

Reputation Management Law is the Next Big Thing

Tony Wilson, of Boughton in Vancouver, wrote in this week's issue of Lawyer's Weekly,

Reputation matters... But it's not just companies and trade-mark owners who have reputations to protect. We all do, and these days, much of our personal reputation is on the web for all the world to see.

Like many professionals, physicians in Canada operate by word-of-mouth referrals, largely based on the personal experiences of patients or other referring physicians. RateMDs has become an increasingly popular site for patients to share experiences about their physician.

It's become enough of a concern to physicians that Sam Solomon provides some advice to MDs in this month's edition of Parkhurst Exchange:

1. Ask for the review to be taken down
2. The Medical Justice approach of providing patients a contract allowing them to only post reviews on sites that confirm poster identity
3. Sue
4. Encourage patients to post positive reviews
5. Use the criticism as an opportunity to improve practice

It's unclear whether option 2) would hold up in court, and 1) is rarely effective, either due to confidentiality issues, site administrative policies, or simple refusal.

RateMDs was founded by the same people who made RateMyProfessors.com, RateMyTeachers.com, and the Ratingz.net network of rating sites that includes LawyerRatingz.com. It seems quite a few of my law professors are up there. A quick survey reveals that many Canadian attorneys have been rated, and most not favourably.

Assuming that the only people to ever review professionals are clients who have utilized their services is far too presumptuous. Competitors, business rivals, people with personal vendettas, and even opposing parties in lawsuits can pose as a client in an attempt to portray the person in a negative light.

It can and has happened. Solomon points to the case of Dr. Mohamed Foda of Leduc, Alberta, who forced RateMDs to provide information about a negative poster through the California Northern District Court in *Foda et al v. RateMDs, Inc.* On April 28, 2008, the Edmonton Sun covered the story,

An Edmonton urologist has launched a \$12-million defamation lawsuit against two unidentified people for allegedly posting bogus poor ratings about him on the California Internet site RateMDs.com. In a March 31 statement of claim, Dr. Mohamed Foda alleges the postings were

not made by actual patients of his, but by someone who has a “malicious” motive to harm his medical business, and states he will seek to identify the unknown defendants by searching for their computer identifying information. Foda claims the defamatory comments have caused irreparable harm to his reputation and medical practice and caused him emotional distress and anxiety.

The posts in question stated:

“This doctor prescribed me an antibiotic that causes birth defects after I clearly told him I was 4 months pregnant!! Apparently he made a ‘mistake.’” — Posted on RateMDs.com on October 1, 2007

“I found Dr Foda to ignore problems until drastic measures were required. Had to call numerous times to get an appointment. Felt that Dr Foda did not do required follow up in a timely manner. Did not inform patients of what he did in the OR [such as] remove tumours. Would have died if not for another [doctor].” — Posted on RateMDs.com on May 26, 2007

Administrator of RateMDs, John Swapceinski, says that the site gets letters from lawyers once a month. Not surprisingly, they do not comply with the requests. The site does serve an important public function for consumers of healthcare. But Swapceinski also said that Dr. Foda’s suit is the first time a lawyer has actually followed through and sued the site, and he indicated he would cooperate with a subpoena to release the information if one was provided.

In light of the *Cohen v. Google* and *York University v. Bell Canada Enterprises* cases I’ve covered previously, it’s probably no great surprise that the court did reveal the identity of the poster.

What is also unique about this case is that the person identified as the RateMDs poster was involved in different lawsuit on the other side of Dr. Foda in *Foda v. Capital Health Region*, [2007] A.J. No. 22; 2007 ABQB 19, where he was making a claim for breach of contract, conspiracy, harassment, defamation, and direct interference with economic relations.

The Court of Appeal ([2007] A.J. No. 668; 2007 ABCA 207) upheld a motion to add a party to his statement of claim, but the defamation claim against this party was struck for lack of evidence using the test in *Botiuk v. Toronto Free Press Publications Ltd.*,

62 ...it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:

[A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.

But if the party Dr. Foda was seeking to add in the Alberta case – a Donna Canart, Surgical Clinic Coordinator at Leduc Community Hospital – is the same person identified in the California proceedings, this evidence may now be available. Canart allegedly filed a report against Dr. Foda according to the Capital Health Corporate Workplace Respect Policy, raising issues in the Alberta case of malicious prosecution. However, similar defamation claims in Alberta were made against co-defendant Linda Scott. The California case has only had two hearings to date, and Dr. Foda only spoke in general terms to Sam Solmon, so it is difficult to ascertain which specific party was behind the RateMDs posting.

Even when a claim is substantiated, it is possible for either party to turn malicious. The Foda case highlights that litigants in lawsuits can and will attempt to affect the reputation of the opposing party online, something I've predicted repeatedly. All types of litigation will invariably cross over into this specialized area of law.

Some of these rating sites allow the professors to respond to their students, even with video. Or, as they put it,

Your professors have been reading your comments on RateMyProfessors.com. Now it's their turn...

I don't see other professions going the same way, given the nature of client solicitation. So where do people turn for help?

Wilson concludes,

Just like there was no such thing as Internet law before the Internet or franchise law before there were franchises, a new and growing niche area is "reputation management law." It straddles libel, slander and defamation law, freedom of speech, privacy law, copyright and trade-mark law, employment law and the rules governing Youtube, Facebook, Twitter and other social media. And like environmental law 25 years ago, it has nowhere to go but up...

Either way, it's clear that online reputation management is the next big thing that everyone will have to deal with.

Everyone reading this is now searching their name on LawyerRatingz.com, or others others like CanLaw. They're probably wondering what they would do if they were deliberately maligned, and trying to figure out who is the best "reputation management lawyer" they know, if any.

And that's assuming that you waited until the end of the article to do so.