical profession. First, patient privacy protections restrict how and when doctors can respond to critical reviews. Second, doctors may believe that they are unfairly criticized by patients who lack the specialized medical knowledge to comment meaningfully on their treatment. Third, certain professional and societal factors may intensify the sting of patient criticisms.

1. Patient Privacy Protections under HIPAA

While some review websites like Yelp allow critiqued businesses to respond directly to criticism,³⁰ physicians may not be able to post detailed rebuttals because of patient-privacy protections under state law and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).³¹ Specifically, the HIPAA Privacy Rule protects all “individually identifiable health information” held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral; this information is termed “protected health information (PHI).”³² Patients may freely self-disclose PHI—and many do when they volunteer detailed accounts of their care online.³³ But this does not mean that a patient automatically authorizes the doctor to discuss all aspects of the patient’s treatment.³⁴ If a physician discusses or transmits PHI without a patient’s consent, she faces penalties of up to \$50,000 per violation depending on its nature and extent and resulting

29. See Lagu, *supra* note 18, at 942.

30. See, e.g., *Responding to Reviews*, YELP, https://biz.yelp.com/support/responding_to_reviews (last visited Feb. 23, 2013) (“Yelp allows businesses to respond publicly and privately to user reviews”).

31. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29 and 42 U.S.C.); see also Claire Cain Miller, *What Would Hippocrates Do?*, FORBES (Aug. 13, 2007), <http://www.forbes.com/forbes/2007/0813/048.html> (“Doctors can post rebuttals (though most don’t), but even if they did, federal privacy rules would prevent them from discussing a particular case.”).

32. 45 C.F.R. § 160.103 (2012).

33. See Nathan Andersen, *Patient Blogs, PHI and HIPAA—Social Networking and Patient Self-Disclosures as Waiver of PHI*, HEALTH LAW PERSPECTIVES 1 (Nov. 2008), [http://www.law.uh.edu/healthlaw/perspectives/2008/\(NA\)%20blog.pdf](http://www.law.uh.edu/healthlaw/perspectives/2008/(NA)%20blog.pdf).

34. Barry Herrin & Trey Ingram, *PHI Faux Pas: Social Media And The Unauthorized Disclosure Of PHI*, 8 HEALTH LAW. WKLY (2010).

harm.³⁵ Thus, while a hotel manager may be able to mitigate a negative review by directly and thoroughly responding to a critical review, a physician risks violating a patient's privacy rights if she provides specific details about a reviewer-patient's care. In the words of one chagrined dentist, "Patients get to lie on Yelp, but because of HIPAA, we cannot tell the truth about the patient and what really happened."³⁶

Although HIPAA's privacy safeguards uniquely restrict a physician's ability to thoroughly respond to poor reviews, doctors may still effectively respond to criticisms with general information about their practices and procedures.³⁷ Thus, a physician can respond to complaints about parking, staff, or billing structure without fear of violating a patient's privacy.³⁸ According to the founder of one physician-review website, complaints about wait times are a "huge issue," as are comments about poor bedside manner and curtness.³⁹ Physicians may even respond to specific criticisms about medical care by describing their practice's procedures and standard of care without confirming or denying that a reviewer is a patient.⁴⁰

2. The Specialized Nature of Medical Care

Physicians may feel that they are unfairly maligned by patients who lack the specialized medical knowledge to comment objectively on their treatment.⁴¹ Some commentators argue that the typical lay patient

35. 42 U.S.C. § 1320d-5 (2006).

36. Jim Du Molin, *Dentists on the Fence About Social Media Site Yelp*, THE WEALTHY DENTIST (Mar. 29, 2011), <http://www.thewealthydentist.com/blog/1524/dentists-on-the-fence-about-social-media-site-yelp>.

37. Shelly K. Schwartz, *Do Online Ratings Matter?*, PHYSICIANS PRACTICE (Dec. 15, 2009), <http://www.physicianspractice.com/patients/content/article/1462168/1589280>.

38. Lagu, *supra* note 18, at 944 ("We found that many of the patient's complaints (e.g., 'not enough parking,' 'didn't spend enough time,' 'waited too long') could be addressed without violating patient confidentiality.").

39. Boodman, *supra* note 1 ("Waiting time . . . is a 'huge issue' mentioned often, as are statements such as the doctor 'never made eye contact and was out in 30 seconds.'").

40. Eric Goldman & Jason Schultz, *How to Respond*, DOCTORED REVIEWS, <http://www.doctoredreviews.com/doctors/how-to-respond> (last visited Feb. 23, 2013).

41. See Jeffrey Segal & Michael Sacopulos, *Should You Worry That Patients Will Use The Web To Grade You?*, 21 OBG MANAGEMENT 21, 22 (arguing that a "physician is not a roofer" and highlighting reasons why physicians cannot correctly or fairly be reviewed online in the way that a consumer might be able to review other non-medical businesses or services).

cannot—and therefore should not—make technical assessments that others might rely on.⁴²

Yet studies have revealed that patients' online reviews are not typically objective, technical critiques; rather, they focus heavily on nonclinical factors like the amount of time the doctor spends with them, parking accommodations, and ease of scheduling appointments.⁴³ For example, one study found a very strong correlation between online patient satisfaction ratings and shorter office wait times.⁴⁴ Available data indicates that patients simply are not evaluating "surgical technique or diagnostic abilities" despite what many doctors seem to fear.⁴⁵ While these types of findings naturally raise arguments about the value of subjective "customer service" focused reviews, physician-review websites are best understood as just one resource that consumers can consult when making health care decisions, alongside other objective quality measures like aggregated clinical data. The subjective experience *does* matter to patients, and patient reviews can capture things that do not show up well in objective statistics; for example, whether the doctor includes the patient as a partner in decision-making or whether the office staff is rude or unhelpful.⁴⁶

Opponents of review sites may also argue that these sites ignore the collaborative nature of medical care. For example, if a non-adherent patient fails to be responsible in her own care, the physician should not be blamed for a poor treatment outcome.⁴⁷ Furthermore, because receiving shoddy health care can have devastating consequences on a patient's wellbeing, consumers may be unusually sensitive to any negative comments about providers.

While non-adherent patients are an unfortunate reality, doctors should not fear the occasional negative review. Studies indicate that some mediocre or negative ratings actually improve consumer confidence in reviews because mixed reviews are perceived as more genuine.⁴⁸

42. See Freudenheim, *supra* note 17 (quoting psychiatrist Ronald Thurston that patients "usually don't understand the technologies and skills needed for treatment.").

43. Lagu, *supra* note 18, at 944.

44. See *id.*

45. Tara Lagu & Peter K. Lindenauer, *Putting the Public Back in Public Reporting of Health Care Quality*, 304 JAMA 1711, 1711 (2010).

46. Anne Polta, Comment to *Online Doctor Reviews: Not Ready For Prime Time Yet*, HEALTH BEAT (Mar. 14, 2012, 12:14 PM), <http://healthbeat.areavoices.com/2012/03/13/online-doctor-reviews-not-ready-for-prime-time-yet>.

47. Freudenheim, *supra* note 17 (quoting psychiatrist Ronald Thurston, "Patients notoriously ignore their doctor's advice to eat well and exercise . . . Often they quit taking their pills when they're feeling better.").

48. See generally FANG WU & BERNARDO A. HUBERMAN, PUBLIC DISCOURSE IN THE WEB DOES NOT EXHIBIT GROUP POLARIZATION (2008), available at http://www.hpl.hp.com/research/scl/papers/opinion_expression/discourse.pdf

Physicians must also trust that prospective patients will be savvy consumers of review data who can decide what is trustworthy. And even if patients are especially impressionable to health review data, physicians should embrace review sites and proactively use them as a tool to actively increase business and respond to patients' concerns.⁴⁹ Today, "physicians compete for patients just as businesspeople compete for customers."⁵⁰ Doctors disadvantage their practices when they ignore anecdotal reviews or passively wait to receive feedback.

