5 Things to Know When Your Practice Gets a Nasty Review

In the age of digital information, people exceedingly rely on review websites, such as Yelp, to help find a nail salon, restaurant, and even a physician. A negative review can lower a practitioner's "rating" on such review websites and thereby potentially steer away prospective new patients. So how can a physician counter a negative review in a practical and effective manner?

There is no uniform solution to deal with negative online reviews. Sometimes, the optimal solution is reached in a non-adversarial manner. Other times, litigation is required to restore a practitioner's credibility. The following are some important items for physicians to know when dealing with a negative review.

1. Communicate with the Poster.

Most authors of such negative reviews feel aggrieved and unheard. Addressing the root cause of the author's frustration is the most effective way to have the author voluntarily remove his or her post and to address his or her concerns. Perhaps the disgruntled poster felt that his or her concerns were not adequately heard or addressed by the physicians. Perhaps there are significant patient satisfaction issues in the practice that need to be addressed. Direct communication with the author may help resolve these underlying issues and ultimately compel the author to remove the negative post.

2. Do Not Aggravate the Situation by Responding Publicly!

Websites will typically allow businesses or individuals who are subject of a negative review to post a reply. Practitioners should avoid responding to negative online reviews in a negative or disparaging manner. Not only are such responses ineffective, but they can also potentially subject the practitioner or the practice to legal exposure.

> Avoid responding to online reviews with factual assertions that may be confidential under federal and state law.

Practitioners should avoid the temptation of responding to negative posts with information that may be protected under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Even if the patient initiates the disclosure of protected health information, practitioners may face liability under HIPAA if they disclose, confirm or dispute any protected health information, without the patient's consent.

3. Review Websites Have Strong Legal Protections

If direct diplomacy with the author fails, physicians may attempt to engage the review website to remove the negative post. This is no easy task, as such review sites typically resist any attempt to remove negative commentary or ask for a fee in their assistance. Threats of litigation are usually ignored, as

review websites have immunity from slander, defamation and/or libel lawsuits under federal law. Section 230 of the Communications Decency Act of 1996 (“CDA”) provides immunity for online review websites, who publish review information that is provided by third-parties (e.g., patients). However, the immunity under the CDA does not foreclose other avenues to remove negative posts.

4. The Terms of Service Shall Set You Free.

It is difficult but possible to convince a review website to remove a negative post. Carefully review the website’s terms of service, as the post in question may violate these provisions. For instance, most review websites do not permit individuals with a conflict of interest, such as competitors of a physician practice, to leave negative posts. Reach out to a representative of the website and explain why the post in question violates the website’s terms of service. Reputable review websites take such violations seriously and may remove the post in question if they agree with your interpretation.

5. Legal Action.

If all else fails, the practitioner may consider legal action to remove the negative post and to seek damages against the author. While the CDA protects websites from negative posts written by patients, such protections do not necessarily extend to the authors. Posters may feel compelled to remove the post in question after a strongly written letter from an attorney. If the author does not respond to correspondence by counsel, an action in state or federal court may be necessary to force the removal of the post and to recover damages.

> Litigation is not always an effective and optimal solution to remove such negative posts.

The costs of retaining counsel and initiating a legal action may be prohibitive or impractical. In addition, a negative review is not necessarily actionable under state law, particularly if the contents of such a review are based on opinion or undisputed facts. Even if the post is actionable, it will be difficult to establish damages suffered by the practitioner. The aggrieved practitioner should also consider the author’s ability to pay any monetary judgments awarded. A practitioner should avoid spending money in litigation, only to learn that the author cannot pay the judgment.

As the public increases its reliance on review websites, it is imperative that physicians properly maintain their online reputation in a practical and effective manner.

***Yulian Shtern, Esq**., is a health law attorney with Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.*