The Legal Profession's Role in Spreading Disinformation: The "Knowledge" Definition Must be Amended in the Model Rules of Professional Conduct

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INTRODUCTION

What is argued in court differs, sometimes significantly, from what is stated in the media. Given the impossibility of divorcing the subject-matter of a lawsuit with the subject-matter of the misrepresentation in the media, bar associations must ensure that lawyers are held accountable for the veracity of out-of-court statements, particularly when the speech has the effect of subverting democratic processes. Without such regulations, the fact of a pending lawsuit will lend credibility to inaccurate, and potentially dangerous, disinformation campaigns. The damage to our democracy caused by disinformation movements is beyond the scope of this article. Instead, this article will evaluate the role of the legal profession in legitimizing disinformation campaigns regarding democratic processes.

The current method of regulating lawyer speech is ill-equipped to address the transforming role of lawyers as politically motivated actors. Lawyers' out-of-court advocacy obscures fact and fiction by leveraging the credibility of lawsuits—even those bound for summary dismissal—to promote the spread of disinformation. When this disinformation is designed to undermine the electoral process, the bar[1] has an obligation to address it. False speech is protected by the First Amendment, with minimal exceptions.[2] However, a central premise underpinning the courts' doctrinal presumption in favor of protecting lies no longer rings true: namely, that counter-speech is sufficient to nullify the harm of spreading false information. While disinformation campaigns are currently within the scope of First Amendment coverage, bar associations must contend with the role of lawyer speech in furthering the spread of disinformation harmful to our democracy.

Grappling with this sort of conduct is precisely what the Model Rules of Professional Conduct are intended to do.[3] The purpose of imposing lawyer discipline is to protect the public, administer justice, and ensure confidence in the legal profession. Preventing lawyers from spreading disinformation implicates all of the above. Yet, the current construction of the Model Rules impedes accountability of lawyers who spread false information.

A minor change to the definition of "knowledge" used in the Model Rules would permit more effective enforcement. The "actual knowledge" standard present throughout the rules ought to be expanded to encompass reckless disregard for the truth. At present, the "actual knowledge" standard incentivizes lawyers to conduct little to no investigation into the veracity of their claims, for fear of triggering additional ethical obligations. Although a duty to investigate is implicit throughout the Model Rules, it currently lacks a meaningful enforcement mechanism. By incorporating "reckless disregard for the truth" into the definition

1. Denotes professional organizations of lawyers who regulate the legal profession.
2. *See infra* Part IV.
3. *See infra* Part II.

of knowledge, the duty to investigate would be made explicit and binding. This slight definitional amendment would pave an avenue to prove a lawyer's "knowledge," because failure to investigate can serve as evidence of recklessness.

Part I provides an overview of the current First Amendment jurisprudence regarding false speech. This section argues that, because the First Amendment generally protects untrue statements, government regulations are an improper avenue to address harmful lawyer speech. Part II discusses why the bar is better equipped to confront the shifting role of lawyers in today's political landscape. This section discusses lawyers' duties broadly, the bar's existing regulations of lawyer speech, and the bar's current unwillingness to respond to false lawyer speech. Part III proposes a minor amendment to the Model Rules of Professional Conduct to respond to the proliferation of disinformation by lawyers. Part IV discusses how the proposed regulation would survive judicial review.

I. GOVERNMENT REGULATION IS AN IMPROPER AVENUE TO REGULATE FALSE LAWYER SPEECH

While false speech by lawyers can have deleterious effects on our democracy, government sanctions are an ineffective avenue to regulate this problem under current First Amendment jurisprudence. The Supreme Court has pushed First Amendment doctrine in a direction protective of lies, meaning one would find little recourse if looking to the Constitution for protection from harmful lawyer speech. The Court has carefully avoided serving as the arbiter of truth in matters with political implications. It has done so by making truth constitutionally irrelevant, even in contexts essential to our democracy.

A. DOCTRINAL BACKGROUND

UNITED STATES V. ALVAREZ

United States v. Alvarez held falsity alone is insufficient to exclude speech from First Amendment protection.[4] The case concerned the constitutionality of the Stolen Valor Act, a federal law criminalizing lies about receipt of military awards.[5] A divided Court struck down the law, reasoning that while protecting the honor of service members was clearly a compelling government interest, this goal could be achieved in a less restrictive manner than the broadly written statute.[6] In reaching this conclusion, the Court relied on the idea that counter speech would be sufficient to overcome any harm caused by false speech, reasoning "[t]he Government has not shown, and cannot show, why counter speech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counter speech, of refutation, can overcome the lie."[7]

4. *See* United States v. Alvarez, 567 U.S. 709, 718 (2012).
5. *Id.* at 716.
6. *Id.* at 715.
7. *Id.* at 729.

