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Patients' Online Reviews of Physicians

By Eric Goldman*

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Online patient reviews are becoming a major force in the healthcare industry, but some healthcare providers lament this development. In fact, an opportunistic vendor, Medical Justice, preyed on healthcare provider fears and sold healthcare providers a form contract that asked patients to waive their rights to post reviews. Medical Justice eventually recognized the errors of that approach and did a complete reversal; it is now selling healthcare providers a service, eMerit, that monitors search engines and doctor rating sites.

Medical Justice's contracts prohibiting online reviews have not been definitively tested in court, but attempts to restrict patient reviews are problematic. Anti-review contracts prevent consumers from expressing their views, and they deprive other consumers of information that can help them make better marketplace choices. The provisions also create serious legal risks for the businesses imposing them, as illustrated by the following three incidents:

- In the late 1990s, software company Network Associates restricted buyers from publishing reviews of its software. In 2003, a New York court enjoined Network Associates from continuing to use that restriction.¹
- The U.S. Department of Health and Human Service's Office of Civil Rights required a doctor to stop using Medical Justice's anti-review form.² The agreement prohibited the patient from "directly or indirectly publishing or airing commentary about the physician, his expertise, and/or treatment in exchange for the physician's compliance with the Privacy Rule."
- New York dentist Stacey Makhnevich and her practice Aster Dental required that patients sign a Medical Justice-based confidentiality agreement as a precondition to treatment. This version of the agreement tried to silence patients by assigning to the dentists a copyright over any comments related to their treatment. The patient, Robert Lee, had a dental emergency and signed the agreement to get treatment. He later sued to invalidate the agreement. The court's initial opinion signaled serious skepticism about the legitimacy of the dentist's conduct.³

Even more important than the legal risks, asking patients to restrict their rights to review a healthcare provider sends a terrible message to patients and sets the stage for distrust.

While contractually restricting patients' reviews is not the right answer, some healthcare providers are frustrated by their perceived inability to publicly defend themselves from negative

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¹ New York v. Network Associates, Inc., 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003).

² *Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule*, US Dept of Health & Human Services, Office of Civil Rights, Health Information Privacy: Private Practice Ceases Conditioning of Compliance with the Privacy Rule, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case29>.

³ Lee v. Makhnevich, 2013 WL 1234829 (S.D.N.Y. March 27, 2013).

patient reviews. Providers have ethical and legal obligations to maintain patient confidentiality, with severe penalties for noncompliance. These restrictions seemingly impose a gag order on doctors to rebut patient misstatements.

If a patient's review misstates facts, healthcare providers actually have several options:

- A patient may consent to discussing the matter publicly. Angie's List prospectively requires this consent from patients who review doctors.⁴
- Most patients' criticisms of their healthcare provider don't relate to individualized medical advice. As one recent study found, "Unhappy patients who post negative online reviews of their doctors complain about poor customer service and bedside manner four times more often than misdiagnoses and inadequate medical skills."⁵ If a healthcare provider feels the need to publicly respond, he or she can rebut most of these issues without discussing confidential patient information.
- If patients discuss their specific medical situations, the healthcare provider may discuss its general philosophies and standard protocols without disclosing confidential patient information.

Doctors also can bring lawsuits to redress negative patient reviews, but litigation isn't a great option. There is no point in suing online review websites for patient reviews. Review websites are categorically protected from liability for third-party content except in cases involving intellectual property (see 47 U.S.C. §230). No doctor has ever successfully won in court against an online review website for publishing patient reviews.

Suing patients is only marginally more attractive than suing review websites, even if a patient has lied. Inevitably the patient will respond with a malpractice claim or a complaint against a provider's license; a lawsuit calls more attention to the patient's assertions; doctors suing patients often look like they have something to hide; and, perhaps most importantly, doctors are not likely to win in court.

Over the past decade, I've identified about two dozen doctor vs. patient lawsuits over online reviews. Doctors have rarely won against their patients in court and, even worse, some doctors have been ordered to pay their patients' attorneys' fees.⁶

The legal analysis is more complicated if it can be proven that a competitor or vindictive party is posting fake reviews. Those lawsuits are more winnable than lawsuits against patients, but often the time and costs required to win simply aren't worth it.

⁴ Angie's List Membership Agreement, April 25, 2012, § 13, <http://my.angieslist.com/angieslist/aluseragreement.aspx> ("You also acknowledge that the healthcare or wellness provider about whom you submit Content may submit Service Provider Content that contain your private or confidential health information in response to Content you submit").

⁵ Press Release: *Online Doctor Reviews: Four Times More Patients Peeved About Service & Bedside Manner Than Medical Skills*, April 30, 2013, <http://www.reuters.com/article/2013/04/30/idUSnGNX736vBG+1c3+GNW20130430>.

⁶ See the complete chart at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1289&context=historical>.

Online patient reviews remain a work-in-progress; more work needs to be done, especially on the part of review websites, to improve the credibility of patient reviews. Still, online patient reviews are good news to the healthcare industry, not bad news. Patient reviews will improve the industry's service levels, providing valuable customer feedback to healthcare providers and help them improve their service. Good healthcare providers will be recognized for the quality services they provide.