What role should professional organizations play in responding to lies and misinformation spread by those within their ranks?
On June 16, 2022, a federal judge sentenced Simone Gold to 60 days in prison for her participation in the January 6 riot. Gold, a California emergency room physician and lawyer, shot to national attention two years earlier when she appeared in a viral video of white-coated doctors promoting untested COVID-19 cures and discouraging the use of masks in the midst of the pandemic. President Trump had retweeted the video, rocketing Gold to prominence. Now, she was facing time behind bars after pleading guilty to a misdemeanor charge for trespassing on Capitol grounds.

Gold has never been shy about her credentials. “I am a Stanford-educated attorney!” she declared inside the rotunda on January 6, Mother Jones reported. During her March 2022 plea hearing, she requested that the judge refer to her as “Dr. Gold.” Through all of this, despite promoting falsehoods about the safety and reliability of the coronavirus vaccine, Gold retained her California medical license. Only after her sentencing was her ability to practice medicine put on hold, under a state regulation automatically inactivating the licenses of doctors incarcerated for misdemeanors.

Her presence in the Capitol underlines the extent to which falsehoods around the coronavirus and election fraud became entangled—in large part thanks to the influence of Donald Trump. The president first began attacking the integrity of the 2020 election in the spring of that year, suggesting that mail-in ballots—newly prevalent because of safety concerns around the developing pandemic—were “a very dangerous thing for this country.” As Trump and his campaign further amplified lies about election fraud over the course of the summer and fall, the president also busied himself with downplaying the danger of the pandemic.

And he was far from alone. Just as lawyers would soon sign onto efforts to overturn the election on the basis of false claims of election fraud, some doctors aligned themselves with Trump-style falsehoods about COVID-19. The viral video released by Gold’s group, called America’s Frontline Doctors, promoted the anti-malaria drug hydroxychloroquine as a treatment for COVID-19, despite a lack of firm medical evidence to that effect. Social media platforms like Facebook, Twitter, and YouTube rushed to take the video down after Trump retweeted it.

Over the course of 2020, social media platforms became increasingly aggressive in moderating inaccurate or potentially harmful material, first when it came to coronavirus misinformation and next concerning the Big Lie of election fraud—culminating in Twitter
and Facebook both banning Trump from their platforms following the Capitol insurrection. But social media platforms are not the only entities with a role in shaping what information the public receives and how people understand it. As doctors and lawyers watched their colleagues pollute the public sphere with falsehoods about the pandemic and the 2020 election, many began advocating for the professional organizations that regulate their disciplines to step in as well. These fabulists, they argued, should face sanctions for spreading lies.

Whether the current state of things is best characterized as a post-truth era, a crisis of misinformation and disinformation, or something else, American politics in the years following Trump's election in has been characterized by a deep anxiety about the reliability of the information around which we base our common life. In response, social media platforms and media outlets have faced demands to exert more control over what information they present. The pressure faced by state bars and medical boards echoes this new desire for institutional guidance on what constitutes truth.

But in another sense, these professional organizations play a very different role than, say, Twitter or The New York Times. Though both technology companies and the press have moved toward providing greater guidance to users and readers about the information they present, the basic promise remains that loading up either Twitter or The Times homepage will tell you what is going on in the world, without the personal opinions of either a Times reporter or a Twitter engineer getting too much in the way. Facebook (now Meta) CEO Mark Zuckerberg famously wrote after the 2016 election that platforms “do not want to be [the] arbiters of truth.” More recently, Elon Musk’s purchase of Twitter, and his subsequent rollback of the platform’s content moderation efforts—all in the name of creating “an inclusive arena for free speech”—reflect an aggressive rejection of the idea that social media companies should play any such role.

Yet professional associations and disciplinary authorities prescribe exactly this sort of arbitration. They are professional not just colloquially, but in the sociological sense: organized communities that seek to regulate the dissemination and use of specialized knowledge. As Robert C. Post of Yale Law School argues in his book *Democracy, Expertise, and Academic Freedom*, “The creation of expert knowledge requires practices that seek to separate true ideas from false ones.”

The confluence of the pandemic and the Big Lie brought medicine and law together as two professions uniquely located at the center of the national predicament. They each offer a promise of neutral expertise within their domains yet were caught up in efforts to distort that expertise for partisan gain, making political what had previously claimed to be outside or above politics. Likewise, both professions require a certain level of fidelity to the way things really are, whether in the form of medical evidence about a patient’s condition or adherence to the shared set of rules that govern behavior in the courtroom.
Medical boards and state bars have not always handed down truths by fiat or disciplined all instances of lying with an iron fist—far from it. Yet these institutions can still help in pushing back against falsehoods in a moment of wider cultural crisis around the role of truth in democratic life. They will not, on their own, save democracy from falsehoods. But they may provide some part of the solution—if they are willing to make that stand.

Falsehoods and the Threat of Discipline

Lawyers and the Big Lie

Following Election Day 2020, the Trump campaign and lawyers backing or affiliated with Trump filed over 60 lawsuits seeking, in one form or another, to overturn the vote and hand the presidency to Trump for a second term.¹⁵ The lawsuits aimed at first to halt the ongoing counting of ballots and then, as time progressed, to halt states’ certification of the electoral vote and delay the final certification of the vote by Congress on January 6.¹⁶ Many depended on questionable allegations of voter fraud or tampering of some sort with the vote count. Perhaps most infamously, lawyer Sidney Powell—after asserting that Trump “won this election in a landslide”—went on to file lawsuits in the swing states of Arizona, Georgia, Michigan, and Wisconsin, alleging “massive election fraud.”¹⁷ (These cases became widely known as the “Kraken” suits, after Powell’s promise to “release the Kraken.”)¹⁸ Around the same time, in early December 2020, Texas Attorney General Ken Paxton filed Texas v. Pennsylvania in the Supreme Court, seeking to block Biden electors from Georgia, Michigan, Pennsylvania, and Wisconsin and from the Electoral College—again, on the basis of poorly substantiated claims of “voting irregularities.”¹⁹ In the following days, 17 Republican state attorneys general signed on to an amicus brief supporting Paxton’s suit.²⁰

These legal efforts dovetailed with an equally aggressive media campaign. In a bizarre November press conference, Powell and fellow Trump campaign lawyer Rudy Giuliani insisted that voting machines manufactured by the companies Dominion and Smartmatic had in fact been manipulated as part of a conspiracy tracing back to deceased Venezuelan president Hugo Chávez.²¹ Days before, Powell had declared in a Fox Business interview that a plot to steal the election from Trump had been “organized and conducted with the help of Silicon Valley people, the big tech companies, the social media companies and even the media companies.”²²

Were these intentional lies, or did Powell and Giuliani really believe what they were saying? Either way, the baseless claims of election fraud sounded in a familiar register for Trump-style politics: It was not really relevant whether they were true, only that they were useful to the president.

But making such a statement at a press conference or on cable television is a very different thing than making it in a courtroom. By late November 2020, the Trump campaign and its supporters had been handed defeat in over 30 cases, and according to one count, only five
lawsuits remained active as of mid-December. Pointing to this string of losses, the legal journalist Dahlia Lithwick suggested in Slate that courts were well-positioned to cut through the fog of mistruths around the election: “[D]ull workaday evaluation of the difference between facts and falsehoods,” Lithwick wrote, “is still usually the best cure for the madness of this current moment.”

Lawyers are not held to a standard of absolute truth—but, as the legal ethicist W. Bradley Wendel argues, “the parties may not rely on fanciful stories without an adequate factual foundation,” and legal arguments “must also be true, in a sense, to existing law.” Likewise, legal philosopher Jeremy Waldron writes that law represents “a mode of thoughtfulness that allows rival and competing claims to confront and engage with one another in an orderly process ... without degenerating into a shouting match.”

The problem for lawyers representing Trump was that the campaign’s claims of election fraud were, essentially, incoherent shouting. “Accusing people of fraud is a pretty big step,” said campaign lawyer Jonathan Goldstein in state court, acknowledging that he was not alleging fraud by election officials—despite the president’s public claims of exactly that. Likewise, though Giuliani had declared in public that Pennsylvania’s vote-counting was “an absolute fraud,” he took a different approach when representing the campaign in its lawsuit against Pennsylvania Secretary of State Kathy Boockvar. “This is not a fraud case,” he finally allowed under questioning by a judge.

Goldstein’s and Giuliani’s awkward admissions were not the first time that the Trump campaign had faced such uncomfortable questions in Pennsylvania courtrooms. During a November 5 hearing concerning Trump campaign allegations that Republican poll watchers had been excluded from the vote-counting process in Philadelphia, Judge Paul Diamond of the Eastern District of Pennsylvania appeared exasperated after a campaign lawyer finally admitted that Trump’s team had “a nonzero number of people in the room.” “I’m sorry, then what’s your problem?” the judge asked.

The judge was only able to extract this truth from Trump’s counsel after demanding it from him “as a member of the bar of this court”—a comment that Adam Winkler, a law professor at UCLA School of Law, later characterized as “judge-speak for ‘Be honest with me right now or I’ll have your bar card.’” Likewise, at the hearing’s close, the judge warned the parties that if he determined “one side or the other has not acted in good faith,” he had “jurisdiction to police the conduct of counsel and parties before me if they have misrepresented to me.”

