

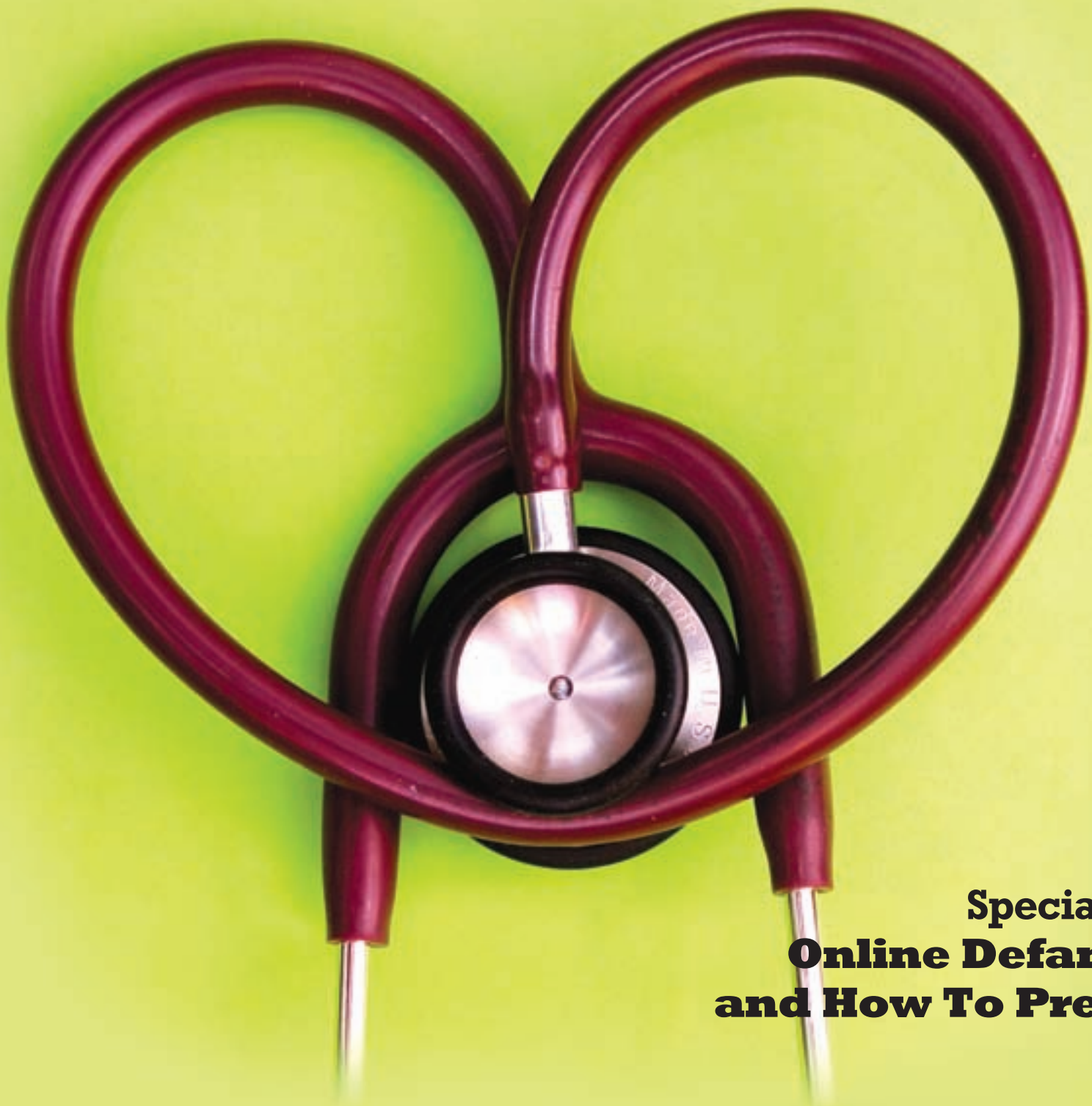
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**Special Focus:
Online Defamation
and How To Prevent It**

Legal Strategies For Doctors To Fight Bad Online Reviews

By George F. Indest III

Defamatory attacks against doctors have become increasingly prevalent as more and more review sites join the Web, allowing patients to post virtually anything they want — good or bad — about a physician or any professional. With more physicians becoming employees of hospital systems or large health-care institutions, adverse surveys, reports or reviews can affect advancement, bonuses, and basic income.

