

# e-Health: The Internet, a Really Scary Place for Medical Practices



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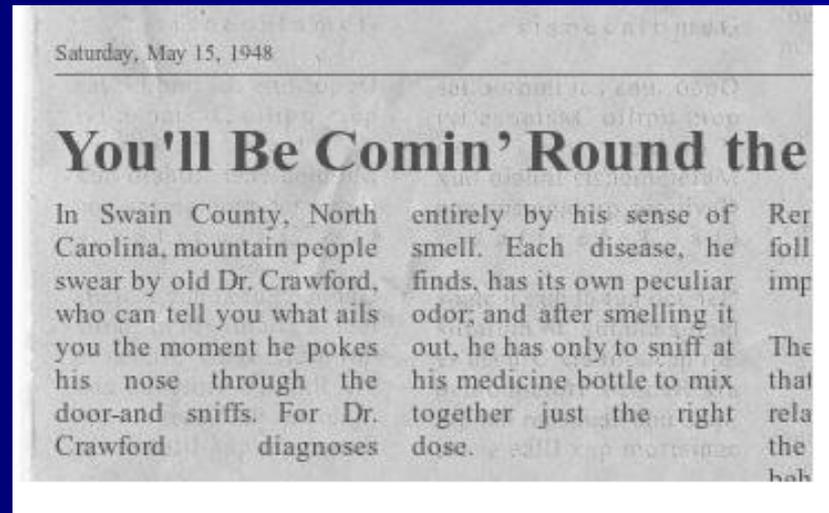
# Setting The Stage

- “The rules haven’t changed; there are just more ways to break them.”
  - David Vigilante, Vice President for Legal Affairs, CNN
- “Anxieties run through most new technology developments ... But I think in some ways, it’s more of the same, and in other ways, it’s just more of the same a lot faster.”
  - Genevieve Bell, In-house Anthropologist, Intel

# Setting The Stage

- \$ 2.1 trillion is spent on healthcare
  - \$7000 per person
- Healthcare is 1/6 of the country's economy

# In Olden Days ...



- The plaintiff alleges that he was materially damaged and asks to recover \$50,000 compensatory and \$25,000 punitive or smart money damage. *Crawford v. Crowell-Collier Pub. Co.*, 87 F. Supp. 509 (1949)

# Now ...



My experience with Dr. XXX and his staff was less than pleasant. To abbreviate a long story: He made an incorrect diagnosis; He was severely wanting in his interaction with me (very poor "bedside manner"); He was inflexible - the list of examples is long (I would run out of space); He uses the assembly line approach, where your time is unimportant. I was in his office a total of about two hours during my initial consultation. He spent a total of less than ten minutes with me; most of the time I either sat waiting for one of his assistants, or watched a movie touting his credentials. I hope I can prevent others from equally unpleasant experiences.

59% of people said physician rating sites are “somewhat important” or “very important” – but less important than “word of mouth from family and friends.”

35% selected a physician based on good ratings.

37% had avoided a physician with bad ratings.

For those who didn't use online physician ratings, 43% reported a lack of trust in the information on the sites.

Asked about possibly leaving negative comments -- 34% had concerns about their identity being disclosed and 26% were concerned about the physician suing them.

# WAPO & ProPublica

- Yelp gave ProPublica and *The Washington Post* access to 1.7 million public reviews.
- Patients mention privacy or HIPAA in more than 3,500 one-star reviews (the lowest).
- “Yelp’s senior director of litigation, Aaron Schur, said most reviews of doctors and dentists aren’t about the actual health care delivered but rather their office wait, the front office staff, billing procedures or bedside manner.” <http://tinyurl.com/PP-WAPO-YelpStudy>

# Understanding the Basics: What is Defamation?

## ■ Elements

- false
- defamatory
- statement of fact
- of and concerning plaintiff
- published to third person
- that is made with fault
- and causes injury

# Defamation: What Gets Contested?

## ■ Elements

- false
- defamatory
- statement of fact
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# An Actual RateMDs Review

My experience with Dr. XXX and his staff was less than pleasant. To abbreviate a long story: He made an incorrect diagnosis; He was severely wanting in his interaction with me (very poor "bedside manner"); He was inflexible - the list of examples is long (I would run out of space); He uses the assembly line approach, where your time is unimportant. I was in his office a total of about two hours during my initial consultation. He spent a total of less than ten minutes with me; most of the time I either sat waiting for one of his assistants, or watched a movie touting his credentials. I hope I can prevent others from equally unpleasant experiences.

