VIEWPOINT

Reducing "COVID-19 Misinformation" While Preserving Free Speech

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Misinformation about risks, prevention, and treatment of COVID-19 has cost lives. Misinformation comes from many sources, with many motives for spreading and believing it. In caring capably and compassionately for patients, a substantial majority of health professionals and health care organizations have vigorously defended the standards of medical science and public health practice. However, a vocal minority and their sponsors or allies have exploited their medical credentials to the detriment of the public. They have understated known risks of severe illness, challenged the safety and effectiveness of vaccines without evidence, touted unproved and risky treatments, and amplified conspiracy theories about science and scientists. These activities have compounded the ethical stress and moral injury the health care workforce has experienced during repeated pandemic surges.[1]

Passing laws to stop physicians and others from sharing unsound medical advice has proved challenging. In the US, the government (including professional licensing boards) may not infringe the right to free speech guaranteed by the First Amendment of the US Constitution. Free speech rights can have counter-intuitive effects on government regulation. The public might expect that prohibiting something would be more difficult than regulating how it is described. However, a law banning tobacco is only a political challenge, whereas a law banning the *advertising* of tobacco would violate the First Amendment. Advertising tobacco to children can be prohibited only because children are not lawful users of tobacco products.

Courts interpreting the First Amendment have not assigned special status to "professional" speech, which has a social function in addition to a commercial function and is associated with exercising the privileges conferred on license holders by state governments.[2] Being subjected to government oversight and discipline as a condition of professional licensure does not, under current law, constitute a waiver of the right to speak freely. Nor, arguably, should it, lest professional licensing boards suppress innovation and independence for reasons other than bona fide protection of the public.[3]

Characterizing all COVID-19–related speech that departs from the scientific and professional mainstream as "misinformation" therefore may assume a legal conclusion that proves incorrect if government regulations or sanctions are tested in court. Still, the Federation of State Medical Boards has stated that "providing misinformation about the COVID-19 vaccine contradicts physicians' ethical and professional responsibilities, and therefore may subject a physician to disciplinary actions."[4] A modest number of such actions have been taken by state licensing boards, although not without political and legal controversy.[5]

Moreover, free speech rights have been strengthened in recent years by an increasingly conservative US Supreme Court, often in connection with expanding parallel rights to the free exercise of religion[2] or enhancing businesses' rights (via "commercial speech" and political donations) to speak or refrain from speaking to further their self-interest. Commercial and professional speech is now essentially equated with "core" political speech, so that restrictions or mandated disclosures require clear justification and regulatory precision and may not discriminate based on speaker, content, or viewpoint. Even seemingly firm legal precedents that allow regulation of potentially false or misleading information may no longer reliably represent the views of the US Supreme Court.[6] This trend limits the ability of governmental bodies, including state professional licensing boards and publicly chartered health care organizations, to regulate speech during the COVID-19 pandemic, regardless of how irresponsible that speech may appear.

There are a few key distinctions on which a ruling upholding or invalidating a challenged disciplinary action or regulation involving COVID-19 misinformation may depend:

Speech vs Conduct

Regulating conduct does not violate the right to speak. However, speech in connection with the delivery of professional services typically remains protected, as does activity necessary to formulating speech such as accessing data.[7,8]

"State Action"

First Amendment rights protect individuals against the government, not against other individuals, private organizations, or businesses. Health departments and professional licensing boards are governmental bodies (termed *state actors* in constitutional law) that are prohibited from infringing on free speech, as are public universities and public hospitals. But private health care businesses, medical specialty societies, and nongovernmental accrediting bodies are not constitutionally constrained in limiting speech.

Conditions of Payment

The government may communicate its own messages without offending the US Constitution, and it may employ others to speak for it. If the government pays health professionals or health care facilities to provide specific services, it typically may restrict speech in connection with those services to subjects and viewpoints consistent with the government's message.[9] However, paying for medical services through Medicare or Medicaid would likely not permit the government to restrict otherwise protected speech by physicians or hospitals as a condition of participation in those programs.