Doctors and coronavirus misinformation

It was around this same time that state medical boards took their first public acts against doctors spreading falsehoods about the coronavirus. On December 3, the Oregon Medical Board suspended the medical license of Steven LaTulippe, a physician practicing in Dallas, Oregon, for “gross negligence” after receiving a complaint from a patient who had been
informed by LaTulippe’s clinic that masks and social distancing were ineffective against COVID-19. According to the board, the doctor also suggested that patients watch a YouTube video advising against the use of masks. YouTube appears to have since taken the video down.

The next month, Thomas Cowan—whose website identifies him as a “well-known alternative medicine doctor”—voluntarily surrendered his medical license to the Medical Board of California. Cowan had become famous in March 2020 after the YouTube channel “Patients for Healthcare Rights” uploaded a video of him claiming that the coronavirus pandemic had been caused by electromagnetic poisoning of cells by 5G technology. (This is false.) According to The Guardian, the video was viewed 1.8 million times in one form or another before YouTube removed it from the platform. 

Cowan was far from the first person to make wild claims about the dangers of 5G technology. But as the conspiracy theory that 5G had somehow caused the coronavirus spread more and more widely, journalists and researchers pointed to video of his remarks as a major factor in the conspiracy theory’s popularity. It’s not clear, though, whether Cowan’s surrender of his license in January 2021 was a direct result of the YouTube video or the outcome of a separate disciplinary process. The doctor had already been working under a five-year probation imposed by the board in 2017 following his treatment of a cancer patient with unlicensed medication.

**Professional identities**

Again and again, both lawyers and doctors identified their shared obligations as members of an expert discipline to explain the importance of accountability. A bipartisan group of over 1,500 lawyers—including a number of retired judges and former presidents of the American Bar Association and state bar associations—argued in a December 2020 open letter that the conduct of attorneys fighting to steal the election “demeans the legal profession and the multitudes of lawyers of all political persuasions who daily serve their clients and the public honorably.” Six months later, in the summer of 2021, the Federation of State Medical Boards (FSMB), a nonprofit representing the boards regulating medical practice across U.S. states and territories, wrote that doctors who spread inaccurate information about COVID-19 vaccines not only violate their “ethical and professional responsibility to practice medicine in the best interests of their patients” but also threaten “to further erode public trust in the medical profession.”

Sociologists often identify medicine and law as sharing their origins among the four “learned professions” established during the Middle Ages, the others being the clergy and university teaching. The two disciplines are usually listed among the earliest and paradigmatic examples of what it means for something to be a profession—though the precise answer to that question proves to be a complicated one. Generally speaking,
though, the idea of a profession refers to a community of highly specialized practitioners who see themselves as providing some kind of socially valuable knowledge and altruistic service, and who attain that knowledge through some kind of formal study.

Just as the profession controls entry into its own ranks, it also polices its own members.\textsuperscript{42} Today, both law and medicine point proudly to themselves as self-regulating.\textsuperscript{43} This is often understood as a contract of sorts between the professional community and society as whole, where the profession is granted freedom from external constraint in exchange for its own commitment to altruistic service.\textsuperscript{44}

The question of discipline for lawyers pushing the Big Lie speaks to the self-conception of the legal profession, just as discipline for doctors spreading falsehood speaks to the self-conception of medicine. This notion of a greater duty to the public, maintained through self-regulation—in these instances, a duty of fidelity to either the Constitution or public health, along with basic facts—is core to the notion of what a profession is. In a May 2021 order suspending Giuliani’s New York law license while bar authorities investigated his conduct, a state court set this idea out explicitly. When an attorney makes false statements “intended to foment a loss of confidence in our elections,” the unanimous five-judge panel explained, this “tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice.”\textsuperscript{45} The risk to the public created by Giuliani’s lies was all the greater, the court reasoned, because of his position as a member of a respected profession.

The State Bar of Texas, meanwhile, brought disciplinary charges against Powell in March 2022.\textsuperscript{46} And a federal judge in the Eastern District of Michigan required Powell and her legal team to pay over $175,000 in legal fees related to their filing of the “Kraken” lawsuit in that state.\textsuperscript{47} “[Their] politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television,” wrote Judge Linda Parker. “The nation’s courts, however, are reserved for hearing legitimate causes of action.”\textsuperscript{48}

**Regulating the Professions**

**Discipline in theory and practice**

The current disputes over truth and falsehood are far from the first time that lawyers and doctors have wrestled with these questions in conjunction with a national political dispute. Members of both professions played crucial roles in the U.S. government’s program of torturing detainees captured in the post-9/11 War on Terror—doctors in designing and implementing the program and lawyers in providing the legal scaffolding for it. Years later, revelations of this conduct sparked debates over the scope of professional responsibility and discipline: Should the lawyers and doctors involved in the program face professional...
sanctions? These disputes were not dry academic discussions; they became, as legal ethicist David Luban wrote at the time, “struggles for the soul of the professions.”

In the end, little in the way of discipline resulted. Complaints filed with medical boards against psychologists involved in torture were universally dismissed. Within the legal profession, the Justice Department’s Office of Professional Responsibility concluded that two officials in the Office of Legal Counsel, John Yoo and Jay Bybee, had engaged in misconduct in producing memoranda authorizing the use of torture—but the office’s analysis was overruled by a senior department official, and neither Yoo nor Bybee ultimately experienced bar discipline. “This is how the American legal profession simultaneously polices and takes care of its own,” wrote law professor Jack Balkin in disgust.

As this experience suggests, the lofty ideals of professional self-regulation often turn out to be considerably less lofty in practice. In both medicine and law, disciplinary authorities have faced repeated criticism for their failures to live up to ideals of professional self-regulation. The FSMB acknowledged in 2006 that many medical boards are “understaffed, overworked and poorly funded,” and state medical boards also vary a great deal in how aggressive they are in going after misconduct—meaning that, in the absence of a unified federal system, a physician who might be disciplined in one jurisdiction could fly under the radar in another. “The practice of medicine is on the honor system,” the executive director of the Virginia Board of Medicine told The Washington Post in 2005. “Once you get your license ... the board assumes that you're out there taking good care of patients until we hear otherwise.” But that system, he explained, “can't catch every single thing.”

Within law, the process of discipline is slow and often opaque, though again the degree of speed and transparency varies from jurisdiction to jurisdiction. In a 1998 overview of the disciplinary system, Leslie C. Levin, an expert on legal ethics, concluded that “sanctions imposed on lawyers are often light and inconsistent.” “Disciplinary rules and enforcement processes have not adequately curbed ethical abuses,” legal ethicist Deborah Rhode argued in 2002, “and the organized bar has not always acknowledged the problems, let alone insisted on solutions.”

Even as lawyers “tend to see the process as too severe and too responsive to frivolous complaints,” Rhode wrote, members of the public understand legal discipline as “too slow, too secret, too soft, and too self regulated.” Along these lines, anxiety over public perceptions of the profession’s capacity for self-regulation seemed to animate, at least in part, the New York appellate court’s decision in suspending Giuliani’s law license. When “false statements are made by an attorney,” the court wrote, this “erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession’s role as a crucial source of reliable information.”

The problem of expertise

https://knightcolumbia.org/content/the-professional-price-of-falsehoods
Medicine and law find themselves in a moment of self-reflection over their responsibility in providing “reliable information” at a time when expertise—the specialized knowledge represented by these professions—is itself in crisis. One way to understand the current anxiety over the stability of truth as a foundation of democratic life is as a reflection of uncertainty as to the role of expert knowledge. Sophia Rosenfeld, who studies intellectual history at the University of Pennsylvania, argues that the “post-truth” moment “is, at heart, a struggle over people as holders of epistemic authority and over their different methods of inquiry and proof in an intensely partisan era.”

Some level of agreement on basic factual truth is foundational for democracy. If we cannot reach mutual understanding about the contours of our shared world, then the only thing left is to compel agreement through force. At the same time, in an increasingly complex society, everyone cannot know everything—not because there is too little information available, but because there is far too much. And the limitations of human attention make it impossible to sort through all this material, both reliable and not. In this way, the democratizing possibilities of the internet—allowing people to instantaneously communicate with one another with relatively little constraint imposed by limitations of time or resources—have paradoxically created an environment that degrades the health of democracy by allowing good information to be drowned out with bad.

Perhaps for this reason, many attempts to grapple on variations of this problem focus on the institutions that mediate information, such as social media platforms and newspapers. Calls for platforms like Facebook to curate what their users post more carefully or to put the brakes on the spread of incendiary untruths are also calls for these companies to provide more guidance to the public about how best to understand the world. Likewise, the mainstream American press has struggled in recent years with the question of how to wisely choose what to direct their readers’ attention to and how—a sense of responsibility that itself assumes the power to shape attention in the first place.

