

## Report on Patient Privacy Volume 23, Number 8. August 10, 2023 'You Don't Have to Take It': Keep OCR Happy, Use Legal Means to Combat Online Comments

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By Theresa Defino

The allegation was shocking and, if true, would devastate the orthopedic surgeon's reputation.

An online commenter accused him of operating on the wrong arm or leg. But the "very upset" surgeon was puzzled: there was no such patient in his records. Instead of clapping back, he hired a law firm. After some digging, the poster accusing the surgeon of malpractice was revealed to be none other than a medical equipment vendor whose business relationship he had terminated.

"We actually went through a number of steps, both using some computer forensic techniques and the subpoena powers of the court" to identify the commenter, recalled Marc Kallish, a shareholder in the Chicago office of Roetzel & Andress. "This was retaliation against a doctor. We sued...for slander. If you are a doctor and you have somebody that is abusing the privilege of [using a website] to post repetitively and maliciously...there are things that you can do...you don't have to just take it."

The vendor ultimately agreed to a financial settlement that included paying the surgeon's attorneys' fees and removing the offending comments, Kallish said. The case demonstrates the appropriate steps a doctor or other HIPAA covered entity or business associate can use to address negative comments online that may appear on the plethora of websites that review providers—including dentists—and health systems.

If they respond to such barbs the wrong way—by challenging comments while revealing protected health information (PHI) to make their argument—providers risk costly enforcement action from the HHS Office for Civil Rights (OCR). That's exactly what happened to Nidagalle Gowda, M.D., a New Jersey psychiatrist who agreed to pay OCR \$30,000 and implement a two-year corrective action plan. OCR announced the settlement in June following an investigation into comments the agency said he made to four patients online that disclosed their mental health diagnoses and treatment.

The settlement was one of three the agency made public that month. Another was for \$75,000 with iHealth Solutions, "a Kentucky-based business associate that provides coding, billing, and onsite information technology services to health care providers." According to OCR, "a network server containing the protected health information of 267 individuals was left unsecured on the internet."<sup>[1]</sup>

The July issue of *RPP* explored OCR's \$240,000 settlement with MultiCare Yakima Memorial Hospital resolving allegations that in 2017, 23 security guards snooped on approximately 400 patients' information through the electronic health records system.<sup>[2]</sup>

Kallish was one of three Roetzel attorneys who provided strategies and recommendations to address online comments. He was joined by Erika Adler, also a shareholder and the firm's health care practice group manager and attorney Julia Mohan, who has since left Roetzel and is now senior counsel for Epsilon Digital Media Services.<sup>[3]</sup>

When someone is insulted, it's human nature to want to strike back—particularly if the slings and arrows strike

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at professional skills and threaten one's livelihood. And, with easy access to internet review sites, negative comments can appear almost instantaneously and "live" online nearly forever.

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