

# ARTICLES

## Vaccine Hesitancy and Legal Ethics

NOELLE N. WYMAN\* AND SAM HEAVENRICH\*\*

### ABSTRACT

*Vaccine hesitancy remains an impediment to America’s successful emergence from the COVID-19 pandemic. This Article analyzes the role that legal ethics can play in countering hesitancy. Though the Rules of Professional Conduct do not obligate lawyers to be vaccinated, several prohibit lawyers from knowingly spreading disinformation about the importance, safety, and effectiveness of vaccines. As the recent fallout from the 2020 post-election litigation shows, however, professional discipline for spreading disinformation is possible but rare. Accordingly, we propose alternative avenues for aligning legal ethics with public health: requiring vaccine passports for court appearances, incorporating public health concerns into the Comments accompanying the Rules, and countering vaccine disinformation through continuing legal education.*

### TABLE OF CONTENTS

INTRODUCTION . . . . .	2
I. VACCINE UPTAKE. . . . .	4
A. VACCINATION AS A MORAL OBLIGATION . . . . .	5
B. VACCINATION AS A PROFESSIONAL OBLIGATION . . . . .	7
II. VACCINE DISINFORMATION . . . . .	9

---

\* Yale Law School, J.D. expected 2022; Columbia University, B.A., 2017.

\*\* Yale Law School, J.D. expected 2022; Columbia University, B.A., 2017. Our deepest thanks to William Garfinkel for his guidance and encouragement and to Connor Mui, Nicole Ng, Elizabeth Rosenblatt, and Derek Weiss for helpful comments and suggestions. We are also grateful to Anashua Dutta, Ben Phillips, Hayley Roth, Molly Sherwood, and the other editors of the *Georgetown Journal of Legal Ethics* for invaluable feedback. © 2022, Noelle N. Wyman & Sam Heavenrich.

A.	DISINFORMATION OUTSIDE OF LITIGATION. . . . .	14
1.	THE RULES . . . . .	14
2.	ELECTION DISINFORMATION . . . . .	16
3.	VACCINE DISINFORMATION . . . . .	18
B.	DISINFORMATION IN LITIGATION. . . . .	21
1.	THE RULES . . . . .	22
2.	ELECTION DISINFORMATION . . . . .	23
3.	VACCINE DISINFORMATION . . . . .	25
III.	ALIGNING LEGAL ETHICS WITH PUBLIC HEALTH. . . . .	27
A.	COURTHOUSE VACCINE PASSPORTS . . . . .	27
B.	MODEL RULE COMMENTS . . . . .	28
C.	CONTINUING LEGAL EDUCATION. . . . .	30
	CONCLUSION. . . . .	31

## INTRODUCTION

Though the COVID-19 vaccine rollout has been in full swing since the end of 2020, just over sixty percent of the American public is fully vaccinated.<sup>1</sup> Nearly twenty percent of Americans do not intend to get vaccinated at all.<sup>2</sup> Contributing in part to the hesitancy is widespread disinformation about the importance, safety, and effectiveness of vaccines.<sup>3</sup> Despite the factual evidence that available vaccines are safe,<sup>4</sup> vaccine hesitancy continues to cost thousands of lives.<sup>5</sup>

---

1. *COVID-19 Vaccinations in the United States*, CTRS. FOR DISEASE CTRL. & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#vaccinations\\_vacc-total-admin-rate-total](https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total) [<https://perma.cc/53QZ-3KUU>] (last updated Dec. 16, 2021).

2. Tamara Keith, *The Share of U.S. Adults Willing to Get Vaccinated Ticks Up, A New Poll Finds*, NPR (Sept. 3, 2021, 12:00 PM), <https://www.npr.org/2021/09/03/1033750072/the-share-of-u-s-adults-willing-to-get-vaccinated-ticks-up-a-new-poll-finds> [<https://perma.cc/MK3S-UW4H>].

3. See *infra* notes 41, 47–51 and accompanying text.

4. See *How Safe Is the Vaccine?*, YALE NEW HAVEN HEALTH, <https://www.ynhhs.org/patient-care/covid-19/Vaccine/how-safe-is-the-vaccine> [<https://perma.cc/C3EX-W2H5>] (last visited Nov. 21, 2021); *Safety of COVID-19 Vaccines*, CTRS. FOR DISEASE CTRL. & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html> [<https://perma.cc/GG84-DN6K>] (last updated Nov. 15, 2021).

5. Emma Pierson, Jaline Gerardin & Nathaniel Lash, *The Lives Lost to Undervaccination, in Charts*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/interactive/2021/09/14/opinion/states-undervaccination-deaths.html> [<https://perma.cc/4UW2-FK5H>].

Against this backdrop, legal scholars and policy makers have explored how to address the disconnect between public sentiment and public health, with employer and school-based mandates receiving the most attention so far.<sup>6</sup> Existing legal scholarship on vaccinations has yet to focus on something closer to home: the role that legal ethics can play in countering vaccine hesitancy. Some individual lawyers and legal organizations have been at the forefront of the opposition to vaccines and the spread of misinformation about vaccine safety and effectiveness.<sup>7</sup> In this Article, we investigate whether the Rules of Professional Conduct offer a way to address these issues.<sup>8</sup>

In Part I, we introduce the concept of vaccination as a moral obligation for lawyers. Though the *Rules* do not—and we believe should not—mandate lawyers to be vaccinated, certain lawyers should consider it a moral duty.<sup>9</sup> In Part II, we examine the legal community’s role in the antivaccination (antivax) movement and explore the concept of disinformation as professional misconduct, looking to recent post-election litigation as an analogy. Importantly, we distinguish disinformation (the *deliberate* spread of false information) from misinformation (the spread of false information in general). Rules requiring truthfulness and candor do prohibit lawyers from knowingly spreading antivax disinformation in certain contexts. Yet in practice, disciplinary authorities are unlikely to actually sanction lawyers for such behavior. Part III presents three alternative pathways for aligning legal ethics with public health: requiring vaccine passports for court appearances, amending the Comments accompanying the *Rules* to incorporate public health concerns, and offering continuing legal education programs on how to identify misinformation and disinformation.

---

6. See, e.g., Debbie Kaminer, *Vaccines in the Time of Covid-19: How Government and Businesses Can Help Us Reach Herd Immunity*, 2020 WIS. L. REV. FORWARD 101 (2020); I. Glenn Cohen & Dorit Rubinstein Reiss, *Can Colleges and Universities Require Student Covid-19 Vaccination?*, HARV. L. REV. BLOG (Mar. 15, 2021), <https://blog.harvardlawreview.org/can-colleges-and-universities-require-student-covid-19-vaccination> [https://perma.cc/WDQ2-264A].

7. See *infra* Part II.

8. The ABA Model Rules of Professional Conduct aim to “define proper conduct for purposes of professional discipline,” setting forth directives for a wide range of attorney conduct, from client confidentiality to lawyer advertising. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 14 (2020) [hereinafter MODEL RULES]. Virtually every state has adopted the Model Rules, with some state-to-state variation. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules) [https://perma.cc/9A87-WJWD]; *Jurisdictional Rules Comparison Charts*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts) [https://perma.cc/A96Y-43XT]. Here and elsewhere, we refer to the Model Rules of Professional Conduct as the “Rules of Professional Conduct,” or “*Rules*,” noting state-level variations and departures from the *Rules* where applicable.

9. See *infra* notes 27–29.

## I. VACCINE UPTAKE

Vaccines are the “highway to normalcy.”<sup>10</sup> The more people are vaccinated, the sooner we approach a post-pandemic world—notwithstanding the emergence of variants.<sup>11</sup> At the beginning of the vaccine rollout, the greatest barrier to uptake was access.<sup>12</sup> Now, though America has a sufficient supply of vaccines for everyone to get an initial full dosage, uptake has stagnated due to vaccine hesitancy.<sup>13</sup>

The reasons for vaccine hesitancy are manifold and complex. One significant driver, which we explore in Part II, is misinformation surrounding the safety and efficacy of vaccines. Other factors mitigate the impact of vaccine hesitancy, such as the existence of vaccine mandates<sup>14</sup> and certain professional and moral obligations.<sup>15</sup>

Lawyers remain among the unvaccinated. Though the federal government, some state and local governments, and a substantial number of large law firms have implemented vaccine mandates,<sup>16</sup> most private law jobs are at smaller firms<sup>17</sup> which may not follow suit. That means that firm-by-firm efforts, though helpful, will not fully address gaps in uptake.

---

10. *Fauci Says COVID Vaccines Are Key to “Normalcy” amid Vaccine Hesitancy*, CBS NEWS (Apr. 20, 2021), <https://www.cbsnews.com/video/anthony-fauci-on-coronavirus-vaccines-and-normalcy-dr-payal-patel-analysis> [<https://perma.cc/KNW6-LFP8>].

11. Nonetheless, current data indicates that vaccines can reduce the severity—and potentially, the spread—of recent COVID variants. *See Science Brief: COVID-19 Vaccines and Vaccination*, CTRS. FOR DISEASE CTRL. & PREVENTION (Sept. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> [<https://perma.cc/7C7S-GQHD>] (last visited Dec. 17, 2021).

12. *Cf.* Kristen Underhill & Olatunde C.A. Johnson, *Vaccination Equity by Design*, 131 YALE L.J.F. 53 (2021) (describing inequities in early vaccine access).

13. *See supra* notes 1–4.

14. *See* Andrea Hsu, *Faced with Losing Their Jobs, Even the Most Hesitant Are Getting Vaccinated*, NPR (Oct. 7, 2021, 5:00 AM ET), <https://www.npr.org/2021/10/07/1043332198/employer-vaccine-mandates-success-workers-get-shots-to-keep-jobs> [<https://perma.cc/AE6T-WMRQ>].

15. *See infra* notes 24–27 and accompanying text.

16. *See* Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021) (federal government); *Mandatory Employee Vaccines—Coming to a State Near You?*, LITTLER MENDELSON (Oct. 26, 2021), <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you> [<https://perma.cc/P7L7-JNHR>] (state and local governments); *Vaccine Mandate Tracker*, AM. LAW. (Sept. 7, 2021, 9:30 AM), <https://www.law.com/americanlawyer/2021/09/07/vaccine-mandate-tracker-the-law-firms-requiring-vaccination-for-office-returns> [<https://perma.cc/HWC7-CU87>] (law firms).

17. *See* Pre-Law Advising Off., *Firm Size: From Solo to BigLaw*, UMASS AMHERST, [https://prelaw.umass.edu/topics/firm\\_size](https://prelaw.umass.edu/topics/firm_size) [<https://perma.cc/3E9A-TAQ4>] (last visited Nov. 30, 2021); *see also* Chinekwu Osakwe, *Many Midsize Law Firms Mandate Vaccinations, Others Wait and See*, REUTERS (Sept. 29, 2021, 1:44 PM), <https://www.reuters.com/legal/government/many-midsize-law-firms-mandate-vaccinations-others-wait-see-2021-09-29> [<https://perma.cc/E62X-HHJY>].

In this Part, we consider whether lawyers have a responsibility to be vaccinated. In answering, we distinguish between *moral* obligations (responsibilities that lawyers should follow as a matter of normative ethics, but which are largely unenforceable) and *professional* obligations (official standards of conduct that lawyers must follow or face the threat of discipline).<sup>18</sup> The *Rules*, which set out professional obligations, do not require lawyers to get vaccinated. Nevertheless, barring extenuating circumstances such as medical contraindications,<sup>19</sup> lawyers who are relied upon to perform vital in-person services should consider it a moral imperative to do so.

#### A. VACCINATION AS A MORAL OBLIGATION

When the American Bar Association (ABA) first promulgated a national code of legal ethics in 1908, known as the Canons, it set forth moral guidelines that were largely aspirational rather than mandatory.<sup>20</sup> By contrast, the current *Rules* focus primarily on minimum standards of conduct—the baseline requirements that lawyers must adhere to or else face potential discipline.<sup>21</sup> But that is not to say that the legal profession is or should be free of broader moral imperatives. Vaccination is arguably one such moral obligation.

Both in the context of COVID-19 and other infectious diseases, scholars have argued under various normative ethical theories that individuals have a moral obligation to contribute to herd immunity by being vaccinated.<sup>22</sup> Beyond the general moral obligation that all individuals have, some actors might bear a heightened duty. This is because the ethical principles underlying the moral obligation

---

18. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1385 n.3 (2004) (“The term ‘ethics’ has a dual meaning, one that connotes standards of conduct for a profession and another that connotes aspirational or moral ideals.”); Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 490 (1999):

“[E]thics” for lawyers means something different from, and more than, simply following a set of rules established by the legal profession, rules with obligatory qualities implying penalties for their violation. Many within the profession seem to think of “legal ethics” as such rule-obligations, but it is fair for us to assume that ethics can and does mean a lot more.

19. Notably, these circumstances are rare. See Megan Cerullo, *Want a Medical Exemption for the COVID-19 Vaccine? Good Luck with That*, CBS NEWS (Sept. 23, 2021), <https://www.cbsnews.com/news/covid-vaccine-mandate-medical-exemption> [<https://perma.cc/89XT-9KR2>].

