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Holding Clinicians in Public Office Accountable to Professional Standards

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Abstract

Clinicians using governing authority to make public health policy are ethically obliged to draw upon scientific and clinical information that accords with professional standards. Just as the First Amendment does not protect clinicians who provide advice that fails to express standard care, so it does not protect clinician-officials who offer information to the public that a reasonable official would not provide.

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Clinician-Governor Leadership

Ever since Benjamin Rush signed the Declaration of Independence, physicians have played an important role in American public life. Many have held elected or appointed positions at the federal, state, or local level. The leadership and expertise of such physicians who guide health agencies, such as the Centers for Disease Control and Prevention (CDC) and local boards of health, can be very valuable, especially during a pandemic.

Unfortunately, not all physician-officials provide the public with medically sound information and guidance. Since the start of the COVID-19 pandemic, several physicians in public office have made false or misleading statements or have given potentially harmful advice about masking, vaccines, and COVID-related treatments. For example, in 2020, Scott Atlas, a neuroradiologist who served as an advisor to then-President Trump, claimed that children cannot transmit SARS-CoV-2.¹ Senator Rand Paul, one of 4 physicians in the Senate in 2021, said that most masks available for purchase over the counter “don’t prevent infection.”² And former Louisiana Congressman Ralph Abraham tweeted in 2020: “Abortions nearly always have a fatal outcome for the baby, and many times it’s the same for the mother.”³

We suggest that, with respect to the provision of health-related information and advice, the relationship between physician-officials and the public resembles that between physicians and patients. Building on that analogy, we argue that physician-officials have an ethical duty to offer medically sound information and advice to the public. We also

examine some limitations to that duty and explain why protection of free speech does not preclude professional regulation of the duty to provide accurate public information. We conclude by suggesting that the profession is best suited to police that duty.

Professionalism and Information

Physicians have both ethical and legal obligations to provide patients with information and advice that aligns with professional knowledge.⁴ This duty, which arises from the asymmetrical nature of the physician-patient relationship—as physicians have expertise that patients lack—is foundational to the concept of **informed consent**. As the US Court of Appeals for the District of Columbia stated in *Canterbury v Spence*: “it is normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient’s edification.”⁵ When a physician gives a patient advice that contradicts professional knowledge, the patient’s consent is not truly informed. Hence the patient may act upon the advice in ways that are detrimental to their health. For example, if a physician tells a patient that the influenza vaccine is dangerous, the patient may avoid vaccination.

Although the duty to provide medically sound advice generally arises within the context of a physician-patient relationship, both courts and the profession recognize limited circumstances in which physicians have duties to others.⁶ For example, in *Tarasoff v Regents of the University of California*, the California Supreme Court held that a psychologist had a duty to **provide reasonable warnings** to individuals whom the patient could foreseeably harm.⁷ Courts have likewise found that physicians have a duty under some circumstances to warn third parties about a patient’s communicable disease.⁶ Many states also require physicians to report cases of certain infectious diseases or suspected cases of child or elder abuse.⁸

The American Medical Association (AMA) *Code of Medical Ethics* recognizes that physicians have some ethical duties to the public. These include the duty “to participate in activities contributing to the improvement of the community and the betterment of public health.”⁹ AMA *Code of Medical Ethics* Opinion 8.12 states that when physicians “engage with the media,” they should “ensure that the medical information they provide is: (i) accurate; (ii) inclusive of known risks and benefits; (iii) commensurate with their medical expertise; [and] (iv) based on valid scientific evidence and insight gained from professional experience.”¹⁰ In a similar vein, the Board of Directors of the Federation of State Medical Boards issued a statement in July 2021 explaining that physicians “have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk.”¹¹ Scholars have urged **licensing boards to discipline physicians** who provide false and dangerous information (eg, regarding the safety of vaccines) to the public writ large.^{12,13}

The case for physician-officials having an ethical obligation to refrain from spreading misinformation to the public is even more compelling. First, at least some public officials, especially those with authority over public health, have a type of fiduciary obligation to the public they serve.¹⁴ By the very nature of their office, they are entrusted to protect the public’s health. Second, because of physician-officials’ superior knowledge about health, the public is likely to rely upon their statements to make personal health decisions. Indeed, because members of the public may reasonably

believe that physician-officials have both expertise and access to information that is not publicly available, they may give special credence to a physician-official's advice, especially during public health emergencies when they are often forced to rely on the advice of government officials rather than their own physician. When that advice is not medically sound, members of the public may make dangerous decisions to the detriment of their health. In that sense, the misinformation or bad advice given by physician-officials is comparable to, but perhaps more dangerous than, the malpractice that occurs when physicians provide their patients with inaccurate information, state an incorrect diagnosis, or provide erroneous advice as to treatments. It is also potentially more dangerous than the bad advice given by licensed physicians with a public profile who are not officeholders—for example, “celebrity physicians” who have a large social media following.¹⁵