Expertise, too, plays a curating role. Ordinary people, Rosenfeld explains in her book *Democracy and Truth: A Short History*, must rely on experts “to supply, candidly and transparently, the preliminary factual truths ... needed to make well-reasoned judgments.” Those without the relevant professional training depend, for example, on lawyers to explain the legal system and the constitutional order, and on doctors to filter out effective courses of medical treatment or public health interventions from meritless or harmful ones. This doesn’t mean that such experts must be deferred to in all circumstances, especially when these matters become issues of democratic concern. The push and pull of political debate leaves room for people to make their own informed judgments. But it does require reserving, as the political theorist Mark Warren writes, “an enormous domain of trust in authorities” on the part of nonexperts.
This creates problems when, as now, public trust in experts begins to erode, either for good reasons or bad ones. In the United States, Americans have come to express low or declining trust in government, in key sources of knowledge such as scientists and the press, and even in one another. Rosenfeld describes in *Democracy and Truth* how tensions between expert knowledge and democratic decision-making surface because “truth and its opposites are always implicated in questions of power—and thus truth is never fully divorced from politics or social conflict.” To what extent are experts looking out for their own interests—by failing to adequately discipline members of their own guilds, for instance—as opposed to the interests of the public? To what extent might they be cloaking their own political preferences in the language of supposedly objective knowledge?

In Rosenfeld’s telling, this question speaks to genuine tensions in how modern democracies navigate issues of truth and knowledge. But the major alternative on offer, presented by Trump and other practitioners of populist politics, does not provide a particularly satisfying answer. This populism, as Rosenfeld writes, is characterized by a rejection of expertise “and all the institutions, values, norms, procedures, and people that expertise goes with” in favor of a more authentic truth accessible by “ordinary people.” Trump promised to cut through the mediating role played by institutions like government, the organizational apparatus of the Republican Party, and the press in order to provide the public—or a certain segment of the public—with direct, authentic truth rather than the dissembling falsehoods of untrustworthy elites.

The problem, of course, is that this authentic, unmediated truth as offered by Trump was usually not truth at all. Often it undercut not only expertise but also the very concept of knowable facts—as when, in 2018, Giuliani declared on cable television that “truth isn’t truth.” The Mueller Report vividly describes Trump’s contempt for efforts by the lawyers around him to keep his conduct within legal bounds and accurately document the president’s actions, as when Trump directed the White House counsel to falsify records and informed him that “lawyers don’t take notes.” Likewise, during a visit to the Centers for Disease Control and Prevention (CDC) headquarters early in the coronavirus pandemic, Trump boasted that “maybe I have a natural ability” to understand medicine. A month later, he would suggest that cases of COVID-19 could be cured if patients injected themselves with disinfectant.

**The mechanics of professional discipline**

It was in this chaotic environment that, in 2020 and 2021, professional associations in medicine and law sought to reassert their role as curators of information and expertise. But the intertwining of questions of truth with questions of politics and power is never simple. And such work becomes all the more difficult when attempting to push back against a political movement that is itself contemptuous of expert knowledge. To what extent can these institutions help reestablish the contours of truth if they are themselves distrusted by a
A significant portion of the public, especially if that distrust falls along partisan political lines? According to one 2022 survey, Democrats and Republicans are sharply diverging when it comes to trust in science and medicine: Confidence in both fields increased among self-identified Democrats from 2018 through 2021 but decreased among Republicans.73

Disciplinary authorities in law and medicine do have one major advantage over other government-backed efforts to respond to mistruths: Although they are public actors that draw their authority from the government, they are less constrained by the First Amendment in their efforts to regulate truth and falsehood. Litigators would surely spring into action if a coalition of state government agencies were to impose some kind of sanction for members of the public spreading mistruths about COVID-19 vaccines. Yet state medical boards retain authority to discipline doctors for such conduct, as the FSMB warned. The question of how precisely this disciplinary authority interacts with the First Amendment is a complicated one, but it’s clear that legal and medical disciplinary bodies have at least some level of power to regulate what professionals say.74

In law, state courts admit lawyers to the bar and oversee the process of legal discipline for those who violate the rules of professional conduct adopted in that jurisdiction. Separately, conduct within the courtroom is governed by an overlapping network of jurisprudence, laws, and rules such as the Federal Rules of Civil Procedure.75 Lawyers who file frivolous suits might confront not only sanctions imposed by the judge in question but also discipline from the state where they are barred. And federal district courts, too, have the authority to establish their own processes for looking into allegations of misconduct and imposing discipline.76

In medicine, meanwhile, the practice of the profession in the United States is governed by state medical boards, which derive their power from what are colloquially known as state medical practice acts. These boards have the authority to admit physicians to the profession and set disciplinary standards.77 Physicians may also receive additional “board certification” from private organizations, also known as boards but distinct from state authorities, which provide credentialing within specialties—for example, in emergency medicine or pediatrics.78

Doctors are subject to numerous constraints on speech in the course of their professional work. Malpractice law, as Robert C. Post notes, imposes limits on physician speech “without so much as a nod to the First Amendment”: “Doctors commit malpractice for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist.”79 And some state medical practice acts do include provisions allowing for discipline of doctors making false or misleading statements to the public. In his overview of legal options for disciplining doctors who spread misinformation about COVID-19, health law scholar Carl H. Coleman points to statutes in Kentucky and Minnesota, which
allow, respectively, discipline of “unprofessional conduct” including “conduct likely to deceive or defraud the public” and “representations in which grossly improbable or extravagant statements are made which have a tendency to deceive or defraud the public.”

Other states limit their definitions of professional misconduct along these lines to falsehoods in advertising specifically.

The rules governing lawyers’ conduct allow and even encourage attorneys to act with less than complete candor in some situations. As Renee Knake Jefferson of the University of Houston Law Center states, “bluffing in negotiations is expected, and the failure to do so may risk violating the duty of competent representation. Lawyers are allowed to argue contrary positions in different jurisdictions at different times for different clients.” But, Jefferson writes, the Model Rules of Professional Conduct adopted by the American Bar Association—which the majority of states have adopted as a basis for their own rules of professional conduct—do forbid certain kinds of lies. Rule 8.4(c), for example, holds that lawyers engaged in “conduct involving dishonesty, fraud, deceit or misrepresentation” have engaged in “professional misconduct.” That rule would come to appear again and again in complaints to state bars and ethics proceedings against the lawyers who sought to overturn the 2020 election.

**Legal Discipline So Far**

**Judicial sanctions**

As litigation over the election dragged on through November and into December, well past when Joe Biden’s victory had become clear, calls for discipline of Trump’s attorneys grew increasingly louder. In late November, Democratic Rep. Bill Pascrell of New Jersey announced on Twitter that he had led complaints with multiple state bar authorities “seeking the disbarment of Rudolph Giuliani and 22 other lawyers representing Donald Trump in his attempts to overturn the election and demolish democracy.” Weeks later, 25 former presidents of the District of Columbia Bar wrote in The Washington Post that “Members of the bar have an obligation to refrain from undertaking a matter for a client when the lawyer knows that the purpose of the lawsuit is purely political and lacks concrete factual support or plausible legal merit.” Rhode, the legal ethicist, emphasized to The Post how “unusual” it was to see open calls for discipline along these lines. “Many of these letters have been crossing the political aisle, and that testifies to both the egregiousness of the conduct and its seriousness for the rule of law and the democratic process,” she said.

In the Michigan “Kraken” case, *King v. Whitmer*, Powell’s team faced early motions for sanctions filed by Michigan Gov. Gretchen Whitmer, Secretary of State Jocelyn Benson, and the city of Detroit—as well as by Robert Davis, a Wayne County, Michigan, resident whose ballot was among those that the Kraken plaintiffs sought to throw out in their efforts to “de-certify” the state’s electoral vote. The group sought sanctions under Section 1927 of Title 28
of the United States Code, which provides for the award of attorneys’ fees when a lawyer “multiplies the proceedings in any case unreasonably and vexatiously.” They also pointed to Rule 11 of the Federal Rules of Civil Procedure—which prohibits litigation filed for an improper purpose or on the basis of frivolous legal or factual claims—and the court’s inherent authority to establish discipline in the courtroom. Later, Detroit additionally requested that the court refer Powell and her team to state disciplinary authorities for disbarment.

Davis and the city of Detroit first moved for sanctions in late December, after Judge Parker denied Powell’s motion for emergency relief. The two defendants argued that the Kraken lawsuit was not only frivolous but also endangered democracy—both noting Judge Parker’s comment that “this lawsuit seems to be less about achieving the relief Plaintiffs seek ... and more about the impact of their allegations” on the public’s “faith in the democratic process and ... trust in our government.” That reasoning only became more pointed after January 6, when a mob of Trump supporters attacked the Capitol in an effort to halt the certification of the electoral vote and secure the president a second term in office. “Plaintiffs and their counsel appear dangerously incapable of understanding the consequences of their actions,” counsel for Detroit wrote following the insurrection.

