Combating Online Medical Misinformation by Physicians: Expansion of Fiduciary Duty of Care

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I. INTRODUCTION

In the midst of a global public health crisis, the spread of false and misleading medical information is of increasing concern.[1] Medical misinformation could easily cause confusion and encourage people to decline verified treatments, reject public health procedures, and approach alternative measures that are unproven or even contrary to established science.[2] The pandemic has brought to our attention how medical misinformation can threaten people's health and well-being, but the problem did not begin with the pandemic and will not end with it.[3] The Internet, with a growing presence of social media platforms in disseminating rapid and far-reaching medical information, has only fueled even broader accessibility of medical misinformation.[4]

Recognizing the need to promote trustworthy medical information is crucial for public health, there have been significant efforts to address the issue.[5] For example, popular technology platforms have increased efforts to remove misleading posts and directing Internet users to information provided by credible medical sources.[6] However, these efforts do not necessarily tackle the source of the misinformation and may fail to deter individuals from engaging in such practice in the future. In particular, licensed physicians are among the most trusted medical professionals, and the public credibility of their medical messages is enhanced by their professional status.[7] However, there have been increasing reports of licensed physicians spreading harmful or misleading medical information via social media platforms, and people generally rely on the authority given their medical status.[8]

Given the rampant spread of online medical misinformation with the potential of devastating consequences,[9] this Note argues that state medical boards should impose disciplinary action against licensed physicians who disseminate medical misinformation on social media platforms. There are constitutional challenges in how medical licensing boards are state agencies subject to the First Amendment and are thus limited in their ability to bring

1. *See* U.S. DEP'T OF HEALTH & HUM. SERV., CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL'S ADVISORY ON BUILDING A HEALTHY INFORMATION ENVIRONMENT, at 4 (2021).

2. *See id.*

3. *See* Fabio Tagliabue et al., *The "Pandemic" of Disinformation in COVID-19*, 2 SN COMPREHENSIVE CLINICAL MED. 1287, 1287 (2020).

4. *See* Laura D. Scherer et al., *Who Is Susceptible to Online Health Misinformation? A Test of Four Psychosocial Hypotheses*, AM. PSYCH. ASS'N, at 1 (2021).

5. *See* U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 6.

6. *See id.*

7. *See* Carl H. Coleman, *Physicians Who Disseminate Medical Misinformation: Testing the Constitutional Limits on Professional Disciplinary Action*, 20 FIRST AMEND. L. REV. 113, 141 (2022).

8. *See* Brian Castrucci, *Covid Vaccine and Treatment Misinformation Is Medical Malpractice. It Should Be Punished*, NBC NEWS (Jan. 8, 2022, 1:47 PM), https://www.nbcnews.com/think/opinion/covid-vaccine-treatment-misinformation-medical-malpractice-it-should-be-punished-ncna1287180 [https://perma.cc/396Y-K5KQ].

9. *See id.*

disciplinary action based on the content of physicians' speech.[10] This Note attempts to reconcile these challenges through a framework of extending the legal obligation of duty of care within the traditional physician-patient relationship to a duty owed by physicians to the general public. In particular, the Note focuses on physicians' duty of care in the application of medical knowledge expected of a reasonably competent physician.[11]

This Note proposes to extend the physician-patient fiduciary relationship in a clinical setting to situations where physicians disseminate medical information on public platforms voluntarily. Physicians should assume a duty of care in ensuring the information they provide is accurate based on available scientific evidence. The Note incorporates the corporate standard of duty of care, where directors and officers must inform themselves of all material information available to make business decisions that, in their prudent judgment, best promote the interests of the company and its shareholders.[12] Physicians should be required to exercise a similar standard of care, which would require them to make reasonable efforts to investigate established areas of science and gather verified information available prior to disseminating medical information to the public, particularly through online social media platforms, to ensure objectivity in the information they share.[13] When physicians breach this duty of care by disseminating information that is in direct contradiction to available medical evidence, state medical boards should impose disciplinary action to protect the public.[14]

Section II of this Note provides a background of the current prevalence of the dissemination of medical misinformation on the Internet. It reviews the existing efforts taken by major social media platforms in tackling the problem and a detailed analysis of the limitations when solely relying on these platforms acting as private entities to regulate the medical information ecosystem. Section III of this Note focuses on the role of the state medical boards acting as state agencies in addressing the spread of medical misinformation. This section directs the focus to licensed physicians, who are able to invoke their professional authority to lend credibility to their messages. In addition to laying out the existing professional standards and enforcement efforts taken by state medical boards, the section analyzes the current constitutional challenges of imposing disciplinary action against

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10. *See* Carl H. Coleman, *License Revocation as A Response to Physician Misinformation: Proceed With Caution*, HEALTH AFFS. FOREFRONT (Jan. 5, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20211227.966736/ [https://perma.cc/R8YX-Q654].

11. *See Duty of Care Required by Physicians*, USLEGAL, https://physicians.uslegal.com/duty-of-care-required-by-physicians/ [https://perma.cc/DA6A-4T7J] (last visited Apr. 1, 2023).

12. *See* Jason Gordon, *Duty of Care (Board of Directors) - Explained*, THE BUS. PROFESSOR (Sept. 25, 2021), https://thebusinessprofessor.com/en_US/business-governance/duty-of-care-explained [https://perma.cc/KH9A-4EEA].

13. *See Ethical Physician Conduct in The Media: Code Medical Ethics 8.12*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/ethics-opinions/ethical-physician-conduct-media [https://perma.cc/RV6P-DR6Z] (last visited Apr. 1, 2023).

14. *See* Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, AMA J. OF ETHICS (2005), https://journalofethics.ama-assn.org/article/role-state-medical-boards/2005-04 [https://perma.cc/BN2Q-5D42] (last visited Apr. 1, 2023).

online medical speech. Section IV proposes a framework of extending the fiduciary relationship to one between physicians and the public beyond the traditional in-patient setting. It focuses on the duty of care, requiring physicians to undertake thorough research and gather all available information before providing medical knowledge to the public. Under this expanded fiduciary duty, physicians found disseminating medical misinformation could face disciplinary action from state medical boards.

II. PREVALENCE OF DISSEMINATION OF ONLINE MEDICAL MISINFORMATION

In recent years, an important challenge for major social media platforms has been responding to the dissemination of medical misinformation. Medical misinformation on the Internet is particularly alarming because the Internet has become a dominant source of information when seeking medical advice or guidance.[15] While these platforms are now taking on a more significant societal role to take decisive actions in response to medical misinformation, their efforts are not without shortcomings and may not be the most efficient ways to address the issue.

A. Defining the Spread and Trends of Medical Misinformation

Medical misinformation has generally been defined as information that is "contrary to the epistemic consensus of the scientific community regarding a phenomenon."[16] By definition, an epistemic consensus among the medical community is constantly changing as a result of technological advancements, aging populations, new methods for the treatment of diseases, and policy reforms.[17] False information can be spread either negligently in a form of misinformation or with deliberate intent to knowingly mislead the public in a form of disinformation.[18] While misinformation refers to information with false or inaccurate facts, disinformation is false information that the author deliberately intends to mislead with misstating facts.[19] It is difficult to differentiate disinformation from misinformation because of the problem of ascertaining intent. Therefore, unless the intent behind a message is clear, this

15. *See* Dawn C. Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 33, 37 (2020).

16. Coleman, *supra* note 7, at 117; *see also* Briony Swire-Thompson & David Lazer, *Public Health and Online Misinformation: Challenges and Recommendations*, 41 ANN. REV. PUB. HEALTH 433, 434 (2019). Some sources have preferred a broader definition of misinformation. The U.S. Surgeon General defined misinformation as "information that is false, inaccurate, or misleading according to the best available evidence at the time." U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 4.

17. *See* Swire-Thompson & Lazer, *supra* note 16, at 434.

18. *See Misinformation and Disinformation*, AM. PSYCH. ASS'N (APA), https://www.apa.org/topics/journalism-facts/misinformation-disinformation [https://perma.cc/3CAH-BSX3] (last visited Apr. 1, 2023).