"Freedom" Laws

Some Republican-led states have responded to the pandemic by passing legislation or issuing executive orders

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that invalidate mask or vaccine mandates issued by local governments, school districts, and private employers. State legislatures similarly may constrain medical licensing boards and other regulatory bodies from scrutinizing COVID-19–related professional behavior.[10] However, it is unclear whether courts would uphold laws prohibiting private health care organizations from disciplining professional employees or affiliates for irresponsible or inaccurate COVID-19–related speech, as those laws would simultaneously constrain the speech rights of the private organizations.

Prior Restraints

The First Amendment prohibits the government from preventing speech, but does not necessarily prevent later sanctions based on the speech's content. For example, the First Amendment would not nullify a malpractice suit that alleged negligent medical advice or lack of informed consent. Neither would free speech rights counter most professional disciplinary actions by licensing boards in response to patient injury or heightened risk of injury from negligent information. However, a pattern of such disciplinary actions might be invalidated as having a chilling effect on speech tantamount to a prior restraint.

With this legal background in mind, health care leaders and policy makers can better assess the likely constitutionality of reducing "COVID misinformation" through government prohibitions or sanctions—assuming, of course, that political support also exists for these measures.

The government can take several actions, including:

- Imposing sanctions on COVID-19–related practices by licensed professionals that flout substantive laws in connection with providing medical services, even if those medical services include speech. This includes physicians failing to comply with COVID-19–related public health laws applicable to medical offices and health facilities, such as mask wearing, social distancing, and restrictions on elective procedures.
- Sanctioning recommendations by professionals that patients take illegal medications or controlled substances without following legally required procedures. The government can also sanction the marketing by others of prescription medications for unapproved indications. However, "off-label" prescribing by physicians (eg, for hydroxychloroquine or ivermectin) remains lawful as long as a medication is approved by the US Food and Drug Administration for any indication and no specific legal conditions on use are in effect.
- Enforcing tort law actions (eg, malpractice, lack of informed consent) in cases of alleged patient injury that result from recommending a potentially dangerous treatment or failing to recommend a necessary treatment.
- Imposing sanctions on individualized medical advice by unlicensed individuals or organizations if giving that advice constitutes the unlawful practice of medicine.

In addition, the government probably can:

- Impose sanctions for false or misleading information offered to obtain a financial or personal benefit, particularly if giving the information constitutes fraud under applicable law. This would encompass physicians who knowingly spread false information to create celebrity or attract patients.
- Threaten disciplinary action by licensing boards against health professionals whose speech to patients conveys incorrect science or substandard medicine.
- Specify the information that may and may not be imparted by private organizations and professionals as part of specific clinical services paid for by government, such as special programs for COVID-19 testing or treatment.
- Reject legal challenges to, and enforce through generally applicable contract or employment laws, any restrictions private health care organizations place on speech by affiliated health professionals, particularly in the absence of special laws conferring "conscience" protections. This would include medical staff membership and privileges, hospital or other employment agreements, and insurance network participation.
- Enforce restrictions on speech adopted by private professional or self-regulatory organizations if the consequences for violations are limited to revoking organizational membership or accreditation.

However, the government probably cannot:

- Compel or limit health professional speech not made in connection with patient care, even if the speech is false or misleading, regardless of its alleged effect on public trust in health professions.
- Sanction speech to the general public rather than to patients, whether or not by health professionals, especially if conveyed with a disclaimer that the speech is "not intended as medical advice."
- Sanction speech by health professionals to patients conveying political views or skepticism of government policy.
- Enforce restrictions involving information by public universities and public hospitals that legislatures, regulatory agencies, and professional licensing boards would not be constitutionally permitted to impose directly.
- Adopt restrictions on information related to overall clinical services funded by large government health programs, such as Medicare and Medicaid.

Current legal interpretations of the First Amendment confer substantial free speech rights on COVID-19–related communication, even when the professional and scientific mainstream condemns it as false or misleading. As a result, private organizations and entities can do more to monitor and counter COVID-19 misinformation than state medical boards and other public bodies, which must choose their issues carefully and approach them strategically.

ARTICLE INFORMATION

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