Congress’ successful certification of the vote on January 6 essentially foreclosed any further legal efforts to undo the results of the election. As the last of the lawsuits petered out, some courts and bar associations began to move—albeit slowly—toward imposing discipline. In February 2021, Judge James Boasberg of the U.S. District Court for the District of Columbia referred attorney Erick Kaardal to the court’s Committee on Grievances. Kaardal had represented the Wisconsin Voters Alliance, a GOP-linked group, in suing to enjoin Congress and Vice President Mike Pence from certifying the electoral vote. Judge Boasberg had denied the plaintiffs’ request for an injunction two days before the certification, writing that the lawsuit “would be risible were its target not so grave: the undermining of a democratic election for President of the United States.”

Giuliani and Powell raised First Amendment objections to the disciplinary processes against them. In a motion to dismiss the charges filed by the Texas bar, Powell argued that disciplining her for alleged falsehoods about the integrity of the election would be at odds with “the First Amendment’s clear command that ‘[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market’”—quoting Justice Oliver Wendell Holmes’ famous dissent in Abrams v. United States. A Texas district court denied her motion in late June 2022.

Similarly, the New York court found unconvincing Giuliani’s similar argument that the state bar investigation into him violated his First Amendment rights, reasoning that “This disciplinary proceeding concerns the professional restrictions imposed on respondent as an attorney to not knowingly misrepresent facts and make false statements in connection with
his representation of a client.” “While there are limits on the extent to which a lawyer’s right of free speech may be circumscribed,” the court wrote, “these limits are not implicated” by Giuliani’s case.\(^8\)

This New York ruling, released in June 2021, in many ways set the tone for disciplinary proceedings to come. The state court suspended Giuliani’s law license on the grounds that his behavior “immediately threatens the public interest”—prohibiting him from practicing law while the state’s Attorney Grievance Committee continued to investigate his conduct.\(^9\) Bar authorities in the District of Columbia soon suspended Giuliani’s District of Columbia license on the basis of the New York investigation before initiating separate District of Columbia proceedings against him, seeking disbarment.\(^10\) The District of Columbia disciplinary committee reached a preliminary, nonbinding conclusion in December 2022 that Giuliani had violated at least one rule of attorney conduct, though the committee didn’t specify which one.\(^11\)

In New York, the court pointed specifically to Giuliani’s breach of multiple rules of professional conduct prohibiting false statements to courts and the public while representing a client.\(^12\) The judges singled out Giuliani’s waffling in *Trump v. Boockvar* over whether or not the campaign was in fact alleging fraud by Pennsylvania officials—the same exchange over which the District of Columbia Bar later brought separate ethics charges. The New York court also noted comments by Giuliani falsely claiming that dead and underage people and noncitizens had voted in various swing states, including multiple assertions made on Giuliani’s radio show after the Attorney Grievance Committee had filed to suspend his law license. “One only has to look at the ongoing present public discord over the 2020 election,” the court wrote, “which erupted into violence, insurrection and death on Jan. 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections.”\(^13\)

Shortly after New York suspended Giuliani’s law license—and after the District of Columbia suspended his license to practice in the district as well—Judge Parker in Michigan granted sanctions against Powell and her team under Section 1927, Rule 11, and the court’s inherent authority. The Kraken lawyers, the judge wrote, must reimburse the city of Detroit, the Michigan governor, and the secretary of state for their legal fees, and were to each complete 12 hours of continuing legal education courses “offered by a non-partisan organization.” Judge Parker also referred each of the lawyers to the relevant state bar for possible further discipline—potentially including disbarment.\(^14\)

The judge’s ruling emphasized the disconnect between the baseless claims of election fraud made by Trump and his supporters in the public sphere, on the one hand, and the ordered system of facts and meaning required in the courtroom, on the other. “Although the First Amendment may allow [the Kraken lawyers] to say what they desire on social media, in press conferences, or on television, federal courts are reserved for hearing genuine legal disputes
which are well-grounded in fact and law,” Judge Parker wrote. She also pointed to Powell’s own statement defending herself against a lawsuit by Dominion, one of the voting machine companies that Powell had declared was involved in a conspiracy to rig the election. “No reasonable person would conclude,” Powell had argued in her motion to dismiss, that her comments about election rigging “were truly statements of fact.” To file the Michigan lawsuit on the basis of those same allegations that Powell now acknowledged were “inexact” and “hyperbole,” the judge said, was “not acceptable.”

Of the many judges before whom post-election cases were litigated, however, only a few have weighed in on the question of discipline. And not all requests for sanctions have been successful. One judge in the U.S. District Court for the Eastern District of Wisconsin rejected motions by Wisconsin Gov. Tony Evers and others to sanction Trump’s legal team over its effort to throw out Biden’s victory in the state, ruling that the Wisconsin officials had waited too long to file and that the Trump team’s conduct, at least in part, had been “within the bounds of objective reasonableness.”

**Bar discipline**

Outside the courtroom, state bars have taken some action. In addition to Giuliani’s tangles with the New York and the District of Columbia bars, the Texas bar has brought disciplinary charges against not just Powell but also Texas Attorney General Ken Paxton—and Paxton’s aide Brent Webster—for their lawsuit asking the Supreme Court to block the counting of electoral votes from Pennsylvania and other swing states. Webster and Paxton, the Texas Commission for Lawyer Discipline alleged in disciplinary petitions filed in state court, “misrepresented to the United States Supreme Court” that votes had been cast illegally or tampered with by Dominion—statements “not supported by any charge, indictment, judicial finding, and/or credible or admissible evidence.” Both men, according to the Texas bar, had violated Rule 8.04(a)(3) of the Texas Disciplinary Rules on Professional Conduct, forbidding “conduct involving dishonesty, fraud, deceit, or misrepresentation.”

So far, Paxton has taken an aggressive posture against the disciplinary proceedings. “I’ll see you and the leftists that control you in court," he declared of the Texas bar. “I’ll never let you bully me, my staff or the Texans I represent into backing down or going soft on defending the Rule of Law.”

The Texas bar likewise alleged that Powell violated Rule 8.04(a)(3) in filing the Kraken litigation, along with a slate of other rules of professional conduct forbidding filing litigation that an attorney knows to be frivolous, “unreasonably increas[ing] the costs or other burdens of the cases,” and intentionally making false statements of material fact of law and pointing to evidence known to be false. As in Paxton’s and Webster’s cases, the Commission for Lawyer Discipline is asking a Texas court to enter a judgment of professional misconduct against Powell and impose “appropriate sanction”—potentially including disbarment. But
Powell, like Paxton, refuses to back down. In addition to arguing that bar’s action violates the First Amendment, she has called the disciplinary action “baseless and illegitimate” and claimed that individuals who filed bar complaints against her “seek to intimidate, harass, and suppress the ability of public officials or individuals to secure legal representation when they had evidence of election fraud.”

Along with Powell, Judge Parker referred the nine other members of the team behind the Michigan Kraken suit to their respective state bar associations for possible discipline. So far, authorities in those states have not made any details of related investigations public. This is typical for investigations in progress, though—so it’s difficult to say whether this silence indicates that state bars have decided not to discipline the other Kraken lawyers or whether probes might be ongoing. The exception is L. Lin Wood, Powell’s co-counsel on all four Kraken lawsuits, whom the State Bar of Georgia had been separately investigating not only for his conduct in election litigation but also erratic behavior toward colleagues.

In July 2022, the District of Columbia’s Office of Disciplinary Counsel began disciplinary proceedings against Jeffrey Clark, the Justice Department official who sought to aid Trump in his efforts to upend the 2020 election. Clark had unsuccessfully pushed the department’s leadership to send a letter to Georgia’s state legislature claiming—falsely—that the Justice Department had “significant concerns” about the integrity of the vote. These actions, according to the Office of Disciplinary Counsel’s filing, violated the District of Columbia ethics rules against “dishonesty, fraud, deceit or misrepresentation” and were “conduct that would seriously interfere with the administration of justice.” Six months later, the State Bar of California announced that it would seek the disbarment of John Eastman, the law professor and Trump advisor who pushed a legal theory under which Vice President Mike Pence could upend Congress’ certification of the electoral vote.

But as with motions for judicial sanctions, not all bar investigations have resulted in discipline: In March 2021, for example, the State Bar of Arizona dismissed a handful of complaints against lawyers who had sought to upend the counting and certification of the vote in that state. And even when bar authorities do bring ethics charges, they have sometimes struggled to move the disciplinary process forward—particularly in Texas. Paxton’s aide Brent Webster successfully convinced a Texas judge to toss out the case against him on jurisdictional grounds, though Paxton himself failed in a similar effort. Both cases are currently on appeal. In February 2023, another Texas state judge dismissed the bar’s case against Sidney Powell—not on the grounds that Powell’s conduct was acceptable, but, strangely, due to a technical issue involving the Texas Commission for Lawyer Discipline’s mislabeling of exhibits in a filing. The bar has not yet said whether it plans to appeal the ruling.

Medical Discipline So Far
Rising calls for action

By the late spring and early summer of 2021, roughly half of Americans had received at least one dose of the COVID-19 vaccine. But experts worried that persistent hesitancy to get vaccinated among some Americans, and outright refusals by others, would prevent the United States from effectively combating the pandemic. Falsehoods told by medical professionals about the safety of the vaccine further exacerbated the problem: While only a small proportion of doctors spread mistruths, the authority represented by a white coat made the danger all the greater. “When a doctor speaks, people pay attention,” Humayun Chaudhry, president of the FSMB, told The New York Times. “The title of being a physician lends credibility to what people say to the general public. That’s why it is so important that these doctors don’t spread misinformation.”