20. See Andrews, *supra* note 18, at 1439–52.

21. William T. Ellis & Billie J. Ellis, *Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer’s Aspirational Drive to an Ethical Practice*, 26 T.M. COOLEY L. REV. 591, 598 (2009). Of course, there are also aspirational *Rules*, like the pro bono requirement. MODEL RULES R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer *should aspire* to render at least (50) hours of pro bono publico legal services per year.” (emphasis added)).

22. See, e.g., Alberto Giubilini, Thomas Douglas & Julian Savulescu, *The Moral Obligation to Be Vaccinated: Utilitarianism, Contractualism, and Collective Easy Rescue*, 21 MED. HEALTH CARE & PHIL. 547 (2018); Lars Korn, Robert Böhm, Nicolas W. Meier & Cornelia Betsch, *Vaccination as a Social Contract*, 117 PNAS 14980, 14980 (2020), <https://www.pnas.org/content/pnas/117/26/14890.full.pdf> [<https://perma.cc/D6EB-BSQX>] (concluding based on an empirical study that “vaccination is a social contract in which cooperation is the morally right choice”).

to be vaccinated—such as beneficence (the moral obligation to act in ways that benefit others) and nonmaleficence (the moral obligation to avoid harming others)<sup>23</sup>—are especially salient in certain contexts like healthcare, where workers bear a “special ethical and professional responsibility to protect others.”<sup>24</sup> In an article advocating for a national COVID-19 vaccine mandate for healthcare professionals, a nurse argued that “personal choice must surrender to professional responsibility if someone’s choice endangers patients.”<sup>25</sup> Teachers, too, have described themselves as bearing a heightened moral duty to be vaccinated. As one leader of a teachers union stated, “[i]t’s our responsibility, those of us who can be vaccinated, to become vaccinated to keep our students safe.”<sup>26</sup>

Vaccine uptake might also be considered a moral obligation for certain groups of lawyers, such as those in direct-services roles. At least when it comes to representing clients, ethical principles of beneficence and nonmaleficence motivate the legal profession as well.<sup>27</sup> As Chief Justice Burger described, “[t]he obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts.”<sup>28</sup> Of course, lawyers typically do not “care” for their clients like emergency-room nurses care for their patients or preschool teachers care for their students. But many lawyers provide vital services to COVID-19-vulnerable populations, such as those who practice elder law or disability law, or who serve individuals in the criminal-justice system, where the risk of contracting COVID-19 is

23. Helena C. Maltezos & Athanassios Tsakris, *Vaccination of Health-Care Workers Against Influenza: Our Obligation to Protect Patients*, 5 INFLUENZA & OTHER RESPIRATORY VIRUSES 382, 386 (2011); *see also id.* (“In light of [the principles of nonmaleficence and beneficence], one would argue that [healthcare workers] have the obligation to take all appropriate measures in order to protect their vulnerable patients and thus should get vaccinated.”).

24. Ezekiel J. Emanuel & David J. Skorton, *Mandating COVID-19 Vaccination for Health Care Workers*, ANNALS INTERNAL MED. (Sept. 2021), <https://www.acpjournals.org/doi/10.7326/M21-3150> [<https://perma.cc/B3GB-3F9V>]; *see also* Susan Fox Buchanan, *Medical Ethics at the Millennium: A Brief Retrospective*, 1997 COLO. L. 141, 143 (“Beneficence and nonmaleficence are considered ‘classical’ medical ethics.”).

25. Theresa Brown, *Vaccinate All Health Care Workers Now*, CNN (Sept. 21, 2021, 8:11 AM), <https://www.cnn.com/2021/07/26/opinions/covid-19-vaccine-health-care-worker-mandate/index.html> [<https://perma.cc/Q3PK-WXWW>].

26. Madeline Fox, *Milwaukee Teachers Union Supports Potential Vaccine Mandate for MPS Teachers*, WIS. PUB. RADIO (Sept. 9, 2021, 10:15 AM), <https://www.wpr.org/milwaukee-teachers-union-supports-potential-vaccine-mandate-mps-teachers> [<https://perma.cc/B9UC-PUSL>]. The President of the American Federation of Teachers likewise described vaccination as a “community responsibility.” Bill Chappell, *Fauci Says Teachers Should Be Required to Be Vaccinated*, NPR (Aug. 10, 2021, 12:44 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/08/10/1026384528/fauci-teachers-vaccination-mandates-schools-students-covid> [<https://perma.cc/Y4G5-SA3G>].

27. *See, e.g.*, MODEL RULES pmb. ¶ 9 (“These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests . . .”); *see also* Robert W. Tuttle, *The Fiduciary’s Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889 (arguing that lawyers representing a fiduciary have moral duties of beneficence and nonmaleficence).

28. Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 276 (1982). Scholars have made similar arguments. *See, e.g.*, James D. Gordon III, *Law Review and the Modern Mind*, 33 ARIZ. L. REV. 265, 271 (1991); Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLINE J. PUB. L. & POL’Y 331, 357–58 (2008); Matt Christensen, *Counselors and Healers at Law*, 52 ADVOCATE 20, 21 (2009); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1.

elevated.<sup>29</sup> All these considerations indicate that at least certain members of the bar have a moral duty to be vaccinated beyond the baseline ethical obligations they share with the general population.

## B. VACCINATION AS A PROFESSIONAL OBLIGATION

Though vaccination should be considered a moral obligation, lawyers do not have a professional obligation to get vaccinated. A crucial distinction exists between what constitutes an ethical duty and what merits enforcement through professional discipline. As one scholar described, the *Rules*, just like the U.S. legal system within which they exist, are not “devised to create or foster a utopia or to force citizens to follow a stringent moral code.”<sup>30</sup> And rightfully so. Even if we think lawyers have special moral obligations beyond the scope of what the *Rules* prescribe, it would be either impractical or counterproductive (and more than a little Orwellian) to enforce many of these obligations through the formal tools of professional discipline.

No *Rules* contemplate vaccine-related duties, or even a lawyer’s duty to promote public health more generally. Arguments could be made for interpreting the *Rules* to implicitly require lawyers to get vaccinated, though we are ultimately unconvinced. The strongest argument is that for certain lawyers—such as those who make court appearances—the duty to zealously represent one’s clients extends to getting vaccinated. Rule 1.3, adopted in substantially the same form in nearly every jurisdiction,<sup>31</sup> requires lawyers to act with “reasonable diligence” when representing a client.<sup>32</sup> Comment 1 to the Rule elaborates: “A lawyer must

---

29. See *Covid-19’s Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), <https://eji.org/news/covid-19s-impact-on-people-in-prison> [<https://perma.cc/5VWU-858C>]. Similar arguments were made for granting certain groups of lawyers priority access to vaccines. When the work of public defenders, judges, and prosecutors slowed during the pandemic, pretrial detainees were held for extended periods due to court closures and the resulting case backlogs. See Nicole Hong & Jan Ransom, *Only 9 Trials in 9 Months: Virus Wreaks Havoc on N.Y.C. Courts*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/12/02/nyregion/courts-covid.html> [<https://perma.cc/PM4W-LNLD>]. The New York State Bar Association urged the state government to prioritize vaccination for these and related workers, such as attorneys for children and legal aid attorneys, whose work has remained both essential and client-facing during the pandemic. *Resolution for the Immediate Vaccination of Criminal Defense Attorneys, Civil Legal Services Attorneys, Mandated Family Court Attorneys, Attorneys for the Children (AFC), Prosecutors, and Family and Criminal Court Judiciary*, N.Y. STATE BAR ASS’N (Feb. 9, 2021), <https://nysba.org/app/uploads/2021/02/NYSBA-VACCINE-RESOLUTION-as-approved-2.9.2021.pdf> [<https://perma.cc/5HNC-KJWF>].

30. Ellis & Ellis, *supra* note 21, at 599.

31. See ABA CPR POL’Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.3 (2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_3.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf) [<https://perma.cc/QF4L-KYP9>]. The two exceptions are Texas and Oregon, which feature substantially the same formulation phrased in the negative. See TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.01(b)–(b)(1) (State Bar of Tex. 2021) (“In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer . . . .”); OR. RULES OF PROF’L CONDUCT R. 1.3 (Or. State Bar 2021) (“A lawyer shall not neglect a legal matter entrusted to the lawyer.”). For why Texas’s *Rules* differ, see Leslie C. Griffin, *What Do Clients Want? A Client’s Theory of Professionalism*, 52 EMORY L.J. 1087, 1095–97 (2003).

32. MODEL RULES R. 1.3.



also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>33</sup>

Being unvaccinated could conceivably interfere with a lawyer's duty to act diligently and with zeal in advocacy. For example, if zealous advocacy requires a lawyer to interview people at a local prison or conduct other in-person interactions, she might be more reluctant to undertake these measures if she were unvaccinated because of the risks posed to her health. Being unvaccinated could thereby give rise to a potential *Rules* violation, if the lawyer allows her personal interests to interfere with zealously advocating for her client.<sup>34</sup> But whether or not this argument has any theoretical merit, it is unlikely that sanctions would ever attach to such behavior. Rule 1.3 discipline is typically reserved for lawyers who utterly fail to represent their clients: not showing up for a hearing or trial, for example, or cutting off communication with the client.<sup>35</sup> Other arguments for interpreting the *Rules* to include a vaccine-uptake duty are even less convincing.<sup>36</sup>

\* \* \*

Whether or not lawyers should consider it their ethical obligation to get vaccinated, it is not a duty that is likely to be enforceable through the Rules of Professional Conduct. Therefore, in Part II, we investigate whether the *Rules*

---

33. *Id.* R. 1.3 cmt. 1.

34. Contracting COVID could also compromise a lawyer's ability to effectively represent her client. However, this would more likely trigger Rule 1.16(a)(2), which requires lawyers to withdraw when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," rather than Rule 1.3's disciplinary sanctions. The two are certainly related; commentators have acknowledged that lawyers who are too ill cannot provide the diligent representation that Rule 1.3 requires. See Mark J. Fucile, *Model Rule 1.16(a)(2): Where Wellness Meets Withdrawal*, 27 PRO. LAW. 1 (2020). However, Rule 1.16(a)(2) tends to apply when a lawyer tries to "continue with an ongoing matter without telling anyone or associating additional or replacement counsel" after developing a serious condition. *Id.* For example, this scenario would be relevant if a lawyer contracted COVID but attempted to work through it and doing so significantly compromised her work. But a duty to withdraw has no necessary relationship to a duty to get vaccinated—for instance, a lawyer could refuse vaccination, contract COVID, and promptly withdraw as counsel without incurring sanctions.

35. See, e.g., *Lorain Cnty. Bar Ass'n v. Lewis*, 172 N.E.3d 139, 141 (Ohio 2021) (finding a violation of Ohio Rules of Professional Conduct Rule 1.3 where the attorney failed to submit relevant documents and respond to telephone calls from a client, resulting in the client having to obtain new counsel); *In re Ogunmeno*, 476 P.3d 1162, 1169 (Kan. 2020) (finding a violation of Kansas Rules of Professional Conduct Rule 1.3 where a defense attorney failed to appear at the client's suppression hearing and the trial itself); *In re Hickman*, 296 So. 3d 1036, 1038–40 (La. 2020) (finding a violation of Louisiana Rules of Professional Conduct Rule 1.3 where the attorney "neglected two legal matters, failed to communicate with two clients, and misrepresented the status of a case to one client").

36. In addition to the argument we discuss, one might argue for a duty to get vaccinated based on lawyers' general obligations to third parties. Over the past few decades, the *Rules* have expanded in scope to cover attorneys' duties to third parties. This move has been controversial; critics charge that obligations to nonclients "threaten[] fundamental aspects of the attorney-client relationship." Barbara Glesner Fines, *Speculating on the Future of Attorney Responsibility to Nonclients*, 37 S. TEX. L. REV. 1283, 1298 (1996). Nonetheless, there are a few places where the *Rules* impose duties on lawyers that extend to parties beyond themselves, their clients, and the court. The most relevant Rules in this regard are Rules 4.1 through 4.4, which obligate lawyers to be honest and respectful towards third parties. That said, we do not believe these modest duties to third parties can be stretched so far as to obligate lawyers to protect nonclients from disease. In the absence of subject-specific language, it is hard to make the case that these Rules directly compel lawyers to get vaccinated.



impose a different duty related to vaccine hesitancy: Must lawyers refrain from spreading disinformation about vaccines?

## II. VACCINE DISINFORMATION

The spread of false information surrounding the importance, safety, and effectiveness of vaccines has impeded their uptake—for COVID-19 and numerous other viral diseases.<sup>37</sup> Crucially, this false information has taken the form of both *disinformation*—that is, false information spread deliberately to influence public opinion—and *misinformation* circulated due to mere ignorance or inadvertence.<sup>38</sup> For the purposes of this Article, we use “misinformation” as an umbrella term encompassing false information spread with or without the intent to deceive, and “disinformation” to refer to intentionally deceptive false information about vaccines.