19. *See id.*

Note will use *misinformation* as an "umbrella term to include all forms of false information related to health."[20]

The Internet plays an ever-expanding role in the distribution of medical misinformation. Internet users increasingly utilize various social media platforms to seek and share information, which provides an unprecedented opportunity for medical professionals to disseminate medical-related knowledge using this communication medium.[21] Studies have shown that, as of 2013, seventy-two percent of web users looked online for health information.[22] Misinformation tends to spread quickly on social media platforms for several reasons. First, these platforms incentivize users to share content to get likes, comments, or subscriptions, which prioritizes "engagement rather than accuracy, allowing emotionally charged misinformation to spread more easily than emotionally neutral content."[23] Second, platform algorithms generally recommend user content based on its popularity or similarity to previously seen content, so a user exposed to misinformation may simply see more and more of it.[24]

As these public platforms have gained wide participation among medical professionals, they have also lowered the cost of generating information. Several studies have evaluated the quality of health information on the Internet based on accuracy and completeness, and many of them concluded that the quality of online health information was problematic.[25] A study conducted by YouTube in 2020 using keywords related to COVID-19 found that over one-quarter of the most viewed relevant videos contained misleading information, reaching sixty-two million viewers worldwide.[26] Skyler Johnson shared his personal experience in combating medical misinformation on the Internet. In battling his wife's cancer, the couple went online to search for useful medical information but found themselves in "a sea of falsehoods, distortions, and half-truths."[27] His team conducted a study where they reviewed fifty of the most trending social media articles on cancers and found that nearly a third of them provided harmful information.[28]

The COVID-19 pandemic has only accelerated the presence of medical misinformation on the Internet. According to researchers, "social media has become a widely accepted channel for public health information and risk communication by government officers, public health agencies, and the

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20. Yuxi Wang et al., *Systematic Literature Review on the Spread of Health-related Misinformation on Social Media*, 240 SOC. SCI. & MED. 1, 2 (2019).

21. *See* Victor Suarez-Lledo & Javier Alvarez-Galvez, *Prevalence of Health Information on Social Media: Systemic Review*, J. OF MED. INTERNET RSCH., at 2 (Jan. 1, 2021).

22. *See* Susannah Fox & Maeve Duggan, *Health Online 2013*, PEW RSCH. CTR. (Jan. 15, 2013), https://www.pewresearch.org/internet/2013/01/15/health-online-2013/ [https://perma.cc/8SYW-DNE5].

23. U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 5.

24. *See id.*

25. *See* Swire-Thompson & Lazer, *supra* note 16, at 439.

26. *See* Heidi Oi-Yee Li et al., *YouTube as a Source of Information on COVID-19: A Pandemic of Misinformation?*, BMJ GLOB. HEALTH, at 1, 6 (Apr. 24, 2020).

27. Kim Krisberg, *Health misinformation a 'threat to public health'— Leaders call out sources of disinformation, social media sites*, THE NATION'S HEALTH (Feb. 2022), https://www.thenationshealth.org/content/52/1/1.1 [https://perma.cc/L4AE-RH6E].

28. *See id.*

general population."[29] Moreover, studies focusing on health misinformation have found that false information diffuses significantly faster and farther on social media sites than does true or verified information.[30] While the problem has long existed, there have been relatively few attempts to examine its real harmful impact. The general public is "[d]rowning in a sea of articles, videos, memes, and posts" and may not have the necessary knowledge or resources to evaluate the credibility of online content.[31] Therefore, it is necessary to address the issue of medical misinformation, especially concerning the oversized role of the Internet in its distribution.

B. Existing Approaches and Challenges by Major Social Media Platforms

With the rampant spread of medical misinformation on the Internet during the pandemic, popular social media platforms have been confronted with an unprecedented societal responsibility to take action in response to the dissemination of false medical information.[32] Anti-vaccine activists have reached more than sixty million followers on Facebook, YouTube, Instagram, and Twitter, and have been using these platforms to spread high volumes of conspiracy statements and false information about the safety of COVID-19 vaccines.[33] Content from some of the major social media sites sharing health misinformation "had almost four times as many Facebook views in April 2020 as equivalent content from the sites of ten leading health institutions, such as the World Health Organization."[34] As a result, these popular social media platforms, including Facebook, Twitter, YouTube, and Google, are burdened to take extensive measures and impose policies to tackle harmful medical information on their sites.

Facebook has responded by primarily "removing speech that it considers to be imminently harmful, while providing counter-speech in response to misleading or false speech on its platform that it deems not to be imminently harmful."[35] Specifically, Facebook partnered with a technology company called Meedan to improve its fact-checking access to health experts, attempting to reduce the overall distribution of misinformation once its

29. Lan Li, et al., *The Response of Governments and Public Health Agencies to COVID-19 Pandemics on Social Media: A Multi-Country Analysis of Twitter Discourse*, FRONTIERS IN PUB. HEALTH, at 11 (Sept. 28, 2021).

30. *See* Swire-Thompson & Lazer, *supra* note 16, at 437.

31. Suzanne Nossel, *How to Save People From Drowning in a Sea of Misinformation*, SLATE (Dec. 15, 2021), https://slate.com/technology/2021/12/information-consumers-misinformation-adrift-media-literacy.html [https://perma.cc/HG2R-Y3RN].

32. *See* Nunziato, *supra* note 15, at 37.

33. *The Disinformation Dozen*, CTR. FOR COUNTERING DIGIT. HATE, at 4 (Mar. 24, 2021).

34. Elizabeth Culliford, *On Facebook, Health-Misinformation 'Superspreaders' Rack Up Billions of Views: Report*, THOMSON REUTERS (Mar. 25, 2020), https://www.reuters.com/article/us-health-coronavirus-facebook/on-facebook-health-misinformation-superspreaders-rack-up-billions-of-views-report-idUSKCN25F1M4 [https://perma.cc/PP94-KAFJ].

35. *See* Nunziato, *supra* note 15, at 38.

algorithm has rated the particular content to be false.[36] During the pandemic, Facebook conducted a close review of its online content to avoid the spreading of conspiracy theories and anti-vaccine rhetoric.[37] Between April and June of 2020, it "applied warning labels to 98 million pieces of COVID-19 misinformation and removed seven million pieces of content that could lead to imminent harm", directing over two billion online users to credible sources of health information.[38] Facebook removed a post from then-President Donald Trump's re-election campaign account when he compared COVID-19 to the flu, a comparison that medical professionals have verified to be unfounded and downplayed the dangers of the coronavirus pandemic.[39]

Google and YouTube have tackled medical misinformation primarily by employing counter-speech to direct users to credible sources when they search for terms that are likely to produce misinformation. For example, in addition to its standard search results generated by intricate algorithms, Google adopted an approach wherein COVID-19 related searches would trigger algorithmic alerts to generate prominent articles from reputable sources and mainstream publications such as the WHO.[40] YouTube updated its service policy to prohibit any content that directly contradicts credible sources like the WHO and videos fueling COVID-19-related conspiracies.[41] Twitter played an overwhelming role in the dissemination of medical misinformation, especially during the pandemic. The company took a much more aggressive approach to address the problem, which includes removing harmful posts containing medical misinformation, directing users to accurate information provided by authoritative sources, adding "context to potentially misleading tweets and a prompt that asks users if they want to read an article before retweeting it", and suspending accounts flagged with mistaken tweets.[42]

An advantage of having social media platforms to manage the spread of medical misinformation is that their efforts are not subject scrutiny under the First Amendment, because they are private entities rather than state

36. *See* Sara Fischer, *Exclusive: New Facebook partnership tackles health misinformation*, AXIOS (July 27, 2021), https://www.axios.com/2021/07/27/facebook-partnership-fact-checkers-health-misinformation [https://perma.cc/89AN-B9A4].

37. *See* Michelle Crouch, *12 Things You Can't Post About the Coronavirus on Facebook*, AARP (Feb. 24, 2021), https://www.aarp.org/health/conditions-treatments/info-2021/facebook-blocks-coronavirus-misinformation.html [https://perma.cc/22YG-RQ9Z].

38. *See* Culliford, *supra* note 34.

39. *See* David Ingram, *Facebook Removes Trump Post That Compared Covid-19 to Flu*, NBC NEWS (Oct. 6, 2020), https://www.yahoo.com/now/facebook-removes-trump-post-compared-155134923.html [https://perma.cc/8GQJ-NA98].

40. *See* Nunziato, *supra* note 15, at 47-48.

41. *See id.* at 49-50.