3. Professional and Societal Considerations

A significant component of medical education aspires to make doctors skillful, knowledgeable, and moral practitioners. Reflecting this goal, Principle 1 of the AMA's *Principles of Medical Ethics* provides that a physician "shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights."⁵¹ Principles 2 and 8 further state that a physician should "uphold the standards of professionalism, be honest in all professional interactions[,] and "regard responsibility to the patient as paramount."⁵² Beneficence and nonmaleficence—the respective duties to do good and to do no harm—are foundational principles in the ethos of medicine.⁵³ When a patient alleges in a review that a doctor harmed her, whether through a medical error or even an offensive bedside manner, that criticism strikes at the heart of the doctor's professional integrity. Even unflattering remarks about staff friendliness or parking accommodations may be interpreted to impugn a physician's ability to run her practice well.

As discussed below, however, doctors should recognize that critical patient reviews—although sometimes uncomfortable to read—can give them direct insights into their patients' preferences and priorities.⁵⁴ Doctors should interpret these criticisms constructively and consider whether changing certain behaviors or aspects of their practices would be in their best financial and professional interests.

(describing a study that concluded an individual is more likely to engage in online opinion expression if his opinion deviates from the previously stated opinions).

49. See *infra* Part IV.

50. *Ravnikar v. Bogojavlensky*, 782 N.E.2d 508, 511–12 (Mass. 2003).

51. *Principles of Medical Ethics*, AMERICAN MEDICAL ASSOCIATION, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page> (last visited Feb. 24, 2013).

52. *Id.*

53. Herbert M. Swick, *Toward a Normative Definition of Medical Professionalism*, 75 ACAD. MED. 612, 614 (2000).

54. See *infra* Part IV.

II. PHYSICIANS' LEGAL RESPONSES TO ONLINE REVIEWS

With the rise of physician-review websites, doctors have increasingly been suing and threatening to sue their patients over their reviews. This section explores two legal strategies that doctors have used: defamation law and a novel type of patient “gag contracts.” These legal responses are virtually useless for managing doctors' online reputations.

A. *Defamation Law*

Defamation law attempts to balance a plaintiff's interest in an untarnished reputation against a defendant's First Amendment right to freedom of speech.⁵⁵ Many legal experts and health care professionals believe that the tort of defamation is the proper legal response to addressing injurious or false reviews.⁵⁶ On the other hand, defamation law frequently skews toward the protection of free speech, and cases are notoriously difficult for plaintiffs to win: one study found that only 13 percent of defamation plaintiffs prevail.⁵⁷ This is primarily for two reasons. First, plaintiffs must meet a high prima facie burden in demonstrating defamation.⁵⁸ Second, a defendant can escape liability through a “panoply of privileges and affirmative defenses.”⁵⁹ Historically complex, defamation law becomes even more complicated when applied to online reviews, implicating issues like author anonymity and questions of service provider liability.

1. Establishing a Cause of Action

a. *The Elements of Defamation*

Defamation is a creature of state law, so the precise requirements vary from state to state.⁶⁰ However, a cause of action for defamation generally requires: (1) a false and defamatory statement concerning

55. Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237, 239 (2007) (characterizing defamation law as a “tug-of-war between a plaintiff's right to enjoy his reputation and a defendant's right to freedom of speech under the First Amendment”).

56. See, e.g., Segal, *supra* note 4, at 350.

57. Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 875 (2000).

58. Thomas G. Ciarlone, Jr. & Eric W. Wiechmann, *Cybersmear May Be Coming to a Website Near You: A Primer for Corporate Victims: How to Respond or Combat Venomous Comments from Current or Former Disgruntled Employees*, 70 DEF. COUNS. J. 51, 54 (2003).

59. *Id.*

60. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 277 (2010).

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 special harm (defamation *per se*) or the existence of special harm caused by the publication (defamation *per quod*).⁶¹ A communication is defamatory if it “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁶² Courts consider the circumstances surrounding the communication and evaluate its effect upon the average reader or listener.⁶³

Analysis depends on whether the statement was slander (oral defamation) or libel (written defamation).⁶⁴ At common law, if the communication was slanderous, the plaintiff must prove that the statement caused economic loss.⁶⁵ On the other hand, if the communication was libelous, the plaintiff ordinarily does not have to prove economic harm.⁶⁶ The rationale behind this distinction is the permanence of written communications as opposed to the ephemeral qualities of spoken ones.⁶⁷ In all cases challenging online patient reviews, plaintiff physicians have proceeded under the theory of libel.⁶⁸

b. Defamation Per Se

Certain categories of speech are so plainly defamatory that they do not require a plaintiff to show any special (i.e., economic) harm.⁶⁹ Injury to reputation is presumed merely from the fact of publication.⁷⁰ A statement can be defamatory *per se* if it imputes the commission of a crime or “incompetence, incapacity or unfitness in the performance of

61. See RESTATEMENT (SECOND) OF TORTS § 559 (1977).

62. *Id.*

63. See, e.g., *Goldberg v. Coldwell Banker, Inc.* 553 N.Y.S.2d 432 (2d Dept. 1990) (“The words complained of must be construed in the context of the statement or publication as a whole and from the standpoint of the average reader.”).

64. RESTATEMENT (SECOND) OF TORTS §568 (1977).

65. Ciarlone, Jr. & Wiechmann, *supra* note 58, at 53.

66. *Id.* However, a showing of economic harm may be required if the defamatory meaning was not clear from the statement itself. Lidsky, *supra* note 57, at 873.

67. Ciarlone, Jr. & Wiechmann, *supra* note 58, at 53.

68. See, e.g., *Wong v. Tai Jing*, 117 Cal. Rptr. 3d 747 (Cal. Ct. App. 2010).

69. See, e.g., *Van Lengen v. Parr*, 525 N.Y.S.2d 100, 100 (1988) (“A cause of action based on a publication that is defamatory per se need not include an allegation of special damages.”).

70. *Id.*

[one's] trade, occupation or profession."⁷¹ Thus, statements that a physician acted unprofessionally or unethically are presumptively defamatory.⁷² For example, in *Nasr v. Connecticut General Life Insurance Company*, the court upheld the *per se* defamatory characterization of slanderous statements that a physician was a "quack," operated a "racket," prescribed ineffective treatments, and was "under investigation."⁷³ Similarly, in *Fuste v. Riverside Healthcare Association, Inc.*, the court held that slanderous statements that two doctors "abandoned" their patients and that there were "concerns about their competence" prejudiced the doctors in the practice of their profession and were defamatory *per se*.⁷⁴

While critical patient reviews might inherently seem defamatory *per se*, that is not necessarily the case: "a mere expression of dissatisfaction with a person's professional performance is not defamatory *per se*."⁷⁵ As discussed below, the powerful defenses of opinion and substantial truth can also shield patient-reviewers from liability for statements criticizing a doctor's fitness as a practitioner.

c. Public v. Private Figures

When a plaintiff is a private citizen defamed about a private matter, the defendant must be at least negligent with respect to the truth of the statements.⁷⁶ A defendant is generally negligent when she fails to act reasonably in attempting to learn whether a statement is true or false.⁷⁷ On the other hand, plaintiffs who are "public figures" must meet an additional burden—showing that the defamer acted with "actual malice."⁷⁸

71. *Id.*

72. *Fuste v. Riverside Healthcare Ass'n, Inc.*, 575 S.E.2d 858, 861 (Va. 2003) (finding statements that physicians "abandoned" patients and that "concerns about competence" existed were demonstrably true or false and could therefore be the basis for a defamation *per se* claim); see also RESTATEMENT (SECOND) OF TORTS § 573 (1977) ("Statements that a physician is a drunkard or a quack, or that he is incompetent or negligent in the practice of his profession, are actionable.").

73. 632 F. Supp. 1024, 1026, 1029 (N.D. Ill. 1986).

74. 575 S.E.2d 858, 861-62 (2003).

75. George L. Blum, Annotation, *Criticism or Disparagement of Physician's Character, Competence, or Conduct as Defamation*, 16 A.L.R. 6th § 2 (2006).