False narratives around vaccines long predate the pandemic. Antivax movements have existed since at least 1796, the year the first smallpox vaccine was developed.<sup>39</sup> In the United States, antivax sentiment picked up at the turn of the twentieth century after Andrew Wakefield published a since-discredited study falsely claiming that the MMR vaccine causes autism.<sup>40</sup>

But the spread of false information about vaccines has worsened over time. In an interview in July 2021, Dr. Anthony Fauci remarked that “if we had the kind of false information that’s being spread now,” he was “certain that we’d still have polio in this country.”<sup>41</sup> Antivax advocates have “cross-pollinated” with conspiracy-theory groups like QAnon to promote elaborate myths about vaccines.<sup>42</sup> During the coronavirus pandemic, they have propagated theories that the government is using COVID-19 vaccines to implant trackable microchips,<sup>43</sup> that Bill

---

37. See *infra* notes 47–51 and accompanying text.

38. *Compare Misinformation*, MERRIAM-WEBSTER’S UNABRIDGED DICTIONARY (last visited Dec. 17, 2021), with *Disinformation*, MERRIAM-WEBSTER’S UNABRIDGED DICTIONARY (last visited Dec. 17, 2021).

39. Jan Hoffman, *How Anti-Vaccine Sentiment Took Hold in the United States*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/health/anti-vaccination-movement-us.html> [<https://perma.cc/N68Y-4PY8>].

40. *Id.*

41. Ben Tinker & Alaa Elassar, *Fauci Says Polio Would Still Exist in the US if the ‘False Information’ Currently Being Spread Existed Decades Ago*, CNN (July 17, 2021, 10:02 PM), <https://www.cnn.com/2021/07/17/us/fauci-polio-coronavirus-false-information/index.html> [<https://perma.cc/K6ZM-TJQG>].

42. Renée DiResta, *Anti-Vaxxers Think This Is Their Moment*, ATLANTIC (Dec. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/campaign-against-vaccines-already-under-way/617443> [<https://perma.cc/JS4B-K2P7>].

43. Jack Goodman & Flora Carmichael, *Coronavirus: Bill Gates ‘Microchip’ Conspiracy Theory and Other Vaccine Claims Fact-Checked*, BBC (May 30, 2020), <https://www.bbc.com/news/52847648> [<https://perma.cc/6C7U-ZBY7>].

Gates engineered the pandemic to make money from selling vaccines,<sup>44</sup> and that ingredients in vaccines will turn people into 5G antennas.<sup>45</sup> Much of this viral misinformation spreads through online platforms like Facebook, Twitter, and Instagram.<sup>46</sup>

Despite the outlandish nature of these claims, antivax misinformation has had widespread and consequential effects. A recent study in *Nature* found that misinformation can significantly increase vaccine hesitancy and thereby limit public uptake of COVID-19 vaccines.<sup>47</sup> While antivax sentiment might originate with fringe groups, inaccurate information about vaccines reaches a remarkably large population of Americans.<sup>48</sup>

The stakes are high. Vaccines save millions of lives each year,<sup>49</sup> and the COVID-19 vaccines in particular prevented over 1.1 million American deaths in the first half of 2021.<sup>50</sup> COVID-19 undervaccination in the United States continues to cause thousands of unnecessary deaths.<sup>51</sup>

Against this backdrop, state attorneys general and members of Congress have called on online platforms to fight misinformation surrounding vaccines.<sup>52</sup> But many members of the legal community have bolstered the antivax movement. For instance, Sidney Powell—a former member of President Trump’s legal team

---

44. Davey Alba & Sheera Frenkel, *From Voter Fraud to Vaccine Lies: Misinformation Peddlers Shift Gears*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/12/16/technology/from-voter-fraud-to-vaccine-lies-misinformation-peddlers-shift-gears.html> [<https://perma.cc/84GD-Z5L6>].

45. DiResta, *supra* note 42; Jack Goodman & Flora Carmichael, *Coronavirus: 5G and Microchip Conspiracies Around the World*, BBC (June 27, 2020), <https://www.bbc.com/news/53191523> [<https://perma.cc/4223-Z9PR>].

46. Barbara Ortutay & Amanda Seitz, *Defying Rules, Anti-Vaccine Accounts Thrive on Social Media*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/anti-vaccine-accounts-thrive-social-media-e796aaf1ce32d02e215d3b2021a33599> [<https://perma.cc/W4W4-VBFR>].

47. Sahil Loomba, Alexandre de Figueiredo, Simon J. Piatek, Kristen de Graaf & Heidi J. Larson, *Measuring the Impact of COVID-19 Vaccine Misinformation on Vaccination Intent in the UK and USA*, 5 NATURE HUM. BEHAV. 337, 337 (2021).

48. Savannah Young, *Addressing Vaccination Hesitancy*, 28 U. MIAMI INT’L & COMP. L. REV. 375, 382 (2021).

49. *Immunization*, WORLD HEALTH ORG. (Dec. 5, 2019), <https://www.who.int/news-room/facts-in-pictures/detail/immunization> [<https://perma.cc/6M5G-XTUT>]. In the United States alone, vaccines have prevented over 700,000 deaths between 1994 and 2013. Cynthia G. Whitney, Fangjun Zhou, James Singleton & Anne Schuchat, *Benefits from Immunization During the Vaccines for Children Program Era—United States, 1994–2013*, CTRS. FOR DISEASE CTRL. & PREVENTION (Apr. 25, 2014), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6316a4.htm> [<https://perma.cc/4D3Y-QN4A>].

50. See Eric C. Schneider, Arnav Shah, Pratha Sah, Seyed M. Moghadas, Thomas Vilches & Alison Galvani, *The U.S. COVID-19 Vaccination Program at One Year: How Many Deaths and Hospitalizations Were Averted?*, COMMONWEALTH FUND (Dec. 14, 2021), <https://www.commonwealthfund.org/publications/issue-briefs/2021/dec/us-covid-19-vaccination-program-one-year-how-many-deaths-and> [<https://perma.cc/HDG5-4LHF>].

51. See Pierson et al., *supra* note 5.

52. Cat Zakrzewski & Rachel Lerman, *Facebook and Twitter Must Do More to Fight Anti-Vaccine Misinformation, a Dozen State Attorneys General Demand*, WASH. POST (Mar. 24, 2021, 1:32 PM), <https://www.washingtonpost.com/technology/2021/03/24/facebook-twitter-attorney-generals> [<https://perma.cc/Z44V-QUC7>].

who became notorious for spreading election-fraud conspiracy theories—has taken to disseminating misinformation surrounding COVID-19 vaccines.<sup>53</sup> Powell is far from unique; a *New York Times* article observed that many of the same actors who spread falsehoods about the 2020 election have pivoted to vaccine misinformation.<sup>54</sup>

Though antivax misinformation has been described as a “staple[] of the pro-Trump disinformation playbook,”<sup>55</sup> lawyers on both sides of the political aisle have propagated falsehoods about vaccines. Indeed, one of the nation’s leading antivax advocates is ultra-liberal Robert F. Kennedy, Jr., who began his career in anticorporate environmental litigation before pivoting to antivax activism.<sup>56</sup> Kennedy has promoted scientifically debunked claims about vaccines since at least 2005.<sup>57</sup> A 2019 study found that the majority of advertisements on Facebook spreading misinformation about vaccines were funded by just two organizations, one of which Kennedy leads.<sup>58</sup> Kennedy’s antivax advocacy picked up during the pandemic, eventually prompting Instagram to ban him in February 2021 for repeatedly making false claims about COVID-19 vaccine safety.<sup>59</sup>

Lower-profile members of the legal community have followed a similar path. In 2016, Texas District Attorney Nico LaHood was featured in the controversial antivax documentary *Vaxxed*.<sup>60</sup> LaHood boldly stated, “I’m here to tell you, vaccines can and do cause autism.”<sup>61</sup> Moreover, he invoked his experience as a lawyer and prosecutor to back up his claim: “I’m a prosecutor for a living. So I look for truth. I have to follow evidence wherever it leads me. So I took that

---

53. Alba & Frenkel, *supra* note 44.

54. *Id.*

55. *Id.*

56. See Keziah Weir, *How Robert F. Kennedy Jr. Became the Anti-Vaxxer Icon of America’s Nightmares*, VANITY FAIR (May 13, 2021), <https://www.vanityfair.com/news/2021/05/how-robert-f-kennedy-jr-became-anti-vaxxer-icon-nightmare> [https://perma.cc/KGT3-5LGC].

57. Seth Mnookin, *How Robert F. Kennedy, Jr., Distorted Vaccine Science*, SCI. AM. (Jan. 11, 2017), <https://www.scientificamerican.com/article/how-robert-f-kennedy-jr-distorted-vaccine-science1> [https://perma.cc/4R54-M22X].

58. Lena H. Sun, *Majority of Anti-Vaccine Ads on Facebook Were Funded by Two Groups*, WASH. POST (Nov. 15, 2019, 7:00 AM EST), <https://www.washingtonpost.com/health/2019/11/15/majority-anti-vaccine-ads-facebook-were-funded-by-two-groups> [https://perma.cc/J5MR-F5D7].

59. Maanvi Singh, *Instagram Removes Anti-Vaxxer Robert F Kennedy Jr for False Covid-19 Claims*, GUARDIAN (Feb. 10, 2021, 10:35 PM), <https://www.theguardian.com/technology/2021/feb/10/instagram-removes-anti-vaxxer-robert-f-kennedy-jr> [https://perma.cc/4KKA-PD9L].

60. VAXXED: FROM COVER-UP TO CATASTROPHE (Autism Media Channel, Del Bigtree Productions 2016).

61. Anna Merian, *Texas District Attorney: ‘I’m Here to Tell You, Vaccines Can and Do Cause Autism,’ JEZEBEL* (Aug. 30, 2016, 1:00 PM), <https://theslot.jezebel.com/texas-district-attorney-im-here-to-tell-you-vaccines-1785947177> [https://perma.cc/5GRQ-JNEG].

same approach in looking at this issue.”<sup>62</sup> Similarly, Ohio attorney Thomas Renz has built a large and enthusiastic following by initiating several federal lawsuits against vaccine mandates and other COVID-19-control measures, such as shut-downs and mask mandates. This is despite the fact that his allegations about the vaccines contradict scientific evidence, prompting one federal judge to write that “[i]t’s simply not my job to try to discern from plaintiffs’ scattered, off-loaded stack of contentions and claims to envision what sort of plausible legal edifice a capable legal architect might erect.”<sup>63</sup> Renz withdrew that lawsuit, but several other federal lawsuits he had filed remained pending.<sup>64</sup>

In other industries, consequences have attached to spreading false information about vaccines. Members of the medical profession, for example, have faced disciplinary action for similar behavior.<sup>65</sup> Because physicians “occupy a position of considerable authority and considerable trust,” their participation in spreading disinformation about vaccines can be particularly damaging, “not only for the patients who hear it but also damaging to the profession because it undermines trust in physicians.”<sup>66</sup>

Though lawyers do not speak with the same scientific and medical knowledge, they still occupy a place of considerable authority in society. Further, the intentional spread of vaccine disinformation by lawyers harms not only public health, but also the legal profession. Courts regard honesty and integrity as “chief among the virtues the public has a right to expect of lawyers,”<sup>67</sup> and “[n]o single transgression reflects more negatively on the legal profession than a lie.”<sup>68</sup> And as we discuss further below, vaccine hesitancy is also a decidedly legal issue today, one that lawyers can and have influenced by invoking their legal authority.<sup>69</sup>

---

62. *Id.*; see also Kathryn Rubino, *This Texas Attorney Is Becoming an Anti-Vaxxer Star*, ABOVE L. (Aug. 30, 2016, 5:00 PM), <https://abovethelaw.com/2016/08/this-texas-attorney-is-becoming-an-anti-vaxxer-star> [https://perma.cc/5Y6T-G55T]. LaHood’s behavior is all the more troubling given his position as a government actor. *Cf. Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (“Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.”).

63. *Renz v. Ohio*, No. 20CV1948, 2021 WL 485534, at \*3 (N.D. Ohio Feb. 9, 2021).

64. Shawn Boburg & Jon Swaine, *One Lawyer’s Rise Shows How Vaccine Misinformation Can Fuel Fundraising and Far-Right Celebrity*, WASH. POST (Sept. 20, 2021, 10:50 AM), <https://www.washingtonpost.com/investigations/2021/09/20/vaccine-lawsuits-thomas-renz-covid> [https://perma.cc/3RQV-JG3D]; Jake Zuckerman, *Ohio Supreme Court Dismisses Lawsuit Targeting Vaccine Lottery*, OHIO CAP. J. (Dec. 17, 2021, 12:55 AM), <https://ohiocapitaljournal.com/2021/12/17/ohio-supreme-court-dismisses-lawsuit-targeting-vaccine-lottery> [https://perma.cc/RQ75-NL8R].

65. Christopher Cheney, *Physicians Face Disciplinary Action for Coronavirus Vaccine Misinformation*, HEALTH LEADERS (Sept. 17, 2021), <https://www.healthleadersmedia.com/clinical-care/physicians-face-disciplinary-action-coronavirus-vaccine-misinformation> [https://perma.cc/9EA6-PTM4].

66. *Id.*

67. *In re Disciplinary Action Against Ruffenach*, 486 N.W.2d 387, 391 (Minn. 1992).

68. *Astles’ Case*, 134 N.H. 602, 606 (1991); see also *Basbanes’ Case*, 141 N.H. 1, 6–7 (1996) (citing this proposition in the context of Rule 3.3); *In re Amberly*, 974 A.2d 270, 273 (D.C. 2009) (“[H]onesty is basic to the practice of law.”).