Caveats

The analogy between medical malpractice and the provision of misinformation or medically unsound advice to the public by physician-officials helps clarify the scope of the latter's duties to the public. Just as physicians' advice to patients is judged against professional standards, so the information and advice offered by physician-officials should be judged against what a reasonable physician would say under the circumstances. Hence, physician-officials do not violate their duty simply by giving advice that proves to be inaccurate as more is learned about a public health issue. The duty is to act with reasonable care, consistent with professional ethics and as measured against professional standards.

Executing this duty is complicated by the fact that physician-officials, especially those who hold elected office, are expected to have and assert ideological and policy positions. Although the public may give extra weight to ideological statements—such as “vaccine mandates violate liberty”—when uttered by physician-officials, such statements are not based on medical expertise and should not be treated as medical information or advice. Nor are there professional standards regarding such statements (although professional organizations often take positions about political issues). Hence, political statements are outside the scope of physician-officials' duties to the public. Nevertheless, the line between political statements and factual ones can be blurry, and the public may read ideologically informed statements (vaccines violate freedom) as implying factual misstatements (vaccines are dangerous).

Remedies

Although the First Amendment's Free Speech Clause protects private speakers from governmental limits on their freedom of expression, the government can restrict clinicians' false speech to some extent.¹⁶ Importantly, the First Amendment does not apply to government speech, and when physicians holding government office speak in their official capacity, they should be considered government speakers rather than private speakers.¹⁷ The government can choose its own message, and it can do so to the exclusion of other messages.^{18,19} It can regulate the speech of government officials who do not have First Amendment rights when speaking in their official capacity. Thus, even though physician-officials have free speech rights when they speak in their personal capacity, the First Amendment does not prohibit the government from policing its official statements to ensure that they align with professional expertise. However, the government's compelling physicians to express its viewpoint does not guarantee truthful statements.¹⁶ Hence, the government should not be relied upon to regulate physician-officials' public health-related communications. We consider 2 alternatives below.

Tort law. As the second author (C.E.H.) has written elsewhere, “Professionals who give bad advice are subject to malpractice liability, and the First Amendment provides no defense” against it.²⁰ Although possible, subjecting physician-officials’ bad professional advice to tort liability would be difficult. First, courts would need to accept that claims for official health-related misinformation constitute a form of malpractice that is actionable in court. Second, many plaintiffs would have to overcome governmental immunities and may have difficulty establishing that the office holders’ statements caused their injury.

Professional regulation. In contrast, there are strong reasons to rely primarily on tightening of professional ethical rules and discipline to police ethical breaches rather than malpractice law. Relevant professional bodies should have greater latitude in addressing the dissemination of misinformation and bad advice by physician-officials. Most immediately, professional bodies, such as the AMA, could revisit their ethical codes to more explicitly require physician-officials to comply with professional standards when providing the public with factual information or health advice. Professional bodies could also police physician-office holders’ failure to do so. To be sure, professional bodies are not beyond criticism. In the past, they have at times taken positions that are now considered outdated or problematic with respect to the interests of patients.⁴ Furthermore, disciplinary enforcement actions by professional bodies are often insufficiently focused on ensuring that members provide information and advice that conforms with expertise.²¹ Nonetheless, professional disciplinary bodies have proven capable of updating their views using their own professional standards.⁴ And they are institutionally best situated to police the advice given by members of the profession. In the dynamic development of knowledge, professional regulatory bodies can be more responsive than courts in professional liability cases and thus can better ensure that clinicians holding public office speak to the public in a way that corresponds to professional insights.

Conclusion

Many of the reasons why physicians have an ethical obligation to provide patients with advice that aligns with professional standards also apply when physicians who hold public office— especially those who have responsibility for the public’s health—give health-related information and advice to the public writ large. Although malpractice law may be available in some instances to redress violations of this duty, professional regulation, including censure and delicensing, offers the most effective remedy.

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