The majority's reasoning in *Alvarez* would not apply to the proposed changes to the Model Rules.[8] In *Alvarez*, the Court took issue with the lack of limiting principles to government power under the Stolen Valor Act.[9] The same could not be said of the proposed regulations in the Model Rules. Unlike the Act, Model Rule regulations would only apply to lawyers, only to lawyer speech relating to their cases, only when lawyers have abrogated additional duties, and only when the speech undermines our democracy.

SUSAN B. ANTHONY LIST V. DRIEHAUS

In *Susan B. Anthony List v. Driehaus*, the Sixth Circuit held Ohio's political false-statements law unconstitutional.[10] The challenged law prohibited the dissemination of false information about a candidate.[11] Application of the law was limited to information included in campaign materials during campaign season when "knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate."[12] The case arose when Susan B. Anthony List issued a press release accusing Congressman Steven Driehaus of supporting "taxpayer-funded abortion" by voting for the Affordable Care Act.[13] Driehaus filed a complaint with the Ohio Elections Commission accusing SBA List of violating Ohio's political false-statements laws, and SBA responded by challenging the applicable law on First and Fourteenth Amendment grounds.[14] In its constitutional analysis, the court noted the compelling government interest the law served by preserving the integrity of its elections.[15] Despite this, the court struck down the law as unconstitutional, finding it was not narrowly tailored.[16] The court cited correctable concerns—including timing, lack of screening for frivolous complaints, materiality, applicability, and level of inclusion—as grounds to forgo any concerns about safeguarding the electoral process.[17] The Sixth Circuit is not alone in interpreting *Alvarez* to permit striking down laws regulating false statements.[18]

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8. *See infra* Part III.
9. *See Alvarez*, 567 U.S. at 722–23.
10. *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 474 (6th Cir. 2016).
11. *Id.* at 469-470.
12. OHIO REV. CODE ANN. § 3517.21(B)(10).
13. *See Driehaus*, 814 F.3d at 470.
14. *Id.*
15. 814 F.3d at 473.
16. *Id.* at 474.
17. *Id.*
18. *Id.* at 476; *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal"); Commonwealth v. Lucas, 472 Mass. 387, 34 N.E.3d 1242, 1257 (2015) (striking down Massachusetts' law criminalizing election related false speech); *see also* Rickert v. State Pub. Disclosure Comm'n, 161 Wash.2d 843, 168 P.3d 826, 832 (2007) (finding Washington's political false-statements law unconstitutional).

GENTILE V. STATE BAR OF NEVADA

While the Supreme Court has broadly protected lying in the public square, *Gentile v. State Bar of Nevada* is a rare case in which the Court concerned itself with the truthfulness of speech. Importantly, *Gentile* found it was appropriate to impose a higher standard on lawyer speech under the First Amendment. *Gentile* stands for the proposition that lawyers' extrajudicial speech may be restricted if the statements create a substantial likelihood of material prejudice to the trial.[19] *Gentile* considered a First Amendment challenge to a disciplinary sanction under the State's equivalent of Model Rule 3.6 Trial Publicity.[20] The majority held that lawyers' speech regarding pending cases may be scrutinized according to a "substantial likelihood" standard, rather than the more stringent "clear and present danger" test.[21] The Court found the "substantial likelihood" standard did not violate lawyers' First Amendment rights because the restrictions were narrowly tailored to achieve the State's interest in a fair trial, applied only to materially prejudicial speech, were point-of-view neutral, and regulated speech only until the completion of trial.[22] Additionally, the Court recounted the numerous ways in which lawyers' speech is subject to ethical restrictions not imposed on non-lawyer speech, given the lawyers' role as an officer of the court.[23] The court also noted the greater authority given to extrajudicial statements made by lawyers, considering lawyers' special access to information.[24]

B. UNDERLYING PREMISES NO LONGER HOLD

The cases discussed above illustrated how First Amendment jurisprudence regarding false speech is premised on the assumption that certain safeguards exist to counter the harms of false speech. This premise does not hold in our age of disinformation.[25] Early Constitutional interpretations theorized "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[26] But even before the age of social media and entrance into the Post-Truth era, the Court recognized "the truth rarely catches up with a lie."[27] The import of this fact seems to be disregarded in the Court's subsequent opinions. For example, the plurality in *Alvarez*[28] posited that "[t]he remedy for speech that is false is speech that is true."[29] This assertion ignores the deliberate efforts of

19. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1057 (1991).
20. *Id.* at 1033-34.
21. *Id.* at 1036, 1065.
22. *Id.* at 1076.
23. *Id.* at 1071.
24. *Id.* at 1074-75.
25. *See* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 205 (2017).
26. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
27. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974).
28. *See* Alvarez, 567 U.S. at 726.
29. *Id.* at 727.

political leaders to leverage their expansive resources and platform to undermine the credibility of the media and sow distrust of experts.[30] Other developments, including our understanding of human psychology[31] and a fundamental change in the methods of speech distribution,[32] render the marketplace of ideas conception less compelling. Moreover, it ignores the fact that "the efficacy of refutation still turns on whether the counter-message comes to the attention of all persons who were swayed by the original idea."[33] A cursory understanding of social media algorithms reveal that, unless an individual seeks out alternative information, it is unlikely that speech refuting the individual's worldview will be presented to them.[34] Even when considering *Gentile*, the most promising case to support regulation of harmful lawyer speech, it is important to note one proposition assumed by the justices in this 1991 decision that no longer rings true today: ". . . constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases."[35]

As outlined above, First Amendment jurisprudence currently permits lawyers to spread disinformation that subverts democracy. However, that does not preclude bar associations from addressing this issue through ethical rules. The proposed changes to the Model Rules would survive judicial scrutiny, notwithstanding the Court's lie protective First Amendment case law.

II. PURPOSE OF MODEL RULES

Lawyer discipline is intended to serve three key purposes: protecting the public, preserving the administration of justice, and securing confidence in the legal profession by deterring other lawyers from similar misconduct.[36] Lawyers

30. *See* MARVIN KALB, ENEMY OF THE PEOPLE: TRUMP'S WAR ON THE PRESS, THE NEW MCCARTHYISM, AND THE THREAT TO AMERICAN DEMOCRACY (2018); Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV 129, 141 (2017) ("Distrust of the media is compounded by an ironic mismatch between the set of journalistic norms and practices that enabled major media entities to earn their reputations for legitimacy, and the current information ecosystem of distrust.").

31. *See* Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006).

32. *Id.* at 697 ("We are shifting between scarcities: from scarcity of communications media (such as newspapers or broadcast frequencies) to scarcity of attention. Therefore, policies promoting access to the marketplace of ideas are less relevant. The problem is not a lack of adequate information–it is that we cannot process the data that is already out there. Injecting additional information makes this processing problem even worse.").

33. *See* Vincent Blasi, *Reading Holmes through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1357 (1997).

34. *See* Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCIENCE 1130, 1130–31 (2015) ("The media that individuals consume on Facebook depends not only on what their friends share but also on how the News Feed ranking algorithm sorts these articles and what individuals choose to read."); Philip M. Napoli, *Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers*, 39 TELECOMM. POL'Y 751, 756 (2015).

35. *See Gentile*, 501 U.S. at 1058.

36. *See* ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS. "Generally, courts agree that protecting the public, upholding the integrity of the legal system, assuring the fair administration of justice, and deterring other lawyers from similar misconduct are the primary purposes of lawyer discipline."

disseminating false speech that undermines our democratic system is harmful to the public, the administration of justice, and confidence in the legal profession. At present, the Model Rules are abrogating their fundamental purpose by failing to deter harmful lawyer speech. To maintain the legal profession's legitimacy as a self-regulating body, it must respond to the shift in behavior of members of the bar.

A. LAWYER'S DUTIES

Every lawyer accepts an obligation to uphold the Constitution, and the rights enshrined within it, when awarded admission to the bar.[37] This includes a responsibility to defend the twenty-seven constitutional amendments, six of which target the development of voting rights,[38] signifying that "free and fair elections are fundamental to American democracy."[39] Importantly, this oath is not limited to a lawyer's advocacy in the courtroom; instead, "unlike jurors and witnesses who take oaths relating solely to their participation in judicial proceedings, lawyers take oaths regardless of whether they will practice in court."[40] But a lawyer's explicit commitment to uphold democracy does not end with their oath. The Preamble to the Model Rules of Professional Conduct makes clear what role a lawyer ought to serve in our system of government—both in their capacity as an advocate and as a public citizen. Members of the legal profession have "a special responsibility for the quality of justice"[41] and a duty to "uphold the legal process."[42] Members of the legal profession should also "seek improvement of the law, access to the legal system, the administration of justice,"[43] and "further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[44] Furthermore, the preamble