# Defamation: What Gets Contested? Factuality.

## FACTUAL

- incorrect diagnosis
- I was in his office a total of about two hours during my initial consultation. He spent a total of less than ten minutes with me.
- I either sat waiting for one of his assistants, or watched a movie touting his credentials.

## NON-FACTUAL

- very poor "bedside manner"
- inflexible
- your time is unimportant
- I hope I can prevent others from equally unpleasant experiences.

# Defamation: What do you mean by “false”?

- In the world of libel, it must be really, really false.
  - “I was in his office a total of about two hours during my initial consultation. He spent a total of less than ten minutes with me.”
    - Minor inaccuracies don’t amount to much.
    - There must be a significant difference between the meaning of what was said and the actual truth.

# Defamation: Who's On The Hook?

- Websites?
  - No because of the Communications Decency Act



**RateMDs**  
DOCTORS YOU CAN TRUST

I'm a doctor and do not think my ratings are fair. What can I do?

You can reply to any or all of your ratings or alternatively, you can click the 'flag' next to the rating to have it re-reviewed. If the rating is flagged, and then re-approved, the flag disappears for that rating.

[How do I get a rating removed from your website? ¶](#)

We generally do not remove ratings. This site is for people to report on their experiences. People rate you every day in their conversations and referrals, whether or not you are listed here. There is a 'flag' option associated with each rating. When you click on that flag, the rating is reviewed. If you are convinced you have been libeled, you might ask an attorney about filing a [Doe subpoena](#).



**RateMDs**  
DOCTORS YOU CAN TRUST

One of these ratings is false and it's hurting my business. I want to send you a letter demanding that it be removed. ¶

We do not accept demand letters because it is not our role to determine whether a review is true or false. You might dispute the truth of a review, but your disputing it does not make it false. Why should we believe you over the reviewer? Still, we believe your voice should be heard, so you are always free to post a public response to any review on this site. If the rating has been flagged, you can click it to have the rating reviewed. If there is no red flag, it means the rating was already reviewed and re-approved, and will not be reviewed again.

# Defamation: Who's On The Hook?

- The poster?
  - Yes but good luck finding.
  - Could have to subpoena website, and they may resist getting involved.
  - The public doesn't like doctors who sue patients.
  - One risk of suing: A court determines the poster was *right!*

# So What Can You Do?

- Remember HIPAA
  - Whatever you do must be done within the parameters of HIPAA, which prohibits disclosure of your patients' personal health information.
- Also ... don't bite off more than you can chew.

# So What Can You Do?

- 1800s: Never pick a fight with people who buy ink by the barrel.
  - Attributed to Mark Twain
- 2016: Never pick a fight with people who know how to type.

# If You Fight Fire With Fire, You Might Get Burned.

- A mother wrote:

–“Half-way through the procedure, the doctor seemed flustered with my crying child. ... At this point the doctor was more upset and he ended up throwing the instruments to the floor. I understand that dealing with kids requires extra effort, but if you don't like to do it, don't even welcome them.”

<http://tinyurl.com/PP-WAPO-YelpStudy>

# If You Fight Fire With Fire, You Might Get Burned.

- The doctor wrote:

- “This patient presented in an agitated and uncontrollable state. Despite our best efforts, this patient was screaming, crying, inconsolable, and a danger to both himself and to our staff. As any parent that has raised a young boy knows, they have the strength to cause harm.” <http://tinyurl.com/PP-WAPO-YelpStudy>

# If You Fight Fire With Fire, You Might Get Burned.

## ■ DHHS wrote:



DEPARTMENT OF HEALTH & HUMAN SERVICES

Voice - (415) 437-8310, (800) 368-1019  
TDD - (415) 437-8311, (800) 537-7697  
(FAX) - (415) 437-8329  
<http://www.hhs.gov/ocr/>

OFFICE OF THE SECRETARY

Office for Civil Rights, Region IX  
90 7<sup>th</sup> Street, Suite 4-100  
San Francisco, California 94103

October 23, 2013

that North Valley Plastic Surgery impermissibly disclosed confidential information by posting the patient health information of his son, (b)(6),(b)(7)(C) on a public online web-blog, YELP, without consent.