42. Brittany Trang, *Twitter Has Spent Years Trying to Combat Health Misinformation. Will Musk's Takeover Make That Harder?*, STAT (Nov. 1, 2022), https://www.statnews.com/2022/11/01/how-musks-twitter-takeover-could-impact-misinformation/ [https://perma.cc/6DF7-GQMB].

actors.[43] Section 230 of the Communications Act of 1934 provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[44] Courts have interpreted this provision to immunize social media platforms from liability for publishing, removing, or restricting access to another's content, giving broad discretion to platforms when implementing content regulation.[45] In other words, social media companies are generally shielded from restrictions imposed by the First Amendment, enabling them to implement limited checks against misleading content. More importantly, most of the platforms' efforts involved directing users to credible information instead of implementing censorship, which is consistent with the "free trade in ideas" model of free speech introduced by Justice Holmes in *Abrams v. United States*, where he argued that the ultimate good is reached in a competition where speakers are engaged in the free trade of ideas.[46]

However, the efforts undertaken by these major platforms are not without problems. Facebook suffered from delays in implementing its policies such that "it can take up to [twenty-two] days for the platform to downgrade [false and/or misleading content]."[47] Further, the implementation of these content moderation policies can be largely dependent on the current state of the world. The dire impacts brought about by medical misinformation online during the pandemic have "ushered in a sea change in the platforms' attitudes and approaches toward regulating content online."[48] Many of these platforms only began to take extensive actions when the volume of such misleading information jumped alarmingly during the pandemic. These policies can also be easily changed or revoked due to various business reasons. With Elon Musk's takeover of X, formerly Twitter, the company announced that it will no longer enforce its policy against COVID-19 misinformation, a decision some perceived as "a clear signal that COVID misinformation is back on the menu."[49] X disbanded its Trust and Safety Council, comprised of "external expert organizations" to advise on tackling harmful content on the platform, and these business decisions may

43. *See* Lata Nott & Brian Peters, *Free Speech on Social Media: The Complete Guide*, FREEDOM FORUM, https://www.freedomforum.org/free-expression-on-social-media/#:~:text=The%20First%20Amendment%20protects%20individuals,websites%20as%20they%20see%20fit [https://perma.cc/5AZV-T8EQ] (last visited Apr. 1, 2023); *see also* Nunziato, *supra* note 15, at 89-90.

44. 47 U.S.C. § 230(c) (2018).

45. *See* JASON A. GALLO AND CLARE Y. CHO, CONG. RSCH. SERV., R46662, SOCIAL MEDIA: MISINFORMATION AND CONTENT MODERATION ISSUES FOR CONGRESS at 1 (2021).

46. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. Nunziato, *supra* note 15, at 42 (quoting *How Facebook Can Flatten the Curve of the Coronavirus Infodemic*, AVAAZ at 2 (Apr. 15, 2020), https://avaazimages.avaaz.org/facebook_coronavirus_misinformation.pdf [https://perma.cc/FJ7G-KYEU]).

48. *Id.* at 34.

49. Annie Burky, *As Twitter Rolls Back Its Ban on COVID Misinformation, Some Health Experts Worry About Threat to Public Health*, FIERCE HEALTH (Jan. 6, 2023), https://www.fiercehealthcare.com/health-tech/usage-anti-vax-terms-increase-twitter-following-end-platforms-covid-19-misinformation [https://perma.cc/56P7-9W99].

substantially influence X's ability to effectively moderate misleading content on its platform.[50]

Relying solely on social media platforms does not target the root of the issue or the source of the misinformation. Even if these platforms attempt to remove misleading information or direct users to more credible sources, there may still be a substantial amount of false content remaining on the platforms. Individuals spreading misleading medical information could make countless attempts to repost their content even after they have been removed or censored. In the absence of federal or state regulations in the United States to prohibit the spread of misleading medical information online, platform interventions are rather restricted to promoting a healthy online community for medical content. Therefore, the focus should be shifted towards regulating the individuals who promulgate medical misinformation.

III. CALLS FOR DISCIPLINARY ACTION AGAINST LICENSED PHYSICIANS

With online medical misinformation becoming a major public health threat, it is particularly alarming to observe licensed physicians spreading false medical information, given their role as trusted sources of medical knowledge.[51] The medical profession has urged state medical boards to impose disciplinary action against physicians who disseminate medical misinformation.[52] However, existing efforts by state boards have faced considerable challenges with limited availability.

A. Focusing on the Dissemination of Medical Misinformation by Medical Professionals

The combination of the pandemic landscape and the widespread use of social media has fueled viral dissemination of misinformation. Adding to the issue is a minority of medical professionals who, leveraging their expertise, have actively spread medical misinformation. Considering the source of medical misinformation is the first step in combating its proliferation: source credibility is often evaluated based on the expertise and trustworthiness of the underlying source.[53] Among a large amount of medical information, the public tends to evaluate the credibility of the content based on the underlying source. "Whereas expertise is the extent to which the source is able to give accurate information, trustworthiness reflects the extent that one is willing to provide accurate information."[54] And a reader generally prefers relying on

50. Donie O'Sullivan, *Twitter Disbands Its 'Trust and Safety Council' that Tackled Harassment and Child Exploitation*, CNN (Dec. 13, 2022), https://www.cnn.com/2022/12/12/tech/twitter-disbands-trust-and-safety-council/index.html [https://perma.cc/4FXC-A74P].

51. *See* Coleman, *supra* note 10.

52. *See id.*

53. *See* Krisberg, *supra* note 27.

54. Swire-Thompson & Lazer, *supra* note 16, at 440.

trustworthiness over expertise when evaluating the effectiveness of a source of content.

Numerous sources with diverse incentives, including news media, politicians, governmental bodies, and medical professionals, contribute to the dissemination of medical misinformation online. Research has shown that people have varying levels of trust in individuals and institutions of different backgrounds.[55] In addition to federal and state medical authorities, the public relies heavily on local medical professionals.[56] In particular, while medical professionals are a relatively uncommon source of medical misinformation, they are highly regarded by the public and receive disproportionate attention because of their professional status.[57] Physicians who make false claims "often couch them in technical language that sounds convincing to nonscientists."[58] Therefore, when medical professionals advocate unproven or dangerous medical advice to the public, they are likely able to draw on their professional expertise and trustworthiness.

During the height of COVID-19 transmission, a small group of physicians promulgated misleading information and anti-vaccination sentiments. Dr. Andrew Kaufman, an Arizona doctor, and a YouTube celebrity, told his followers that COVID-19 vaccines are full of poison and the viruses do not exist.[59] Dr. Joseph Mercola, a successful anti-vaccine entrepreneur, has been selling supplements and false cures as alternatives to COVID vaccines, and posting claims, such as the idea that "hydrogen peroxide treatment can successfully treat most viral respiratory illnesses" on social media accounts with over three million followers.[60] Dr. Rashid Buttar, an osteopathic physician, posted on Twitter alleging that "COVID-19 was a planned operation" and claimed that COVID-19 tests have living microorganisms in a video posted on Facebook.[61] Studies have shown a negative correlation between reliance on these conspiracy beliefs and vaccine intentions, potentially leading to detrimental consequences.[62]

Reaching a larger scale, Dr. Mehmet Oz has been widely criticized for his popular television show, which has included a considerable amount of medical advice that was not evidence-based. While selling his medical professional status, he has promoted alternative medical advice with no

55. *See* U.S. DEP'T OF HEALTH & HUM. SERV., *supra* note 1, at 11.

56. *See id.*

57. *See* Coleman, *supra* note 7, at 117.

58. Rita Rubin, *When Physicians Spread Unscientific Information About COVID-19*, 327 JAMA 904, 905 (Mar. 8, 2022).

59. Jonathan Jarry, *The Psychiatrist Who Calmly Denies Reality*, MCGILL (Sept. 24, 2020), https://www.mcgill.ca/oss/article/covid-19-pseudoscience/psychiatrist-who-calmly-denies-reality [https://perma.cc/J4RW-JX3Z].

60. CTR. FOR COUNTERING DIGIT. HATE, *supra* note 33, at 13.

61. Victoria Knight, *Will 'Dr. Disinformation' Ever Face the Music?*, KHN (Sept. 22, 2021), https://khn.org/news/article/disinformation-dozen-doctors-covid-misinformation-social-media/ [https://perma.cc/6GCA-EFNM]; *see* CTR. FOR COUNTERING DIGIT. HATE, *supra* note 33, at 24.