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37. *See* Alex Goldstein, *The Attorney's Duty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 744 (2022) (quoting Barry Daniel Malone, *The Burden of our Privilege*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/mentoring/the-burden-of-our-privilege/)("Every lawyer swears an oath to the 'promote, uphold, and defend the Constitution,' which includes a duty to protect the civil liberties enshrined within it").

38. U.S. Const. amends. XIII, XIV, XV, XIX, XXIV, XXVI.

39. *See* Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 121 (2019).

40. *See* Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEG. ETHICS 3, 51 (2009).

41. MODEL RULES OF PRO. CONDUCT R. 1.1 (AM. BAR ASS'N 2025) [hereinafter MRPC], Preamble and Scope, cl. 1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

42. MRPC, Preamble and Scope, cl. 5. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

43. MRPC, Preamble and Scope, cl. 6. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.

44. MRPC, Preamble and Scope, cl. 6. A lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

highlights the particular role of lawyers in our system of self-governance.[45] In addition to the aims touted in the preamble, it has been well documented that lawyers possess a special obligation to uphold democracy.[46] This duty is more than merely aspirational: "[B]ecause an attorney is obligated to uphold the legal system, which relies on democracy for its legitimacy, 'a lawyer's fealty to democracy is obligated rather than aspirational.'"[47] Given this, the legal profession cannot permit members of the bar to abrogate this responsibility. In particular, it "cannot and must not sit idly by on the sidelines as witnesses to the erosion of the public's confidence in the fundamental institutions of democracy and freedom."[48] Considering the understanding that members of the bar have a duty to uphold our democracy, how is it that they are being permitted to spread false speech, which undermines it, without consequence?

B. SANCTIONING FALSE LAWYER SPEECH

Bar authorities appear disinclined to sanction unethical lawyer conduct when it may be perceived as "political" in nature.[49] This concern is warranted, but it is not a reason to enable our democracy to backslide.[50] Rather, it is antithetical to the purpose of lawyer disciplinary action. In fact, bar associations' tacit acceptance of such conduct only serves to heighten the risk of future misconduct and diminish the public's faith in the legal system.[51] Moreover, bar authorities must not take for granted the fact that certain speech deserves the paramount level of protection accorded political speech just because the speech concerns an election or other democratic process.[52] As

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45. MRPC, Preamble and Scope, cl. 12–13. The legal profession's relative autonomy carries with it special responsibilities of self-government. Lawyers play a vital role in the preservation of society. . .The Rules of Professional Conduct, when properly applied, serve to define that relationship.

46. *See* Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO J. LEGAL ETHICS 155, 161 (2006).

47. *See* Goldstein, *supra* note 37, at 744

48. *See* Michael Miller, *Lawyers Have a Special Obligation to Our Democracy*, LAW.COM (Aug. 27, 2018, 2:11 PM), https://www.law.com/newyorklawjournal/2018/08/27/lawyers-have-a-special-obligation-to-our-democracy/.

49. *See* Sam Libby, *The Case for Proactive Bar Sanctions to Combat the Next Big Lie*, 102 TEX. L. REV. 1331, 1342 (2024).

50. *See* Goldstein, *supra* note 37, at 767. Despite state bar associations' understandable worry about appearing political, "[i]t is not [. . .] "political" to stand up for democratic values and institutions.

51. *See* Brendan Williams, *Did President Trump's 2020 Election Litigation Kill Rule 11?*, 30 B.U. PUB. INT. L.J. 181, 203 (2021) (quoting Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election*, HARTFORD COURANT (Dec. 10, 2020, 3:18 PM), https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyepe-story.html.) "Judges 'don't want to be perceived as openly political,' Geyh said. 'If they come down on lawyers who represent the president like a ton of bricks, they are aware of how that will be perceived.' And yet what if what is 'perceived' is that attorney misconduct goes unsanctioned simply because one's client is the president? How would such a perception have elevated justice in the estimation of the public?'