Under the Privacy Rule, a covered entity generally may disclose protected health information (PHI) only for purposes of treatment, payment, or health care operations. See 45 CFR § 164.502(a). A covered entity may not confirm or deny that a particular person was, in fact, a patient, or disclose any other individually identifiable health information (IIHI) including but not limited to demographic information such as name or address. The Privacy Rule plainly states that patient PHI is any IIHI maintained by a covered entity as part of a patient's medical record. Therefore, you may wish to remove any specific information about current or former patients from your web-blog.

–<http://tinyurl.com/PP-WAPO-YelpStudy>

# If You Fight Fire With Fire, You Might Get Burned.

- When ProPublica sought comment from North Valley Plastic Surgery, they said “no comment” but added:
  - “Everyone that was directly involved in the incident no longer works here. The nurse on this case left a year ago, the surgeon in the case retired last month, and the administrator left a few years ago.” <http://tinyurl.com/PP-WAPO-YelpStudy>

# Contracts: Another approach, but don't ...

- Some physicians have patients sign away their rights to criticize online.
  - Don't do this.
- Some physicians have patients agree – in advance – that if they complain online they've waived HIPAA rights.
  - Don't do this.

# Instead ...

- In a perfect world, we provide perfect care and service, nothing goes wrong, and all our reviews are glowing.



THE SAME DOCTOR:

*My husband has been [seeing Dr. XXX] for twelve years, since a work related accident involving the loss of one eye and most of the vision in the remaining eye. Dr XXX and staff have consistently been professional, helpful and compassionate for the entire time. Wouldn't go anywhere else!*

# Instead ...

- You can respond with non-personal information
  - This can “set the record straight”
  - This can provide public education.

# Instead ... A HIPAA-Compliant Response

Federal law prohibits a physician from disclosing a patient's medical information, or even acknowledging he treated a particular patient. For that reason, I am not responding to the specific complaints of Patient X. However, generally speaking, there are many things that can lead to post-operative complications of an angioplasty. The most common risks include re-narrowing of the artery, blood clots, and bleeding. It is important to take aspirin or other medications to reduce those risks. It also is important to avoid strenuous exercise and lifting heavy objects for several days afterward. Our medical practice has an outtake procedure in which we verbally instruct patients on post-operative care and show a video that repeats those instructions. We provide our patients with instructions written in plain English for them to take home and give them a number they can call in the event of any unexpected post-operative response.

# Instead ... The solution to pollution is dilution.

- Invite feedback and post it liberally.
  - “University of Utah Health Care (UUHC) started surveying patients and asking them how *they* define excellence. ... became the first academic medical center in the country to put our patient reviews online, complete with unedited comments and an accessible five-star ranking...” *Harvard Business Review*, <http://tinyurl.com/HBR-Docs-Not-Afraid>
- People don't believe all 5-star reviews.

# Instead ... Go to the source.

- Communicate with the patient.
- Put yourself in your patient's shoes.
- Resist human nature; don't be defensive.
- Listen.
- Always be respectful.
- Often people mostly want to be heard.

# More Reading

- If you are interested in this topic, there is a lot you can read.
- For a curated list, go to

<http://tinyurl.com/MoreM3Reading-1>

through

<http://tinyurl.com/MoreM3Reading-10>

# Fighting Within the Ranks.

- Dispute between partners spilled out
  - Dr. D wrote letter to hospital that Dr. P was going to lose his medical license.
  - Dr. D went on a local radio show and said Dr. D had interfered with Dr. D's treatment of a patient.
  - Dr. D said Dr. P's interference caused permanent harm to the patient.
- Dr. P filed suit against Dr. D.

# Fighting Within the Ranks.

- The deposition:

9	Q	Was that correct?
10	A	It turned out not to be correct.

# Fighting Within the Ranks.

- Judge awarded \$150,000 in actual damage.
- Judge also awarded \$500,000 in punitive damages (“smart money”).

# Website Terms of Use

## ■ Browsewrap

- You don't do anything other than go on and look around.
- You probably are not bound by the terms.

## ■ Clickwrap

- “I agree” or “ $2+2=4$ ” or “Click all the lighthouses”
- You probably are.