Internet ratings on review sites like Vitals and Yelp can range from snide comments about the patient's waiting time in the physician's office to vicious attacks that can have serious implications for a physician, including economic impact. In many cases, the review, comment, or rating may be a purposely untrue statement by a disgruntled patient, competitor, or former employee. When the comment is posted, search engines like Google or Yahoo may bring up the false statement every time someone searches for that doctor's name. This can cost doctors both their reputation and their business, especially if they start losing patients because of bad reviews.

Many doctors are now seeking legal strategies to combat alleged online libel and defamation in order to save their reputation and their practice. However, not all negative online comments or ratings meet the actual definition of "defamation."

Defamation generally is a factual statement that can be proven true or false. For example, if a patient writes that she had a procedure performed by a doctor, this is a statement of fact that can be

confirmed or disproved. However, if someone writes about a doctor's poor attitude during a visit, this statement is usually considered to be an opinion that cannot necessarily be proven true or false.

If you find any statements about you or your practice that may be considered defamatory, the following are some legal measures you may take to try to stop the inflammatory comments:

1. IDENTIFY PERSON MAKING COMMENTS.

Attempt to identify the person making the negative remarks. You may find it is a disgruntled former employee or a friend or relative of the patient who does not have any first-hand knowledge. See other tips below on how you might do this. Contact that person directly.

2. CHECK YOUR OFFICE RECORDS.

Your own records should be checked. Your notes about office visits or procedures, your appointment schedule, or your own billing records may help you identify the patient who wrote the review or comment. If you think you may know who wrote a comment, try to contact the patient directly to discuss his or her concerns and request that the comment be removed. Sometimes you will find that you never treated this patient or that the patient has the wrong physician.

3. CONSULT WITH AN ATTORNEY.

Before making any decisions about the contents of a comment, consult with an experienced attorney for guidance. An experienced attorney will be able

to determine whether the Internet posting is considered an opinion or defamation.

4. SEND A LETTER TO THE WEBSITE, OWNER, AND INTERNET SERVICE PROVIDER.

Once the poster has been identified, doctors can contact the patient directly to ask that the post be removed. If the patient refuses, a doctor should request that his or her attorney send a letter warning the poster of potential legal action if the post is not removed from the Website. If that doesn't work, the physician should have his or her attorney send a letter demanding the comments be removed to the Website, Website host, owner and Internet service provider

5. CONTACT THE WEBSITE.

If you are unable to determine who may have written something online, or if the person refuses to take the comment down, try contacting the Website. Many Websites have policies against defamatory statements. Ask about its policy and get the comment removed. However, be very careful about signing up as a participant on the Website and, especially, of agreeing to its terms of service (TOS) or terms of use (TOU). See below.

6. AVOID AGREEING TO THE WEBSITE'S TERMS.

Avoid the urge to join the Website, subscribe, or otherwise agree to the Website's policies and procedures. You may be agreeing to a legally enforceable contract that waives your rights to sue for defamation or other course of action. Every Website has TOS or TOU, usually with a simple block to check to

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doctors," Peter Budetti, CMS deputy administrator for program integrity, said in a written comment on the new rules.

Premier Healthcare Alliance, which provides purchasing and other services to 2,700 hospitals and hospital systems, welcomed the rule for bringing "sunlight to an area where consumer confidence has been undermined by conflicts of interest." Patients now "can feel more confident that the treatments they receive are based on evidence-based care and their physicians' best judgment, rather than inappropriately influenced by financial relationships."

REINING IN IMAGING SERVICES

Medicare payments for self-referred magnetic resonance imaging (MRIs) and computed tomography (CT) scans surged in the 2004-2010 period, the General Accountability Office reported — sufficient reason, according to GAO, for CMS to do more than it has so far to rein in imaging services than it has. During the seven-year period, for example, the number of self-referred MRI services alone increased over this period by more than 80%, compared with an

increase of 12% for non-self-referred MRI services.

