revenues" as a year-over-year change in net patient care operating income, which is equal to patient care revenue for the year minus patient care-related expenses for the same year. This is a significant change from the previous FAQ, which was less definite, referring to "lost revenues" as any revenue a healthcare provider loses due to COVID-19, without incorporating expenses. Recipients who relied on this prior guidance need to review and evaluate the effect of the modified definition.

• Eligible expenses should be reported, but only to the extent the expense is not reimbursed or obligated to be reimbursed by other sources.

• Recipients of between $10,000 and $499,999 in aggregated Provider Relief Fund payments will report healthcare-related expenses attributable to coronavirus in two aggregated categories: General and administrative expenses, and other healthcare-related expenses. Those who received $500,000 or more in payments need to provide more detailed information.

• Entities that received more than $750,000 in Provider Relief Fund payments are subject to audit requirements.

"Any sort of reporting program needs to take all of this into account. Providers may need to recalculate their lost revenues and need to be sure to document everything," Macre says. "Audits are likely, especially if a larger amount of funds was taken. Accounting needs to be done carefully and in a well-documented manner." ■

SOURCE

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What to Do When Malpractice Allegations Become Defamation

Medical malpractice litigation can get ugly, with passionate plaintiffs and indignant clinicians or hospital administrators firing off heated accusations and insults. But where is the line where a malpractice allegation becomes defamation? What can be done when that happens?

TV star Terry Dubrow, MD, filed a defamation lawsuit after a patient sued him for $10 million. The suit alleges a former patient's lawyer made defaming comments about Dubrow to a newspaper. The attorney called the surgeon's work "incredibly incompetent," among other accusations. *(More information is available at: https://pge.sx/2Il2w4i.)*

Proving defamation in such a case can be difficult, says **Carol Michel**, JD, partner with Weinberg Wheeler Hudgins Gunn & Dial in Atlanta. Courts generally give broad leeway regarding statements connected to a legal filing, she says. It can be less clear when these are statements made before the initiation of legal action or they are made outside the broad scope of the litigation itself.

Court Statements Hard to Challenge

"If the statements are made publicly and sufficiently outside what the court sees as being part and parcel of the malpractice case, the court could see the defamatory statements as actionable," Michel explains. "Trying to find that line is difficult. I would say that if these types of statements are not something necessary for the litigation, then an attorney should be hesitant about making statements like that."

If that line is crossed, Michel says the healthcare organization should be cautious in responding. A defamation lawsuit may give greater public awareness to the original comments, she notes.

Defamation is especially difficult to prove with statements made in court. There usually is a privilege for statements in court, including pleadings, because society wants people not to be afraid to speak truthfully, says **John A. Lynch, Jr.**, JD, professor of law at the University of Baltimore. However, there may be a civil remedy for abuse of process or malicious prosecution if the lawyer maintains a groundless suit, he says.

The standard for when a lawyer should tell a client that he or she has no case is quite high, Lynch notes. The judgment that a lawyer has acted tortiously in alleging malpractice is made in hindsight, so the lawyer is given considerable margin for error.

The definition of "defamation" encompasses false statements of fact that may injure someone's occupational or professional reputation, explains **Eric Easton**, JD, professor of law emeritus at the University of Baltimore.

"In my view, any allegation of medical malpractice may be

actionable in a libel suit by the practitioner. Of course, the fact that a statement is defamatory in no way guarantees the plaintiff's success," Easton says. "Indeed, defamation is only one of several elements that a plaintiff must prove even to make a prima facie case."

The others are publication to a third party and identification of the plaintiff, falsity, fault, and injury, Easton says. Even then, there is a shield for the defendant. When a lawyer is the defendant, the obvious defense is privilege, although that typically applies to statements made in court, not to the media, Easton explains.

Many Forms of Defamation

There are many potential areas in healthcare where defamation claims can arise, says **Elizabeth L.B. Greene**, JD, partner with Mirick O'Connell in Worcester, MA.

Defamation by a patient or their representative relative to the care received or not received from a doctor or hospital is commonly understood to be a false statement of fact, published to a third party. This is harmful to the reputation of the doctor or hospital, Greene says.

"Notably, there are many nuances to defamation claims, as most states have defamation statutes, which vary in how they define the elements, defenses, potentially recoverable damages, and filing limitations," Greene explains. "As the law of defamation varies by state, understanding your state's defamation statutes is important to evaluating the merits of a potential claim for defamation."

Typically, opinions and factually accurate statements are not actionable as defamation, Greene explains. Opinions are protected when they cannot reasonably be interpreted as a statement of fact and cannot be determined to be true or false, she adds.