69. See *infra* text accompanying note 138.

Granted, in some circumstances, lawyer lies are acceptable or arguably even required by the *Rules*.<sup>70</sup> For instance, according to an ethics opinion issued by the District of Columbia Bar, lawyers who work in an intelligence or national security capacity may “‘act deceitfully’ if required for engagement in clandestine activities.”<sup>71</sup> Further, attorneys are typically only accountable for spreading falsehoods that they know—or at least, have reason to know—are untrue.<sup>72</sup> But as we discuss in the Sections that follow, the *Rules* explicitly prohibit dishonesty in many contexts.

Restrictions on lawyer speech spreading disinformation may also raise First Amendment concerns. The First Amendment places certain lawyer speech beyond the bounds of professional discipline,<sup>73</sup> though where those lines are drawn is “notoriously elusive.”<sup>74</sup> The Supreme Court has held that “in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed and lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.”<sup>75</sup> Even outside the courtroom or the context of pending cases, the Court has suggested that lawyers might not always be “protected by the First Amendment to the same extent as those engaged in other businesses.”<sup>76</sup> Though the exact scope of this rule remains the subject of debate,<sup>77</sup> courts generally permit states to regulate lawyer speech to a greater extent than speech in general.<sup>78</sup> One justification is that lawyers are “perceived by the public to be in a position of knowledge, and therefore, a crucial source of information and opinion.”<sup>79</sup> Accordingly, courts have upheld various restrictions on lawyer speech, such as regulations pertaining to advertising and solicitation, press statements, speech by government employees, and even private correspondence between lawyers.<sup>80</sup>

---

70. See Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J.F. 114, 125–26 (2021).

71. *Id.* (quoting *Ethics Opinion 323: Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, D.C. BAR (2004)), <https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-323> [<https://perma.cc/D78N-C92H>].

72. See *infra* notes 90–94, 154–155 and accompanying text.

73. See Jefferson, *supra* note 70, at 135.

74. *Id.*

75. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991).

76. *Id.* at 1073.

77. See, e.g., W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 358 (2001) (arguing that the rule in *Gentile* is “emphatically not that lawyers have diminished expressive rights, as compared with ordinary citizens, in most speech situations,” contrary to some lower-court interpretations).

78. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 580 (1998); see also Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 967 (2014) (“The legal profession is appropriately treated as a carve out from the First Amendment principles that apply in the general marketplace.”).

79. *In re Giuliani*, 146 N.Y.S.3d 266, 270 (App. Div. 2021) (citation omitted).

80. See Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 660–61 (2011) (collecting cases); ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 9–12 (2020) (discussing First Amendment challenges); *In re Gershater*, 17 P.3d 929, 936–37 (Kan. 2001) (noting in dicta that an attorney may be disciplined for correspondence with another attorney without contravening the First Amendment).

In the Sections that follow, we investigate the possibility that leveraging professional ethics rules could deter attorneys from intentionally spreading disinformation about vaccines, both in litigation and outside the courtroom doors.

## A. DISINFORMATION OUTSIDE OF LITIGATION

Legal ethics rules prohibit lawyers from engaging in dishonesty and deceit in or out of court. In certain circumstances, lawyers may be disciplined for intentionally spreading disinformation to the general public.

### 1. THE RULES

Two Rules of Professional Conduct require lawyers to be truthful beyond the context of litigation<sup>81</sup>—and thereby raise the possibility that lawyers who knowingly spread disinformation about vaccines in nonlegal forums like social media platforms or press appearances violate ethical codes.<sup>82</sup> Rule 8.4(c)—known as the “dishonesty rule”<sup>83</sup>—makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>84</sup> Rule 4.1 prohibits lawyers from “knowingly . . . mak[ing] a false statement of material fact or law to a third person” in the course of client representation.<sup>85</sup>

Together, Rules 8.4(c) and 4.1 prohibit a broad swath of dishonest attorney behavior. On its face, Rule 8.4(c) is sweeping.<sup>86</sup> This is no accident: it reflects a

81. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 209, 220 (2006).

82. Both Powell’s Twitter account and Kennedy’s Instagram account have since been suspended for promoting misinformation. See Christopher Brito, *Robert Kennedy Jr. Banned from Instagram over False COVID Vaccine Claims*, CBS NEWS (Feb. 11, 2021, 11:35 AM), <https://www.cbsnews.com/news/robert-kennedy-jr-instagram-ban-false-covid-19-claims> [<https://perma.cc/6P3R-9X5K>]; Ben Collins & Brandy Zadrozny, *Twitter Bans Michael Flynn, Sidney Powell in QAnon Account Purge*, NBC NEWS (Jan. 8, 2021, 4:28 PM), <https://www.nbcnews.com/tech/tech-news/twitter-bans-michael-flynn-sidney-powell-qanon-account-purge-n1253550> [<https://perma.cc/RT68-TR2G>].

83. See, e.g., Cynthia A. Brown & Carol M. Bast, *Professional Responsibility: Making “Smart” Ethical Decisions While Making the Most of “Smart” Technology*, 48 CREIGHTON L. REV. 737, 758 (2015); Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule – A Rule with a Future*, 74 OR. L. REV. 665 (1995); Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381 (2002); Eliot T. Tracz, *Lies, Liars, and Lawyers as Legislators: An Argument Towards Holding Attorneys Accountable for Violating the Model Rule of Professional Conduct 8.4(c) Whilst Acting in a Legislative Role*, 42 S. ILL. U. L.J. 451, 452 (2018).

84. MODEL RULES R. 8.4(c).

85. *Id.* R. 8.4(c) & 4.1. Both Rules 4.1 and 8.4(c) have been adopted in substantially the same form in every jurisdiction, though some states omit Rule 4.1(b), which covers failures to disclose (as opposed to affirmative misrepresentations). See CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 4.1 (Sept. 29, 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_4\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_1.pdf) [<https://perma.cc/3W8S-TNWC>]; CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.4 (Nov. 9, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf) [<https://perma.cc/3LGV-R8TN>].

86. See Keveney, *supra* note 83, at 386 (“Apart from a small subset of personal activity, there is little that does not fall within the purview of Rule 8.4(c).” (citations omitted)); Ellen Yaroshefsky, *Regulation of Lawyers in Government Beyond the Client Representation Role*, 33 NOTRE DAME J. L. ETHICS & PUB. POL’Y



deliberate effort for the Rule to serve as a catch-all provision or a “gap-filler,” making it challenging for savvy lawyers “to engage in undesirable behavior that falls outside of the scope of the clear rules on the books.”<sup>87</sup> However, some state courts have cabined the scope of Rule 8.4(c).<sup>88</sup> For example, the Supreme Court of Vermont does not “believe that *any* dishonesty” is actionable under Rule 8.4(c), only “conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.”<sup>89</sup>

Further, although Rule 8.4(c) does not contain an express knowledge element, many jurisdictions have interpreted the Rule to implicitly require that attorneys knew their statements were false in order for liability to attach.<sup>90</sup> Jurisdictions vary as to whether the burden is on the disciplinary committee to show the presence of mens rea or on the attorney to show its absence as an affirmative defense against charges of misconduct.<sup>91</sup> Regardless, even jurisdictions that do not require knowledge of falsity nevertheless require a showing of “some level of mental culpability, beyond mere negligence, on the part of the accused attorney.”<sup>92</sup> The Supreme Court of Pennsylvania, for instance, has held that a prima facie violation of Rule 8.4(c) can be shown by a knowing or reckless misrepresentation.<sup>93</sup> Mere negligence—like sharing a link to a false article that the attorney did not bother to actually read—does not rise to the level of a Rule 8.4(c) violation.<sup>94</sup>

Like Rule 8.4(c), Rule 4.1 holds lawyers accountable for dishonest statements they make to the general public or third parties outside the courtroom. The Rule covers not only blatantly false statements, but also misrepresentations that “occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”<sup>95</sup> But unlike Rule 8.4(c),<sup>96</sup> Rule 4.1 is limited to

151, 166 (2019) (“Rule 8.4(c) serves as somewhat of a catch-all provision designed to discipline a range of lawyer misconduct that might otherwise go unpunished and its broad scope often overlaps with other RPC provisions.”).

87. Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235, 271 (2019).

88. *See id.* at 272–75.

89. *In re* PRB Docket No. 2007-046, 187 Vt. 35, 43–44 (2009).

90. *In re* Giuliani, 146 N.Y.S.3d 266, 271 (App. Div. 2021) (collecting cases).

91. *Compare id.* at 271–73 (concluding that the defendant violated Rule 8.4(c) given that he failed to rebut the Attorney Grievance Committee’s prima facie case), *with* Iowa Supreme Ct. Att’y Disciplinary Bd. v. Netti, 797 N.W.2d 591, 605 (Iowa 2011) (putting the burden on the Iowa Supreme Court Attorney Disciplinary Board to show that the defendant committed a knowing violation of Rule 8.4(c)).

92. *Off. of Disciplinary Couns. v. Anonymous Att’y A*, 714 A.2d 402, 406–07 (Pa. 1998).

93. *Id.* at 407.

94. *Cf. id.* at 406 (“[O]ur sister states require a showing that the respondent attorney had mental culpability beyond mere negligence in order to make out a prima facie showing of a violation of Rule 8.4(c).”).

95. MODEL RULES R. 4.1 cmt. 1.

96. *See* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 64 (2018) (“As should be immediately apparent, these provisions impose absolutely no requirement that the conduct at issue have occurred while the lawyer is representing clients, delivering legal services, or otherwise engaging in the practice of law.”).

conduct that occurs in the course of client representation,<sup>97</sup> and expressly applies only in instances where the attorney acted “knowingly.”<sup>98</sup>

Violations of Rules 8.4(c) and 4.1 can result in suspension, disbarment, or other professional sanctions,<sup>99</sup> though discipline is largely context-dependent.<sup>100</sup>

## 2. ELECTION DISINFORMATION

Past application of Rules 8.4(c) and 4.1 to lawyers participating in election-related disinformation efforts suggests that at least in theory, lawyers cannot knowingly spread antivax disinformation to the general public with impunity.

Beginning in 2017, Rule 8.4(c) was wielded several times against Trump-affiliated attorneys during what Professor Brian Sheppard terms the “Ethics Resistance,” a coordinated movement to oppose the Trump Administration’s agenda by filing legal ethics grievances against Administration lawyers.<sup>101</sup> These efforts included Rule 8.4(c) complaints filed against former senior adviser to the President Kellyanne Conway,<sup>102</sup> former Attorney General Jeff Sessions,<sup>103</sup> and former head of the Environmental Protection Agency Scott Pruitt.<sup>104</sup> For instance, in a series of media appearances in January 2017, Conway lied about the crowd size at President Trump’s inaugural address and, more significantly, defended Trump’s travel ban by describing how two Iraqi men had entered the United States and committed a massacre—which, it turned out, had never happened.<sup>105</sup> A group of law professors who teach legal ethics organized and filed complaints

---

97. The Comment accompanying Rule 4.1 instructs readers to reference Rule 8.4 “[f]or dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client.” MODEL RULES R. 4.1 cmt. 1.

98. *Id.* R. 4.1.

99. *See, e.g., In re Lang*, 741 S.E.2d 152, 153 (Ga. 2013); Att’y Grievance Comm’n of Maryland v. Siskind, 930 A.2d 328 (Md. 2007); *In re Zeiger*, 692 A.2d 1351 (D.C. 1997); *In re Houchin*, 622 P.2d 723 (Or. 1981).

100. Yaroshefsky, *supra* note 86, at 167.

101. *See generally* Sheppard, *supra* note 87.

102. Disciplinary Complaint Against Kellyanne Conway from Abbe Smith et al. to Off. of Disciplinary Couns., D.C. Ct. of Appeals (Feb. 20, 2017), [https://docs.google.com/viewerng/viewer?url=https://above-thelaw.com/wp-content/uploads/2017/02/Kellyanne-Letter.pdf&hl=en\\_US](https://docs.google.com/viewerng/viewer?url=https://above-thelaw.com/wp-content/uploads/2017/02/Kellyanne-Letter.pdf&hl=en_US) [<https://perma.cc/MHM7-Q4KX>]; *see also* Sheppard, *supra* note 87, at 244–48.

103. Complaint Against Jefferson Beauregard Sessions from Christopher Anders, Am. C.L. Union, to Ala. State Bar Disciplinary Comm’n, [https://www.aclu.org/sites/default/files/field\\_document/new\\_sessions\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/new_sessions_complaint.pdf) [<https://perma.cc/6L3V-RZLB>]; *see also* Sheppard, *supra* note 87, at 248–52.

104. Complaint Against Edward Scott Pruitt from Ctr. for Biological Diversity and Kristen Vande Biezenlos to Off. of the Gen. Couns., Okla. Bar Ass’n (Mar. 21, 2017), [https://www.biologicaldiversity.org/programs/biodiversity/pdfs/2017\\_03\\_21\\_Center\\_KVDB\\_to\\_OBA\\_Grievance\\_Pruitt.pdf](https://www.biologicaldiversity.org/programs/biodiversity/pdfs/2017_03_21_Center_KVDB_to_OBA_Grievance_Pruitt.pdf) [<https://perma.cc/8MGM-P9HZ>]; *see also* Sheppard, *supra* note 87, at 252–56.