In July 2021, the federation's board of directors unanimously voted to approve a statement warning that, “Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license.” Doctors, the FSMB wrote, “have a powerful platform in society, whether they recognize it or not.”

According to Chaudhry, the board decided to draft the statement in response to rising concerns over the role of doctors in disseminating falsehoods. Over the following months, a number of state medical boards endorsed the FSMB’s comments or adopted similar policies. Some of them, such as the Maine, Mississippi, and Washington medical boards, extended the federation’s reasoning to condemn misinformation around COVID-19 beyond just material directly related to vaccines.

Voluntary medical associations, which do not license or discipline doctors but can provide additional credentialing for particular specialties, also weighed in. The American Board of Emergency Medicine announced in August 2021 that “making public statements that are directly contrary to prevailing medical evidence can constitute unprofessional conduct and may be subject to review by ABEM.” The next month, the American Board of Family Medicine, the American Board of Internal Medicine, and the American Board of Pediatrics released a joint statement in September 2021 announcing “support” for the FSMB’s position and warning “all physicians certified by our boards” that “such unethical and unprofessional conduct may prompt their respective board to take action that could put their certification at risk.”

Richard Baron, the president and CEO of the internal medicine association, told the medical journal The BMJ, “As standard setting organizations, we thought it was important to be on record, in a public way, to make clear that putting out flagrant misinformation is unethical and dangerous during a pandemic.”

This was not the first time that medical organizations had warned against falsehoods during the pandemic: In April 2020, the American Medical Association, a voluntary professional
group, warned that, “Physicians who engage public concerns through the media have an obligation to uphold the ethical standards of the profession.” But the involvement of the FSMB—whose member boards have the power to remove doctors’ licenses, and with it their ability to practice medicine—was something new. David Gorski, an oncologist and sharp critic of alternative medicine and the anti-vaccine movement, wrote on the website Science Based Medicine that he had been “heartened” to see the FSMB’s release. “The fact that the FSMB issued such a statement stating that physicians spreading misinformation and disinformation about COVID-19 risk disciplinary action was a big deal, at least to me.” Some, though, told The BMJ that they worried a potential loss of certification could squelch good-faith disagreement. “When I got that email I thought I’d better not put anything on social media about vaccines,” said Shveta Raju, a Georgia physician.

Raju’s views on the coronavirus may not be shared by all doctors. In March 2022, she would participate in a roundtable on “Closing the Curtain on Covid Theater” convened by Florida Gov. Ron DeSantis and would endorse Florida’s policy of recommending against vaccinating healthy children for COVID-19—counter to guidance from the CDC. But her comment speaks to the genuine difficulties inherent in regulating the boundaries of truth and falsehood. Where and how could professional organizations draw the line between harmful mistruths and genuine disagreement in a developing area of science and medicine? Social media platforms similarly encountered this problem early in the pandemic when they struggled to navigate rapidly changing guidelines from public health authorities over whether or not people should wear masks to avoid the coronavirus.

**The cases**

Perhaps because of this uncertainty, a relatively small number of doctors seem to have faced discipline from state boards for promoting coronavirus falsehoods. In the case of Steven LaTulippe, the Oregon physician whose medical license was suspended in December 2020, it took nine more months before the state’s medical board revoked the doctor’s license outright and ordered him to pay a $10,000 fine. LaTulippe, the board wrote in its final order, engaged in “unprofessional and dishonorable” conduct and “gross negligence” under Oregon law by downplaying the seriousness of the coronavirus to his patients and advising them against wearing masks.

Over the course of 2021 and 2022, a handful of state medical boards across the country began to take action. In October, the Washington state medical board temporarily pulled the license of Scott C. Miller, a physician assistant who had proposed ivermectin as a COVID-19 “cure” and inveighed against the use of masks at a school board meeting. Miller later prescribed ivermectin to multiple patients suffering from COVID-19—two of whom later died. Two months later, the Maine Board of Osteopathic Medicine issued an order requiring Doctor Paul Gosselin to temporarily cease practicing medicine in response to Gosselin’s
“spread of misinformation regarding COVID-19” and practice of signing letters granting exemptions from COVID-19 vaccine requirements.¹³⁶

Both Miller and Gosselin sought to rally public opinion behind them. Shortly after Miller’s suspension, an enthusiastic news article on a right-leaning website described a rally of “well over one hundred supporters” gathering to demand Miller’s reinstatement.¹³⁷ Fundraisers linked on Miller’s professional website and a page calling to “Reinstate Scott Miller” show over $90,000 raised in donations.¹³⁸ On his own GoFundMe page, Gosselin defended himself against what he characterized as an unjust investigation persecuting him for “revealing the truth about the current restrictions being imposed on our children and the American people.” GoFundMe, however, soon removed the fundraiser under its policies prohibiting vaccine misinformation.¹³⁹ In the spring of 2022, Gosselin also sued unsuccessfully to block ongoing disciplinary proceedings.¹⁴⁰

But as of June 2022, Gosselin can once again practice medicine—though he’s prohibited from issuing vaccine exemption letters during a year of probation. The Maine osteopathy board fined him $1,000 and required him to complete 20 hours of continuing medical education. Notably, though, the board’s order references only Gosselin’s issuing of vaccine exemption letters and poor record keeping—not anything to do with misinformation.¹⁴¹ Gosselin’s lawyer, F. Ron Jenkins, presented this as a victory in comments to the press, declaring, “This case started out as a witch hunt against a doctor alleged to be spreading ill-defined ‘COVID-19 misinformation’ and a danger to the public.”¹⁴² Miller, though, had his license indefinitely suspended in December 2022.¹⁴³

As with bar investigations, ongoing disciplinary processes by state medical boards are typically confidential—so it’s difficult to get a complete picture of the landscape of discipline for doctors peddling falsehoods about the coronavirus.¹⁴⁴ And there’s no way to know how many boards might be conducting such probes out of the public eye.¹⁴⁵ What’s more, the medical publication Medscape reported that, according to FSMB president Chaudhry, “in some cases ... boards have contacted physicians and have persuaded them to voluntarily refrain from making false public statements, without taking disciplinary action.”¹⁴⁶

In December 2021, the FSMB released statistics on how its member boards were grappling with falsehoods around the coronavirus. The federation wrote that 67 percent of boards “have experienced an increase in complaints related to licensee dissemination of false or misleading information.”¹⁴⁷ Meanwhile, 21 percent “have taken disciplinary action” on that basis.¹⁴⁸ “The staggering number of state medical boards that have seen an increase in COVID-19 disinformation complaints is a sign of how widespread the issue has become,” FSMB leader Chaudhry commented.¹⁴⁹ He framed the numbers as a positive sign: “We are encouraged by the number of boards that have already taken action to combat COVID-19 disinformation by disciplining physicians who engage in that behavior and by reminding all
physicians that their words and actions matter, and they should think twice before spreading disinformation that may harm patients.”

But if two-thirds of boards received complaints about misinformation and less than a third have taken action on that basis, that leaves a substantial number that have not yet done so. And there are many doctors prominently involved in distributing coronavirus falsehoods who appear to remain in good standing with state disciplinary authorities. In September 2021, NPR reviewed the medical licenses of 16 doctors with “proven track records” of promoting misinformation. The reporters found that 15 maintained licenses in good standing. One had let his license expire, with no indication of discipline involved.

Among the physicians identified by NPR was Simone Gold, the doctor present at the Capitol on January 6. But most prominent and prolific among the doctors disseminating falsehoods about COVID-19 may be Joseph Mercola, an osteopathic physician in Florida identified by The New York Times as “the most influential spreader of coronavirus misinformation online.” Mercola, who has repeatedly tangled with regulators over his sale of unproven health treatments, has been banned from YouTube for his promotion of falsehoods about the pandemic, and Twitter and Facebook say that his posts on those platforms are commonly labeled as misleading or taken down.

In at least one instance, a medical board has pointed to a physician’s endorsement of Mercola in disciplining a doctor: Suspending physician Meryl Nass for prescribing ivermectin and hydroxychloroquine, the Maine Board of Medical Licensure also identified physician Nass’ decision to tweet an interview with Mercola as evidence that she was spreading misinformation. Yet Mercola still himself maintains an active Illinois medical license.

**Can Disciplinary Authorities Do More?**

**Improving medical discipline**

Some advocates have called for medical boards to become more aggressive in disciplining physicians who spread falsehoods. No License for Disinformation, a group of health care professionals and patient advocates formed during the coronavirus pandemic, has argued for “the urgent need for state medical boards to investigate physicians who are publicly and intentionally spreading false information.” “It is clear that state medical boards have grounds to take disciplinary action based on state Medical Practice Acts,” the group wrote in a December 2021 report produced together with the de Beaumont Foundation, a nonprofit working on issues of public health.