76. RESTATEMENT (SECOND) OF TORTS § 580B (1977).

77. *Id.*

78. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (distinguishing between "public" and "private" officials for the purposes of defamation suits); see also *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 132 (1967) (extending the *New York Times* distinction to encompass all "public figures").

To prove actual malice, the plaintiff must show that the defendant acted with knowledge of falsity or reckless disregard for the truth.⁷⁹

The fact that an individual practices medicine does not automatically make her a public figure,⁸⁰ though she may become one if she holds herself out as a pioneer, “seek[s] to develop and advance a new treatment option,”⁸¹ or seeks publicity or injects herself into a matter of public controversy.⁸² For example, in *Rodriguez-Erdmann v. Ravenswood Hospital Medical Center*, a physician was denied staff membership at the hospital where he worked.⁸³ After the physician held several press conferences alleging that he was discharged in retaliation for “speaking out about problems of malpractice,” the hospital circulated a memo stating that the physician was merely acting out of disappointment.⁸⁴ In the resulting libel suit, the court held that the doctor was a public figure in this instance because he “thrust himself to the forefront of the controversial issue of medical malpractice.”⁸⁵ Because the physician could not prove actual malice, the court affirmed dismissal of his suit.⁸⁶ Thus, a “public figure” physician must satisfy the higher burden of proving actual malice to sue a patient for a review implicating that status.

d. The Challenge of Anonymous Reviewers

Physician-review websites frequently allow users to post their impressions without requiring any personally identifying information. Because the First Amendment protects the rights of individuals to speak anonymously, even on the Internet, physicians may have difficulty identifying anonymous and pseudonymous defendants.⁸⁷ A doctor may

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79. *N.Y. Times*, 376 U.S. at 280; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that although each state may set its own standard for defamation liability, showing fault is always required). The rationale behind requiring public figures to show the heightened burden of actual malice is the presumption that “public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *Id.* at 344.
80. *Healey v. New Eng. Newspapers, Inc.*, 555 A.2d 321, 325 (R.I. 1989).
81. Segal, *supra* note 4, at 362.
82. *Rodriguez-Erdmann v. Ravenswood Hosp. Med. Ctr.*, 545 N.E.2d 979, 985 (Ill. App. Ct. 1989).
83. *Id.*
84. *Id.* at 982–83.
85. *Id.* at 985.
86. *Id.*
87. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995) (“Despite readers’ curiosity and the public’s interest . . . an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to

have to issue a special production of evidence subpoena to a website administrator or web host to compel them to reveal identifying information about an anonymous poster.⁸⁸ Once the poster is “unmasked,” the defamation suit can proceed as usual. Courts, however, have expressed discomfort with issuing these types of subpoenas, citing the potential of impermissibly chilling free speech.⁸⁹

There is no clear standard that courts apply when asked to identify an anonymous defamation defendant on the Internet.⁹⁰ One authority, however, is *Dendrite International, Inc. v. Doe No. 3*, in which the court articulated a four-part test for when an anonymous poster’s identity may be revealed.⁹¹ First, the plaintiff must make an effort to notify the anonymous poster that an order for disclosure is pending against him and to allow the anonymous defendant reasonable time to oppose the application.⁹² Second, the plaintiff must specifically identify the allegedly defamatory material.⁹³ Third, the plaintiff must present a prima facie case of defamation against the anonymous poster.⁹⁴ Fourth, the court must balance the defendant’s First Amendment right to anonymous free speech against the strength of the plaintiff’s prima facie case and the need for the defendant’s identity to be revealed for the case to go forward.⁹⁵

2. Defenses to Claims of Defamation

Even if a physician can successfully establish a prima facie case of defamation, a complex set of protections and affirmative defenses may

preserve as much of one’s privacy as possible.”). Generally speaking, communications on the Internet enjoy the same First Amendment protections as speech in any other medium. *See Reno v. ACLU*, 521 U.S. 844, 869 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [online communications].”).

88. Matthew Mazzotta, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. REV. 833, 842 (2010). *But see* Ben Quarmby, *Protection from Online Libel: A Discussion and Comparison of the Legal and Extrajudicial Recourses Available to Individual and Corporate Plaintiffs*, 42 NEW ENG. L. REV. 275, 291 (2008) (noting that technologically savvy internet users can use means to thwart identification).
89. *See, e.g.*, *Doe v. 2themart.com Inc.*, 140 F.Supp.2d 1088, 1093.
90. Erik P. Lewis, *Unmasking “Anon12345”: Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947, 957–58 (2009).
91. 775 A.2d 756, 760–61 (N.J.Super.A.D. 2001).
92. *Id.* at 760.
93. *Id.*
94. *Id.*
95. *Id.* at 760–61.

shield a poster's online comments. Aggrieved doctors are further stymied by the Communications Decency Act (CDA), which protects websites that host disparaging comments.⁹⁶ Finally, the threat of anti-SLAPP (Strategic Lawsuits Against Public Participation) suits and negative publicity resulting from a defamation suit may effectively be defenses by barring or deterring a physician from bringing a defamation suit.

a. *Immunity for ISPs under Section 230 of the CDA*

In an online defamation case, both the author of the defamatory statements and the operator of the service displaying the defamatory material are potential defendants. For economic reasons, plaintiffs might prefer to sue Internet Service Providers (ISPs) and website administrators rather than individual authors who are less likely to have "deep pockets."⁹⁷ However, Section 230 of the CDA largely immunizes ISPs from liability for content posted on their websites.⁹⁸ Specifically, subsection 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher of any information provided by another information content provider."⁹⁹ In other words, even if a website allows users to post potentially actionable content, these sites are immunized from liability.¹⁰⁰ As a result, "nearly all of the cases interpreting Section 230 defenses have found ISPs immune."¹⁰¹ However, ISPs or site administrators may still be liable if they "interact[] with the content or its source" or are "responsible for the creation or development of the content."¹⁰² Perhaps the clearest example

96. 47 U.S.C. § 230(c) (2006).

97. See Lidsky, *supra* note 57, at 871–72.

98. 47 U.S.C. § 230(c)(2) (2006); see generally DANIEL J. SOLOVE THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 153 (2007) (providing an overview of the history, development and contours of §230 of the Communications Decency Act).

99. 47 U.S.C. §230(c)(1).

100. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

101. Daniel Zharkovsky, "If Man Will Strike, Strike Through the Mask": *Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress*, 44 COLUM. J.L. & SOC. PROBS. 193, 201 (2010).

102. See Edward Fenno & Christina Humphries, *Protection Under CDA § 230 and Responsibility for "Development" of Third-Party Content*, 28 COMM. LAW. 1, 1 (2011) (internal quotations omitted).

of this exception is editing user comments: if a review website alters a user's statements in such a way that they can be read defamatorily, the site loses Section 230 immunity.¹⁰³

In *Reit v. Yelp!, Inc.*, dentist Glenn Reit sought a preliminary injunction requiring the consumer review website Yelp to remove an anonymous comment alleging that that his office was “small,” “old,” and “smelly” and that the equipment was “old and dirty.”¹⁰⁴ Reit blamed the post for reducing the number of appointment calls he received from ten to fifteen per day to four or five per day.¹⁰⁵ The court denied Reit's request for an injunction, finding that Yelp was an “internet computer service” within the contemplation of Section 230 and therefore free to display the post.¹⁰⁶

Although it is largely fruitless for doctors to sue review websites directly, physicians still have a strong interest in pursuing the individual authors of offensive material. Aside from the obvious desire to remove reviews, a physician may act to recover damages or for personal vindication.¹⁰⁷ We turn now to the defenses available to the individual authors of defamatory content, including truth and opinion.

b. Substantial Truth

It is axiomatic that truth is an absolute defense to defamation.¹⁰⁸ To be clear, however, a defendant does not have to prove that a statement is *entirely* true to escape liability—only that it is *substantially* true.¹⁰⁹ Courts may “overlook[] minor inaccuracies” in allegedly defamatory material and focus instead on the overall gist of a statement when considering its veracity.¹¹⁰

103. *Id.* at 3.