105. Samantha Schmidt & Lindsey Bever, *Kellyanne Conway Cites ‘Bowling Green Massacre’ that Never Happened to Defend Travel Ban*, WASH. POST (Feb. 3, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/03/kellyanne-conway-cites-bowling-green-massacre-that-never-happened-to-defend-travel-ban> [<https://perma.cc/ETH2-WQ7L>].

against Conway with state disciplinary authorities in D.C. and New Jersey, but their efforts were unsuccessful.<sup>106</sup>

Then came the 2020 election, and with it, a new frontier of ethical breaches and discipline. Rules 4.1 and 8.4(c) were invoked numerous times in the post-election context, most notably in the many petitions to sanction Rudy Giuliani, former Mayor of New York and President Trump's personal lawyer.<sup>107</sup> After the 2020 election, Giuliani repeatedly questioned the election results and alleged widespread voter fraud without any factual basis for his claims.<sup>108</sup> This culminated in Giuliani urging a crowd to engage in "trial by combat" before they stormed the United States Capitol.<sup>109</sup> In response, several attorneys, politicians, and legal groups called for Giuliani's disbarment from the State of New York.<sup>110</sup> The highest-profile complaint, lodged by Lawyers Defending American Democracy and signed by over 3,000 attorneys, urged the state to investigate Giuliani's alleged violations of Rules 8.4(c) and 4.1.<sup>111</sup> Calls for investigations did not just target Giuliani. Other members of President Trump's election team, including Sidney Powell, faced similar demands for sanctions.<sup>112</sup>

This time, the ethics complaints were successful. Giuliani's licenses to practice in New York and D.C. were suspended in summer 2021 as a result of his propagation of election-related disinformation, much of which occurred *outside* of court.<sup>113</sup> The Supreme Court of New York sanctioned him for "communicat[ing] demonstrably false and misleading statements to courts, lawmakers and *the public at large*."<sup>114</sup> In various press conferences, radio programs, podcasts, and other public addresses, Giuliani lied about illegally counted mail-in ballots;<sup>115</sup> irregularities in auditing processes;<sup>116</sup> and voting by children, disenfranchised felons,

---

106. See Sheppard, *supra* note 87, at 248. The Office of Attorney Ethics for the State of New Jersey responded to the complaint with a single-page letter stating that the "grievance, even if proven, would not constitute unethical conduct or incapacity." *Id.*

107. E.g., Ethics Complaint Against Rudy Giuliani from Scott Harshbarger, Lawyers Defending Am. Democracy, to Att'y Grievance Comm., N.Y. Supreme Ct. (Jan. 20, 2021), <https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf> [<https://perma.cc/3WWW-VRZA>]; see also Sonia Moghe, *NYC Bar Association Joins Push to Have Giuliani Investigated to Be Disbarred*, CNN (Mar. 2, 2021, 1:47 PM), <https://www.cnn.com/2021/03/02/politics/giuliani-nyc-bar-association/index.html> [<https://perma.cc/KP4H-JZ6U>].

108. Ethics Complaint Against Rudy Giuliani, *supra* note 107.

109. Moghe, *supra* note 107.

110. *Id.*

111. *Id.*

112. Debra Cassens Weiss, *Hundreds of Lawyers Call for Ethics Probes of Attorneys for Election Fraud Claims; Are Bar Charges Likely?*, A.B.A. J. (Dec. 8, 2020, 10:01 AM), <https://www.abajournal.com/news/article/hundreds-of-lawyers-call-for-ethics-probes-of-lawyers-for-election-fraud-claims-is-it-a-likely-outcome> [<https://perma.cc/CBQ5-Q3NZ>].

113. See Rachel Weiner, *Rudy Giuliani Suspended from Practicing Law in D.C. Court*, WASH. POST (July 7, 2021, 7:03 PM), [https://www.washingtonpost.com/local/legal-issues/giuliani-washington-court/2021/07/07/9f7a7f5c-df6a-11eb-9f54-7eeec10b5fcd2\\_story.html](https://www.washingtonpost.com/local/legal-issues/giuliani-washington-court/2021/07/07/9f7a7f5c-df6a-11eb-9f54-7eeec10b5fcd2_story.html) [<https://perma.cc/JU8U-7DH9>].

114. *In re Giuliani*, 146 N.Y.S.3d 266, 268 (App. Div. 2021) (emphasis added).

115. *Id.* at 272, 278–79.

116. *Id.* at 275–76.

noncitizens, and the deceased.<sup>117</sup> The court determined that in each of these instances, Giuliani had violated Rules 4.1 and 8.4(c). It noted that their prohibition against false statements is “broad” and includes “conduct both inside and outside of the courtroom.”<sup>118</sup> Further, the court found “simply no proof” to support Giuliani’s defense that he did not knowingly make false statements.<sup>119</sup> As for the appropriate sanctions, the court suspended Giuliani’s license to practice law in light of the “immediate threat to the public” posed by his spreading of disinformation.<sup>120</sup>

### 3. VACCINE DISINFORMATION

The fate that befell Giuliani suggests that attorneys who knowingly spread antivax disinformation in public statements could face discipline. However, complaints against attorneys for out-of-court disinformation would still face a host of noteworthy hurdles.

Before the post-election ethical fallout, a general consensus existed that courts were unlikely to impose sanctions for simply spreading disinformation. One reason is that courts will not sanction lawyers for violating Rule 8.4(c) (or Rule 4.1) without a showing that they acted knowingly, or in some cases, recklessly.<sup>121</sup> Meeting these *mens rea* standards may be particularly challenging in today’s “post-truth” era,<sup>122</sup> given that the proliferation of fake news and disinformation has made it “really hard to know what is real.”<sup>123</sup> The very lawyers that would be the subjects of ethics complaints for spreading vaccine disinformation would also have particularly strong defenses: research on cognitive bias suggests that individuals in hyper-partisan communication networks are especially susceptible to believing the fake news they encounter.<sup>124</sup>

Further, state disciplinary authorities have often been hesitant to recommend discipline. Applying Rules 4.1 and 8.4(c) to out-of-court speech is controversial

---

117. *Id.* at 274–80.

118. *Id.* at 269–70.

119. *Id.* at 272; *see also id.* at 275 (“[R]espondent fails to provide a scintilla of evidence for any of the varying and wildly inconsistent numbers of dead people he factually represented voted in Philadelphia during the 2020 presidential election.”).

120. *Id.* at 281.

121. *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 311 (2017) (“Each of these rules, either on their face or as interpreted in bar disciplinary proceedings, has a *mens rea* standard of either knowledge or recklessness.”).

122. *Word of the Year 2016*, OXFORD LANGUAGES, <https://languages.oup.com/word-of-the-year/2016> [<https://perma.cc/92FG-5NZA>] (last visited Nov. 6, 2021).

123. John Wihbey, “*It Is Really Hard to Know What Is Real*,” NIEMAN REPS. (Oct. 16, 2018), <https://niemanreports.org/articles/it-is-really-hard-to-know-what-is-real> [<https://perma.cc/8YJE-TGAS>]; *see also Speaking of Psychology: Fake News and Why It Matters*, AM. PSYCH. ASS’N, <https://www.apa.org/research/action/speaking-of-psychology/fake-news> [<https://perma.cc/9TJ6-LNKW>] (last visited Nov. 6, 2021).

124. Giovanni Luca Ciampaglia & Filippo Menczer, *Biases Make People Vulnerable to Misinformation Spread by Social Media*, SCI. AM. (June 21, 2018), <https://www.scientificamerican.com/article/biases-make-people-vulnerable-to-misinformation-spread-by-social-media> [<https://perma.cc/5DVP-863G>]; *see also infra* note 136 and accompanying text (discussing how vaccination has become a partisan issue).

because restrictions on lawyer’s general speech, especially political speech, risk impinging on First Amendment rights.<sup>125</sup> Even lawyers with “no sympathy for Conway’s habitual disregard for truth” came to her defense on free speech grounds.<sup>126</sup> “Political debate is protected by the First Amendment, even when it strays into questionable territory,” one legal ethics professor wrote, “and it should not be the job of the bar authorities to police the exaggerations and misstatements of politicians just because they happen to be lawyers.”<sup>127</sup>

Perhaps for this reason, bar counsels are “as a rule, loath to police attorney speech—even when hyperbole veers into spurious attacks and conspiracy mumbo-jumbo.”<sup>128</sup> This is true even though, as the Supreme Court has acknowledged, professional standards of conduct can limit attorneys’ free speech rights.<sup>129</sup> Instead, bar counsels “typically focus on concrete instances of clients harmed by lawyer malfeasance.”<sup>130</sup>

When bar counsels do bring ethics charges under Rule 8.4(c) for out-of-court statements, they tend to target lawyers who impugn the legitimacy of the court or the legal system itself—for example, when a Kansas attorney received an informal admonition for sending a tweet calling the Kansas Attorney General something unprintable,<sup>131</sup> or when a Florida attorney received a public reprimand for

---

125. See, e.g., Abbe Smith, *Criminal Justice—Or Any Justice at All—Under Trump*, 46 GEO. L.J. ANN. REV. CRIM. PROC. III, at xi (2017); Jan Wolfe, *Explainer: Can Trump’s Lawyers Be Disciplined for Making False Claims?*, REUTERS (Nov. 25, 2020, 6:11 AM), <https://www.reuters.com/article/us-usa-election-lawyers-sanction-explain/explainer-can-trumps-lawyers-be-disciplined-for-making-false-claims-idUSKBN2851FW> [<https://perma.cc/XQ3U-JFX4>]; see also Sheppard, *supra* note 87, at 303 (“First Amendment safeguards are at their most fierce when political speech is being restricted. . . . [O]ne should hesitate before filing a complaint under those circumstances.”); *supra* notes 73–80 and accompanying text (summarizing the interaction between restrictions on lawyer speech and the First Amendment).

126. Steven Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017, 9:22 AM), <https://slate.com/news-and-politics/2017/02/the-misconduct-complaint-against-kellyanne-conway-is-dangerously-misguided.html> [<https://perma.cc/U4JF-NZHQ>]; see Yaroshefsky, *supra* note 86, at 153 n.5.

127. Lubet, *supra* note 126.

128. Andrew Strickler, *Ethics Complaints Against Trump Attys Are Likely a Dead End*, LAW360 (Nov. 24, 2020, 9:31 PM), <https://www.law360.com/articles/1331926> [<https://perma.cc/5FGS-8Q2F>].

129. See *In re Snyder*, 472 U.S. 634, 644–45 (1985) (“The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.”); see also U.S. Dist. Ct. for E. Dist. of Wash. v. Sandlin, 12 F.3d 861, 865 (9th Cir. 1993) (“[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct.”); cf. Wendel, *supra* note 77, at 312 (“Protecting the public image of the bar, for example, has been deemed a legitimate state interest, justifying regulations on expression, even in light of the Supreme Court’s commercial speech doctrine, which does not permit restrictions on speech to be justified by similar concerns.”).

130. Strickler, *supra* note 128.

131. Tessa L. Dysart, *Social Media Ethical Concerns for Appellate Lawyers*, APP. ADVOC. BLOG (July 23, 2019), [https://lawprofessors.typepad.com/appellate\\_advocacy/2019/07/social-media-ethical-concerns-for-appellate-lawyers.html](https://lawprofessors.typepad.com/appellate_advocacy/2019/07/social-media-ethical-concerns-for-appellate-lawyers.html) [<https://perma.cc/GK4J-H9KC>]; Seth L. Laver, *Attorney’s Tweet Leads to Sanctions*, PROF. LIAB. MATTERS (Jan. 27, 2014), <https://professionalliabilitymatters.com/social-media-lessons/attorneys-tweet-leads-to-sanctions> [<https://perma.cc/V5WA-CJV2>].

posting that a local judge was an “evil unfair witch.”<sup>132</sup>

Finally, bar counsels are “highly resistant to charging any lawyer pressing a political agenda for a willing client, inside or outside of court.”<sup>133</sup> For example, the efforts of the Ethics Resistance to hold Trump Administration officials accountable through legal ethics complaints were not met with much response from state disciplinary authorities until election tensions reached a boiling point.<sup>134</sup> Legal ethics experts attribute this reluctance to “a fear of making the disciplinary system appear partisan.”<sup>135</sup> Vaccine disinformation could suffer from the same defect—though the COVID-19 vaccine should not be political, it is.<sup>136</sup>

And yet, Giuliani’s disbarment shows that in the face of truly deleterious public-facing lies, courts are willing to step in. At least one factor that set these post-election lies apart from others was their broad and serious impact. In its decision, the New York court emphasized how Giuliani’s false statements about the election risked damaging public confidence both in the government and, given Giuliani’s occupation as an attorney, in the legal profession as well. The Court explicitly invoked the storming of the Capitol to underscore “the extent of the damage that can be done when the public is misled by false information about the elections.”<sup>137</sup>

To be sure, there are several differences between lawyers spreading disinformation about elections and disinformation about vaccines. The administration of elections and the protection of democracy are more closely tied to lawyers’ core competencies. Vaccine safety and efficacy, on the other hand, are the province of doctors and scientists. A lawyer’s statements about vaccines may therefore project less authority than her statements about elections. Accordingly, one might wonder whether legal ethics authorities ought to concern themselves with vaccine disinformation to the same extent as they have with election disinformation. But while antivax disinformation does not have the same direct destabilizing effect on our democracy, it threatens another essential condition for social stability: public health. In another era, the link between vaccine disinformation and legal ethics still might have seemed more attenuated. In 2022, vaccine hesitancy is a decidedly legal issue and a matter of enormous public concern. Insofar as lawyers

---

132. Report of Referee at 3, *Florida Bar v. Conway*, No. SC08-326 (Fla. 2007) (capitalization altered), [https://www.floridasupremecourt.org/content/download/340202/file/08-326\\_ROR.pdf](https://www.floridasupremecourt.org/content/download/340202/file/08-326_ROR.pdf) [https://perma.cc/E3PD-LNZF]; see also Wendel, *supra* note 77, at 312–13 (“Judges . . . uphold decency and dignitary restrictions on speech critical of the judiciary, despite a consistent line of cases protecting undignified and indecent speech, subject only to narrow exceptions for obscenity, and making clear that the offense of a listener is alone no basis for restricting expression.”).

