

Negative Online Reviews— Bane of Physicians and Other Professionals



Neha Sareen

Negative online reviews affect a great number of professionals on a daily basis. In my practice thus far, I have observed that physicians, in particular, are seeking the advice of attorneys to protect themselves and their practices from the adverse effects of Internet defamation.

The unfortunate reality is that defamation law can be very complex. Moreover, getting involved in litigation can be costly, time-consuming, and difficult. Therefore, it is important to understand defamation, the common concerns, and any preventive measures before filing a lawsuit based on defamation.

A Brief Look into Defamation Law

What Is Defamation?

Essentially, a defamatory statement is one that can adversely affect a person's reputation in the community. A defamatory statement can either be written or spoken. Spoken defamation is often termed *slander*, whereas written defamation, such as statements on an Internet consumer review website, is termed *libel*.

Can any harsh written statement constitute libel? If, for instance, an online review says something along the lines of, "I think this physician is awful and I would never go back to him," is this an actionable defamatory statement? Not necessarily.

Courts generally evaluate whether a statement is one of opinion or fact. Opinions, for the most part, are constitutionally protected speech. Even if someone writes harsh words in an online review about you, if it is deemed an opinion, it is constitutionally protected. A fact, by contrast, is generally defined as a statement that can be proven to be either true or false. Courts often use a "reasonable person" standard—whether a reasonable person would construe a certain statement as verifiably true or false, thus rendering a statement to be one of fact.

But keep in mind that the law is gray on what can constitute a fact or opinion, which is one of the reasons defamation law is complex. Negative statements beginning with words such as "I think" or "I feel" will arguably be construed as protected statements of opinion. However, statements in a review along the lines of "This doctor is underqualified" or "This doctor is a crook" are likely to



be deemed as statements of facts because a professional's qualifications or the existence of any criminal record can be proven as true or false upon investigation.

A Plaintiff's Burden of Proof

Another reason for defamation law's complexity are the requirements for what the plaintiff needs to show, that is, the plaintiff's burden of proof, in order to prevail in a defamation claim. The requirements differ depending on whether a defendant is deemed a private individual or a public figure.

Many of us can be deemed private individuals. However, a public figure is not necessarily someone who is "famous," such as a celebrity or politician. Rather a public figure is an individual who has thrust him- or herself into his or her community for a particular purpose. Therefore, a popular physician who teaches at a local university, speaks at conferences, and is head of his or her department at a hospital can arguably be considered a public figure.

If a defendant is deemed a public figure, then the plaintiff needs to prove that the defendant made the defamatory

statement with actual malice, meaning that the defendant made the statement with knowledge of its falsity or with reckless disregard for its truth.

Can the statement at issue be construed as a fact or opinion? Is a defendant a private individual or public figure? What is the appropriate standard dictating what the plaintiff must prove? These questions are often the subject of litigation and are also the reason defamation lawsuits can become time-consuming.

Before Bringing a Claim for Defamation, Think about the Following

- Jurisdictional issues
- California's Anti-SLAPP Statute
- Requesting injunctive relief

Thinking about Jurisdiction

Before filing a claim for defamation, one needs to think about the location of the individual posting the negative online review ("the poster"). If the poster is located in a state different from yours, it will not be easy to bring suit

against the poster in your state. Usually a plaintiff needs to prove that the poster purposely directed his or her publication at the forum state, that is, your home state. This is not an easy task, and therefore jurisdictional issues need to be discussed with your attorney.

California's Anti-SLAPP Statute

Most defamation suits filed in California are countered with the filing of a motion to strike a complaint based on the Anti-SLAPP Statute, codified as California Code of Civil Procedure Section 425.16. The term *SLAPP* stands for strategic lawsuit against public participation. Essentially, this motion seeks to dismiss any claim that “chills speech.” It is popular because the Anti-SLAPP statute allows a prevailing defendant to recover not only costs but also attorney’s fees—a rarity in most litigation.

Pursuant to Section 425.16, a defendant will often argue that the posted statement is protected speech because it is either:

1. Made before a legislative, executive, judicial, or other official proceeding,
2. Made in connection with a legislative, executive, judicial, or other official issue,
3. Made in a public place or public forum in connection of an issue of public interest, or
4. Made in connection with exercising one’s constitutional right of free speech in connection with a public issue or interest.

Thus, with allegedly defamatory statements, the argument is usually that the statement is a statement made in connection with a public issue, and it is therefore protected speech. What constitutes a public issue varies and is often heavily litigated.

Overall, when considering bringing a defamation suit, consider the Anti-SLAPP Statute. To win against it, a plaintiff needs to show a reasonable probability of prevailing on his or her claim, which can be a difficult task depending on the facts.

Requesting the Court for Injunctive Relief

Requesting a court for injunctive relief is asking the court to take down the offensive statement or entire Internet review. Will this definitely get granted? Not necessarily. One thing to keep in mind is that Section 230 of the Federal Communications Decency Act essentially grants Internet service providers (ISPs) immunity from liability based on defamation and invasion of privacy claims. Therefore ISPs, at times, may disregard or take “their sweet time” in dealing with such requests. Of course this too can be litigated, extending the timeline for litigation, and increasing costs.

So What Is a Person to Do?

Well, a person cannot just sit there and watch his or her reputation get tarnished. One suggestion, especially if you have your own practice, is to be proactive from the start with your marketing. For instance, services provided by websites such as Reputation.com help “scan the Internet” and ensure that any negative statements about you or your practice will appear at the bottom of a Google search. This, in turn, will prevent the rapid dissemination of any negative online reviews concerning you or your practice.

If you are serious about seeking the advice of an attorney and wanting to bring a lawsuit based on defamation, realize that not every statement is actionable defamation, different courts may interpret the alleged statements differently, and that litigation is often costly and time-consuming with no guarantee of a “complete win.” In this day and age it is better to be cautious and proactive from the start. Do not wait until a problem arises. Realize any potential challenges and seek to prevent them.

Neha Sareen practices in commercial and business litigation. She obtained a business law specialization while in law school and became a member of the state bar in December of 2012. Currently, she is an associate attorney for Ari Law.

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