104. *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 412 (Sup. Ct. N.Y. Co. 2010).

105. *Id.*

106. *Id.* at 415.

107. *See* Lidsky, *supra* note 57, at 876 (discussing why corporations choose to sue online defamers even if there is no financial incentive: the “social and psychological benefits of suing make it worthwhile . . . and an even simpler goal: they may just want the defamation to stop, and a defamation suit is the only legal tool available to accomplish this goal.”).

108. *See, e.g.*, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967) (“Truth has become an absolute defense [to defamation] in almost all cases.”).

109. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 3:7 (4th ed. 2007).

110. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991); *see also* *Kruska v. Perverted Justice Found. Inc.*, CV-08-00054-PHX-SMM, 2010 WL 4791666 (D. Ariz. Nov. 18, 2010) (“Slight inaccuracies do not prevent the statement from being true in substance, so long as the general meaning of the statement is justified.”).

But even true statements can be defamatory when they are misleading or mischaracterize the plaintiff. For example, in *Wong v. Tai Jing*, a father posted a scathing review of his child's dentist on Yelp.¹¹¹ In his post, he implied that the dentist dangerously administered general anesthesia, failed to disclose that the child's fillings contained mercury (a potentially dangerous heavy metal), and misdiagnosed the child.¹¹² While the dentist did in fact apply general anesthesia, implant a filling with mercury, and did not discover all of the child's cavities, the court found that the father's review deliberately omitted the legitimate reasons underlying these circumstances.¹¹³ Thus, even though the review was technically factual, its accusatory tone and misleading implications transformed it into libel.¹¹⁴

c. *Opinion*

The defense of opinion is another privilege that may be remarkably difficult for an aggrieved physician to overcome. As a threshold matter, courts must determine whether allegedly defamatory speech asserts facts or opinions.¹¹⁵ The First Amendment protects pure statements of opinion, no matter how derogatory.¹¹⁶ On the other hand, a disparaging statement may be actionable if an average reader or listener might reasonably believe that it is an assertion of fact.¹¹⁷ Courts look to the nature and context of a statement to determine if it is a protected opinion.¹¹⁸ A statement that "appears in a place usually devoted to, or in a manner usually thought of as representing personal viewpoints, is . . . likely to be understood—and deemed by a court—to be nonactionable opinion."¹¹⁹ A comment is not usually defamatory when it is hyperbolic, wildly offensive, or consists of "loose, figurative language."¹²⁰

Thus, a physician who believes that she is defamed on a review site must show that an offending comment could reasonably be interpreted

111. *Id.* at 753.

112. *Id.* at 762.

113. *Id.* at 762.

114. *Id.*

115. *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

116. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("However pernicious an opinion may seem, we depend, for its correction, not on the conscience of judges and juries but on the competition of other ideas."). *But see Milkovich*, 497 U.S. at 18 (clarifying that this language in *Gertz* was not "intended to create a wholesale [libel] exemption for anything that might be labeled 'opinion.'").

117. *Milkovich*, 497 U.S. at 18–19.

118. Quarmby, *supra* note 88, at 286.

119. SACK, *supra* note 109, at § 4.3.1.1.

120. Quarmby, *supra* note 88, at 286.

as factual. Ironically, outrageous accusations that might offend a physician the most are likely protected because of their hyperbolic quality. For example, a statement maligning a physician as “the biggest idiot I have ever met” likely would be nonactionable.

d. *Unintended Consequences: Anti-SLAPP Suits and the “Streisand Effect”*

Physicians who sue a patient for posting a negative review may also be subject to an anti-SLAPP (Strategic Lawsuits Against Public Participation) motion to strike the complaint on the grounds that the online posting is protected public interest speech.¹²¹ Over half of the states have adopted anti-SLAPP legislation to curb frivolous lawsuits that defamation plaintiffs frequently bring to harass, bully, and intimidate critics into silence.¹²² Although these laws vary from state to state, they share two key features.¹²³ First, they provide an expedited procedure to short-circuit SLAPPs, conserving all parties’ time and resources.¹²⁴ Second, successful defendants are awarded legal defense costs.¹²⁵ Thus, facing the double risks of a dismissed suit and having to pay the defendant’s fees, physicians must think carefully about the merits of a case before bringing a potential SLAPP.

Finally, one of the most significant challenges facing potential online defamation plaintiffs is a phenomenon humorously referred to as the “Streisand Effect.”¹²⁶ In 2003, Barbra Streisand unsuccessfully attempted to sue photographers for \$50 million to remove an aerial photograph of her mansion from the Internet.¹²⁷ Before Streisand filed the suit (claiming invasion of privacy), hardly anyone knew the picture existed; after she filed the suit, the photo was downloaded and viewed 420,000 times.¹²⁸ Thus, the Streisand Effect “covers those situations where the threat of legal action has brought publicity to the information sought to be suppressed.”¹²⁹ When physicians choose to pursue an online defamation

121. Orange County Medical Association, *Online Consumer Review and Rating Sites: Ten Questions and Answers*, CALIFORNIA MEDICAL ASSOCIATION, Nov. 22, 2011, <http://ocma.org/article/online-consumer-review-and-rating-sites-ten-questions-and-answers-next>.

122. Eric Goldman, *Selected Recent Developments In Online Defamation*, 47 *U.S.C. §230 And Anti-SLAPP Motions*, Intellectual Property Course Handbook Series, PLI Order No. 30703.

123. *Id.*

124. *Id.*

125. *Id.*

126. Kraig J. Marton et al., *Protecting One’s Reputation—How to Clear a Name in a World Where Name Calling is So Easy*, 4 PHX. L. REV. 53, 63–64 (2010).

127. *Id.* at 64.

128. *Id.*

129. *The Streisand Effect*, SKEPTIC LAWYER (Jan. 17, 2012, 8:01 AM), <http://www.skepticlawyer.com.au/2012/01/17/the-streisand-effect>.

case, they risk calling attention to a statement that might otherwise go unnoticed; this heightened publicity is exactly the opposite of what the physicians want. In the words of one commentator, “the remedy may be worse than the problem.”¹³⁰

Indeed, the Streisand Effect has played out with surprising ferocity when physicians have attempted to suppress negative online reviews. For example, in 2010, a Minnesota physician filed a \$50,000 defamation lawsuit against the son of a former patient.¹³¹ Angered by the physician’s alleged mistreatment of his eighty-five-year-old father, the son posted several negative reviews online that criticized the doctor’s poor bedside manner, disinterested attitude, and insensitivity.¹³² After the doctor filed suit, news of the litigation reached Reddit.com, a popular social media website, where readers promptly set out to excoriate the doctor online.¹³³ As a result, Reddit users churned out over a hundred scathing comments across the web about the physician and the lawsuit.¹³⁴

3. Summarizing Problems with Defamation Law

For a physician who simply wants to remove a review she believes—or knows—is unfair or untrue, resorting to defamation law can be a nightmare. It is frustratingly complex, with a dizzying array of factors to juggle. Physicians may have difficulty establishing a prima facie case, and even if they can, defendants may escape liability through a vast network of defenses and privileges. Litigation may attract publicity to an otherwise unremarkable claim. And practically speaking, lawyers are rarely willing to offer a contingency fee arrangement in defamation practice;¹³⁵ many patient-reviewers will likely be judgment-proof as well.

This Note does not call for physicians to entirely abandon defamation law. For example, if a review falsely alleges serious misconduct, a doctor should consider filing suit. But in less extreme cases, this Note advocates looking to defamation as a measure of true last resort, and only after careful and realistic consideration of the case’s merits.

130. Segal, *supra* note 4, at 350.

131. Mark Stodghill, *Patient’s Son Complains; Duluth Doctor Sues*, DULUTH NEWS TRIBUNE (June 12, 2010), http://www.duluthnewstribune.com/event/article/id/171193/publisher_ID/36/.

132. *Id.*

133. Brett Pollard, *A Physician Review Gone Wrong*, ALERT PRESENCE (Mar. 24, 2011), <http://www.alertpresence.com/2011/03/24/a-physician-review-gone-wrong>.