133. Strickler, *supra* note 128.

134. Weiss, *supra* note 112.

135. *Id.*

136. See Giovanni Russonello, *The Rising Politicization of Covid Vaccines*, N.Y. TIMES (Apr. 8, 2021, 11:25 AM), <https://www.nytimes.com/2021/04/06/us/politics/covid-vaccine-skepticism.html> [https://perma.cc/HXX7-XU78]; see also Sebastian Guidi, Alessandro Romano & Chiara Sotis, *Depolarizing the COVID-19 Vaccine Passport*, 131 YALE L.J.F. 1010 (2022) (finding high levels of political polarization over vaccine passports).

137. *In re Giuliani*, 146 N.Y.S.3d 266, 283 (App. Div. 2021).



are officers of the courts, and courts are arms of the state, lawyers' role in compounding that public concern raises ethical questions. This is especially so when lawyers like Nico LaHood spread vaccine misinformation not only in the course of exercising their legal authority, but also with the aid of that authority.<sup>138</sup>

The applicability of legal ethics to vaccine misinformation certainly has its limits. A single tweet or passing remark is unlikely to trigger sanctions, for good reason. In cases of sustained disinformation campaigns, sanctions are more likely. But establishing the requisite *mens rea* is vital, and may often prove difficult.

\* \* \*

On their face, Rules 8.4(c) and 4.1 prohibit lawyers from spreading vaccine disinformation outside of litigation that they know to be false. Giuliani's suspension demonstrates that the *Rules* have some bite to them. But in all likelihood, bar counsels will shy away from prosecuting out-of-court speech, and courts will be unlikely to sanction it, except in the case of sustained and egregious violations.

## B. DISINFORMATION IN LITIGATION

Knowingly spreading disinformation is a more serious offense when it occurs in the course of litigation. As one scholar has explained, “[i]n today’s post-truth era, courts are among the rare fora where statements must still be supported by evidence-based, verifiable facts. . . . [The courthouse] is one of the last places where rules cling to the goal of truth-telling, even if imperfectly.”<sup>139</sup>

Accordingly, a lawyer’s role in disseminating disinformation surrounding the importance, safety, and effectiveness of vaccinations could take on heightened significance in the context of litigation. The COVID-19 vaccine is already the subject of numerous lawsuits. While some states, schools, and businesses have rolled out “vaccine passport” programs, others protest that requiring proof of vaccination to gain access to spaces or participate in activities unjustly intrudes on privacy and civil liberties.<sup>140</sup> The Equal Employment Opportunity Commission issued guidance that businesses can require employees to show proof of vaccination without contravening the Americans with Disabilities Act or other federal antidiscrimination laws.<sup>141</sup> Yet legal challenges have been brought against vaccine mandates, and some have succeeded.<sup>142</sup> Though

138. See *supra* notes 60–62 and accompanying text.

139. Jefferson, *supra* note 70, at 132.

140. Sheryl Gay Stolberg & Adam Liptak, *Likely Legal, ‘Vaccine Passports’ Emerge as the Next Coronavirus Divide*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/vaccine-passports-coronavirus.html> [<https://perma.cc/VHP4-TCAQ>].

141. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/MVJ8-5BD6>].

142. *E.g.*, Susan Montoya Bryan, *New Mexico Corrections Officer Sues over Vaccination Mandate*, AP NEWS (Mar. 4, 2021), <https://apnews.com/article/public-health-lawsuits-coronavirus-pandemic-courts-new-mexico-47b5e8eb9d20eb7c1a3910f9ee1b3a98> [<https://perma.cc/BM9A-D35V>]; *Biden v. Missouri*, Nos. 21A240, 21A241, slip op. (U.S. Jan. 13, 2022) (per curiam).

Supreme Court precedent<sup>143</sup> makes challenges to state-mandated vaccines unlikely to succeed on constitutional grounds, twenty-one states have religious freedom laws that extend beyond the First Amendment.<sup>144</sup>

In a nutshell, it was inevitable that vaccine resistance would reach the courts. With it, so have lawsuits based on misinformation (such as one recently brought by Kennedy’s foundation against a university vaccine mandate, which claims that vitamin C and zinc “could be used to bring this pandemic under control and end it”).<sup>145</sup> The following Sections evaluate the ethical dimensions of these scenarios.

### 1. THE RULES

In addition to Rules 4.1 and 8.4(c), which apply both in and out of litigation, two other *Rules* bear on the spread of disinformation specifically in the course of litigation: Rule 3.1, which prohibits frivolous claims, and Rule 3.3, which requires candor to the court.<sup>146</sup>

Every state and the District of Columbia has adopted some form of Rule 3.1.<sup>147</sup> The *Rules* leave the term “frivolous” undefined, though some states offer their own elaborations. New York, for example, defines frivolous conduct to encompass three scenarios: (1) knowingly advancing a legally unwarranted claim, unless it is a good faith argument for changing existing law; (2) delaying or prolonging litigation, or harassing or maliciously injuring others; and (3) knowingly asserting material factual statements that are false.<sup>148</sup> Other states apply an objective “reasonable attorney” standard to Rule 3.1, defining a “frivolous position” as “one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it.”<sup>149</sup> Whatever the standard, Rule 3.1 imposes a high bar.<sup>150</sup> To meet it, a claim must

---

143. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding a state compulsory vaccination law); *Zucht v. King*, 260 U.S. 174 (1922) (upholding a school vaccination ordinance).

144. See Ross D. Silverman, *Could Religious Exemptions Trump a COVID-19 Vaccine Mandate? Well, That Depends*, MED. XPRESS (Aug. 31, 2020), <https://medicalxpress.com/news/2020-08-religious-exemptions-trump-covid-vaccine.html> [<https://perma.cc/5XWN-4AK2>].

145. E.g., Verified Complaint at 7, *Child. ’s Health Def., Inc. v. Rutgers*, No. 21-cv-15333 (D.N.J. Aug. 16, 2021).

146. MODEL RULES R. 3.1, 3.3.

147. See CPR POL’Y IMPLEMENTATION COMM., AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 3.1 (Dec. 11, 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.pdf) [<https://perma.cc/MQ3E-M5MH>].

148. N.Y. RULES OF PROF’L CONDUCT R. 3.1 (N.Y. State Bar Ass’n 2020).

149. *O’Brien v. Superior Ct.*, 105 Conn. App. 774, 786 (2008) (citing RESTATEMENT (THIRD), LAW GOVERNING LAWYERS § 110 cmt. d (2000)); *In re Disciplinary Proceeding Against Jones*, 338 P.3d 842, 854 (Wash. 2014) (same); *De Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 683 (Fla. Dist. Ct. App. 2007) (same).

150. N.Y. State Bar Ass’n, Formal Op. 1214 (2021), <https://nysba.org/ethics-opinions-1214> [<https://perma.cc/39AU-K2EH>].

lack “*any* basis in law or fact.”<sup>151</sup> Sanctions for filing frivolous claims include reprimand, suspension, and disbarment.<sup>152</sup>

Whereas Rule 3.1 focuses on the substance of legal claims, Rule 3.3(a) looks more broadly at a lawyer’s behavior before the court (or applicable tribunal) in the course of litigation. “Lawyers have a greater duty than ordinary citizens to be scrupulously honest at all times,” the D.C. Court of Appeals has written, “for honesty is basic to the practice of law.”<sup>153</sup> Recognizing this, Rule 3.3(a) prohibits lawyers from knowingly making “a false statement of fact or law to a tribunal.”<sup>154</sup> Courts apply a subjective standard to the “knowing” requirement: to merit discipline, the attorney must actually know that the statement was false.<sup>155</sup> Rule 3.3(a) frequently overlaps with other ethics rules, especially Rule 8.4(c).<sup>156</sup> In fact, “[a] finding that [a lawyer] violated Rule 3.3(a) triggers a finding that he also violated Rule 8.4(c).”<sup>157</sup> But Rule 3.3(a) is narrower in scope, applying only to conduct before a tribunal.<sup>158</sup> Discipline for Rule 3.3(a) violations can be severe, including disbarment.<sup>159</sup>

## 2. ELECTION DISINFORMATION

The role of lawyers in spreading disinformation about the 2020 presidential election once again offers a starting point for analyzing whether Rules 3.1 and 3.3(a) prohibit lawyers from spreading antivax disinformation in the course of litigation—and if so, whether the *Rules* will be enforced. While disciplinary authorities held some lawyers, like Giuliani, accountable for spreading disinformation outside of court, they more readily sanctioned lawyers for relaying election disinformation in the course of litigation.

The legal drama that embroiled Sidney Powell offers one example. After the 2020 election, Powell sought to invalidate the election results in key battleground states.<sup>160</sup> The false narratives she told were so pernicious that they prompted

---

151. *Commonwealth v. Chmiel*, 612 Pa. 333, 467 (2011).

152. *E.g.*, *Rozbicki v. Statewide Grievance Comm.*, 958 A.2d 812 (Conn. 2008) (reprimand); *In re Spikes*, 881 A.2d 1118 (D.C. 2005) (thirty-day suspension); *In re Rolleston*, 651 S.E.2d 739 (Ga. 2007) (disbarment).

153. *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (quotation marks omitted) (quoting *In re Reback*, 513 A.2d 226, 231 (D.C. 1986)).

154. MODEL RULES R. 3.3.

155. *In re Kline*, 298 Kan. 96, 125 (2013); *State ex rel. Okla. Bar Ass’n v. Layton*, 2014 OK 21, ¶ 28.

156. *E.g.*, Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 306 (2004).

157. *Basbanes’ Case*, 141 N.H. 1, 6 (1996); *see also* Richmond, *supra* note 156, at 306 (“A lawyer who breaches the duty of candor under Rule 3.3(a)(1) violates Rule 8.4(c), as well.”).

158. *In re Dodge*, 141 Idaho 215, 219 (2005) (“Unlike Rule 3.3(a)(1), the application of Rule 8.4(c) is not limited to conduct before a tribunal and therefore is very broad.”).

159. *See, e.g.*, *In re Amberly*, 974 A.2d 270, 274 (D.C. 2009).

160. Powell infamously described her litigation campaign as “releas[ing] the Kraken.” *See* Alison Durkee, *Sidney Powell, ‘Kraken’ Attorneys Sanctioned for Bringing Michigan Election Fraud Lawsuit*, FORBES (Aug. 25, 2021, 6:46 PM), <https://www.forbes.com/sites/alisondurkee/2021/08/25/sidney-powell-kraken-attorneys-sanctioned-for-bringing-michigan-election-fraud-lawsuit/?sh=50aa802a1124> [<https://perma.cc/V3BM-SWY3>].

Dominion Voting Systems to sue her for defamation.<sup>161</sup> In an unusual move, Powell defended herself against the defamation charge by arguing that her election-fraud claims were so outlandish that “reasonable people would not accept such statements as fact.”<sup>162</sup>

Among other challenges she brought against the election results, Powell filed a lawsuit in federal district court alleging widespread voter fraud in Michigan.<sup>163</sup> After District Court Judge Parker dismissed Powell’s lawsuit as “based on nothing but speculation and conjecture,”<sup>164</sup> Michigan Governor Gretchen Whitmer, along with the state’s Attorney General and Secretary of State, filed grievances alleging that Powell violated Rules 3.1 and 3.3(a)<sup>165</sup> and calling for her permanent disbarment.<sup>166</sup> In August 2021, Judge Parker imposed sanctions under Federal Rule of Civil Procedure 11<sup>167</sup>: Powell and her co-counsel had to pay the defendants’ legal fees and attend at least twelve hours of continuing legal education.<sup>168</sup> The judge also referred the attorneys to their state disciplinary boards for further action under Rules 3.1 and 3.3.<sup>169</sup>

These consequences demonstrate that the *Rules* have teeth when it comes to sanctioning lawyers for misbehavior in court. In the order sanctioning Powell and other attorneys, Judge Parker drew a line between disinformation spread in court and in the public sphere: “While there are many arenas—including print, television, and social media—where protestations, conjecture, and speculation may be advanced, such expressions are neither permitted nor welcomed in a court of law.”<sup>170</sup> Though a desire to stay above the fray might make state bars hesitate before pursuing discipline in a politically charged context, that does not mean they will tolerate blatant dishonesty *in court*, where lawyers enjoy less leeway to fudge the truth.<sup>171</sup>

For this reason, lawyers tend to shed their most outlandish claims when entering the courthouse. Though the fear of sanctions did not deter some attorneys like

---

161. See Jefferson, *supra* note 70, at 119.

162. Defendants’ Motion to Dismiss at 32, *US Dominion, Inc. v. Powell*, No. 1:21-cv-00040-CJN (D.D.C. Mar. 22, 2021), <https://s3.documentcloud.org/documents/20519858/3-22-21-sidney-powell-defending-the-republic-motion-to-dismiss-dominion.pdf> [<https://perma.cc/TTT6-3GJ7>].

163. Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, *King v. Whitmer*, No. 20-cv-13134, 2020 WL 6993809 (E.D. Mich. Nov. 25, 2020).

164. *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020), *appeal dismissed*, No. 20-2205, 2021 WL 688804 (6th Cir. Jan. 26, 2021).

165. TEX. DISCIPLINARY RULES OF PROF’L. CONDUCT R. 3.01, 3.03(a) (State Bar of Tex. 2021).

166. Ethics Complaint Against Sidney Powell from Gretchen Whitmer, Governor, Mich., et al. to State Bar of Tex. 20 (Feb. 1, 2021), [https://www.michigan.gov/documents/ag/Powell\\_atty\\_complaint\\_-\\_signed\\_714982\\_7.pdf](https://www.michigan.gov/documents/ag/Powell_atty_complaint_-_signed_714982_7.pdf) [<https://perma.cc/3QX9-MMNN>].

167. See Durkee, *supra* note 160. Federal Rule of Civil Procedure 11 is the federal counterpart to Rule 3.1’s prohibition on frivolous claims. See ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT § 3.1 (9th ed. 2019).

168. *King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at \*41–42 (E.D. Mich. Aug. 25, 2021).

169. *Id.* at \*41.

170. *Id.* at \*1.

171. Wolfe, *supra* note 125.

Powell from bringing election disinformation into court, it likely deterred countless others: in general, lawyers who spoke of election fraud to the press and the public were far more cautious in the actual legal arguments and statements they made before judges.<sup>172</sup>

### 3. VACCINE DISINFORMATION

Powell's sanctions suggest that lawyers who knowingly spread vaccine disinformation in court could also face consequences. However, there are two complicating factors in the vaccine context.

First, professional discipline is highly unlikely in the context of cases brought in federal vaccine court, even if attorneys knowingly spread disinformation that may have triggered sanctions in an ordinary state or federal courthouse. The National Childhood Vaccine Injury Act of 1986 (NCVIA) established the Office of Special Masters, known as the "vaccine court," within the United States Court of Federal Claims to hear vaccine injury complaints and administer a compensation program.<sup>173</sup> The court compensates people for legitimate injuries resulting from vaccination, ranging from rare allergic reactions to shoulder injuries caused by improper vaccine administration.<sup>174</sup> It also regularly receives—and dismisses without sanction—claims based on pure misinformation.<sup>175</sup> Parents have filed thousands of petitions alleging that vaccines caused their children's autism, for example, despite the overwhelming scientific consensus to the contrary.<sup>176</sup>

The improbability of attorney discipline in vaccine-court cases reflects deliberate public policy choices made by Congress. The NCVIA aims to improve access to justice by ensuring that petitioners "will have readily available a competent bar to prosecute their claims."<sup>177</sup> In order to incentivize lawyers to take on longshot vaccine cases, attorney's fees are overenforced and attorney sanctions are underenforced in the vaccine court. In accordance with the NCVIA's fee provisions,<sup>178</sup> the court generally awards attorney's fees and costs if petitioners have a "reasonable

---

172. *See id.*

173. *See* Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34); *Vaccine Claims/Office of Special Masters*, U.S. CT. OF FED. CLAIMS, <https://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters> [<https://perma.cc/GT9D-S8A5>] (last visited Nov. 6, 2021).

174. Meredith Wadman, *Vaccines on Trial: U.S. Court Separates Fact from Fiction*, *SCI. MAG.* (Apr. 27, 2017, 1:15 PM), <https://www.sciencemag.org/news/2017/04/vaccines-trial-us-court-separates-fact-fiction> [<https://perma.cc/96NA-WUR3>].

175. *Id.*

176. *See, e.g.*, Thomas H. Maugh II & Andrew Zajac, 'Vaccines Court' Rejects Mercury-Autism Link in 3 Test Cases, *L.A. TIMES* (Mar. 13, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-mar-13-la-sci-autism13-2010mar13-story.html> [<https://perma.cc/S2NG-AW7X>]; *Autism and Vaccines*, *CTRS. FOR DISEASE CTRL. & PREVENTION* (Aug. 26, 2021), <https://www.cdc.gov/vaccinesafety/concerns/autism.html> [<https://perma.cc/5A34-S9WL>].

177. *Saunders v. Sec'y of Health & Hum. Servs.*, 25 F.3d 1031, 1035 (Fed. Cir. 1994).

178. *See* 42 U.S.C. § 300aa-15(e)(1).

basis” for their claims, whether they win or lose on the merits.<sup>179</sup> And even when petitioners lack *any* reasonable basis for their claims, the court will nonetheless avoid referring attorneys to their state bar disciplinary boards for violating Rule 3.1. The court has described one vaccine-autism claim as frivolous and “wholly without merit,” for example, and then gone on to award partial fees to the counsel of record.<sup>180</sup> In a subsequent case involving the same attorney and the same frivolous argument, the court did not award fees but went out of its way to stress that it was *not* sanctioning the attorney for his conduct.<sup>181</sup>

Second, even in litigation outside of federal vaccine court, the ethical dimensions of disinformation may be more complex in vaccine-related challenges than in the post-2020 election litigation. Unlike in the post-election context, where the underlying claims often started and ended with disinformation, vaccine disinformation may enter court intermingled with legitimate, non-frivolous legal challenges. For instance, over the past two years, a team of antivax lawyers, including Robert F. Kennedy Jr., has sued New York State for narrowing medical<sup>182</sup> and religious<sup>183</sup> exemptions to school vaccine requirements. The claims themselves, which allege due process and equal protection violations, are not necessarily “frivolous” for purposes of Rule 3.1, even if they are not ultimately meritorious.<sup>184</sup> But non-frivolous claims might include, within them, disinformation about vaccines. In such circumstances, Rules 3.3(a) and 8.4(c) would still be relevant. Lawyers who lie during litigation are subject to discipline under these Rules, plain and simple. If Kennedy or another attorney knowingly introduces disinformation about vaccines in statements to the court, then sanctions are possible whether or not the underlying suit is frivolous.

Granted, an asymmetry still exists between the frequency with which lawyers violate Rules 3.3(a) and 8.4(c) and how often they actually incur discipline for those violations. But as discussed above, courts have a much shorter fuse when disinformation crosses over from the public sphere into the courthouse. All this suggests that even when ethics complaints brought against lawyers spreading politicized disinformation in court fail, they discourage particularly egregious lies from entering the courtroom.

\* \* \*

---

179. *Hashi v. Sec’y of Health & Hum. Servs.*, No. 08-307V, 2016 WL 5092917, at \*2 (Fed. Cl. Aug. 25, 2016).

180. *Hooker v. Sec’y of Health & Hum. Servs.*, No. 02-472V, 2017 WL 3033940, at \*14, \*26 (Fed. Cl. Apr. 11, 2017); *see also Hardy v. Sec’y of Health & Hum. Servs.*, No. 08-108V, 2016 WL 4729530 (Fed. Cl. Aug. 16, 2016) (awarding partial fees and costs for a “simply frivolous” vaccine-autism claim).

181. *A.S. ex rel. Sterling v. Sec’y of Health & Hum. Servs.*, No. 16-551V, 2020 WL 549443, at \*6 n.6 (Fed. Cl. Jan. 3, 2020).

182. Class Action Complaint, *Doe v. Zucker*, No. 120CV840BKSCFH, 2020 WL 6196148 (N.D.N.Y. Oct. 22, 2020).

183. *C.F. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 139 N.Y.S.3d 273, 278 (App. Div. 2020).

184. *See supra* notes 148–149 (discussing how states define “frivolous” in the context of Rule 3.1).



In sum, lawyers who knowingly bring disinformation about vaccines into court risk becoming the subject of legal ethics complaints. As seen in the post-election context, those complaints may very well succeed in sanctioning—or at least deterring—the most egregious behavior. But standing alone, the *Rules* will not be a panacea. Nor should the *Rules* serve as a cure-all, when the line between intentional disinformation and inadvertent misinformation is often difficult to discern and the costs of over-policing speech are high. The Part that follows explores alternative ways to curb vaccine hesitancy through a legal ethics framework.

### III. ALIGNING LEGAL ETHICS WITH PUBLIC HEALTH

Legal ethics scholarship typically centers on the duties lawyers owe to their clients or to the legal profession. But as the post-election sanctions illustrate, legal ethics rules can also function as a bulwark against behavior by lawyers that risks harm to democracy. Indeed, courts might be more likely to sanction attorneys when breaches of conduct are nationally salient. The legal profession could encourage a similar baseline of non-harm to public health.

At present, the *Rules* do not impose a duty to get vaccinated. They prohibit lawyers from knowingly spreading disinformation, but instances of discipline will be rare, especially when the dishonest behavior occurs outside of court. This Part proposes three alternative avenues for policy makers and members of the legal profession to align legal ethics with public health: requiring vaccine passports for court appearances, incorporating ethical concerns implicating public health into the Comments accompanying the *Rules*, and offering continuing legal education on how to identify and dispel misinformation.

#### A. COURTHOUSE VACCINE PASSPORTS

First, courts—both state and federal—can take the lead in promoting vaccine uptake among lawyers by conditioning appearance in court on proof of vaccination. Requiring proof of vaccination for in-person court appearances is a commonsense way to encourage attorneys—especially those most likely to appear in court, such as public defenders and immigration counsel<sup>185</sup>—to be vaccinated. Indeed, many courts across the country, including numerous federal courts of

---

185. See Joe Nelson, *Public Defenders Plead for COVID-19 Vaccination Priority as Criminal Trials Resume*, PRESS ENTER. (Feb. 18, 2021, 3:32 PM), <https://www.pe.com/2021/02/17/public-defenders-plead-for-covid-19-vaccination-priority-as-criminal-trials-begin-to-resume> [https://perma.cc/EP3U-NXVF]; Christian Nolan, *NYSBA Advocates for Immediate Vaccination of Certain Members of the Legal Profession*, N.Y. STATE BAR ASS'N (Feb. 18, 2021), <https://nysba.org/nysba-advocates-for-immediate-vaccination-of-certain-members-of-the-legal-profession> [https://perma.cc/8ABA-KF9B]; Letter from Eliana C. Nader, Chair, Am. Immigrant Lawyer's Ass'n, New Eng. Chapter, et al. to Charlie Baker, Governor, Mass., et al. (Feb. 9, 2021), [https://bostonbar.org/docs/default-document-library/covidvaccinationletter-joint.pdf?sfvrsn=894e9fa0\\_2](https://bostonbar.org/docs/default-document-library/covidvaccinationletter-joint.pdf?sfvrsn=894e9fa0_2) [https://perma.cc/E7H7-YVLZ].

appeals, have already implemented either vaccine mandates or mandatory testing requirements.<sup>186</sup>

Vaccine passports are not feasible everywhere. Many state governors have issued executive orders barring recipients of state funds, including courts, from employing vaccine passports.<sup>187</sup> But where allowed, courts can require proof of vaccination: state supreme courts give broad leeway to local courts to set their own rules,<sup>188</sup> and the same is true of the federal courts.<sup>189</sup> Decentralized implementation has a downside as well: as a practical matter, it is unlikely that every eligible local court across the country will embrace vaccine requirements. But even if only some courts do, it can make a difference.

A court-implemented vaccine passport would add another key incentive. In a vaccine-passport jurisdiction, lawyers who refuse vaccines risk running afoul of the *Rules*. In a formal opinion issued last year, the New York City Bar advised that lawyers who refuse to appear in court due to fear of contracting COVID-19 risk violating Rule 1.3's requirement of diligent representation, among other professional-conduct standards.<sup>190</sup> By analogy, a lawyer who must appear in a court that requires proof of vaccination would risk incurring sanctions unless the lawyer either obtains a vaccination or withdraws from the representation.<sup>191</sup>

## B. MODEL RULE COMMENTS

The ABA should consider addressing the public health dimensions of legal ethics in the *Rules*. Though changing the language of the *Rules* themselves would carry greater weight, doing so is a challenge. As one judge put it, "amending the Model Rules is about as difficult as getting legislation through Congress"<sup>192</sup>—

---

186. See, e.g., Madison Alder, *Vaccinations, Renewed Caution at Circuit Courts as Delta Spreads*, BLOOMBERG L. (Aug. 13, 2021, 1:48 PM), <https://news.bloomberglaw.com/us-law-week/some-circuits-require-vaccinations-stay-remote-as-delta-spreads> [<https://perma.cc/LW2A-3FFA>]; *Current Covid-19 Courtroom Procedures*, 7TH CIR. (July 2021), [https://www.ca7.uscourts.gov/forms/Current\\_Covid-19\\_Courtroom\\_Procedures.pdf](https://www.ca7.uscourts.gov/forms/Current_Covid-19_Courtroom_Procedures.pdf) [<https://perma.cc/D4YQ-DB7L>]; General Order, *In re Updated Reopening Protocol*, No. 95-01 (10th Cir. Aug. 12, 2021), [https://www.ca10.uscourts.gov/sites/ca10/files/documents/news/GeneralOrderAug122021-VaxToEnterMaskInPublicAreas\\_0.pdf](https://www.ca10.uscourts.gov/sites/ca10/files/documents/news/GeneralOrderAug122021-VaxToEnterMaskInPublicAreas_0.pdf) [<https://perma.cc/2YW6-8MHU>]; *Revised Protocols for In-Person Arguments*, FED. CIR. (Aug. 12, 2021), <https://www.ca9.uscourts.gov/sites/default/files/arguments/RevisedProtocolsInPersonArguments.pdf> [<https://perma.cc/QQ57-URSE>].