52. Peter A. Joy & Kevin C. McMunigal, *The Ethics of Trump's Shadow Lawyers?*, 69 WASH. U. J.L. & POLICY 127, 143–44 (2022) ("The lawyers who made, promoted, and enabled the baseless claims of voter fraud in more than sixty lawsuits should face discipline . . . Precisely because they are sworn to uphold the rule of law, they attempted to give, and in the eyes of some did give, a false patina of legitimacy to meritless claims.").

Justice Brennan clarified in *Garrison v. Louisiana*, "[t]hat speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution."[53] To do otherwise would "prevent ethics rules from operating in a context in which they are critically important: the protection of our constitutional democracy."[54] There are existing ethical rules that may be applied to false lawyer speech concerning democracy,[55] but ethical committees have been hesitant to leverage them based on a fear of appearing to be politically motivated. By adding "reckless disregard for the truth" to the definition of knowledge in Rule 1.1 to provide a stronger legal hook to sanction false lawyer speech, this fear can be ameliorated.

C. EXISTING REGULATIONS OF LAWYER'S SPEECH

In theory, it should be no cause for concern that lawyer's harmful out-of-court speech faces little government intervention since—as stated in the Preamble to the Model Rules of Professional Conduct—"To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."[56] At present, the legal profession appears to be failing to meet those obligations. Accordingly, the Model Rules ought to be adjusted to better hold lawyers to account for conduct harmful to our democracy. Lawyers accept, without question, restraints placed on their First Amendment right when in the courtroom.[57] Moreover, lawyer conduct is often limited outside the courtroom, in the form of ethical rules involving advertising solicitations, statements to the press, and licensing requirements.[58] However, the Model Rules disproportionately concern trial advocacy, leaving out-of-court content largely unregulated.[59]

III. AMEND THE MODEL RULES

The current constellation of relevant rules creates an atmosphere at odds with the aspirations of the preamble. The use of an "actual knowledge standard" for rules concerning false speech results in essentially unenforceable rules. To make the rules effective, the ABA ought to adjust the standard to "knowing or with reckless disregard for the truth." Presently, the duty to investigate is implicit throughout the rules.[60] The addition of a "reckless disregard for the truth" in the knowledge standard would make that duty explicit and binding. This minor

53. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

54. *See* Joy & McMunigal, *supra* note 52, at 144.

55. *See* MRPC r. 1.2(d), r. 8.4, r. 3.6.

56. MRPC, Preamble and Scope, cl. 11.

57. *See* Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) ("Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice, much like rules of order in a town meeting.").

58. *See* Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 YALE L.J. FORUM 114, 135 (2021).

59. *See* Bruce A. Green, *Judicial Regulation of US Civil Litigators*, 16 LEGAL ETHICS 306, 309–11 (2013).

60. *See infra* Part III.A.

change would properly hold lawyers accountable for their dangerous speech by allowing their state of "knowledge" to be evidenced through compliance, or lack thereof, with pre-existing ethical obligations. In other words, whether a lawyer spoke with reckless disregard for the truth could be proved by a breach of other existing duties, namely the duty to investigate. The current construction of the rules disincentivize lawyers from conducting investigation, as it would trigger certain obligations—most notably the duty of candor—once they have acquired actual knowledge. Although each state adopts its own set of ethical rules, they are all derived from the Model Rules.[61] Importantly for the sake of this issue, "[e]very jurisdiction has adopted a version of the Model Rules' duty of candor, ban on frivolous litigation, and prohibition against knowingly false statements of material facts to third parties."[62] This minor change would not only protect against lawyers spreading disinformation that subverts democracy, but would give the rules effective enforceability across the board.

A. IMPLICIT DUTY TO INVESTIGATE

The Model Rules' implicit requirement for lawyers to conduct a meaningful investigation can be seen in Rule 1.1 – Competence. Rule 1.1 requires lawyers to provide competent representation to a client.[63] The rule explains that competent representation requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[64] Comments to the rule, which are informative rather than binding, begin to solidify a duty to investigate. Comment 5 states that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."[65] The Annotation to the Model Rules spells this out clearly: "The interrelated obligations of thoroughness and preparation require a lawyer to investigate all relevant facts and research applicable law."[66] This latent duty to investigate can be further seen in comments to Rule 3.1 – Meritorious Claims and Contentions. Comment 2 states that "[w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."[67] In other words, they must investigate.[68]

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61. *See About the Model Rules*, AM. BAR ASS'N (2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/Q7N8-QZQE].

62. *See* Jefferson, *supra* note 58, at 130.