Other members of the medical profession, though, are less certain. Disciplinary processes “weren’t designed” to address “doctors who are out in the public domain, making broad statements about discredited treatments,” said Kristina Lawson, who leads the Medical
Jeffrey Flier, the former dean of the Harvard Medical School, told The BMJ that he was “not opposed to certain levels of misinformation triggering a decision to question somebody’s license” during “a public health emergency” like the pandemic, but warned that “this is not how the system for licensure and certification has traditionally worked, and creates many opportunities for mistaken judgment about what is and is not misinformation.”

As Flier notes, part of the difficulty here for state medical boards would involve the inherent trickiness of identifying where exactly the line falls between harmful falsehood and legitimate debate. But another factor has to do with the distinction between regulating doctors’ conduct concerning patients under their care, as opposed to regulating what they might say outside the hospital or exam room. In every public case of a physician or physician assistant who has thus far been disciplined for behavior relating to misinformation, boards have pointed to conduct involving direct treatment of patients. Yet with doctors like Gold and Mercola, the main concern involves their spreading of mistruths to the public as a whole.

Aggressive pursuit of discipline on those grounds, though, could raise First Amendment concerns—particularly after the Supreme Court’s 2018 ruling in National Institute of Family and Life Advocates (NIFLA) v. Becerra, which struck down a California law requiring certain disclosures by anti-abortion “crisis pregnancy centers.” In finding that content-based regulations of speech “are presumptively unconstitutional,” NIFLA seemingly restricted some of the previous leeway in First Amendment doctrine that professional organizations might use to govern conduct. The Court did, however, allow that a vague category of “regulations of professional conduct that incidentally burden speech” would be permissible.

Where does that leave efforts to discipline medical professionals for falsehoods related to the coronavirus? Coleman, the health law scholar, writes that state medical boards will be on firmer ground in “disciplining physicians for statements made in connection with medical procedures,” which would fall into the category of regulation “incidentally” burdening speech. But outside the space of medical practice, disciplining doctors who spread misinformation in public statements would likely constitute a content-based regulation under NIFLA and would be subject to the exacting strict scrutiny standard. For this reason, Coleman suggests that state medical boards focus disciplinary efforts on “physicians who knowingly spread medical misinformation, or who do so despite having serious doubts as to whether the information is true,” echoing the standard for actual malice under New York Times v. Sullivan. Such conduct undermines public faith in medicine, Coleman argues, and professional discipline in response may hold up under strict scrutiny as “a narrowly tailored means of achieving the compelling interest in preserving trust in the integrity of the medical profession.”
In April 2022, the FSMB issued a report that seems to adopt this careful approach while also acknowledging public frustration with the slow process of discipline. The document, titled Professional Expectations Regarding Medical Misinformation and Disinformation, notes that “some state medical boards have faced criticism from their state government or frustrated segments of the public and media outlets because of certain actions or perception of inaction on their part” and recommends that state boards both issue policies against disinformation and think expansively about how to use existing statutes to tackle the problem. The federation encourages medical boards weighing discipline to take into account whether the mistruths in question occurred “during the course of provision of care” to a patient or “in the context of an established physician-patient relationship,” and to ask themselves: “Did the licensee knowingly disseminate disinformation?”

Focusing on knowing dissemination of falsehoods also helps mitigate the difficulty of where to draw the line between good-faith disagreement and malicious mistruths. “If the physician can’t point to any credible evidence that supports what they’re saying, it’s reasonable to make an inference either that they knew that it was false information or that they just didn’t care,” Coleman explained at a May 2022 meeting of the FSMB, pointing to claims that vaccines implant microchips in patients’ blood or magnetize their bodies.

Recent legislation in California suggests how difficult it can be to find this sweet spot. In September, Gov. Gavin Newsom signed into law a bill explicitly authorizing the Medical Board of California to discipline physicians for sharing coronavirus falsehoods with patients “in the form of treatment or advice.” Not just knowing lies but also misinformation, defined as “false information that is contradicted by contemporary scientific consensus contrary to the standard of care,” could be the basis for discipline. A number of state and national medical associations backed the legislation, and Lawson, the state medical board’s president, endorsed the bill on Twitter.

Because the board already has authority to investigate California doctors, it’s not clear how much the legislation would actually do. In a signing statement seemingly crafted to guard against First Amendment challenges, Newsom emphasized that the law is “narrowly tailored to apply only to those egregious instances in which a licensee is acting with malicious intent or clearly deviating from the required standard of care while interacting directly with a patient under their care” and that “discussing emerging ideas or treatments ... does not constitute misinformation or disinformation under this bill's criteria.” Still, the legislation quickly faced challenges in court from doctors who argue that it could chill medical debate and restrict physicians from speaking candidly with patients. In January 2023, a federal district judge granted a preliminary injunction against the law’s enforcement on the grounds that its definition of “misinformation” was unconstitutionally vague.

Elsewhere, state medical boards have faced political pressure from Republican politicians aligning themselves with coronavirus skepticism. As of fall 2022, lawmakers in 30 states had
introduced legislation that would restrict boards’ ability to discipline doctors for providing off-brand treatments for COVID-19 or spreading mistruths. So far, three states—Missouri, North Dakota, and Tennessee—have passed such provisions into law, though these bills focus on the act of prescribing ivermectin or hydroxychloroquine rather than related speech. In Tennessee, after the state’s medical board voted to adopt a policy on vaccine misinformation similar to the FSMB’s, the Republican-dominated state legislature pushed the organization to take down the statement—even, reportedly, threatening to dissolve the board outright if it did not comply. The standoff resolved when the medical board agreed to remove the policy from its website but did not rescind it outright.

Under these circumstances, it’s not hard to see why state medical boards in Tennessee and other states with Republican governors and legislatures might think very carefully before launching aggressive investigations of doctors spreading misinformation. The FSMB report seems to strike a warning note on this front, writing, “State medical boards should not be dissuaded from carrying out their duty to protect the public.” The federation has also spoken publicly against legislation limiting the authority of medical boards, warning that this “sets a dangerous precedent and puts the public at risk.” Likewise, in a June 2022 policy “aimed at addressing public health disinformation,” the American Medical Association announced that the group would work to “ensure licensing boards have the authority to take disciplinary action against health professionals for spreading health-related disinformation.”

But even when boards do have the authority and political leeway to look into cases of potential misconduct, there is also the problem of investigative capacity. Chaudhry acknowledged to CNN that state medical boards “simply do not have the resources ... to monitor what's happening on the internet or what’s going on even in an individual patient encounter.” As he explained, boards generally are not proactive in looking into misconduct but depend on complaints from members of the public to begin investigations. This problem of resources is longstanding: The FSMB conceded in 2006 that many state boards are “understaffed, overworked and poorly funded,” and a study published that year by the Department of Health and Human Services (HHS) and the Urban Institute found that boards “reported that constrained funding or staffing limited their capabilities to discipline doctors.”

In its report with the de Beaumont Foundation, No License for Disinformation proposed addressing this issue by explicitly authorizing state medical boards to conduct investigations without waiting for complaints and establishing “public-private partnerships for proactive monitoring and investigating.” The group has also pushed for additional transparency as boards carry out their work, calling for some mechanism by which “questionable decisions or disproportionate levels of inaction can be reviewed and referred to the entity that oversees the state medical boards for review.”
Improving legal discipline

As in medicine, it’s hard to gauge the number of lawyers who might face discipline for their role in election litigation. Bar investigations, like investigations by state medical boards, are generally confidential, though some jurisdictions institute more transparency than others.184 Of the nine lawyers referred by Judge Parker to their respective state bars for discipline, for example, only Powell’s and Wood’s cases have become public; there has been no news of how authorities are handling the additional referrals. The same is true of lawyers involved in the other Kraken cases. It’s not clear what, if anything, has come of Judge Boasberg’s referral of Erik Kaardal to the disciplinary committee of the U.S. District Court for the District of Columbia, though Kaardal failed in his effort to throw out the referral when the U.S. Court of Appeals for the District of Columbia Circuit ruled against him on procedural grounds.185

In some respects, the legal disciplinary system has moved with unusual aggression in responding to election misinformation. Interim suspensions from the practice of law, such as the one New York imposed on Giuliani, are “relatively rare” and must meet a “very high” standard, according to Stephen Gillers, a legal ethics professor at New York University.186 Meanwhile, in Texas, the state bar first rejected the ethics complaint against Paxton that eventually led to the bar’s case against him. After the bar declined to investigate, the Texas Board of Disciplinary Appeals ordered it to look into the matter—a rare reversal that, as of 2021, occurred in only eight percent of cases.187 “This is a big step because this rarely happens,” said Jim Harrington, a Texas lawyer and voting rights advocate who joined a complaint against Paxton, when the bar finally decided to bring its ethics case in Texas court. “I just know from being a lawyer for 50 years, this is very rare.”188

Some would like it to be less so. One organization, the 65 Project—named for one tally of the lawsuits seeking to overturn Biden’s victory—is working to file bar complaints against lawyers involved in these cases. According to CNN, the group has identified “111 lawyers who signed on to legal pleadings.”189 So far, it has filed over 50 complaints, including against lawyers litigating the Kraken lawsuits; would-be “fake electors” promoting themselves as alternative Electoral College delegates for Trump in states carried by Joe Biden; and Republican Sen. Ted Cruz.190 But once again, there’s no way to know how disciplinary authorities might handle such cases, and it may be months or years before their decisions become public—if they ever do.