62. *See* Daniel Allington et al., *Media usage predicts intention to be vaccinated against SARS-CoV-2 in the US and the UK*, 39 VACCINE 2595, 2601 (2021).

scientific foundation.[63] According to the British Medical Journal (BMJ), it was found that approximately half of the recommendations provided on Dr. Oz's talk shows either lack supporting evidence or are contradicted by the best available evidence.[64] Many physicians have shared stories of patients following Dr. Oz's advice resulting in devastating harm. A patient admitted that her skin had broken out with orange, itchy bumps after she applied a homemade fruit face mask that she learned from Dr. Oz's show, and she alleged that "I thought I could trust him because he's a doctor."[65] "Physicians' speech invokes medical authority, so when they speak, patients tend to listen," which attracts public reliance on their credibility for the messages conveyed.[66]

These medical professionals have used their credentials to provide medical advice that has no evidentiary basis or is contrary to established science, and their words are often assigned great importance, even in areas where they lack expertise.[67] Individuals browsing the Internet need to realize that recommendations provided by medical experts "may not be supported by higher evidence or presented with enough balanced information to adequately inform decision making."[68] Responding directly to the source of information as a way to regulate medical misinformation disseminated by professionals could be an effective way to reduce its spread on social media platforms.

B. Existing Enforcement Efforts and Legal Challenges of Justifying Disciplinary Action

In all states, physicians could be subject to professional disciplinary action for activities that occur outside of the physician-patient relationship based on a generalized allegation of "unprofessional conduct."[69] For example, some state medical boards have proposed disciplinary action against physicians who provide non-evidence-based testimony as expert witnesses in malpractice lawsuits.[70] The American Medical Association (AMA) passed a resolution asserting that providing expert testimony constitutes a practice of

63. *See* Jeffrey Cole, *Dr. Phil, Dr. Oz, and Dr. Drew: Do No Harm (Unless It Is Good for Ratings)*, DIGIT. CTR. (Apr. 7, 2021), https://www.digitalcenter.org/columns/doctors-do-no-harm/ [https://perma.cc/YZQ9-ELRZ].

64. *See* Christina Korownyk et al., *Televised Medical Talk Shows-What They Recommend and the Evidence to Support Their Recommendations: A Prospective Observational Study*, BMJ, at 1 (Dec. 17, 2014), https://pubmed.ncbi.nlm.nih.gov/25520234/ [https://perma.cc/NL4Q-A8YN].

65. Bethany Rodgers, *Pa. Physicians Group Shares Stories of Patients Following Oz Show Advice*, GOERIE (Oct. 19, 2022, 10:05 PM), https://www.goerie.com/story/news/politics/2022/10/20/pennsylvania-doctors-blast-dr-oz-for-spreading-medical-misinformation-backing-john-fetterman/69564455007/ [https://perma.cc/6QTC-5H6F].

66. *See* Coleman, *supra* note 10.

67. *See* Philip A. Pizzo et al., *When Physicians Engage in Practices That Threaten the Nation's Health*, 325 JAMA 723, 723 (Feb. 23, 2021).

68. Christina Korownyk et al., *supra* note 64, at 4.

69. *See* Coleman, *supra* note 7, at 125.

70. *See* Pizzo et al., *supra* note 67, at 724.

medicine.[71] While existing case law in this area is inconclusive, state boards retain the authority to impose disciplinary action against any physician found to have delivered false witness testimony in a malpractice lawsuit.[72] Professionals have argued that the same rationale should apply to justify disciplinary action against physicians who "violate the standards of professionalism in policy advisory roles" of disseminating medical information to the public, and this argument is particularly compelling because medical misinformation on the Internet can reach a significantly broader audience, given the number of people potentially in danger.[73]

The combination of the COVID-19 landscape and the widespread use of social media has brought increasing calls in the medical community to discipline physicians who disseminate medical misinformation to the public.[74] Proponents of disciplinary action argue that the Hippocratic Oath to "do no harm" should transcend "individual patient-physician encounters to situations in which physicians make medical recommendations for populations."[75] When physicians use the language and authority of their profession to promote false medical misinformation, they are more than expressing their own opinions but have rather "crossed the line from free speech to medical practice" or something "akin to malpractice."[76] Dr. Arthur L. Caplan argued that physicians who disseminate views "based on anecdote, myth, hearsay, rumor, ideology, fraud or some combination of all of these" should have their licenses rescinded and "states have the right tools to do so."[77]

Voluntary professional associations have advocated for license revocations or other disciplinary action against physicians who promulgate medical misinformation, as their harmful claims often garner significant attention.[78] The AMA's Code of Ethics states that physicians should respect their medical expertise and make sure that any public statements they provide must be "accurate", conveying known risks and benefits, "based on valid scientific evidence."[79] The Federation of State Medical Boards (FSMB) has warned physicians that spreading misinformation and disinformation about COVID-19 could lead to suspension or revocation of medical license.[80] The FSMB explains that "[d]ue to their specialized knowledge and training,

71. *See* B. Sonny Bal, *The Expert Witness in Medical Malpractice Litigation*, 467 CLINICAL ORTHOPAEDICS & RELATED RSCH. 383, 385 (2009); *see also* Pizzo et al., *supra* note 67, at 724.

72. *See* B. Sonny Bal, *supra* note 71, at 388.

73. Pizzo et al., *supra* note 67, at 724.

74. *See* Coleman, *supra* note 7, at 123.

75. Pizzo et al., *supra* note 67, at 723.

76. Richard A. Friedman, *We Must Do More to Stop Dangerous Doctors in a Pandemic*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/opinion/scott-atlas-doctors-misinformation.html [https://perma.cc/8ADG-GX78].

77. Arthur L. Caplan, *Revoke the License of Any Doctor Who Opposes Vaccination*, WASH. POST (Feb. 6, 2015), https://www.washingtonpost.com/opinions/revoke-the-license-of-any-doctor-who-opposes-vaccination/2015/02/06/11a05e50-ad7f-11e4-9c91-e9d2f9fde644_story.html [https://perma.cc/CZU4-T2K3].

78. *See* Tony Yang & Sarah Schaffer DeRoo, *Disciplining Physicians Who Spread Medical Misinformation*, 28 J. OF PUB. HEALTH MGMT. & PRAC. 595, 595 (2022).

79. *See* AM. MED. ASS'N., *supra* note 13.

80. *See* Coleman, *supra* note 10.

licensed physicians possess a high degree of public trust and therefore have a powerful platform in society," so they must share information that is "factual, scientifically grounded and consensus-driven for the betterment of public health."[81] Other professional associations have issued similar guidance.[82]

Relying on non-binding professional organizations often "lacks teeth" as non-member physicians could simply continue to engage in such practices. According to Jacob M. Appel, the psychiatry and assistant director at the Icahn School of Medicine, regulation of physician speech is better left to state authorities who have the power to act against all licensees "regardless of their standing with professional organizations."[83] State medical boards, with their licensing authorities over licensed physicians, have an important role to play in the enforcement of effective standards. In some states, there are laws explicitly authorizing disciplinary action against physicians who make misleading statements to the public. New York prohibits medical statements made in connection with advertising that is "false, fraudulent, deceptive, misleading, sensational, or flamboyant." [84] Other states have proposed broader statutes to cover false statements "unrelated to the solicitation of patients or customers." [85] Minnesota established that the medical board may refuse to grant a license or impose disciplinary action against any physician who engages in any improper conduct "likely to deceive or defraud the public."[86] California's legislature approved a bill in 2022 that would allow regulators to punish doctors for spreading false information about COVID-19.[87] While the bill does not address comments online or on television, it is an attempt to legislate a remedy for the spread of false information by medical physicians.[88]

However, many cases involving investigations against physicians alleged to be disseminating medical misinformation have not resulted in disciplinary action for several reasons. First, while FSMB expects its member boards to conduct more investigations, some states have restricted the board's powers. During the pandemic, state legislators have introduced bills to protect

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81. *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License At Risk*, FSMB (July 29, 2021), https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/ [https://perma.cc/88HR-45LN].

82. *See* Warren Newton et al., *Statement About Dissemination of COVID-19 Misinformation*, AM. BD. OF PEDIATRICS (Sept. 9, 2021), https://www.abp.org/news/press-releases/statement-about-dissemination-covid-19-misinformation [https://perma.cc/Q88B-KZSR].

83. Jacob M. Appel, *If It Ducks Like a Quack: Balancing Physician Freedom of Expression And the Public Interest*, 48 JM. J. MED ETHICS 430, 433 (2022) (describing the inability of the APA to enforce to prevent diagnosis of public figures as psychiatrists merely resigned APA membership and continue to engage in such practice).