63. MRPC r. 1.1.

64. *Id.*

65. MRPC r. 1.1 cmt. 5.

66. MRPC r. 1.1 annot., citing People v. Boyle, 942 P.2d 1199 (Colo. 1997); In re Guy, 756 A.2d 875 (Del. 2000); Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295 (Iowa 2013); Att'y Grievance Comm'n v. Sanderson, 213 A.3d 122 (Md. 2019).

67. MRPC r. 3.1, cmt 2.

68. *See In re* Alexander, 300 P.3d 536 (Ariz. 2013); *In re* Bontrager, 407 P.3d 1235 (Colo. 2017; *In re* Zohdy, 892 So. 2d 1277 (La. 2005).

Although a duty to investigate is implicit throughout the Model Rules, lawyers are disincentivized to investigate by the "actual knowledge" standard defined in the Rules because conducting an investigation may trigger additional ethical obligations. Remaining ignorant of relevant facts allows lawyers to evade their responsibilities under additional rules. The actual knowledge standard is laid out in Rule 1.0(f) – Terminology. Rule 1.0(f) defines knowingly/known/knows as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[69] This definition is opaque. However, its application is critical to the understanding and application of a number of essential rules. Accordingly, it should be amended to "knowing or with reckless disregard for the truth" not only to provide clarity, but to encompass harmful behavior that currently evades sanction under the actual knowledge definition.

B. IMPLICATIONS FOR OTHER RULES

This minor definitional amendment would bolster a number of existing ethical obligations to prevent the false lawyer speech subverting democracy from going unsanctioned. The proposed amendment would not only govern lawyers' speech in the courtroom,[70] but would extend to the public square as well.[71] Rule 4.1 – Truthfulness in Statements to Others prohibits a lawyer from making a false statement of material fact or law to a third person or failing to disclose a material fact to a third person in the course of representing a client.[72] Pursuant to Rule 4.1, lawyers must be held to account for their statements during the course of their representation. "Just because a lawyer lied to the general public does not mean that the lawyer did not "communicat[e] on behalf of a client with a nonclient."[73] Accordingly, under a "reckless disregard for the truth" standard, Rule 4.1 would prohibit false extrajudicial statements made with reckless disregard for the truth.

Some may contend that lowering the "knowledge" threshold would impermissibly infringe on a lawyer's ability to zealously represent their client, as required by Rule 1.3 – Diligence.[74] This rule is not without limits, as the comment articulates that "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client"[75] and are not required to use "offensive tactics"[76] in furtherance of their client's interests. Moreover, a lawyer is not precluded from diligently representing their client merely by imposing a requirement that they do

69. MRPC r. 1.0(f).
70. *See* MRPC r.3.3. This rule prohibits a lawyer from making a false statement of fact or law to a tribunal and offer evidence the lawyer knows to be false, among other things.
71. *See* Libby, *supra* note 49, at 1339.
72. *See* MRPC r. 4.1.
73. *See* MRPC r. 4.1.
74. MRPC r. 1.3.
75. MRPC r.1.3 cmt 1.
76. MRPC r.1.3 cmt 1.

not act with reckless disregard for the truth, a requirement already implicit in Rule 1.1 – Competence.[77]

IV. JUDICIAL REVIEW

Any efforts to regulate a citizen's First Amendment rights must not be taken lightly. Political speech is subject to strict scrutiny—meaning regulations are presumed unconstitutional. To overcome the presumption, the government must prove it has a compelling interest in regulating the speech, the regulation is narrowly tailored to meet the compelling interest, and the regulation is the least restrictive means of accomplishing the desired objective.[78] This high threshold appropriately preserves the essential right to expose the shortcomings of our system of government.[79] For political speech to fall outside the scope of First Amendment protection, it must fit within one of the few narrow categories of exceptions—limited to "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words', child pornography, fraud, true threats and speech presenting some grave and imminent threat the government has the power to prevent."[80] Under our current First Amendment jurisprudence, false speech that subverts democracy does not squarely fall within the existing exceptions, and thus is fully protected. However, the reasoning applied in the existing First Amendment exception cases indicates perhaps it should. Although we have no reason to anticipate an imminent doctrinal shift on this topic, that does not preclude the bar from applying similar reasoning to regulate damaging lawyer speech.