Compared to the 111 lawyers reportedly identified by the 65 Project, a relatively small number have faced court sanctions or are now facing public action by a bar—a ratio that suggests that discipline might be merited for more attorneys than have so far received it. “One might debate whether, in any given case or class of cases, disciplinary authorities are exercising laudable self-restraint or falling down on the job,” writes Bruce Green, who directs Fordham Law School’s Lou Stein Center for Law and Ethics.191 “But it is hard to judge since the
disciplinary decision-making process is confidential and the authorities do not publicly acknowledge, much less justify, their decisions not to pursue discipline.”

In an article surveying the prospects for discipline of lawyers involved in post-election litigation, Green notes that authorities have a great deal of discretion in deciding whether to impose discipline. They might, he suggests, hold back in bringing ethics charges for fear that such action would appear “an unjustifiable response to public pressure or a discriminatory action based on the plaintiffs’ lawyers’ unsympathetic political beliefs, political objectives, or clients”—exactly what Powell and Paxton have alleged in Texas.

And the matter is complicated still further by the tangled dynamics between state bars, courts in which post-election cases were litigated, and litigants deciding whether to file motions for sanctions. Political considerations, Green writes, may have influenced the decision of state officials not to bring motions for sanctions in many of the election lawsuits: Perhaps “the officials might have worried that many voters would disfavor a punitive motion, or the officials may have thought it unwise to continue providing a judicial forum for baseless election fraud allegations.” Likewise, judges and state bars might be deferring to each other in deciding whether to pursue discipline—with the result that no discipline takes place.

Green’s suggestion is that state bars adopt greater transparency in their decision making. “The disciplinary process’s opacity,” he argues, “erodes public confidence in the law as a self-regulating profession, as the public reaction to the disciplinary outcomes in the cases of the lawyers who challenged the 2020 presidential election may come to prove.” Without a view into how state authorities choose which cases to pursue, “the public sees lawyers regulating lawyers, effectively giving scofflaws a pass, in secret and without any justification”—even if authorities have good reasons not to push for charges against some lawyers involved in the post-election litigation.

The District of Columbia Bar, at least, appears to have taken this into consideration. Filings in disciplinary cases are not typically available online, but as of fall 2022, the website of the District’s Board on Professional Responsibility now boasts a link to filings in “Cases of Public Interest.” So far, the only two cases listed are those of Clark and Giuliani.

Other scholars and advocates have proposed empowering disciplinary authorities to allow for more aggressive policing of mistruths. Renee Knake Jefferson argues that “Lawyer lies about the outcome of a valid election, whether told in chambers or in a press conference, risk causing unique, devastating harm to our democratic form of government and should not be tolerated by members of our profession.” Lawyer discipline tends to focus on conduct that takes place within the scope of a lawyer’s professional practice. Thus, for example, the 65 Project’s argument that Ted Cruz was representing the Trump campaign and Pennsylvania Republicans: that attorney-client relationship, in the group’s view, puts Cruz’s
public comments about a stolen election within the bounds of bar discipline. But, Jefferson writes, “This confluence of duties to the legal system and society in a democracy supports a narrow extension of the duty of candor beyond the confines of the courthouse, especially if a lawyer’s speech causes severe harm.”

Once again, though, the issue is how such an extension would interact with the First Amendment. In Jefferson’s view, confining this duty of candor to “lies about election results” would be narrow enough to pass constitutional muster. But Green and Rebecca Roiphe of New York Law School have argued that “[r]estrictions that limit an attorney’s speech outside a courtroom but have no clear effect on a pending proceeding or on the fiduciary relationship” of lawyer and client “likely violate the First Amendment”—reasoning that a lawyer’s lie in such circumstances differs little from the constitutionally protected lie of a nonlawyer. At the very least, extending ethics rules to public statements by lawyers would not be a sure constitutional bet, particularly after NIFLA.

So, there are likely limits on the kind of discipline that medical and legal state authorities can provide when it comes to misinformation. Even if those organizations were to push the envelope, though, the mechanics of professional discipline may not be well-suited to responding to the spread of falsehoods.

**Practical and political concerns**

Disciplinary processes work slowly—an issue that has long been a matter of concern in both the legal and medical professions. In his study of New York legal disciplinary procedures, Stephen Gillers points to instances of years-long investigations and argues that such delay “mocks the professed goal of protecting the public and the administration of justice if a lawyer who will be (and should be) suspended or disbarred is left to practice for years until the day of sanction.” Likewise, the 2006 HHS-Urban Institute report on state medical boards acknowledged that “critiques of Board performance have often cited long delays before closure.”

Along these lines, No License for Disinformation and the de Beaumont Foundation propose “expedited timelines to process complaints in the domain of public health”: “Medical misinformation and disinformation directly impact public health in a matter of days. Complaint review processes that take months or years are completely insufficient.” The group undoubtedly has a point. Consider, for example, Thomas Cowan’s video blaming 5G for the coronavirus: The original video of Cowan’s remarks uploaded to YouTube received 390,000 views within a week and racked up almost 2 million views on the platform before YouTube and other social media companies took action. But Cowan retained his medical license for another 10 months before surrendering it to the Medical Board of California.

Likewise, while attorneys like Giuliani and Powell are facing discipline for their role in pushing to overturn President Biden’s victory in the 2020 election, many other lawyers have
not. And even in cases where the disciplinary process is moving along, it’s moving slowly. Giuliani’s law license may be suspended in New York, but the state’s disciplinary authority has yet to conclude its investigation into conduct that occurred in late 2020 and early 2021—and the District of Columbia Bar only filed ethics charges in June 2022. Powell, meanwhile, was first sanctioned by a federal judge in August 2021, a full nine months after the election she sought to undermine. It was another seven months before the Texas bar brought disciplinary action against her in state court—only for that suit to be dismissed by a judge in the winter of 2023, over two years after the insurrection. By that time, the Big Lie of election fraud had long ago become orthodoxy in the Republican Party.²⁰⁶ It remains a persistently malignant force in American politics today and shows no sign of ebbing any time soon.

Perhaps speedier discipline against Powell might have prevented the lie from taking root quite so deeply. But given how quickly information travels across the internet, it’s hard to imagine any way that a disciplinary process could possibly outpace the spread of lies. Even the most efficient of investigators will need to conduct exactly the kind of careful, diligent work that Giuliani and Powell declined to engage in—not the least because of the necessity that a state adjudicative body observe certain requirements of due process.²⁰⁷ And even if an aggressive judge moves quickly to impose sanctions, those proceedings take time—and meanwhile any lies contained in a lawyer’s initial filing will have long since made their way to Twitter or Fox News.

When it comes to countering falsehood, then, it might make more sense to weigh the value of professional discipline as a deterrent. If lawyers and doctors know that discipline will likely follow if they file a frivolous complaint built on lies about election fraud or tell their patients falsehoods about the coronavirus, perhaps they’ll be less inclined to take that step. “I … take into account the risk that this substantial sanction might chill zealous advocacy for potentially legitimate claims,” wrote one magistrate judge in an order imposing a sanction of over $186,000 on two lawyers who had filed a conspiratorial lawsuit challenging the 2020 election. “But I conclude that the repetition of defamatory and potentially dangerous unverified allegations is the kind of ‘advocacy’ that needs to be chilled.”²⁰⁸

Within the legal field, there’s some indication that the prospect of discipline already had that effect in 2020. A number of prestigious law firms signed on to represent the Trump campaign or the Republican Party in early post-election lawsuits—only to quickly abandon ship. In one instance, the firm Porter Wright Morris & Arthur withdrew from Trump v. Boockvar only four days after filing the lawsuit in the first place.²⁰⁹ As Winkler, the legal ethicist, noted at the time, “Lawyers in high-profile cases rarely quit a client so quickly—unless they fear that the representation will violate the rules of legal ethics. Then they have no choice.”²¹₀

The result was that the majority of legal challenges to the 2020 election were litigated not by top-tier election lawyers but rather by the people who were willing to take the risk of
sanctions. Porter Wright’s withdrawal, for example, set in motion the chain of events that led to Rudy Giuliani tangling with a Pennsylvania judge over whether or not the campaign was alleging fraud.²¹¹

The 65 Project, the group seeking to shame lawyers involved in post-election litigation, has explicitly pointed to deterrence as a goal in filing ethics complaints. “Ultimately, we want to demonstrate to all the lawyers that the next time that Sidney Powell or Rudy Giuliani calls and says, ‘Hey, will you sign your name to this,’ they’ll say ‘no,’ because they’ll realize that there are professional consequences,” Michael Teter, the organization’s director, told The New York Times.²¹²

This presents an empirical question: Given that the Big Lie is very much alive and well, will the disciplinary process as it’s currently operating dissuade lawyers going forward from filing litigation built on baseless claims of election fraud? Claims of election fraud will continue to permeate American elections going forward. What, then, will litigation look like after the 2024 presidential vote? Established firms like Porter Wright may continue to steer clear of such lawsuits, especially after seeing the disciplinary proceedings against lawyers like Powell—but will others?