Although truth often is a defense to a defamation claim, under some state laws, truth may not be a defense to written defamation where actual malice is proven, Greene says. When public figures, which may include some doctors, claim defamation, they must prove actual malice to recover damages. "Actual malice" often is defined as knowledge of falsity or reckless disregard for the truth.

"When a defamation claim is related to allegations of medical malpractice, the assessment of the merits of the defamation claim may be tied to the fact-finder's determination on the malpractice claim," she says. "For example, when the defamation is about the quality of medical care, the truth of that statement may be established by the jury's finding as to whether the doctor met the applicable standard of care in caring for the patient in the malpractice case."

When a defendant individual or organization seems to be the victim of defamation, responding with a lawsuit may not be the best option, Greene says. Clinicians and hospitals should consider filing defamation suits against patients only as a last resort.

Can Be Hard to Prove

Proof of the elements necessary to recover for a defamation claim can be complicated by HIPAA and state patient confidentiality laws, and litigation can be expensive, Greene explains. If a clinician or hospital believes a patient or their representative's statement is defamatory, it is advisable to consult with counsel experienced to assist with assessing all potential options, including the merits and risks of filing suit for defamation.

"It is best to exercise caution in responding to allegedly defamatory statements, consult with counsel regarding whether the statements are considered opinion or defamation under your state's law, and the best approach for responding if the statements are considered defamation," Greene says. "Prior to filing suit against a patient for defamation, a physician or hospital will want to consider whether a meeting or other communication with the dissatisfied patient could lead to resolution of a potential misunderstanding and, potentially,

EXECUTIVE SUMMARY

Some claims made regarding a medical malpractice allegation could amount to defamation. It can be a difficult choice whether to pursue a defamation lawsuit.

- Many statements from attorneys regarding malpractice claims are protected and do not amount to defamation.
- Statements made to the media generally are less protected than statements made in court or as part of court filings.
- Unfounded statements posted online by patients can be defamatory. It is possible to pursue litigation and request the statements be removed.

a retraction of the defamatory statement."

In many instances, evaluating the harm that is or may be caused by the defamatory statement is important, as pursuing a claim for defamation potentially will inflame the dissatisfied patient and can increase the public's awareness of the allegedly defamatory statement, Greene explains.

Providers and hospitals also should be mindful of the statute of limitations for defamation claims in their state. "However, at times, after consultation with counsel and analysis of the issues, the only way for a physician or hospital to defend their reputation is to bring a claim for defamation," Greene says. "If the defamatory statements are sufficiently egregious, depending on the applicable state statute, the doctor or hospital may also recover for punitive damages."

Good Faith Can Protect Statements

Greene notes some hospitals and medical groups post all government-required satisfaction survey responses patients fill out once a certain number of reviews are received for a provider. Providing a place for patients to submit feedback and voice any concerns close in time to their visit may create opportunities to address the patient's care-related concerns and prevent some patients from making allegedly defamatory statements, she says.

A malpractice claim has to be based in good faith, meaning the plaintiff believes he or she was harmed by the negligence of the physician or the hospital, notes **Marc H. Kallish**, JD, shareholder with Roetzel & Andress in Chicago. Before filing a malpractice lawsuit in Illinois, the plaintiff must submit a certificate stating the matter was reviewed by a licensed physician and the physician has certified the "potential" for malpractice exists, he says.

Typically, if a plaintiff files the allegations in a court pleading in compliance with the requirement of Illinois state law, he or she likely will be immune from a defamation action, Kallish says.

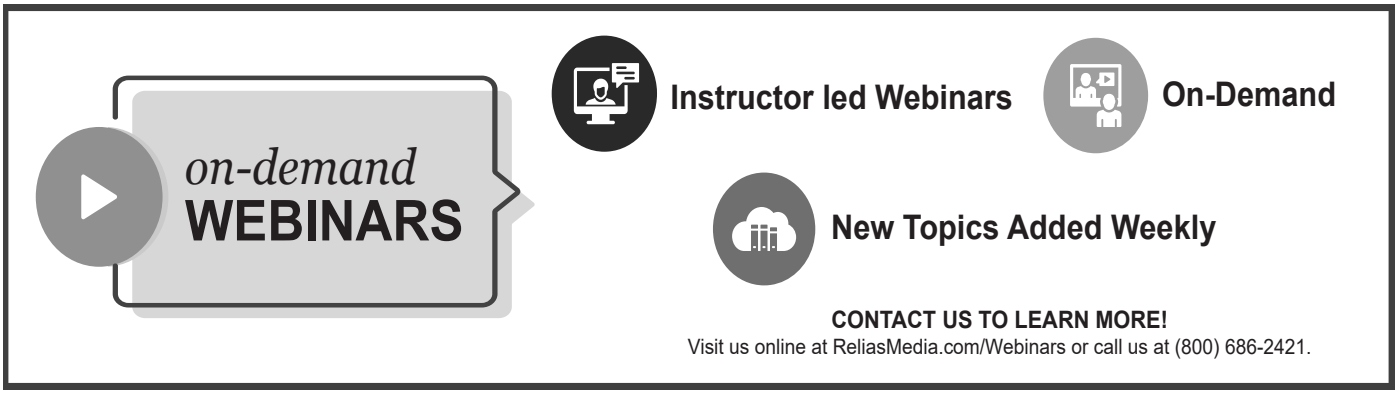
In general, a well-pled malpractice case in a civil action immunizes the plaintiff from a defamation act, Kallish says. Furthermore, otherwise defamatory statements may be shielded from suit if they are "conditionally privileged," which applies to situations in which some interest of the person who publishes the defamatory matter is involved; situations in which some interest of the person to whom the matter is published or of some other third person is involved; or situations in which a recognized interest of the public is concerned.