A. CATEGORICAL EXCLUSIONS

An analysis of existing categorical exclusions from First Amendment coverage indicates false speech that undermines democratic processes may warrant entry into the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[81] *Chaplinsky*, which ruled that "fighting words" are unprotected, outlined the two primary considerations for determining whether speech ought to fall outside the scope of First Amendment protection: historical tradition and a balancing test. The court went on to apply these factors in their decisions excluding libelous

77. MRPC r. 1.1.

78. *See* Strict Scrutiny Review (First Amendment), Practical Law Glossary Item w-007-3046, WESTLAW (2025).

79. *See* Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.").

80. *See Alvarez*, 567 U.S. at 717 (internal citations omitted).

81. *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942).

speech,[82] obscenity,[83] and child pornography[84] from First Amendment protection. Though excluded categories of speech are "well-defined and narrowly limited," the Court in *Alvarez*[85] noted that they can be expanded for "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law."[86] Considering this, one may find good cause to include the spread of disinformation that subverts democracy into the "well defined and narrowly tailored categories" of unprotected speech.

Applying this test to this article's proposed amendment, one finds a clear historical tradition of regulating lawyer speech, particularly when the speech relates to democratic processes: "Lawyers' self-recognized professional obligation to support democracy dates to the founding of our Republic."[87] This tradition continued into the following century, with legal scholars contemplating that "[t]he duty of watching over and guarding these fundamental principles—these legal morals, if I may be allowed the term—of developing, explaining, and defending them, rests with the legal profession."[88]

When balancing the social value of false speech that thwarts democratic processes against its harms, the outcome is obvious. First, the Court has repeatedly noted the low value of false speech in and of itself.[89] For example, the *Chaplinsky* Court found that intentionally false statements "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[90] Because the false speech concerns our democracy, the speech is not only valueless, but potentially harmful to preserving our system of government.[91] Moreover, an underlying premise of freedom of speech, that

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82. *See* Beauharnais v. People of State of Ill., 343 U.S. 250, 256–57 (1952) (holding libelous speech against a defined group of persons falls outside First Amendment coverage. The Court noted the longstanding existence of libel laws, and quoted *Chaplinsky* to emphasis that the speech was of slight social value.).

83. *See* Roth v. United States, 354 U.S. 476, 484–85 (1957) (emphasizing founding-era constraints on blasphemy, profanity, and obscenity and a modern absence of "social importance" regarding obscenity, illustrated through judicial precedent and existing obscenity laws.).

84. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982) (ruling child pornography beyond the scope of First Amendment protection based on the historical exclusion of speech integral to unlawful conduct and a balancing test, stating "the evil to be restricted [that] so overwhelmingly outweighs the expressive interests . . . at stake.").

85. *See Alvarez*, 567 U.S. at 722 (quoting *United States v. Stevens*, 559 U.S. 460, 473)

86. *See Stevens*, 559 U.S. at 473; *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011) ("[P]ersuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.").

87. *See* Rosen, *supra* note 46, at 169.

88. *See* Lawrence Lowell, *The Responsibilities of American Lawyers*, 1 HARV. L. REV. 232, 235 (1887).

89. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

90. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

91. *See* Goldenziel & Cheema, *supra* note 39, at 169 ("Disinformation threatens the existence of a well-informed public, and therefore, democracy itself.").

speech will contribute to the marketplace of ideas, is not applicable to false speech.[92] False speech is antithetical to this objectives, as it "interfer[es] with the truth-seeking function of the marketplace of ideas."[93] Dissemination of false speech, particularly in the age of social media, serves only to dilute and confuse the marketplace.[94] By rendering true speech the minority, disinformation campaigns "enable the effective suppression of the facts through the proliferation of fake news."[95] Permitting the spread of false speech, especially by lawyers, "directly contravenes that purpose if the marketplace is used to keep human society mired in socially dysfunctional misunderstandings about the nature of the world and its history."[96] In other words, the perceived benefit of the speech is in fact harmful.[97] This concept is not unique to our digital age. In 1964, the *Garrison* Court found "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[98] This has been rendered more dangerous by the scale at which false information can be spread on social media, especially when administered as part of a strategic disinformation campaign. The serious risk we face has been recognized by our own government: "[T]he greatest current threat to democratic legitimacy now comes from lies by domestic actors who seek to convince Americans that their election systems are fraudulent, corrupt, or insecure."[99]

B. STRICT SCRUTINY

Even if the spread of disinformation by lawyers was not found to warrant a categorical exemption, the proposed rules would certainly survive judicial scrutiny. Because the veracity of the speech—not the subject matter of the speech—is at issue, the regulations are content neutral, thus should be reviewed under intermediate scrutiny. Even so, the regulations would survive strict scrutiny. The analysis would begin by considering the government interest at stake. Here, the interest could not be more commanding: democracy itself.[100] *Garrison v. Louisiana* noted

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92. *See* William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 350–51 (2007) ("Deliberately false statements were never envisioned as a useful component of this marketplace. They are analogous to counterfeit money in the physical marketplace: both equally worthless, yet both potentially very harmful. In the same way that counterfeit money is properly excluded from the physical marketplace, so too is deliberately false speech properly excluded from the marketplace of ideas.").

