



Avoiding Defamation Lawsuits in Urgent Care

Urgent message: People are unlikely to trust their healthcare to a provider with a sullied reputation, so speaking ill of a provider can cost them in terms of patient revenue or future employment opportunities. Understanding the causes and defenses for defamation can help you protect your reputation and your business.

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We live in a nation where the First Amendment should protect “free speech,” particularly among public figures. Yet, Google “defamation lawsuit” and you’ll find the news full of instances in which the ability to share one’s *bona fide* opinion was met with censure and penalty in the form of civil litigation.

This has also occurred in urgent care as defamation lawsuits have ensnared operators in their capacity as a competitor and employer, as well as patients—many of whom are victims.

- Can one speak an “opinion” about the quality of a competitor’s services relative to yours?
- Can an urgent care operation separate itself from a provider who has been charged with (but not convicted of) a crime or regulatory infraction?
- Can victims of alleged malpractice seek legal recourse including sanctions against a provider?
- Can patients share their negative experiences with the greater “online” community including on social media and through reviews?

After all, isn’t there a “public interest” in people having complete information about medical providers?

What Is Defamation?

Defamation is defined as “the unprivileged publication of false statements which naturally and proximately result in injury to another.”¹ The elements of a cause of action for defamation are:

1. the defendant published a false statement
2. about the plaintiff
3. to a third party and



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4. the falsity of the statement caused injury to the plaintiff²

Note that libel and slander are both acts of defamation.

Libel is defaming someone in writing, and *slander* is defaming them orally. Libel is a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to sully the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule.³ To sustain an action for libel, the allegedly defamatory *words or images* must refer to some ascertained or ascertainable person, and that person must be the plaintiff.⁴

Slander is a “false and unprivileged *oral* communication attributing to a person . . . certain unfavorable char-

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The “Granddaddy” of Reputation Lawsuits: Believability Is Key

In 1983, *Hustler* magazine published a mock advertisement parodying the Reverend Jerry Falwell, a well-known Fundamentalist pastor, political activist, and founder of Liberty University, claiming he had engaged in incestuous relations in an outhouse. Falwell sued publisher Larry Flynt for libel, invasion of privacy, and intentional infliction of emotional distress.

After Falwell was awarded \$150,000 by a lower court for the emotional distress claim, *Hustler* appealed to the United States Supreme Court.

In its unanimous landmark 1988 decision, the court held that the interest of protecting the First Amendment right to “free speech” surpassed the state’s interest in protecting public figures from patently offensive speech, so long as such speech could not reasonably be construed to state actual facts about its subject.

Falwell’s conundrum went to the believability of Flynt’s allegations. When asked whether people believed the outrageous assault on his character, Falwell was indignant...“of course not!” But because Falwell asserted that no reasonable person would possibly think a reverend of his stature had engaged in such uncouth activities, Falwell negated his own claim.

Falwell might have seen a different outcome if he had proven Flynt’s depiction of an incestuous outhouse encounter were believable.

Adapted from Foster JC. *Hustler magazine v Falwell* (1988). *The First Amendment Encyclopedia*. Available at: <https://www.mtsu.edu/first-amendment/article/559/hustler-magazine-v-falwell>. Accessed March 28, 2022.

acteristics or qualities.”³ In other words, *slander* means any libel communicated by spoken words.⁵ To prove slander, or oral defamation, a plaintiff must show:

1. The imputing to another a crime punishable by law
2. Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society
3. Making charges against another in reference to his trade, office, or profession, calculated to injure him therein or
4. Uttering any disparaging words productive of special damage which flows naturally therefrom⁶

Defamation includes both libel (written or published communication) and slander (communicated by written words).