134. *Id.*

135. Marton, *supra* note 126, at 76.

*B. Medical Non-Disclosure Agreements:
A Contract- and Copyright-Based Approach*

Frustrated with the complexity of defamation law, some physicians have resorted to using patient “gag orders” that manipulate contract and copyright law to restrict online reviews.¹³⁶ I borrow from commentator Tobias Butler and refer to these instruments as “medical non-disclosure agreements (medical NDAs)”.¹³⁷ These contracts go by other names colored by varying attitudes toward them: one advocacy group headed by law professors Eric Goldman and Jason Schultz opposed to medical NDAs brands them as “anti-review contracts,”¹³⁸ while an organization that advocated the use of medical NDAs referred to them innocuously enough as “mutual privacy agreements.”¹³⁹

While some providers have praised medical NDAs as innovative and effective “vaccine[s] against libel,”¹⁴⁰ other commentators pan medical NDAs as unethical and almost certainly illegal.¹⁴¹ Medical NDAs have been highly controversial, drawing protests from patients, patient advocates, health care professionals, and even doctors themselves. Although it is unclear how many providers use these agreements, one source from 2012 reports that 3000 physicians and dentists purchased and used these contracts from marketer Medical Justice.¹⁴² For a fee, Medical Justice provided medical NDA templates to its members and monitored online comments about them.¹⁴³

After a lawsuit was filed against Medical Justice in November 2011, the company announced that it was “retiring” medical NDAs.¹⁴⁴ It is

136. See Eric Goldman & Jason Schultz, DOCTORED REVIEWS, <http://www.doctoredreviews.com> (last visited Feb. 24, 2013).

137. Tobias Butler, *The Realities of Relying on Doctor-Patient Non-Disclosure Agreements for Reputational Protection*, 22 THE HEALTH LAW. 23, 23 (2010).

138. Eric Goldman & Jason Schultz, DOCTORED REVIEWS, <http://www.doctoredreviews.com> (last visited Sept. 11, 2013).

139. MEDICAL JUSTICE, <http://www.medicaljustice.com/feature-det.asp?feature-id=904467817> (last visited Jan. 24, 2012). As discussed below, at the time of this Note’s publication, Medical Justice has since moved away from advocating these types of contracts, although it is unclear how many providers still use them and whether other businesses will continue to market them.

140. Alicia Gallegos, *Company Withdraws Contracts Controlling Online Comments By Patients*, AMERICAN MEDICAL NEWS (Jan. 2, 2012), <http://www.amednews.com/article/20120102/profession/301029947/4/>.

141. See Boodman, *supra* note 1.

142. Gallegos, *supra* note 140.

143. *Id.*

144. *Id.*

certainly possible, however, that doctors are continuing to use these agreements or similar ones: Medical Justice has stated that members are “free to do what they want to do,” which includes continuing to use the contracts as they wish.¹⁴⁵ Moreover, the company has not suggested that doctors inform patients of the contracts’ “retirement.”¹⁴⁶ Thus, medical NDAs still merit discussion, albeit largely as symptom of physicians’ deep frustration or dissatisfaction with existing tools for reputation management.

1. How Do Medical NDAs Work?

Medical NDAs are contracts that prospective patients sign agreeing to restrict their online comments about their doctor.¹⁴⁷ As Professors Eric Goldman and Jason Schultz have observed, over time, these contracts have reflected different approaches. Some contracts expressly prohibit patients from posting online reviews: one agreement provides that patients must “refrain from directly or indirectly publishing or airing commentary upon Physician and his practice, expertise and/or treatment unless explicitly mandated by law.”¹⁴⁸ This restriction might be limited to only negative reviews, or it might broadly prohibit a patient from posting any commentary at all, good or bad.¹⁴⁹

Other iterations of medical NDAs are less draconian. These contracts theoretically work by prospectively transferring copyright ownership of any online reviews that a patient might author to the doctor:

[I]f Patient prepares such commentary for publication on web pages, blogs, and/or mass correspondence about Physician, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Physician for any written, pictorial, and/or electronic commentary. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary.¹⁵⁰

145. *Id.*

146. *Id.*

147. Butler, *supra* note 137, at 23.

148. SONORAN ALLERGY & ASTHMA CENTER, MUTUAL AGREEMENT TO MAINTAIN PRIVACY, *available at* http://www.sonoranallergy.com/00_docs/MUTUAL%20AGREEMENT%20TO%20MAINTAIN%20PRIVACY.pdf (last visited Feb. 24, 2013).

149. Alison Stewart, *Doctor’s (Gag) Orders*, NPR (Mar. 24, 2009 1:00 PM), <http://www.npr.org/templates/story/story.php?storyId=102297861&sc=emaf>.

150. DR. SAMUEL LAM & LAM FACIAL PLASTICS, MUTUAL AGREEMENT TO MAINTAIN PRIVACY, <http://www.lamfacialplastics.com/wp-content/uploads/Medical-Web.pdf> (last visited Feb. 24, 2013).

Thus, even if the contract allows the patient to post unrestricted commentary online, her physician, as the presumptive copyright holder, can demand that review websites and individual authors take down any unfavorable posts.¹⁵¹ In this way, a patient is still ceding control of her commentary to her doctor, albeit indirectly. Finally, some hybrid contracts take the belt-and-suspenders approach of both explicitly restricting online reviews and assigning a patients' ownership of online commentary to physicians.¹⁵²

A medical NDA is often included with other intake forms.¹⁵³ It may exist as a separate contract or be incorporated within a larger one.¹⁵⁴ These contracts do not prevent patients from expressing their opinions about their medical care in more "traditional" ways—talking with friends and family, other doctors, lawyers, medical licensing boards, and even going to court.¹⁵⁵ However, they might be written expansively enough to prohibit patient commentary not only on review sites but also on social networks, blogs, and other online forums.¹⁵⁶ Physicians using medical NDAs condition care upon signing these contracts—a decision that has angered patients, health care professionals, and academics.¹⁵⁷

By using contract and copyright law to restrict patients' online reviews, a physician can theoretically demand takedowns based on copyright infringement and breach of contract—ostensibly easier claims to prevail upon than defamation.¹⁵⁸ Indeed, medical NDAs are precisely designed to bypass defamation law and its associated costs, complexities, and emotional burdens. More specifically, medical NDAs are meant to circumvent Section 230 of the CDA, which protects websites from liability for content posted by users.¹⁵⁹ Because Section 230 provides such broad immunity, websites generally have little incentive to remove user-generated posts that are allegedly defamatory; this is true even when the

151. Eric Goldman & Jason Schultz, *The Back Story*, DOCTORED REVIEWS, <http://www.doctoredreviews.com/patients/the-back-story> (last visited Feb. 24, 2013).

152. *Id.*

153. *Id.*

154. *Butler*, *supra* note 137, at 23.

155. Stewart, *supra* note 149.

156. *Butler*, *supra* note 137, at 23.

157. *See, e.g., The "Gag Contract" Wall of Shame*, RATEMDS (Mar. 5, 2009 11:55 PM), <http://www.ratemds.com/social/?q=node/35256> (cataloguing providers who condition care on patients signing medical NDAs).

158. Eric Goldman & Jason Schultz, *Myths*, DOCTORED REVIEWS, <http://www.doctoredreviews.com/medical-justice-myths/> (last visited Feb. 24, 2013).

159. *See* discussion *supra* Part I.A.2.a.

website knows that it is hosting defamatory content.¹⁶⁰ However, Section 230 does not protect websites against claims of copyright notice and takedown, and copyright infringement can lead to severe legal penalties that powerfully motivate websites to comply.¹⁶¹ Thus, medical NDAs are designed to transmute otherwise toothless defamation claims into copyright claims. Aggrieved doctors can then target websites instead of pursuing the individual authors of reviews.