84. N.Y. EDUC. LAW § 6530(27)(a)(1) (2021).

85. Coleman, *supra* note 7, at 126.

86. MINN. STAT. § 147.091(g)(1) (2021).

87. *See* Steven L. Myers, *California Approves Bill to Punish Doctors Who Spread False Information*, N.Y. TIMES (Aug. 29, 2022), https://www.nytimes.com/2022/08/29/technology/california-doctors-covid-misinformation.html [https://perma.cc/BS3S-7J4H].

88. *See id.*

medical professionals from being punished by regulatory bodies for spreading COVID-19 misinformation or unproven remedies.[89] For example, the chair of the Tennessee House Government Operations Committee believed that the state medical board's warning on the revocation of medical licenses had overstepped its boundary and threatened to terminate the board if it did not remove the warning.[90] Second, some state boards simply lack the legal tools to discipline physicians for actions taken on social media platforms, because the precedents for unprofessional behavior have been more narrowly tailored to speech made directly to individual patients, so the legal structures in many states are not suited to discipline doctors who broadcast misinformation on social media platforms.[91] The head of the Medical Board of California acknowledged that the legal processes of the country were not designed to discipline physicians making broad statements about discredited treatments in the public.[92]

Unlike social media platforms, medical boards are "entities of the state" subject to constitutional limitations.[93] The Tenth Amendment authorizes states to establish laws and regulations "protecting the health, safety, and general welfare of their citizens," and each state has established and authorized state medical board to govern the practice of medicine and regulate physicians.[94] All of the state medical boards issue licenses for the practice of medicine, "investigate complaints, discipline those who violate the law, conduct physician evaluations, and facilitate rehabilitation of physicians."[95] However, the protection of freedom of speech under the First Amendment applies to all branches of the government, including state medical boards. Therefore, while state medical boards are given such licensing authorities, they may run into First Amendment challenges and be limited in their ability to penalize licensed physicians based on the content of their speech when they are speaking outside of the professional context.[96]

As mentioned above, California Governor Gavin Newsom introduced a bill in 2020 that sought to penalize doctors who spread misinformation about COVID-19 during patient care, but the bill is now facing lawsuits challenging

89. *See* Michael Ollove, *States Weigh Shielding Doctors' COVID Misinformation, Unproven Remedies*, STATELINE (Apr. 6, 2022), https://stateline.org/2022/04/06/states-weigh-shielding-doctors-covid-misinformation-unproven-remedies/ [https://perma.cc/4YNN-E5ZH].

90. *See id.*

91. *See* Darius Tahir, *Medical Boards Get Pusheback as They Try to Punish Doctors for Covid Misinformation*, POLITICO (Feb. 1, 2022), https://www.politico.com/news/2022/02/01/covid-misinfo-docs-vaccines-00003383 [https://perma.cc/D7BH-UQH7].

92. *See id.*

93. Alison M. Whelan, *How Should State Licensing and Credentialing Boards Respond When Government Clinicians Spread False or Misleading Health Information?*, 25 AMA J. OF ETHICS 210, 213 (2023).

94. *Guide to Medical Regulation in the United States*, FED'N OF STATE MED. BD., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/introduction/ [https://perma.cc/6UFL-H9Q6] (last visited Apr. 1, 2023).

95. *Id.*

96. *See* Whelan, *supra* note 93, at 212-13.

it as a violation of free speech under the First Amendment.[97] The bill designates the spread of misleading COVID-19 information as "unprofessional conduct" subject to "punishment by the agency that regulates the profession" in hopes of avoiding First Amendment challenges.[98] However, the California Medical Association faces two lawsuits alleging that the law was intended to "silence dissenting views" and the legal system of the country "opts toward a presumption that speech is protected."[99] Dr. Tracy Hoeg, one of the plaintiffs in the lawsuits, argued that the bill imposes "self-censorship" and "self-silencing" of "dissenting views" onto physicians.[100] In response to these arguments, Governor Newsom acknowledged the protection of free speech under the First Amendment but emphasized that the law focused specifically on "clear deviations from established standard of care" with a "malicious intent" to spread false information.[101]

Freedom of speech is not absolute. The Supreme Court has determined three types of speech restrictions of varying levels of scrutiny: content-based, commercial, and professional.[102] State medical boards' disciplinary proceedings can be considered content-based restrictions, which are presumptively unconstitutional and are upheld only if they can satisfy the "strict scrutiny" standard of review, which requires the government to show that the limitations promote a "compelling state interest" and are the "least restrictive means" available.[103] While proponents of board disciplinary action argue that disseminating medical misinformation could have a devastating impact on public health, it is likely not the only or the least restrictive means for achieving the state's public health goals, because counter-speech offers an alternative option to counter false information with accurate messages.[104]

Some critics argue that when physicians offer medical advice, they are essentially engaging in a form of professional practice and should be subject to disciplinary action if their statements deviate from accepted medical standards as if providing the same information in a single-patient setting.[105] It is intuitively assumed that when a doctor advises a patient or a lawyer offers legal advice, they are exercising professional speech.[106] The "professional speech" doctrine is a concept employed by some courts to "define and often limit the free-speech rights of professionals when rendering advice or

97. *See* Brendan Pierson, *California Law Aiming to Curb COVIDM Misinformation Blocked by Judge*, THOMSON REUTERS (Jan. 26, 2023), https://www.reuters.com/business/healthcare-pharmaceuticals/california-law-aiming-curb-covid-misinformation-blocked-by-judge-2023-01-26/ [https://perma.cc/8RRX-PKBS].

98. *See* Steven L. Myers, *Is Spreading Medical Misinformation a Doctor's Free Speech Right?*, N.Y. TIMES (Nov. 30, 2022), https://www.nytimes.com/2022/11/30/technology/medical-misinformation-covid-free-speech.html [https://perma.cc/5WLQ-M2X3].

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* Yang & DeRoo, *supra* note 78, at 596.

103. *See id.*

104. *See* Coleman, *supra* note 10.

105. *See* Coleman, *supra* note 7, at 137.

106. *See* Claudia E. Haupt, *Professional Speech*, 125 THE YALE L. J. 1238, 1245 (2016)

counsel", and its existence is implicit in some court cases.[107] However, despite its recognition, the Supreme Court has never expressly defined a doctrine of "professional speech" under the First Amendment, leaving the analysis of the appropriate level of protection for professional speech inconclusive.[108]

Recent court decisions involving professional speech include the Ninth Circuit's ruling in *Pickup v. Brown*, which upheld a California law that penalizes licensed mental health providers for performing therapies to alter the sexual orientation of minors.[109] The Court found that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished."[110] However, while free-speech rights may be diminished with providing medical advice in a professional relationship, the Court held that First Amendment protection is "at its greatest" when a medical professional engages in a "public dialogue," adhering to the value of the First Amendment to protect public speech on matters of public concern.[111] For example, "a doctor who publicly advocates a treatment that the medical establishment considers outside mainstream, or even dangerous, is entitled robust protection under the First Amendment . . . even though the state has the power to regulate medicine."[112]

In 2018, the Supreme Court attempted to elaborate on the application of the First Amendment on professional speech in *National Institutes of Family Advocates v. Becerra (NIFLA)*. The Supreme Court struck down a California statute requiring crisis pregnancy centers to notify women that the state provides free or low-cost services, including abortions, asserting that most content-based restrictions on speech are "presumptively unconstitutional" and may only be upheld if they are "narrowly tailored to serve compelling state interests."[113] The Ninth Circuit decided not to apply strict scrutiny to such a content-based regulation after concluding that the notice regulates "professional speech."[114] The Supreme Court disagreed with the lower court and affirmed that it "has never recognized professional speech as a separate category of speech subject to different rules" beyond the First Amendment.[115] Nonetheless, *NIFLA* left open the standards for governing physician-patient communications, noting that "states may regulate professional conduct, even though that conduct incidentally involves speech."[116]

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107. David L. Hudson Jr., *Professional Speech Doctrine*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1551/professional-speech-doctrine [https://perma.cc/TMR2-QW5E] (last visited Apr. 1, 2023); *see* Haupt, *supra* note 106, at 1245; *see also* Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D. Cal. 1997) ("Although the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one.").

108. *See* Haupt, *supra* note 106, at 1245.

109. *See* Pickup v. Brown, 728 F.3d 1208, 1215 (9th Cir. 2013).

110. *Id.* at 1228.

111. *Id.* at 1227.

112. *Id.*

113. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018).

114. *Id.*

115. *Id.* at 755-57.