Damage to Reputation

In addition to the definitions above, defamation can be “the invasion of the interest in a reputation and good name.”^{7,8} A New York federal court has held that a statement that tends to injure another in his or her trade, business, or profession is defamatory per se.^{9,10}

For physicians and medical businesses, specifically, their “reputation” is their stock in trade. People are unlikely to trust their future healthcare to a provider of ill-repute.¹¹⁻¹³ Therefore, speaking ill of another provider can cost them in terms of patient revenue or future employment opportunities—especially when the purported defamation entails issues of qualifications, competence, or professional ethics.^{14,15}

Thus, a statement is defamatory *per se* if it “tend[s] to injure another in his or her trade, business, or profession.”¹⁶⁻¹⁸

While a simple Google search reveals defamation lawsuits that have been filed, dismissals rarely make the news and settlements are usually subject to non-disclosure agreements. So it’s far more difficult to ascertain how any of these lawsuits were finally resolved.

What are Possible Defenses to a Claim of Defamation?

- **Truth.** Truth is a complete defense to a defamation claim.¹⁹⁻²¹ In addition, “substantial truth” is an absolute defense to a defamation action in some states.²²⁻²⁴
- **Privilege.** Privilege can be used as a defense in a defamation action.²⁵⁻²⁷
- **Opinion.** Ordinarily, opinion statements have absolute protection, and are nonactionable since they are not capable of being objectively characterized as true or false.²⁸ For example, the Minnesota Supreme Court held that referring to someone as “a real tool” falls into the category of pure opinion because the term “real tool” cannot be reasonably interpreted as stating a fact and it cannot be proven true or false.²⁹
- **Consent:** If the plaintiff consents to the publication of the statement in question, they can’t claim defamation.
- **Statutory defenses:** Certain defenses are prescribed by law, such as anti-SLAPP (strategic lawsuit against public participation) statutes.³⁰

Reputation Damages

Reputation damages are recoverable but not susceptible

to precise calculation, courts have said.³¹⁻³³ Even so, an award of damages cannot be based on mere speculation that the plaintiff's reputation suffered.³¹

"Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from the injury to reputation caused by the defamation and not from the effects of the defamation."²² Damages must be specific; they must be fully and accurately stated.³⁴ Round figures aren't enough.²²

Note that the average defamation settlement will depend on the specific facts. And although there's no such thing as an "average defamation settlement," there are several factors that determine a settlement, such as:

- The nature of the defamatory statements
- Whether a plaintiff can prove economic damages with bank statements, tax returns, and other financial records
- Whether a plaintiff can demonstrate actual malice to substantiate punitive damages
- If a plaintiff uses expert witnesses to establish general damages such as emotional distress
- The credibility of each side's witnesses and evidence

What Can a Provider Do About Defamation to Their Business?

At a bare minimum, a provider may engage an attorney to send a cease-and-desist letter to someone who posts an untruthful review, which may warn others of the risks of such defamatory statements. An urgent care owner who is the victim of online defamation should take a screenshot of the defamatory statements to preserve a record of that evidence.³⁵

With the help of an attorney, a provider may be able to prove that the statements in a negative online review by a patient are false and constitute defamation. If so, the author may be liable for damages to the provider's professional reputation.

In addition, the urgent care provider may try to contact the review website directly to remove the defamatory statements. While this can prove difficult, providers can address the negative reviews by encouraging legitimate and satisfied patients to post their honest reviews to eventually lose the unfair review in a long list of positive reviews.

Urgent care owners should understand that—as mentioned above—truth is an absolute defense to a defamation claim.³⁶ So, if an urgent care is under investigation for state health regulation violations, and it's reported truthfully, it is not defamation.³⁷

No Defamation Lawsuits Under HIPAA

If employees of a medical provider were to reveal the protected health information about a patient, thus sully the patients' reputation...could that provider be subject to a defamation lawsuit? Take, for instance, the high-profile case of Jussie Smollett who was recently sentenced by a Cook County, IL judge to 5 months in jail after being convicted of filing a false police report claiming he had suffered a racist and homophobic attack.