Providers' referrals of MRI and CT services substantially increased the year after they began to self-refer after buying or leasing imaging equipment or after joining a group practice that already self-referred. Providers that began self-referring in 2009, for example, increased MRI and CT referrals on average by about 67% in 2010 compared to 2008.

Overall, providers who self-referred in 2010 likely made 400,000 more referrals for advanced imaging services than they would have if they were not self-referring, at a cost to Medicare of about \$109 million, GAO concluded. To the extent that these additional referrals were unnecessary, they needlessly exposed beneficiaries to the cancer risk from ionizing radiation.

Nevertheless, CMS dismissed two GAO suggestions for fixing the problem — requiring imaging providers to indicate on their Part B claims whether they had self-referred and reducing Medicare payment rates for such claims.

Identifying self-referrals with a checklist on the claim "would be complex to administer" and would fail to identify self-referrals to outside facilities in which the referring practitioner has an interest,

CMS said in comments appended to the GAO report. A better alternative is to rely on other payment reforms, such as accountable care organizations (ACOs) or physician participation in Medicare's bonus payments for "value-based" care, CMS said.

As for a payment reduction, it "would not address the underlying conflict of interest." At best, it would reduce, but not eliminate, the underlying financial incentive to self-refer for imaging services; "at worst, it would incentivize physicians to maintain their income from such services by referring for even more imaging services, resulting in little or no change in program costs and possibly reduced quality of care."

Also, such a payment reduction could easily be avoided if one physician in a practice was to order the imaging service and a practice partner were to provide it. Finally, CMS expressed doubt that it has the statutory authority to require different payment levels for the same service, though it agreed to consider ways for assuring that imaging services are appropriate.

Burt Schorr is senior editor of Home Health Line newsletter and Success in Home Care magazine, bschorr@decisionhealth.com, 800-929-4824, ext. 2258.

acknowledge you agree to all of its terms. Do not do this. You may be waiving all of your rights to legally challenge defamatory comments that are published.

7. FILE A LAWSUIT.

Filing a lawsuit should be a physician's last resort in handling defamatory online comments. Legal proceedings can often take years to complete and can draw more negative attention to the physician. However, in many cases the only way for a physician to defend his or her reputation is in court.

Before you can file a lawsuit you must check state laws regarding statute of limitations in which to file defamation suits. If the negative comment falls outside this statute of limitations, you will not be able to sue. You will also need to review state defamation and false light laws to see what are considered appropriate claims. Remember it is difficult to sue someone for an opinion, and many online reviews can be considered and can't be proven true or false. It is also usually best to sue the individual

poster, not the Website, as The Communications Decency Act of 1996 protects Internet service providers from liability for third-party comments.

8. SEEK A SUBPOENA.

If the Website provides no assistance in removing the comment, you and your attorney can seek a subpoena ordering the Internet service provider to give identification data. Generally courts will grant a subpoena during a defamation investigation. Identification information could be an email address, name or location information of the poster.

9. REQUEST A COURT ORDER.

If all requests for a post to be removed are unsuccessful, doctors can request a court order or an injunction. A doctor must be able to show that the comments are probably false and are causing irreparable harm to their reputation or practice in order for a judge to demand the comments be removed. Usually you will be required to file a petition or complaint (lawsuit) first.

There are also alternative methods for protecting your reputation online. Be proactive and make sure you are putting out positive information about yourself and your practice through your website, social media sites, and blogs. This will help bury negative comments that appear on search-engine results, making it less likely that potential patients will see bad reviews.

Physicians should also distribute surveys to their patients, which provide an instant forum for patients to express their feelings about visits. Such tools as having your own internal office complaint or grievance procedure for patient complaints may help. If patients feel that they are able to provide immediate feedback to a physician, they may be less inclined to share their feelings online.

George F. Indest III is president and managing partner of The Health Law Firm, with its main office in Orlando; www.TheHealthLawFirm.com; 407-331-6620.

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