116. *Id.* at 768.

The holdings in *Pickup* and *NIFLA* may imply that states have considerable discretion in disciplining physicians for professional speech within medical procedures. However, the decisions are not broad enough to cover public statements regarding public health matters not directly related to medical procedures for individual patients.[117] This means that state boards may still need to bear the high burden of satisfying the strict scrutiny standard to survive a constitutional challenge in disciplining content-based speeches. Accordingly, a broader disciplinary framework should be imposed to regulate physician professional speech on public platforms.

IV. JUSTIFYING DISCIPLINARY ACTION AS AN EXTENSION OF FIDUCIARY DUTY OF CARE

The foregoing analysis suggests that existing efforts by social media platforms, the medical community, and the existing professional speech regulation are unlikely to play a major role in responding to medical misinformation on the Internet. Because courts have given considerable discretion to states to discipline physicians for speech tied to professional conduct, medical boards, acting as state agencies to "serve the public by protecting it from incompetent, unprofessional, and improperly trained physicians," should assume the duty to discipline physicians who breach their duty of care to the public by spreading medical misinformation.[118] In accordance with the Federation of State Medical Boards (FSMB), disciplinary action may include suspension or revocation of the physician's medical license.[119] State medical boards regulate the activities of more than one million health professionals in the country, so it is certain that they could play an essential role in holding physicians accountable for medical misinformation online.

However, as discussed above, state medical boards are limited in their ability to sanction physicians based on speech on public platforms with existing standards. To avoid the likely reality that these physicians may face no legal repercussions, this Note proposes to expand the current duty of care owed by physicians. Under the expanded framework, a duty of care arises between a physician and the public when a licensed physician willingly volunteers to share medical information on public platforms, particularly on the Internet. The standard of such duty of care is analogous to that owed by directors and officers to the corporation they work for, wherein they are required to fully inform themselves of all material information before making any reasonable business decision.[120] When the medical information provided is found to be in direct contradiction to the prevailing medical evidence, the

117. *See* Yang & Schaffer Deroo, supra note 78, at 596.

118. Carlson & Thompson, *supra* note 14; *see also Nat'l Inst. of Fam. & Life Advocs.*, 585 U.S. at 767.

119. *See* Coleman, *supra* note 10.

120. *See Duty of Care*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/duty_of_care#:~:text=The%20duty%20of%20care%20is,corporation's%20stakeholders%20or%20broader%20society [https://perma.cc/Y2F7-TSFB] (last visited Apr. 1, 2023).

licensed physician has breached his or her duty of care, and the state medical board may impose penalties accordingly.

A. Physicians as Fiduciaries and Limitations of Courts to Remedy Breaches of Fiduciary Duties

Physicians are relied upon for their training and knowledge by patients as the "gatekeepers" to medical services "for access to medical aid, thus creating a relationship of dependency."[121] In general, physicians assume a legal duty to provide an adequate standard of care to their patients acting as fiduciaries for the patients.[122] Fiduciary obligations are imposed in relationships where one party places trust, confidence, and reliance on another party who has a fiduciary duty to act in their best interest.[123] Fiduciary duty was introduced by law to "protect vulnerable people in their transactions with others."[124] The physician-patient relationship has long been recognized as one of the traditional fiduciary relationships, where the physician acts for the benefit of a patient with express or implied consent.[125] The professional duty of a physician is to bring his or her medical skill and expertise to patients with inferior knowledge in the area.[126]

After a physician-patient relationship is recognized, physicians are under an obligation to perform their professional services by "the prevailing standard of professional competence in the relevant field of medicine."[127] In a medical malpractice claim, physicians owe a duty of care to patients "to exercise that degree of care, skill, and diligence customarily demonstrated by physicians in the same line of practice."[128] The "medical standard of care" generally refers to the type of care that "a reasonably skilled and competent medical provider with a similar level of education within the same area would

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121. Sam F. Halabi, *Against Fiduciary Utopianism: The Regulation of Physician Conflict of Interest and Standards of Care*, 11 U.C. IRVINE L. REV. 433, 444 (2020).

122. *See* David Orentlicher, *The Physician's Duty to Treat During Pandemics*, 108 AM. J. PUB. HEALTH 1459, 1459 (2018).

123. *See* Dheeraj Vaidya, *Fiduciary Relationship*, WALLSTREETMOJO, https://www.wallstreetmojo.com/fiduciary-relationship/ [https://perma.cc/M3P6-N8UE] (last visited Apr. 1, 2023).

124. Andrea Donaldson, *Breach of Fiduciary Duty Claims Against Physicians*, PAC. MED. L. (Oct. 22, 2019), https://www.pacificmedicallaw.ca/blog/breach-of-fiduciary-duty-claims-against-physicians/ [https://perma.cc/5J7B-6FUZ].

125. *See* Saniya Suri, Note, *Action, Affiliation, and a Duty of Care: Physicians' Liability in Nontraditional Settings*, 89 FORDHAM L. REV. 301, 307 (2020); *see also* M.A. v. United States, 951 P.2d 851, 854 (Alaska 1998) ("[W]e have recognized that the unique nature of the physician-patient relationship confers upon physicians a fiduciary responsibility toward their patients.").

126. *See* Wiseman v. Alliant Hosps., Inc., 37 S.W.3d 709, 713 (Ky. 2000) ("The fiduciary relationship between the parties grants a patient the right to rely on the physician's knowledge and skill.").

127. Halabi, *supra* note 121, at 449.

128. Julie Jaquays, *Doe v. Cochran: Does Reducing Physicians' Duty of Care Owed to Third Parties to Identifiable or Identified Victims Unduly Restrict the Scope of Foreseeability*, 39 QUINNIPIAC L. REV. 599, 601-05 (2021); *see also* Dallaire v. Hsu, 23 A.3d 792, 798 (Conn. App. Ct. 2011).

have provided to a patient under the same circumstances."[129] Some obligations within the physician's standard of care may include "retention of a competent support staff, making and keeping adequate records, and keeping current with diagnostic and treatment advances."[130]

However, the accepted standard of care is not a list of guidelines but a duty "determined by a given set of circumstances that present in a particular patient, with a specific condition, at a definite time and place."[131] Factors taken into account may include the physician's medical expertise and the traditional accepted medical practices.[132] Due to the unpredictability of the standard of care, courts have rarely analyzed a physician's duty of care within the fiduciary relationship with patients.[133] At times, courts have rejected to rely on various clinical practice guidelines to ascertain a physician's fiduciary duty of care. In *Hinlicky v. Dreyfuss*, the plaintiff tried to introduce the Physicians' Desk Reference (PDR) to establish the standard of care.[134] The Court argued that the PDR alone could not be employed as prima facie evidence to establish a standard of care and that expert testimony is required to provide an explanation.[135] While expert testimony is generally required to establish the standard of care in claims against physicians by patients, many physicians may refuse to testify within the patient's community.[136]

Despite the general recognition of a fiduciary relationship between physicians and patients, courts have been hesitant to remedy breaches of physician fiduciary duties.[137] First, "plaintiffs must bring all their claims arising out of the same transactional nucleus of facts in the same civil action" under the rules of civil procedure, so patients are burdened to bring claims in contract and torts in addition to suing for breach of fiduciary. Second, courts tend to reject attempts to sue for breach of fiduciary duties "in favor of medical malpractice."[138] The Arizona Supreme Court in *Hales v. Pittman* argued that "a patient may pursue a malpractice action premised on a negligence theory" and the law should not be expanded to "recognize a new cause of action based on breach of trust."[139] Malpractice lawsuits are not a sufficient option in combating medical misinformation on the Internet as most

129. *What Is Standard of Care in Medical Malpractice*, RAYNES & LAWN (Dec. 13, 2021), https://rayneslaw.com/what-is-standard-of-care-in-medical-malpractice/#:~:text=The%20medical%20standard%20of%20care%20refers%20to%20the%20type%20of,which%20the%20alleged%20malpractice%20occurred [https://perma.cc/9YNT-FV2W].

130. Halabi, *supra* note 121, at 450.

131. Howard Smith, *A Model for Validating an Expert's Opinion in Medical Negligence Cases*, 26 J. LEGAL MED. 207, 208 (2005).

132. *See What Is Standard of Care in Medical Malpractice*, *supra* note 129.

133. *See* Halabi, *supra* note 121, at 455.

134. *See* Hinlicky v. Dreyfuss, 848 N.E.2d 1285, 1291 (N.Y. 2006).