The 2022 midterm elections provided a test case. In the runup to the November 2022 elections, The New York Times tallied at least “three dozen lawyers and law firms” that backed Trump’s efforts to overturn the election in 2020 and now were organizing to “lay the groundwork for challenging the results of midterm elections.” Among them were John Eastman and Erick Kaardal.²¹³ But in the end, the weeks and months after the midterms saw almost no litigation seeking to overturn election results—nothing close to the flood of cases after the November 2020 vote. The exception was in Arizona, where Republican gubernatorial candidate Kari Lake—an aggressive proponent of falsehoods about the 2020 election—sued in state court to overturn her loss to Democratic candidate Katie Hobbs.²¹⁴ The Arizona judge threw out the case, as did a federal judge in an earlier suit by Lake challenging the use of electronic voting machines in the state. In federal court, Lake’s legal team is now facing sanctions under Rule 11 and Section 1927.²¹⁵ Kurt Olsen, Lake’s counsel in both the state and federal litigation, had previously worked to keep Trump in power after the 2020 election, including by signing on to represent Texas in Paxton’s failed Supreme Court lawsuit.²¹⁶

The relative calm after the 2022 midterms might be a success story for deterrence, in that respectable lawyers and law firms stayed away from litigation challenging election results. Stories like Olsen’s, though, point to something important: Deterrence works only if the subject of that deterrence actually cares about the potential punishment imposed. In 2020, the risk of sanctions was effective in dissuading lawyers at Porter Wright and other large firms from litigating baseless fraud claims—because, presumably, it mattered to those
lawyers what other members of their professional community thought of them. But if someone—like Olsen—is willing to burn those bridges, that threat may do less to stop them.

Many of the lawyers facing bar discipline have maintained a defiant posture. Powell and some members of her Michigan Kraken team have filed an appeal of Judge Parker’s sanctions order with the U.S. Court of Appeals for the Sixth Circuit, arguing that the district judge’s ruling was “nit-picky.” In her filings in Texas court, Powell wrote at length about supposed evidence of potential election insecurity, though she’s held back from outright arguing that fraud occurred in 2020. Responding to the ethics charges against them, both Giuliani and Eastman have insisted that they were correct in their belief that malfeasance had taken place during the 2020 election. Giuliani repeatedly cited the widely debunked documentary “2000 Mules” as evidence of election irregularities.

These positions seem unlikely to endear bar authorities. That matters little, though, because the audience for these claims is less the community of fellow lawyers and more the alternative media ecosystem on the far right. In this world, which exists on networks like Fox and Newsmax and “alt-tech” websites like Trump-run Twitter alternative Truth Social, Trump really did win the election—and if these attorneys lose their bar licenses, they may well be able to position themselves as martyrs. Paxton, for his part, won a runoff election for the Republican nomination to serve another term as Texas attorney general even after the Texas bar filed suit against him.

A similar dynamic is at work in medicine, too. Ryan Cole, a physician who referred to coronavirus vaccines as “needle rape” and a “poisonous attack on our population,” was appointed to a regional Idaho public health board in September 2021 and has retained his seat despite reports of an ongoing investigation into Cole’s care of COVID-19 patients by the Washington Medical Commission. Rather than a source of concern for the GOP county commissioners who appointed Cole, the doctor’s skepticism of vaccines was actually a selling point: One commissioner told the Idaho Capital Sun that he hoped Cole would stand up to the “force and coercion” of mainstream medicine. In January 2023, the Washington board announced ethics charges against the doctor. Selling the story of a brave doctor opposing an oppressive medical establishment can be a lucrative business. Gorski, the oncologist and medical blogger, argued in an August 2021 post that “In the age of COVID-19, the entire right-wing COVID-19 disinformation ecosystem ... will treat any physician whose license is sanctioned by a state medical board as a free speech martyr.” A month later, he wondered “if even losing their licenses would dissuade some of these doctors” from spreading falsehoods about the coronavirus—on the grounds that some of the physicians most prominently making these arguments are by now more pundits or social media personalities than practicing doctors.
Leading coronavirus misinformation purveyor Joseph Mercola, for example, has made millions of dollars selling health supplements. Simone Gold, meanwhile, raised $430,000 for her legal defense—an amount that, her lawyer acknowledged in court, far outstripped her actual legal expenses—by framing herself as a victim of political persecution for her presence in the Capitol on January 6, despite the fact that she had pleaded guilty. “I find it unseemly that your organization is raising hundreds of thousands of dollars for its operations, including your salary,” commented the judge before sentencing Gold to 60 days in prison.

“Some answers are clearly wrong”

This doesn't mean that professional discipline has no value—or that authorities couldn't be more aggressive in pursuing that discipline. A doctor whose medical license has been suspended or revoked will still be able to spread falsehoods online, but they will no longer be able to potentially harm their patients by, say, prescribing ivermectin to treat COVID-19. A disbarred lawyer can no longer file a frivolous suit. That does not solve the problem of misinformation writ large, but it isn't nothing, either.

Rosenfeld, the historian, suggests in Democracy and Truth that reestablishing truth as a basis for democratic politics requires “small-bore ways of modeling ... truth-telling and lie-detecting as epistemological and ethical commitments in public life.” She argues for the strengthening of a range of institutions originally “founded in part to help us police the boundaries between truth and falsehood as a civic responsibility”—among them the courts, as a branch of government “in the business of upholding the reign of truthfulness.”

Professional disciplining authorities might fit in this category, too.

Such organizations can't reestablish truth singlehandedly. State medical boards will not be able to definitively draw the line between fact and falsehood, as the difficulty of pinning down what constitutes medical misinformation shows. The same is true in the legal context. Paul Rosenzweig, who sits on the board of the 65 Project, explained in a podcast interview that the legal discipline process “is probably a good thing for reasserting the value of truth, but it doesn't establish what the truth is. It just establishes that there was falsity out there that was sanctionable.” Likewise, because legal ethics allows lawyers room to reframe the facts in the way most advantageous to their client, legal discipline is ill-suited “to police anything except the grossest and most extreme of falsehoods,” Rosenzweig explained.

But in an era where extreme falsehoods have become unnervingly common, there is a power to naming them as such. As two executives of the American Board of Internal Medicine (ABIM) wrote in The New England Journal of Medicine, arguing for more aggressive oversight of doctors spreading falsehoods, “There aren't always right answers, but some answers are clearly wrong.” In some ways, legal and medical disciplinary authorities are growing more assertive, but there is a long way to go until they measure up fully to the moment—which
requires acting both aggressively and judiciously to reidentify the boundaries of the “clearly wrong.”

And other organizations have a role to play. Within medicine, voluntary professional associations, as private actors not bound by the First Amendment, have greater flexibility than state medical boards in disciplining members—and some such groups, like the ABIM, have argued for using that power by temporarily or permanently rescinding the certifications of doctors spreading falsehoods. At least one hospital has severed its relationship with a doctor over her promotion of vaccine misinformation. More broadly, the professional circles of doctors and lawyers are just one part of a much larger, overlapping network of cultures and institutions—including the mainstream press and the moderation efforts of social media companies—that help a democratic society piece together what constitutes truth. None of those institutions alone can fully man the barricades against harmful falsehoods, but they can each provide some portion of the defense.

But for this to work, the public must be able to have faith in these institutions in the first place. In this respect, concerns over maintaining public trust in the medical and legal professions speak directly to Rosenfeld’s desire for a more open, democratic mechanics of expertise. If people perceive state bars and medical boards as closing ranks to protect their own members rather than taking a stance in defense of the truth, this may further damage public confidence. Inaction in the face of these falsehoods risks shoring up the same dismissive view of these professions—that is, as elites standing only for their own self-enrichment—expressed by populist figures like Donald Trump.

The man himself, though, has stayed relatively quiet on the subject. Despite his onetime place at the center of the networks of falsehood around the coronavirus and election fraud, his roughly two-year-long ban from Twitter and Facebook in the wake of the insurrection left him without a prominent and reliable platform from which to weigh in. “...I am hereby demanding EQUAL TIME to spell out the massive Voter Fraud & Dem Security Breach!” he posted somewhat plaintively on Truth Social in response to hearings by the House committee investigating January 6.

But even without the reach of Trump’s Twitter platform, those to whom he once gave a boost on social media are doing their best. In the days following her sentencing and despite the judge’s admonition against fundraising, Gold tweeted a link to her almost 500,000 Twitter followers directing them to a new website soliciting donations to #FreeDrGold. When she left prison in September 2022, far-right Republican Rep. Louie Gohmert was there to greet her, posing for photographs to be posted to Twitter as he presented Gold—who had just served a sentence for breaching Congress on January 6—with a flag that had flown over the U.S. Capitol. And there was something else waiting for Gold, too: a new medical license, freshly issued to her by the Florida Board of Medicine.
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