Preceding the trial, at least 50 employees of Northwestern University Memorial Hospital in Chicago were terminated for accessing Smollett's medical record without a "need to know" as prescribed by privacy provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Presumably, any of those employees could have leaked information to the press. If that had occurred, could Smollett sue the hospital under HIPAA?

Most likely not. There's no private cause of action in HIPAA, meaning a patient cannot sue for a HIPAA breach even if their protected health information has been impermissibly disclosed and even when the patient has been harmed as a direct consequence of that violation.

HIPAA does not have a private cause of action. Only the government can prosecute a provider or covered entity under HIPAA. Typically, patients submit a complaint to the Department of Health and Human Services' Office for Civil Rights (OCR), which is the primary enforcer of HIPAA compliance. Complaints must be submitted within 180 days of the discovery of the violation.

In cases of alleged criminal violations of HIPAA, such as use of patient data for personal profit or malicious purposes, patients can complain to the Department of Justice as well as professional boards such as their state Board of Medicine and Board of Nursing, and to state attorneys general, who all have the authority to pursue cases against HIPAA-covered entities.

In some jurisdictions, state privacy laws (HIPAA is federal) may enable patients to sue healthcare providers for privacy violations on the grounds of negligence and breach of implied contract. The plaintiff must establish that physical, mental, or financial harm was more than likely suffered as a result of the covered entity's negligence or failure to comply with state laws.

Adapted from Garrity M. 50 Northwestern Memorial Hospital employees fired for accessing Jussie Smollett's records. *Becker's Hosp Rev.* March 19, 2022. Available at: <https://www.beckershospitalreview.com/hospital-management-administration/50-northwestern-memorial-hospital-employees-fired-for-accessing-jussie-smollett-s-records.html> and Compliance Junction. Who can sue for a HIPAA violation? Available at: <https://www.compliancejunction.com/sue-for-a-hipaa-violation/>. Accessed March 28, 2022.

Summary

- Slander and libel are two distinct forms of defamation. Where slander occurs when someone is defamed in oral communication, libel is committed when someone is defamed in writing (including imagery).
- Charges of defamation can effectively be defended against based on:
 - Truth
 - Privilege
 - Opinion
 - Consent
 - Statutory defenses
- Damages in a defamation case can be difficult to quantify, as the offense is to one’s reputation. However, a settlement amount may be based on the nature of the defamatory statements; whether a plaintiff can prove economic damages with bank statements, tax returns, and other financial records; whether a plaintiff can demonstrate actual malice to substantiate punitive damages; if a plaintiff uses expert witnesses to establish general damages such as emotional distress; and the credibility of each side’s witnesses and evidence.
- Damage done to a person’s reputation by virtue of release of personal health information cannot be the basis of a defamation suit. In fact, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not have a private cause of action at all. Patients who wish to complain about a HIPAA violation need to submit a complaint to the Department of Health and Human Services’ Office for Civil Rights.

Let’s look at a few more examples:

If a physician is sued for malpractice, a patient can post the following if it is the truth: “I just filed suit in Minnesota District Court against Dr. Spitz for medical malpractice, docket number 22-87145.” That’s a fact and isn’t defamation.³⁸

If the patient posts, “I sued Dr. Spitz because he’s a lousy doctor and operated on the wrong hip,” the “lousy doctor” would be the patient’s opinion and if the doctor did actually operate on the wrong hip, that also is a fact, so again, no defamation.

However, if the patient says, “Dr. Spitz is blind as a bat and doesn’t know right from left,” that may be actionable because the doctor isn’t, in fact, blind and he does know right from left. As such, the patient published falsities about Dr. Spitz. But again, remember that Dr. Spitz must prove he and/or his reputation were damaged to recover.

Takeaway

Remember, First Amendment freedom of speech generally doesn’t apply to falsehoods. That’s called *defamation*, the defense of which is *truth*. If a patient, competitor, employee, or someone else publishes a false statement about your urgent care or providers, seek the assistance of an experienced attorney to determine if you have an actionable claim with provable damages. ■

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