135. *See id.*

136. *See* Halabi, *supra* note 121, at 455-56.

137. *See id.* at 452.

138. *See id.* at 454.

139. Hales v. Pittman, 576 P.2d 493, 497 (Ariz. 1978).

require proof of a clear physician-patient relationship.[140] Although some courts have recognized malpractice actions in the absence of a traditional physician-patient relationship, those cases tend to involve a physician providing medical advice for an "identified third party" when it is foreseeable that the third party will rely on that advice to be harmed.[141] While one may argue that it is reasonably foreseeable that web users will rely on physicians' words and be harmed by such misleading information, it is seemingly impossible to identify a particular party likely to be harmed on the Internet.

B. Expanding Physicians' Legal Duty of Care Beyond the Traditional Framework

A fiduciary duty of care is imposed once a physician-patient relationship is established, and the patient must then prove the physician's practice deviates from the applicable standard of care. When physicians and patients interact in a direct clinical setting, where a patient is referred to a physician and is then treated or operated on by the physician, a clear physician-patient relationship is established, where the physician owes the patient a duty of reasonable care.[142] However, as discussed above, the responsibilities underlined within a traditional physician-patient relationship are insufficient to address medical misinformation by physicians on the Internet. This Note proposes to expand the current framework of fiduciary duty where physicians owe a duty of care to the general public.

Some courts have held that a duty of care may exist in the absence of a well-recognized fiduciary relationship. In *Rowland v. Christian*, the Supreme Court of California applied a public policy approach in addressing the duties owed by possessors of land to entrants on their properties.[143] The Court argued that the rigid justifications for the common law distinctions between trespassers, invitees, and licensees are insufficient and adopted a new test in which the liability of possessors of land depends on whether they acted as a reasonable person in warning entrants of the probability of injury on the premises.[144] Though the *Rowland* case dealt with landowners, California courts have gradually applied this approach to assess whether a duty of reasonable care was appropriate in other contexts of relationships.[145] Other courts have found that physicians may owe a duty of care when providing medical advice to someone who was not previously their patient. In *Green v.*

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140. *See* Ande v. Rock, 647 N.W.2d 265, 276 (Wis. Ct. App. 2002) (granting defendants' motions to dismiss because parents, who sued state employees for claims related to children's cystic fibrosis, made no showing of a physician-patient relationship which is necessary to support a medical malpractice claim).

141. *See* Warren v. Dinter, 926 N.W.2d 370, 375-76 (Minn. 2019) (allowing medical malpractice action against hospitalists who refuse to admit patients with symptoms of undiagnosed infection).

142. *See* Mead v. Legacy Health Sys., 283 P.3d 904, 910 (Or. 2012); Suri, *supra* note 125, at 305.

143. *See* Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968).

144. *See id*. at 567-68.

145. *See* Patrick D. Blake, *Redefining Physicians' Duties: An Argument for Eliminating the Physician-Patient Relationship Requirement in Actions for Medical Malpractice*, 40 GA. L. REV. 573, 595 (2006).

Walker, the Fifth Circuit imposed a duty of care in a non-traditional physician-patient relationship between the examining physician and examinee because the physician has superior knowledge in his profession.[146]

Courts have found that a duty of care exists in other circumstances involving nontraditional physician-patient relationships. Physicians have increasingly exerted a greater influence on public healthcare through nontraditional interactions, such as performing informal curbside consultations or independent assessments at request.[147] In the Internet age, physicians and individuals seeking medical information have access to distinct technological resources. When the framework of a physician-patient does not cover nontraditional medical interactions, courts have and should continue to recognize the need to deviate from the traditional understanding of a fiduciary relationship and "find a duty of care notwithstanding the lack of such a physician-patient relationship."[148] To justify disciplinary action against licensed physicians responsible for the dissemination of medical misinformation, the scope of a physician's duty of care should be extended by courts beyond the restricted definition of direct contact with patients.

The AMA's Code of Ethics states that physicians, except in emergencies, are free to choose "whom to serve, with whom to associate, and the environment in which to provide medical care."[149] Physicians off-duty assume no affirmative duty to provide medical advice on Facebook or X, formerly Twitter. However, "an off-duty doctor is expected to provide the same degree of care, diligence, and skill as would reasonably expected of a competent physician."[150] As stated by William Sage, a professor of law and medicine at Texas A&M University, physicians certainly do not relinquish their free speech rights upon obtaining medical licenses, but they can be held accountable for providing inaccurate medical recommendations, such as advising a dangerous medication. [151] Accordingly, once physicians invoke their medical status and volunteer to share medical information with the public, particularly through online platforms reaching millions of potential patients, a fiduciary relationship should have been formed where physicians owe a duty of care in the information they provide. In other words, a legal duty of care should be imposed when a physician, announcing of his or her medical status to invoke authoritative attention, willingly and knowingly volunteers to provide medical advice on any public platform. Even if physicians do not voluntarily announce their medical status, social media platforms often contain clues that allow Internet users to infer their

146. *See* Green v. Walker, 910 F.2d 291, 294-95 (5th Cir. 1990).

147. *See* Suri, *supra* note 125, at 305.

148. *Id.* at 307.

149. *See AMA Code of Medical Ethics*, AM. MED. ASS'N. (2006).

150. Jennifer Corbett, *Liability of an Off-Duty Doctor or Physician*, LEGALMATCH, https://www.legalmatch.com/law-library/article/liability-of-an-off-duty-doctor-or-physician.html #:~:text=The%20hospital%20must%20have%20directed,by%20an%20off%2Dduty%20physician [https://perma.cc/4R66-DV6Z] (last visited Apr. 1, 2023).

151. *See* Stacy Weiner, *Is Spreading Medical Misinformation a Physician's Free Speech Right? It's Complicated*, AAMC (Dec. 26, 2023), https://www.aamc.org/news/spreading-medical-misinformation-physician-s-free-speech-right-it-s-complicated [https://perma.cc/MV9M-U8F3].

professional standing. Therefore, the responsibility falls on the physicians to monitor and manage their social network profiles.

The basis of the above rationale can be analyzed through the Fifth Circuit's ruling in *Kadlec Medical Center v. Lakeview Anesthesia Associates*, involving a case of alleged misrepresentations from the defendant's referral letters.[152] In *Kadlec Medical Center*, Dr. Berry was terminated by Louisiana Anesthesia Associates (LAA) for his drug use problems and applied for a new job where two colleagues from LAA provided recommendation letters describing Dr. Berry as an excellent anesthesiologist without mentioning his problematic behavior.[153] The Fifth Circuit held that "although a party may keep absolute silence and violate no rule of law or equity, . . . if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to [disclose] the whole truth."[154] Similarly, while physicians are not legally obligated to provide medical information to the public when acting on their own initiative outside of a professional setting, once they do so, they assume "a duty to insure that the information volunteered is correct."[155] A physician's professional status should carry "additional legal obligations" to exercise a similar degree of care as that ordinarily exercised in active practice when using their specialized knowledge and specialization to lend credibility to their words.[156]

C. Implementation of the Extended Duty of Care in the Dissemination of Medical Information

For medical boards to effectively impose disciplinary action against physicians for disseminating medical misinformation, a clear standard of care regarding physician speech should be defined. The fundamental principles of duty of care in corporate law could be useful in formulating an expanded duty of care framework for physicians. The rule limiting liability of directors under the business judgment rule is a foundation built into the structure of corporate law. The business judgment rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[157] At the same time, a fiduciary duty is held by corporate directors to put the interests of the company and its shareholders over their personal interests when making business decisions and evaluating opportunities.[158] Absent evidence of a violation of fiduciary duty, the business judgment rule shields directors from judicial scrutiny of their business

152. *See* Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs., 527 F.3d 412, 415-17 (5th Cir. 2008).

153. *See id.* at 416.

154. *Id.* at 419.

155. *Id.*

156. *Green*, 910 F.2d at 295.

157. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

158. *See* Mike Lincoln, *Your Duties as a Directors: The Basics*, COOLEY GO (Apr. 11, 2022), https://www.cooleygo.com/director-fiduciary-duties/#:~:text=Directors%20have%20fiduciary%20duties%20of,the%20Company%20and%20evaluating%20opportunities [https://perma.cc/7LJ6-UMC2].

decisions.[159] Duty of care in a corporate context refers to a fiduciary responsibility held by directors of a corporation to exercise the utmost care in making business decisions.[160]

Smith v. Van Gorkom was the first case where the Delaware Supreme Court found a breach of the duty of care in connection with a board's business judgment, which involved a class action against the board of the target company in a flawed merger agreement process.[161] In *Van Gorkom*, the Court affirmed that a director has the fiduciary duty "to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal."[162] However, the board of directors breached its duty of care because it did not act with "informed reasonable deliberation" before engaging in a merger transaction.[163] For example, the board failed to inquire into the chief executive officer's role in drafting merger terms, review the merger agreements in detail, seek outside expert opinion on the purchase price, and engage in more extensive discussions in addition to the two-hour meeting when approving the sale.[164] The directors lacked sufficient information about the value of the corporation and simply failed in their duty of "knowing, sharing, and disclosing information that was material and reasonably available for their discovery."[165]

The corporate duty of care can be summed up as requiring directors of a company to stay informed by conducting sufficient investigation and taking all material information reasonably available into account before making business decisions to promote the company's best interests.[166] Some of the ways that directors could exercise the duty of care include ensuring all material information is reasonably available, investigating viable business alternatives, consulting experts for credible information, referring to meeting minutes, staying abreast of outside developments and changes, and making sure a decision is not made based solely on the opinion of one candidate.[167] The principles underlying the corporate duty of care could be applied in the context of physicians promulgating medical information to the public. When physicians owe a duty to the public in the medical information they voluntarily disseminate, they should fulfill their fiduciary duty by engaging in extensive scientific research, similar to the expectations required of corporate directors.

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159. *See* Adam Hayes, *What is the Business Judgment Rule? With Exemptions & Example*, INVESTOPEDIA (Apr. 27, 2022), https://www.investopedia.com/terms/b/businessjudgmentrule.asp [https://perma.cc/AVD9-B45Y].

160. *See* Will Kenton, *What Does Duty of Care Mean in Business and Financial Services?*, INVESTOPEDIA (Dec. 26, 2022), https://www.investopedia.com/terms/d/duty-care.asp [https://perma.cc/2KCC-SD6Y].

161. *See* Smith v. Van Gorkom, 488 A.2d 858, 863 (Del. 2009).

162. *Id.* at 873.

163. *Id.* at 881.

164. *See id.* at 875-81.

165. *Id.* at 893.

166. *See* Kenton, *supra* note 160.

167. *See id.*

Principle V of the AMA Principles of Ethics expresses that "a physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other professionals when indicated."[168] And Principal VII states that a physician shall assume a responsibility to engage in activities "contributing to the improvement of the community and the betterment of public health."[169] These ethical principles articulate the responsibility of physicians to provide credible information based on scientific evidence, rather than engaging in unregulated proliferation of false medical information.[170] A duty of care should be imposed, mandating physicians to take advantage of their medical expertise, perform a diligent scientific investigation of all available evidence, remain informed of relevant developments in the area, and consult medical professionals to ensure the accuracy of the information they share to the public are supported by substantial scientific evidence.

Medical professionals should be trusted with their specialized knowledge and training, and the rule simply reinforces their unique responsibility to direct the public to reliable sources of medical information. Similarly, even though a corporate board's decisions might not always be the most profitable for the company, directors must nonetheless engage in a thoughtful and careful decision-making process to avoid subjecting the company to dreadful circumstances. A breach of the duty of care thus arises from defects within the decision-making process rather than the substantive quality of the decision itself.[171] When physicians inform themselves of all scientifically available evidence and seek advice from other medical experts, they should be able to refrain from sharing information contrary to the weight of scientific evidence. When physicians make statements that contradict well-established medical evidence, medical boards can make a strong argument that the physicians have breached their duty of care, because they should have recognized the information as false or at least entertained serious doubts as to its credibility if they had performed diligent research.

Regulators have been concerned that allowing the medical boards to revoke physicians' licenses could result in a chilling effect on valuable speech.[172] An argument against penalizing physicians based on speech content is that medical knowledge is an ever-expanding practice, and physicians should be allowed to express opinions on new studies with the First Amendment protecting the open expression of ideas.[173] Physicians may be concerned that the boards may be "free to penalize physicians whenever they

168. *AMA Principles of Medical Ethics*, AM. MED. ASS'N. (Apr. 29, 2016), https://www.ama-assn.org/delivering-care/ama-principles-medical-ethics [https://perma.cc/FKN9-Z2B5].

169. *Id.*

170. *See* Joel T. Wu & Jennifer B. McGormick, *Why Health Professionals Should Speak Out Against False Beliefs on the Internet*, AMA J. ETHICS (2018), https://journalofethics.ama-assn.org/article/why-health-professionals-should-speak-out-against-false-beliefs-internet/2018-11 [https://perma.cc/JJ4E-5GXJ] (last visited Apr. 1, 2023).

171. *See* Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1147 (2013).

172. *See* Coleman, *supra* note 7, at 139.

173. *See* Myers, *supra* note 98.

express opinions that conflict with prevailing professional norms, even if those opinions cannot be shown to be objectively false."[174] This Note recommends state boards to organize a special committee similar to the Special Litigation Committee (SLC) in shareholder derivative litigation. An SLC is a tool that a corporation can employ to address derivative litigation when shareholders believe that the board of directors failed to pursue the corporation's best interests.[175] The committee is made up of independent or impartial individuals to consider whether derivative claims against directors for breach of fiduciary duty are advantageous for the company by conducting investigations, reviews, and evaluations.[176] The purpose of an SLC is to ensure that its members can objectively evaluate the merits of a derivative suit for the company.[177]

Similarly, whenever a physician is found disseminating information on public platforms contrary to the prevailing medical evidence, a committee composed of medical professionals and a member of the public should independently investigate the case. By establishing a special committee to review disciplinary actions, a physician confronted with potential liability is afforded the chance to contest the decision before the committee. This allows physicians to explain the prudent research they have conducted, drawing from available evidence, and to demonstrate the good-faith efforts made to fulfill their duty of care. Nonetheless, how to regulate such speech is a challenging question, especially when a physician believes in good faith that the majority medical consensus is wrong despite the weight of existing evidence. One possible way to ensure the right to express contrarian opinions is to require physicians, in addition to showcasing the diligent research and study they had performed, to make clear to audiences the absence of medical authority or existing scientific evidence to justify their position.

It is important to realize that the disciplinary authority of medical boards is a neutral one and does not seek to censor free speech or silence dissenting views. Because medical progress depends heavily on rigorous scientific research, the purpose of the extended duty is not to dissuade physicians from sharing potentially valuable speech but rather to encourage their exercise of reasonable caution in staying updated with advancements in medical practice, which involves invoking their professional authority judiciously to ensure the best interests of the public. Licensed physicians are free to express their views on current medical topics but are only asked to exercise reasonable care by taking the time to investigate and ask questions ensuring that they are well-formed surrounding their speech.

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174. Coleman, *supra* note 7, at 139.

175. *See* Michael Pike & Daniel Lusting, *Shareholder Derivative Claims: What is A Special Litigation Committee (SLC)?*, PIKE & LUSTIG, LLP (Feb. 28, 2022), https://www.turnpikelaw.com/shareholder-derivative-claims-what-is-a-special-litigation-committee-slc/ [https://perma.cc/RK7T-W9YN].

176. *See* Scott Hirst, *Special Litigation Committees in Shareholder Derivative Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REGUL. (Apr. 25, 2010), https://corpgov.law.harvard.edu/2010/04/25/special-litigation-committees-in-shareholder-derivative-litigation/ [https://perma.cc/KD27-PHJT].

177. *See id.*

V. CONCLUSION

The promulgation of medical misinformation with social media platforms playing an ever-expanding role in today's information ecosystem has become an alarming concern. In particular, physicians expressing statements on medical matters that run contrary to the consensus of scientific evidence, such as advocating dangerous cures or opposing public health measures, pose a serious challenge to regulatory bodies and a "grave threat to societal welfare."[178] To overcome the constitutional challenges under the First Amendment and justify disciplinary action by state medical boards, the traditional fiduciary duty of a physician-patient relationship should be expanded where a duty of care arises between a physician and the public when the physician voluntarily disseminates medical information on public platforms. Because physicians carry professional credibility that gives their voices inordinate weight, they owe a duty of care to perform diligent scientific research prior to disseminating any medical information. State medical boards are justified to discipline licensed physicians who breach their duty of care by providing information unambiguously refuted by a substantial body of medical evidence, a framework likely to play a major role in combating the issue.

178. Appel, *supra* note 83, at 430.