"Nevertheless, public statements of malpractice that are patently false can be the basis of a defamation action," Kallish says. "For example, we have represented many physicians whose patients have publicly posted completely false allegations on the internet, such as an orthopedic surgeon who was accused of operating on the wrong leg of a patient, as well as a physician who was accused of misdiagnosing a patient's cancer, leading to the patient's death. In those cases, the allegations were completely false and nonprivileged, so we sued the patients for defamation, and took legal action to get the postings taken down."

Just as individuals can bring defamation suits, so can corporation or other entities, Kallish notes.

Damages Assessed by Court

If claims prevail, showing the statements are false, proving the clinician or hospital sustained reputational harm, damages are assumed, says **Andrew Clott**, JD, associate with Roetzel & Andress in Chicago. However, a court still must assess damages in some monetary amount so loss of business or reputation is considered when formulating a monetary award, he says.



For example, Illinois recognizes two types of defamation claims: per se and per quod. In a per se action, the statement's defamatory character is considered so "obvious and apparent on its face" that "injury to the plaintiff's reputation may be presumed," Clott explains. This means the plaintiff does not have to prove damages because they are assumed.

Under Illinois law, "words that impute an inability to perform or a want of integrity in the discharge of duties of office or employment" fall under the per se category of defamation. False statements by a patient against a doctor relating to his medical treatment would be those which "impute an inability to perform" his duties as a doctor, meaning they would be considered defamation per se, Clott says.

"We have handled several situations where patients or competitors have posted false claims of malpractice and bad care on healthcare websites where the physician had a reasonable basis to believe the statement was false and it was hurting their inflow of patients. We pursued defamation action or sent cease and desist letters. We have won these cases and gotten damage awards or settlements," Clott explains. "We also have had success getting the false, damaging materials pulled from rating websites. Often, postings on rating websites are anonymous, which complicates pursuing redress against false posters."

In those cases, Clott's firm has used the court's subpoena powers to obtain URL identification information of posters from websites and other means of identifying a potential defamer.

"In some scenarios, it is worth pursuing, and in other instances, it is better to ignore," Clott says. "These situations must be dealt with on a case-by-case basis."

Difficult with Attorneys

Pursuing a defamation claim against an attorney may be more difficult than the same claim against a former patient, says **David Richman**, JD, partner with Rivkin Radler in Uniondale, NY. Attorneys' stock and trade are their words, he says. They are consequently afforded more latitude to use those words when commenting on another individual than someone not representing a client in matters that tend to be adversarial in nature, Richman says.

THIS LIMITED IMMUNITY GENERALLY WILL COME INTO PLAY WHEN THE ATTORNEY MAKES COMMENTS ABOUT A CLIENT'S ADVERSARY TO A LISTENER, LIKE THE MEDIA, OUTSIDE OF THE COURTROOM.

In the context of words spoken before the court or in a judicial or quasi-judicial proceeding, attorneys are accorded absolute immunity against a suit for defamation even if those statements are proven to be false, malicious, or made with ill will, Richman explains. Many states have codified this protection. The only test these statements must survive is whether the statements are pertinent and material to the litigation.

In New York, that protection appears in Sec. 74 of the New York Civil Rights Law and reads, in part, "A civil action cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding, or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof." *(The code is available at: https://bit.ly/3lDgJrL.)*

"The reasoning behind this protection is a policy recognizing the need for vigorous representation of one's client and the assumption that, as officers of the court, counsel will act in a manner consistent with that responsibility, even if those actions and words are not true and sound personal in nature," Richman explains.

This protection is available to attorneys for words spoken outside of an actual legal proceeding, although it is generally regarded as less absolute and therefore subject to some conditions. This limited immunity generally will come into play when the attorney makes comments about a client's adversary to a listener, like the media, outside of the courtroom, Richman says.