93. *See Hustler Magazine*, 485 U.S. at 52.

94. *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 267 (2017).

95. *Id.*

96. *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. (2008).

97. *See* 379 U.S. at 75.

98. *See* Garrison v. State of La., 379 U.S. 64, 75 (1964).

99. *See* H. COMM. OVERSIGHT AND REFORM, MAJORITY STAFF REPORT: "EXHAUSTING AND DANGEROUS": THE DIRE PROBLEM OF ELECTION MISINFORMATION AND DISINFORMATION (2022).

100. *See* Burson v. Freeman, 504 U.S. 191, 199 (1992); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334

the unique import of political speech, highlighting how "speech concerning public affairs is more than self-expression; it is the essence of self-government."[101] This may initially be read as a reason to prohibit any regulation of speech concerning public affairs. However, a closer analysis reveals that permitting lawyers to inject knowingly false information into the marketplace of ideas is tantamount to throwing a wrench in the machine of self-governance, and should be regulated accordingly. Next, the regulation is narrowly tailored to meet the compelling interest, and the regulation is the least restrictive means of accomplishing the desired objective. The proposed regulation is limited only to false lawyer speech that undermines democratic processes. It is important to consider the possible chilling effect of speech this regulation could have, as some bright legal scholars have done.[102] However, the proposed regulations include a number of safeguards to protect well intentioned speech. For example, lawyers would only be subject to sanction from their speech if the speech was false. This fact alone is insufficient to prevent the chilling of speech. But falsity is not the only issue: the speech must be uttered with knowledge of its falsity or with reckless disregard for the truth. Considering the existence of lawyers' ethical duties to investigate the veracity of their claims, this should not be characterized as an undue burden. Moreover, the proposed regulations are narrowly tailored to consider only false speech that subverts democratic processes; thus, the chilling effect is appropriately limited.

CONCLUSION

Politically motivated lawyers are using their perceived status as people with access to "inside information" to perpetuate disinformation that undermines democratic processes. Despite the credibility that lawyers' speech can lend to disinformation campaigns under current ethical regulations, this behavior largely evades discipline. Because the First Amendment generally extends protection to false statements, it is incumbent upon the Bar to address the spread of false speech by lawyers. Permitting members of the Bar to spread disinformation intended to subvert our democracy undermines the Bar's legitimacy as a self-regulating body. The Bar need only amend the definition of "knowledge" established in Model Rule 1.1 to bolster the legal hook for sanctioning dangerous false lawyer speech. Shifting from the "actual knowledge" standard presently employed to

(1995) (Scalia, J., dissenting) ("[N]o justification for regulation is more compelling than the protection of the electoral process. Other rights, even the most basic, are illusory if the right to vote is undermined."); Brown v. Hartlage, 456 U.S. 45 (1982) (acknowledging the state's legitimate interest in preserving the integrity of the electoral process).

101. 379 U.S. at 74–75 (holding that "voters from confusion and undue influence," and "ensuring that an individual's right to vote is not undermined by fraud in the election process" are compelling.).

102. *See* Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POLICY 37, 58 (2022) ("Vague government interests like preserving the rule of law or the reputation of the profession do not suffice to justify limitations on lawyers' political speech precisely because they leave room for targeting unpopular groups agitating for change. Limitations on lawyers' First Amendment rights have been confined to those necessary to protect clients and ensure the proper functioning of the courts.")

"reckless disregard for the truth" would prevent lawyers from deliberately eluding ethical obligations by not investigating factual matters. Moreover, the proposed amendment would empower Rule 4.1 to reach potentially dangerous out-of-court statements.

Although this proposed amendment would regulate lawyer speech beyond what the First Amendment currently requires, the revised Model Rules would survive judicial review. Not only does the purpose of the proposed amendment to the Model Rules align with the reasoning of categorical exceptions to First Amendment protections, but the regulation would survive even strict scrutiny.