Proponents of medical NDAs argue that they deter patients from posting negative online comments. And physicians may be attracted to having a system in place to deal with negative reviews rather than litigating individual cases *ad hoc* under the vagaries of defamation law.¹⁶²

2. Problems with the Medical NDAs

Several critics oppose these contracts as both unethical and unenforceable.¹⁶³ One advocacy website, jointly operated by Santa Clara University High Tech Law Institute and The Samuelson Law, Technology & Public Policy Clinic at the University of California Berkeley School of Law, thoroughly explains how medical NDAs harm doctors, patients, and review websites.¹⁶⁴ RateMDs.com maintains a virtual “Wall of Shame” that catalogues physicians who condition care on patients’ signing medical NDAs.¹⁶⁵ The use of these documents almost certainly violates contract and copyright law. Medical NDAs may also bring about unforeseen harms to physicians such as lawsuits and—ironically—new reputational risks associated with these contracts.

a. Contract Law

Medical NDAs may be challenged under basic contract law principles.¹⁶⁶ First, these documents may be unenforceable because of

160. Caitlin Hall, *A Regulatory Proposal for Digital Defamation: Conditioning § 230 Safe Harbor on the Provision of a Site “Rating”*, STAN. TECH. L. REV., Dec. 2008, at N1, ¶ 12.

161. 17 U.S.C. §512 (2006).

162. *But see* Butler, *supra* note 137, at 25 (pointing out that relying on a remedy under a medical NDA is still a reactive remedy, like defamation law).

163. *See* Boodman, *supra* note 1.

164. Eric Goldman & Jason Schultz, DOCTORED REVIEWS, <http://www.doctoredreviews.com> (last visited Feb. 24, 2013).

165. *The “Gag Contract” Wall of Shame*, RATEMDs (Mar. 5, 2009 11:55 PM), <http://www.ratemds.com/social/?q=node/35256>.

166. Timothy B. Lee, *Doctors And Dentists Tell Patients, “All Your Review Are Belong To Us”*, ARS TECHNICA (May 24, 2011, 12:30 AM), <http://arstechnica.com/tech-policy/news/2011/05/all-your-reviews-are-belong-to-us-medical-justice-vs-patient-free-speech.ars>; *see also* People v. Network Associates, 758 N.Y.S.2d 466, 470 (2003) (holding that a contract provision in a software license agreement that prohibited consumers from

lack of consideration.¹⁶⁷ While some medical NDAs claim to offer “enhanced privacy protections” to patients as valuable consideration for signing, what these protections are is unknown.¹⁶⁸ Because state privacy laws and the HIPAA Privacy Rule mandate rigorous privacy protections, it is unclear what “enhanced” protections a physician may offer.¹⁶⁹ The Office of Civil Rights in the Department of Health and Human Services has already disciplined a provider for requiring patients to sign a medical NDA in exchange for promising to maintain their privacy, explaining that a “covered entity’s obligation to comply with all requirements of the Privacy Rule cannot be conditioned on the patient’s silence.”¹⁷⁰ Second, these contracts may be unconscionable and therefore unenforceable.¹⁷¹ When a patient seeks medical care, there is a strong possibility that she may be asked to sign a medical NDA at a time when she is physically and emotionally vulnerable and lacks meaningful choice about accepting the terms of the contract.¹⁷² If a physician buries the contract provision within a larger contract or gives it to the patient alongside other intake documents, there is a strong possibility of procedural unconscionability. This likelihood is greatly increased if the physician does not adequately explain the contract or its legal ramifications to the patient.

publishing reviews about its software violated consumer protection laws). Thus, medical NDAs, which call for a similar restriction on consumer speech, might be illegal under states’ various consumer protection schemes. Eric Goldman, *The Regulation of Reputational Information*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET*, 293, 302 (2010).

167. Jodie Griffin, *The Doctor Will Be Right With You . . . After You Sign Over Your Copyright*, PUBLIC KNOWLEDGE (June 8, 2010), <http://www.publicknowledge.org/node/3148>.
168. *Id.*; see also Lee, *supra* note 166 (“The Medical Justice website still claims that patients are ‘granted additional privacy protections’ under the law, but doesn’t elaborate or back up this claim.”).
169. *All Case Examples*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html>.
170. *Id.*
171. *See Hume v. United States*, 132 U.S. 406, 411 (1889) (citing *Earl of Chesterfield v. Janssen*, 2 Ves.Sr. 125, Eng.Rep. 82 (1750) (defining famously an unconscionable bargain as one “such no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”).
172. *See Griffin, supra* note 167. As one critic notes, a patient may feel especially pressured to sign the contract if the provider is a specialist or if the patient has limited access to other medical resources. Butler, *supra* note 137, at 24.

b. *Copyright Problems*

Medical NDAs may also be unenforceable under copyright law for several reasons. “First, it is unclear whether a person can even assign copyright ownership in a work that has not yet been created, outside of a work-made-for-hire relationship.”¹⁷³ Copyright law generally requires written assignments of copyright to be exchanged for some form of payment or made in the context of ongoing employment relationships; obviously, neither of these factors applies to the physician-patient relationship.¹⁷⁴ If copyright cannot be properly assigned, medical NDAs are legally worthless. Second, a large number of reviews are not sufficiently original to be copyrightable.¹⁷⁵ This is especially true for physician-review websites that do not allow reviewers to leave written comments but only collect numerical information.¹⁷⁶ Merely reorganizing numbers does not meet the very low threshold of copyright originality— “at least some minimal degree of creativity.”¹⁷⁷ And brief, written comments (e.g., “Dr. X was mean”) may be so generic as to be non-copyrightable.¹⁷⁸

Finally, takedown notices that doctors send websites under 17 U.S.C. Section 512 may also be invalid. These claims only work if medical NDAs properly assign copyright,¹⁷⁹ a question that remains legally untested but dubious for all of the reasons outlined in this section. If copyright takedown notices are sent improperly, they can create legal liability for the claimant, including damages.¹⁸⁰ Doctors particularly risk liability if they send wrongful takedown notices based on anonymous or pseudonymous reviews.¹⁸¹

c. *Other Problems*

As in defamation suits, a suit to enforce medical NDAs might be considered a “Strategic Lawsuit Against Public Participation” (SLAPP) that could lead to legal liability for the physician.¹⁸² Depending on the state, a defendant may invoke a SLAPP statute to get a case dismissed

173. Griffin, *supra* note 167.

174. Dan Whalen, *Medical Justice or an Unjust Medical Practice?*, IP OSGOODE (May 17, 2011), <http://www.iposgoode.ca/2011/05/medical-justice-or-an-unjust-medical-practice/>.

175. Griffin, *supra* note 167.

176. *Id.*

177. *Feist Publ'ns., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991).

178. Griffin, *supra* note 167.

179. Goldman, *supra* note 166.

180. *Id.*

181. *Id.*

182. *See* Lee, *supra* note 166.

as frivolous and contrary to public policy.¹⁸³ In some states like California and New York, a defendant may file a counterclaim or separate claim against a SLAPP plaintiff for punitive and compensatory damages for abuse of the legal process.¹⁸⁴ And ironically, the mere use of these contracts can erode patient confidence.¹⁸⁵ In several cases, prospective patients who have been asked to sign medical NDAs have retaliated by going to review websites and other online forums to denigrate the physicians and warn other would-be patients about the contracts.¹⁸⁶ One disgruntled patient even published an article on a popular technology news website detailing his experiences with a medical NDA.¹⁸⁷ After weathering a subsequent torrent of criticism, the dentist featured in the article, Ken Cirka, stopped using the contracts, claiming that he “do[es] not agree with censorship.”¹⁸⁸

3. Recent Litigation over Medical NDAs

In November 2011, the Center for Democracy and Technology (CDT) petitioned the Federal Trade Commission and several state attorneys general against Medical Justice.¹⁸⁹ CDT asserted several of the allegations discussed above: that Medical Justice’s contracts lack valuable consideration,¹⁹⁰ are unconscionable,¹⁹¹ abuse copyright law,¹⁹² and violate medical ethics guidelines.¹⁹³ In light of these deficiencies, CDT alleged that Medical Justice engaged in deceptive trade practices

183. Shauna L. Spinosa, *Yelp! Libel or Free Speech: The Future of Internet Defamation Litigation in Massachusetts in the Wake of Noonan v. Staples*, 44 SUFFOLK U. L. REV. 747, 758 (2011).