The question of propriety will first turn on whether the context of the statement was central or ancillary to the litigation, he explains. If ancillary, as it usually is when an attorney speaks with the media, the question of propriety will turn on whether the statement was made with

"actual malice." But even there the question of whether the statement was defamatory has to clear several hurdles that examine the context of the statement.

"If, for example, the statement was made in response to a comment by or on behalf of the adversary, the response, though sounding defamatory, will likely be given greater leeway," Richman says. "If a statement was made by one party about the circumstances of the underlying litigation, the response, calling the adversary a liar and defending oneself against the perceived lie, would generally not be viewed as defamatory."

The question becomes even more complicated when the allegedly defamed party is a public figure. In the Dubrow case, the plastic surgeon is a well-known TV personality and therefore would be viewed as a public figure, Richman says.

Actual Malice a Big Hurdle

Consequently, while the statements by counsel to the media would seem to be clearly harmful to the doctor's reputation, the standard of proof to be met must establish the defendant/defamer acted with "actual malice" — that is, that he or she knew or should have known the statements were untruthful, Richman says.

"Where the lines become blurred for attorneys and the courts weighing defamation claims against attorneys in this context is whether and/or to what extent the statements relate to allegations made in the complaint," he says. "If claims, using the Dubrow situation, are simply echoes of the allegations of malpractice — such as 'he ruined my client's life,' 'he was grossly incompetent,' 'he turned my client's life upside down' — it is more likely than not that the plaintiff in an ensuing defamation claim will not prevail."

Should the public figure protection be lost, the court's analysis of the attorney's statements will be based on a more traditional standard of proof for defamation, including whether the statement was false and whether the statement was an unprivileged communication to third parties, Richman says. What sets these types of claims apart from most other litigable claims is the burden of proof shifts from the person who was defamed to the person making the statement. The one made the remark will bear the burden of proving the statement was not defamatory, provided the plaintiff has met his or her burden in the initial pleading.

"If the statement is not previously stated in a pleading or filing with the court, claims against non-public figures that the other party was incompetent or unfit will be deemed to be defamatory per se, meaning that the statement is presumed to be harmful to the person about whom the statement is made," Richman explains.

This analysis applies whether the attorney is commenting about a layperson or one connected with the healthcare industry, be it a physician, nurse, hospital, or medical office or clinic, he says. For hospitals or medical care providers on the receiving end of what might be viewed as defamatory statements, the decision of what to do in response, if anything, should rest, in part, on a balance between the benefit to be gained by pursuing a claim vs. refraining from a response, Richman says.

As always, the context is important. If the statement is untethered to a court or quasi-judicial proceeding, the grounds for pursuing a claim may be more justified, Richman says. But again, context is everything, as is the question of the perceived harm.

"Has the statement or is the statement likely to impact business or reputation? If so, is the damage short- or long-lived?" Richman asks. "The analysis should also consider the chances of success at trial, as the vast majority of defamation suits wind up in favor of the alleged defaming party, particular if the one making

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the statement is an attorney and the comments are arguably related to actual or anticipated litigation arising out of a failed doctor-patient relationship." ■

SOURCES

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Online Ratings Pose Risk of Defamation, May Need Response

The risk of defamation increases with the proliferation of online rating services in the medical industry, says **Marc H. Kallish**, JD, shareholder with Roetzel & Andress in Chicago.

"There is a significant distinction between defamation and opinion. For example, if a patient of a hospital posts or makes a public statement that they believe the care at a particular hospital or clinic is 'sub-standard,' 'impersonal,' or 'not the best,' this would likely be construed as opinion and not actionable as defamation," Kallish explains. "However, if the patient says, 'I went to particular hospital and they operated on the wrong leg' when this never happened, or the hospital 'misdiagnosed my appendicitis,' but the patient never went to the hospital for this condition, the hospital could have a defamation action against the patient."

Another scenario is where the patient actually went to the hospital and received treatment but ultimately experienced a bad outcome. The patient's public statements about this may be protected if made in a legal pleading, Kallish says.

In these scenarios, truth is an absolute defense to a defamation action, Kallish says. Consider a patient who presents to a hospital emergency department complaining about symptoms that sound like a heart attack. However, the patient is discharged without treatment, and suffers a massive heart attack at home. This patient may publicly accuse the hospital of malpractice and post this story on the internet, Kallish says.

The hospital could dispute that they did anything wrong and pursue a defamation action against the patient. In defense, the patient may claim it was true the hospital committed malpractice in its treatment. If proven in a defamation action brought by the hospital, the patient would prevail, Kallish says.

"If the patient proves malpractice occurred, truth is a total defense to defamation action," he says. "On the other hand, if it is proven that the hospital met the standard of care, even though the facts posted by the patient were substantially true, the patient may be subject to damages for defamation." ■

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