187. See Reese Oxner, *Gov. Greg Abbott Bans State Agencies and State-Funded Organizations from Requiring Proof of COVID-19 Vaccination*, TEX. TRIB. (Apr. 6, 2021, 9:00 AM), <https://www.texastribune.org/2021/04/06/texas-greg-abbott-covid-vaccine-passport> [<https://perma.cc/Y74J-YLX7>].

188. *Will Reopening Continue While Coronavirus Spreads?*, JD SUPRA (July 6, 2020), <https://www.jdsupra.com/legalnews/will-reopening-continue-while-39344> [<https://perma.cc/4NK5-B38R>].

189. *Current Rules of Practice & Procedure*, U.S. CTS., <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure> [<https://perma.cc/NYL2-L6W4>].

190. N.Y.C. Bar Comm'n on Pro. Ethics, Formal Op. 2020-5, at 4 (2020).

191. Of course, some attorneys have medical reasons for opting out of vaccination. For these attorneys and others who remain unvaccinated, courts with vaccine mandates permit oral arguments to be conducted remotely by video conference or telephone. See, e.g., *Current Covid-19 Courtroom Procedures*, *supra* note 186 (Seventh Circuit); General Order, *supra* note 186 (Tenth Circuit).

192. Zoom Video Conference with Judge William Garfinkel, United States Magistrate Judge and Visiting Lecturer in Law, Yale Law School (Apr. 13, 2021).

that is to say, extremely difficult.<sup>193</sup> But each *Rule* features multiple Comments that elaborate on the Rule and provide nonbinding guidance on its contours and scope. Incorporating public health concerns into the Comments—a more feasible proposal<sup>194</sup>—could encourage lawyers to be more conscientious about their role in promoting public health.

Though Comments are not binding,<sup>195</sup> they are influential. They can steer courts' interpretation of the *Rules*,<sup>196</sup> and they are taught to law students preparing for the Multistate Professional Responsibility Examination.<sup>197</sup> Comments can thereby impact attorneys' behavior and their conceptions of ethical lawyering. To this end, the ABA should consider amending the Comments accompanying Rule 1.1, which requires competent representation, and Rule 8.4, which prohibits lawyer dishonesty.

The Comments to Rule 1.1 elaborate on the general competency requirement. Of note is Comment 8, which instructs lawyers to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>198</sup> The ABA added the clause on technology in 2012 to address emerging data security risks to clients' confidential information.<sup>199</sup> Adding an analogous clause instructing lawyers

193. See Andrew Rudalevige, *Why Does Congress Have Such a Hard Time Passing Laws? Let's Blame the Constitution*, WASH. POST (July 11, 2017, 8:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/11/why-does-congress-have-such-a-hard-time-passing-laws-lets-blame-the-constitution/> [https://perma.cc/BV9L-VJG6].

194. The House of Delegates, ABA's policy-making body, meets twice annually to consider resolutions drafted and submitted by ABA committees, state and local bar associations, and other special entities. See *FAQs: The House of Delegates*, AM. BAR ASS'N 12 (2019), [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/house-publications/hod-faqs-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/house-publications/hod-faqs-2019.pdf) [https://perma.cc/U9HL-C4D5]. Amendments to both the Model Rules and their accompanying Comments go through the House of Delegates, but pushing through a proposal to amend only a Comment is far easier than getting the House of Delegates to approve a Rule change. See, e.g., Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 206–11 (2017) (discussing how the House of Delegates was willing to adopt a Comment, but not a Rule).

195. MODEL RULES pmb. ¶ 14 (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); MODEL RULES pmb. ¶ 21 (“The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”).

196. See, e.g., *In re Ivy*, 350 P.3d 758, 764 (Alaska 2015) (relying on Comments to help settle the meaning of Rules); *In re Marshall*, 902 N.E.2d 249, 253 (Ind. 2009) (same); Iowa Supreme Ct. Att’y Disciplinary Bd. v. Rhinehart, 827 N.W.2d 169, 176 (Iowa 2013) (same). But see *In re Kline*, 113 A.3d 202, 209 (D.C. 2015) (“[R]eliance on the comment to support [an] interpretation of the rule is unavailing because the text of the rule is always controlling when it comes to interpreting a rule.”).

197. See, e.g., STEVEN A. LEWIS, SYLLABUS – LAW 210 SEC. 1 – LEGAL PROFESSION 1 (2016), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fid=9727> [https://perma.cc/5EAY-38NP] (assigning Comments); RICHARD A. SCHWARTZ, PROFESSIONAL RESPONSIBILITY SPRING 2020, at 2 (2020), <http://www.law.uh.edu/assignments/spring2020/25287.pdf> [https://perma.cc/B3LN-F3L6] (instructing students they are “responsible for looking up and reading the entire Rule as well as the corresponding Comments”).

198. MODEL RULES R. 1.1 cmt. 8.

199. Comm. on Ethics 20/20, *Report to the House of Delegates 105A*, AM. BAR ASS'N 7–8 (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meemeeet\\_105a\\_filed\\_may\\_2012.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meemeeet_105a_filed_may_2012.pdf) [https://perma.cc/J8VX-XB4A].

to monitor and comply with their jurisdiction's public health requirements would serve a similar function. It would mark a modest step towards shaping lawyers' understandings of public health measures, the importance of which has become especially evident over the course of the pandemic.

Additionally, the ABA could add a Comment to Rule 8.4 to clarify that knowingly advancing discredited scientific theories or hoaxes qualifies as "fraud, deceit or misrepresentation" barred by 8.4(c).<sup>200</sup> Rule 8.4's Comment 3 already provides definitions and examples of discrimination and harassment, which 8.4(g) prohibits.<sup>201</sup> Courts and scholars have looked to this Comment (or to its state analogues) when determining the contours of Rule 8.4(g).<sup>202</sup> Adding similar examples of conduct that 8.4(c) prohibits would discourage members of the bar from spreading public health disinformation they know to be false.

### C. CONTINUING LEGAL EDUCATION

Practicing United States lawyers must fulfill their state's continuing legal education (CLE) requirements.<sup>203</sup> Typically, this consists of three to fifteen hours of education each year, which lawyers can complete by attending in-person programs or webinars on legal ethics, diversity, or practice-area-specific topics.<sup>204</sup>

To counter the threat that vaccine misinformation poses to public health, the ABA and other CLE providers should consider expanding and updating their collection of educational content on how to identify and avoid disinformation online. Timely CLE webinars on the topic could present best practices for verifying information, such as checking article dates and URLs, scrutinizing sites with unusual layouts or formatting, and looking for reliable corroborating sources.<sup>205</sup> The

200. MODEL RULES R. 8.4(c).

201. *Id.* R. 8.4(c) cmt. 3.

202. *See, e.g.,* *Ellis v. Harrison*, 947 F.3d 555, 563 (9th Cir. 2020); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 215 (2017); Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 DUKE J. GENDER L. & POL'Y 1, 3 (2017).

203. *See CLE FAQs for Newly-Admitted Attorneys*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle> [<https://perma.cc/6FTL-Y5PZ>] (last visited Nov. 7, 2021). All but five jurisdictions—Maryland, Massachusetts, Michigan, South Dakota, and the District of Columbia—impose CLE requirements on practicing attorneys. *See MCLE Jurisdictions: Number of Credits Required Per Year*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/directories/policy/mcle\\_rules\\_maps\\_aba.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/mcle_rules_maps_aba.pdf) [<https://perma.cc/6726-6PD5>] (last visited Nov. 7, 2021).

204. *See Mandatory CLE*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle> [<https://perma.cc/BB5U-XLBF>] (last visited Nov. 7, 2021); *Comparison of Jurisdiction Rules to ABA MCLE Model Rule by State*, AM. BAR ASS'N, [https://www.americanbar.org/content/dam/aba/directories/policy/aba\\_model\\_rule\\_comparison\\_by\\_state\\_meet\\_model\\_rule\\_noted.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/aba_model_rule_comparison_by_state_meet_model_rule_noted.pdf) [<https://perma.cc/6Q8U-WFYE>] (last visited Nov. 7, 2021).

205. *See, e.g., How to Spot Fake News*, CORNELL UNIV. LIBR. (Mar. 11, 2021, 12:49 PM), [https://guides.library.cornell.edu/evaluate\\_news/infographic](https://guides.library.cornell.edu/evaluate_news/infographic) [<https://perma.cc/W8PY-LH5W>]; *Fake News: Develop Your Fact-Checking Skills: Fact Checking*, BENEDICTINE UNIV. LIBR. (Sept. 23, 2020, 8:30 PM), <https://researchguides.ben.edu/c.php?g=608230&p=4219925> [<https://perma.cc/L7LW-7TTY>]. Some existing CLE content discusses fake news, but most focuses on First Amendment and public policy considerations rather than methods to identify disinformation. *See, e.g., "Fake News" and the First Amendment*, UNIV. DAYTON SCH. OF

current assortment of CLE content is extremely wide-ranging,<sup>206</sup> and many recently produced webinars already focus on similar topics (vaccine passports,<sup>207</sup> workplace vaccination,<sup>208</sup> and foreign election interference,<sup>209</sup> to name a few). Adding additional content on misinformation, and promoting existing content more heavily, would help address serious ethical gaps that the *Rules* do not reach.

That said, perhaps those least likely to tune in are the very lawyers who most actively spread disinformation about vaccines.<sup>210</sup> But “lighter-touch” educational content has been shown to help in many cases.<sup>211</sup> For example, a recent study found that presenting a ten-point list of digital media tips significantly improves Americans’ ability to differentiate between real and fake news.<sup>212</sup> A CLE webinar could do the same for attorneys.

## CONCLUSION

The stakes of vaccine hesitancy are high. While lawyers may have a heightened moral obligation to be vaccinated, professional ethics rules do not demand it. Lawyers are prohibited from knowingly spreading disinformation about vaccines, but they are unlikely to actually incur discipline for doing so, barring particularly egregious violations or lies told directly to a court. Nonetheless, the legal community can still tailor its ethical standards to account for the impact lawyer conduct has on public health. After all, the COVID-19 pandemic is far from over, and it will not be the last public health crisis we face.

---

L. (Mar. 2021), [https://udayton.edu/law/events/first\\_amendment.php](https://udayton.edu/law/events/first_amendment.php) [<https://perma.cc/BMH8-AE8J>]; Joseph Rosenbaum, *A Perfect Storm: The Intersection of Fake News, Celebrity Endorsements & Social Media*, LAWLINE (July 24, 2018), <https://www.lawline.com/course/a-perfect-storm-the-intersection-of-fake-news-celebrity-endorsements-social-media> [<https://perma.cc/X3XH-FCV7>].

206. The ABA website currently lists 1,665 videos available for CLE credit across virtually every legal topic. See *CLE Marketplace Search*, AM. BAR ASS’N, <https://www.americanbar.org/cle-marketplace> [<https://perma.cc/GH67-RVA9>] (last visited Nov. 7, 2021).

207. *The Legal Challenges of Vaccine Passports and Workplace Vaccine Policies*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/ecd/ondemand/411711132> [<https://perma.cc/YE7E-8QFN>] (last visited Nov. 7, 2021).

208. GPSolo, *Workstation Vaccination*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/ecd/ondemand/411016212> [<https://perma.cc/ZQ2Y-TC62>] (last visited Nov. 7, 2021).

209. *Hacking Democracy: Elections and Beyond*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/ecd/ondemand/403942557> [<https://perma.cc/D9GV-NQM8>] (last visited Nov. 7, 2021).

210. See Weir, *supra* note 56; Alba & Frenkel, *supra* note 44. Fittingly, part of Powell’s discipline was to complete twelve hours of CLE on pleading standards and election law. See *supra* note 168 and accompanying text.

211. Gordon Pennycook & David G. Rand, *The Psychology of Fake News*, 25 TRENDS COGNITIVE SCI. 388, 396 (2021).

212. Andrew M. Guess, Michael Lerner, Benjamin Lyons, Jacob M. Montgomery, Brendan Nyhan, Jason Reifler & Neelanjan Sircar, *A Digital Media Literacy Intervention Increases Discernment Between Mainstream and False News in the United States and India*, 117 PROC. NAT’L ACAD. SCI. 15, 536 (2020).