184. *Id.*

185. *See, e.g.*, Lee *supra* note 166.

186. *See, e.g.*, Christopher G., Comment to *Ken Cirka, DMD*, YELP (May 25, 2011), <http://www.yelp.com/biz/ken-cirka-dmd-philadelphia> (“[Dentist] makes you sign an agreement before he will treat you that says anything you write on-line about him is his property and he can do with it what he wants, including have it removed from the web.”); Sam S., Comment to *Stacy Makhnevich, DDS*, Yelp (Dec. 7, 2011), <http://www.yelp.com/biz/stacy-makhnevich-dds-new-york>, (“I found it repulsive having to sign a waiver that says I cant [sic] rate your service . . .”).

187. Lee, *supra* note 166.

188. *Id.*

189. Complaint and Request for Investigation, Injunction, and Other Relief, In Re Medical Justice Corp., *available at* https://www.cdt.org/files/pdfs/20111129_medjustice_complaint.pdf [hereinafter *Complaint*].

190. *Id.* ¶ 38.

191. *Id.* ¶ 23.

192. *Id.*

193. *Id.* ¶ 43.

by marketing contracts that were legally ineffective and powerless to remove negative reviews.¹⁹⁴

On November 29, 2011, a patient filed a class action suit against a New York dentist who attempted to stifle his reviews with one of Medical Justice's NDAs.¹⁹⁵ After Robert Lee posted negative reviews of dentist Stacey Makhnevich, she invoked her purported copyright ownership; sent him invoices for \$100 every day that the reviews remained online; demanded that the websites remove his reviews; and threatened to sue Lee for copyright infringement, breach of contract, and defamation.¹⁹⁶ In the suit, brought on behalf of Lee and Makhnevich's other patients who signed medical NDAs, Lee asked the court to declare (1) that forcing patients to sign the contract constitutes a breach of "fiduciary duty and violations of dental ethics" and (2) that the medical NDA is unconscionable and void under New York law.¹⁹⁷ In response to these challenges, Medical Justice promptly announced its decision to "retire" its contracts.¹⁹⁸ Until legal conclusions are reached, however, it is possible that doctors may continue to use medical NDAs.¹⁹⁹

4. Summary of Problems with Medical NDAs

Research shows that when "patients perceive their physician as open, transparent, and engaging, they have a more positive perception of the care that they receive."²⁰⁰ It would seem that the opposite is true—that patients distrust and negatively perceive doctors who forbid them to discuss their treatment in public. The use of medical NDAs for reputation management highlights many of the shortcomings of defamation law. It is easy to understand why medical NDAs appeal to physicians: these contracts promise to be a "magic bullet" that circumvents defamation law and streamlines the takedown process. Medical NDAs tempt physicians with the promise of sparing time, money, and the stress of litigation. While one can certainly sympathize with physicians who want to protect their reputations, this goal should

194. *Id.* ¶ 24.

195. Class Action Complaint for Declaratory and Injunctive Relief and Individual Action for Declaratory Relief and Damages, *Lee v. Makhnevich*, No. 11-civ-8665 (S.D.N.Y. Nov. 29, 2011), *available at* www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf.

196. *Id.* ¶ 4.

197. *Id.* ¶ 37.

198. Alicia Gallegos, *Company Withdraws Contracts Controlling Online Comments By Patients*, AMERICAN MEDICAL NEWS (Jan. 2, 2012), <http://www.amednews.com/article/20120102/profession/301029947/4>.

199. *See id.*

200. Erik W. Black et al., *An Analysis of Healthcare Providers' Online Ratings*, 17 INFORMATICS IN PRIMARY CARE 249, 252 (2009).

not—and cannot—be achieved by manipulating contract and copyright law to stifle patients’ freedom of expression.

III. PHYSICIANS SHOULD VALUE PATIENT-REVIEW SITES

Physician-review websites are here to stay—and likely to grow. One 2010 study reports that one in six practicing doctors in the United States is now reviewed online.²⁰¹ Although doctors may be reluctant to regard their practices as businesses subject to online scrutiny, physicians should accept the realities of the networked marketplace and the burgeoning culture of consumer reviewing. Doctors should consider physician-review sites as a valuable resource that can help them generate business and provide a rare, unfiltered glimpse into their patients’ values and perceptions. Patients overwhelmingly rate their physicians highly. Instead of focusing on how to minimize unfavorable reviews, doctors should find ways to maximize overall reviews and increase patient satisfaction—a win-win outcome for both physicians and those they treat.

Instead of fearing physician-review sites and relying on ineffective legal tools to manage their reputations, doctors should embrace patient reviews and develop more constructive strategies to respond to unfavorable ones. Physician reviews suggest that patients desire more openness, increased information, and better customer service from their doctors. Doctors can address these concerns in a number of practical and meaningful ways. First, physicians should actively build and maintain a web presence that clarifies their credentials, practices, and procedures. Second, physicians should diligently monitor their online reputations and act quickly when they receive unfavorable reviews. Third, physicians should accept that receiving some online criticism is simply a reality of doing business in a technological age. These criticisms, especially if they are frequent, may indicate that a physician should evaluate or change some aspect of her practice.

A. Physicians Should Actively Establish a Positive Online Identity

Doctors should not stand by while others define their online reputations. As one commentator observed, conversations about a physician’s practice “will take place with or without [her] participation.”²⁰² Regardless of a doctor’s personal feelings toward review websites, ignoring the evaluations that consumer-patients are increasingly reading and posting online can put providers at a competitive disadvantage—especially if others are quicker to adapt to the new culture of online reviewing. Rather than being intimidated by

201. Guodong Gordon Gao et al., *A Changing Landscape of Physician Quality Reporting: Analysis of Patients’ Online Ratings of Their Physicians over a 5-Year Period*, 14 J. MED. INTERNET RES. e38, e38 (2012).

202. *Id.*

review sites, savvy physicians should take advantage of these resources to deliver a message that presents their practices in the best light.²⁰³

Physicians can take several steps to establish a positive web presence and clear up any misconceptions or doubts that patients may have after reading an unfavorable review. For example, a physician should create a website that provides information about her credentials, procedures, and practice methods.²⁰⁴ She can communicate that she is committed to patient satisfaction and encourage dissatisfied patients to contact her directly to work through problems. And pictures of the physician's office and parking accommodations, for example, can go a long way toward dispelling critical comments. Physicians might also use their websites to post useful medical information to enhance their credibility and draw in general readership, with the added benefit that their knowledge or expertise might make them more attractive to potential patients.

Physicians should also encourage patients to post feedback on a select number of review websites.²⁰⁵ This approach benefits doctors, whose credibility grows with increased ratings and who can reap the rewards of patient feedback. It also benefits both past patients, who have the satisfaction of freely sharing their impressions, and prospective patients, who enjoy a larger pool of trustworthy, legitimate reviews. Although asking patients to submit reviews might seem like an awkward request, the encouragement might be as simple as giving a patient a business card after a visit asking them to share their thoughts on specific websites. Physicians should be prepared to receive honest reviews if they do this, and nothing guarantees that all comments will be positive. On the other hand, if a physician is confident in the quality of her services, she should have little to fear. This strategy can be especially effective if a doctor asks those patients she knows are satisfied to share their opinions. By taking proactive measures like these, physicians can effectively develop their online reputations rather than waiting for others to do so.

203. See Bryan Vartabedian, *Physician Online Reputation Management—2 Realities*, 33 CHARTS (Dec. 20, 2010), <http://33charts.com/2010/12/physician-online-reputation-management.html> (advising doctors “to create the reality that people see. If you create nothing you are entirely at the mercy of what’s created about you on your behalf. And you create your own story through the creation of your own digital footprint.”).

204. See Barbara Rose, *Staking Your Reputation: Web Attacks Can Diminish Your Good Name, but Something Can Be Done*, A.B.A. J., Apr. 2011, at 48, 52.

205. Schwartz, *supra* note 37.

B. Physicians Should Continuously Monitor Their Online Profiles

After establishing a strong online presence, physicians should monitor it by diligently running Internet searches on themselves.²⁰⁶ By staying abreast of their online personas, physicians can react swiftly to negative comments and decide how to mitigate risks of reputational harm. Reacting quickly to unfavorable or false reviews is critical because of the rapidly changing and multiplicative nature of Internet communications. Conversely, if a physician consistently receives good reviews, she might be rewarded by the positive feedback and continue to manage her practice well. When physicians monitor information as it trickles in, they can analyze patterns and trends in their patients' satisfaction. In this way, they receive valuable real-time feedback on their performance, their staff, or other aspects of their practice.

When possible—for example, on sites like on Yelp and Angie's List—physicians should actively respond to their patients' comments. Regardless of whether reviews are good or bad, doctors can show former and prospective patients that they are engaged practitioners who value patients' opinions and increased satisfaction. Indeed, some clinics routinely send follow-up satisfaction surveys to patients after their visits.²⁰⁷ One provider who has found success with active monitoring is Ken Cirka, a dentist who abandoned medical NDAs in favor of more pro-patient strategies.²⁰⁸ Not only does Dr. Cirka send follow-up emails to patients after every visit, he diligently monitors his reputation on Yelp, where he responds courteously to positive and critical reviews alike, apologizing for poor patient experiences and publically offering the chance to “make it right.”²⁰⁹ Dr. Cirka's diligence seems to have paid off: on Yelp!, he currently enjoys a rating of 4.5 out of 5 based on forty-four detailed reviews.²¹⁰

Physicians are busy professionals, and it may be difficult to find the time to scour the Internet for reviews while actively responding to patient comments. However, even if a physician is pressed for time or unfamiliar with the technology, she can rely on a few simple tools to stay aware of her online profile. For example, doctors can easily set up alerts that notify them when new content appears about them on the

206. See Rose, *supra* note 204; see also ANDY BEAL & DR. JUDY STRAUSS, *RADICALLY TRANSPARENT: MONITORING AND MANAGING REPUTATIONS ONLINE* xxv (2008).

207. Daniel O'Connor, *Rated Negatively Online? What's a Physician To Do?*, AMERICAN MEDICAL NEWS (Aug. 8, 2011), <http://www.ama-assn.org/amednews/2011/08/08/prca0808.htm>.

208. See *supra* Part III.B.2.

209. Ken Cirka, Comment to *Ken Cirka, DMD*, YELP (June 6, 2011), <http://www.yelp.com/biz/ken-cirka-dmd-philadelphia>.

210. *Ken Cirka, DMD*, YELP, <http://www.yelp.com/biz/ken-cirka-dmd-philadelphia> (last visited Feb. 25, 2013).

Internet. Physicians can also hire private Internet watchdog companies to monitor their online reputations.²¹¹ These companies' services are widely available, and doctors should consider the costs of their services as a necessary business expense—or at least an alternative to litigation fees or subscriptions to legally dubious contracts.

C. Physicians Should Accept the Realities of Negative Online Reviews

As the adage says, you can't please everyone all of the time. Physicians should recognize that some poor online reviews are probably inevitable and that online criticisms are simply a reality of going into business in a technological age. Perhaps it is a matter of attitude: as one commentator opines, a negatively reviewed physician can distinguish herself from others with a demonstrated "ability to answer concerns and resolve issues in a real way."²¹²

Doctors might also trust prospective patients to be savvy consumers who can spot trends and differentiate between legitimate concerns and mere whining or spitefulness.²¹³ Indeed, hyperbolic and outrageous claims (e.g., that a doctor is a "crackpot" or a "criminal") tend to be less believable, especially when contrasted against more reasoned criticisms. A handful of negative reviews are also unlikely to undo the positive effects of others, and research suggests that a few negative reviews might even enhance consumers' trust in online reviews by signaling that data sets are more authentic.²¹⁴

Finally, a physician might also consider improving her practice in areas where she receives frequent criticism. In this way, physician-review websites might act as a free "focus group" that highlights a provider's strengths and points out what can be improved.²¹⁵ Online ratings may help physicians assess their own performance—studies have found they may have difficulty doing it themselves.²¹⁶ Ultimately, as one physician

211. Brett Pollard, "My Doctor Sucks" and Other Tweets I Found, Part 3, ALERT PRESENCE (Jan. 27, 2010), <http://www.alertpresence.com/2010/01/27/my-doctor-sucks-and-other-tweets-i-found-part-3>.

212. Debra Beaulieu, *Make The Most of Positive Online Reviews*, FIERCE PRACTICE MANAGEMENT (July 20, 2011), <http://www.fiercepracticemanagement.com/story/make-most-positive-online-reviews>.

213. Eric Goldman & Jason Schultz, *Why Online Reviews Help*, DOCTORED REVIEWS, <http://www.doctoredreviews.com/doctors/why-online-reviews/> (last visited Feb. 25, 2013) ("Prospective patients are generally smart consumers of information. While a few prospective patients may overreact to a single negative review, most consumers use reviews to look for trends and patterns about the reviewed business.").

214. *Id.* (citing FANG WU & BERNARDO A. HUBERMAN, PUBLIC DISCOURSE IN THE WEB DOES NOT EXHIBIT GROUP POLARIZATION (2008)).

215. Schwartz, *supra* note 37.

216. See David A. Davis et al., *Accuracy of Physician Self-Assessment Compared with Observed Measures of Competence*, 296 JAMA 1094, 1095

reasoned, although review websites are not flawless, they give him a rare glimpse into his patients' values and attitudes.²¹⁷ Knowing this information allows him to be a better doctor.²¹⁸

CONCLUSION: THE CASE OF MEDICAL JUSTICE

Shortly after "retiring" its medical NDAs, Medical Justice unveiled its new "eMerit" system, which provides doctors with tablet computers to hand patients immediately after their appointments.²¹⁹ These devices are linked to review sites where patients can share their experiences.²²⁰ Patients also have the option of notifying doctors if there is anything they want to discuss, thus "shortening the time needed to resolve potential problems, improving communication and strengthening the patient-doctor relationship."²²¹ On the Frequently Asked Questions page of the eMerit website, one item stands out: "If a patient reviews me, will I have the opportunity to control what is posted online?"²²² The answer is revealing: "No. Enabling those patients to share their experience is the best way to promote a positive online presence."²²³ Instead of turning to legal solutions to manage their reputations, physicians should become more comfortable with allowing patients to share their experiences. Studies indicate that physicians' biggest fears about review sites are largely unfounded. Patients are not evaluating their doctors' technical prowess in diagnoses and surgical procedures. Instead, their reviews tend to focus on customer-service aspects like communication skills, parking, wait times, and scheduling. Doctors can respond to these patient concerns without violating patient privacy protections. And far from being hotbeds for doctor defamation, physician-review sites generate overwhelmingly positive reviews.

Even if patient reviews shed more light on subjective measures of satisfaction than objective treatment outcomes, they are still relevant and valuable. Physician-review sites are simply one resource that

(2006); M.J. Gordon, *A Review of the Validity and Accuracy of Self-assessments in Health Professions Training*, 66 ACAD MED. 762, 762 (1991); David Dunning et al., *Flawed Self-Assessment: Implications For Health, Education, And The Workplace*, 5 PSYCHOL. SCI. IN THE PUB. INT. 569, 571 (2004).

217. Shaili Jain, *Googling Ourselves—What Physicians Can Learn from Online Rating Sites*, 362 NEW ENG. J. MED. 1, 6 (2010).

218. *See id.*

219. *Frequently Asked Questions*, EMERIT: MEDICAL & DENTAL REPUTATION MANAGEMENT, <http://www.emerit.biz/faq> (last accessed Sept. 12, 2013).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

consumers can consult when making informed health care decisions, alongside other quality measures like aggregated clinical data and traditional word-of-mouth recommendations. These sites are just one piece of the “puzzle” that patients assemble in their ongoing search for quality health care information.