



**Regulation Matters:
a CLEAR conversation**

Episode 57: Update on FSMB's COVID Misinformation Policy September 8, 2022

Line Dempsey: Welcome back to our podcast, Regulation Matters: a CLEAR conversation. Once again, I'm your host, Line Dempsey. I am currently the chief compliance officer with Riccobene Associates Family Dentistry here in North Carolina. And I'm also CLEAR's president-elect.

As many of you are aware, the Council on Licensure, Enforcement and Regulation, or CLEAR, is an association of individuals, agencies and organizations that comprise the international community of professional and occupational regulation. This podcast is an opportunity for you to hear about important topics in our regulatory community.

Today's episode is an update to a webinar CLEAR hosted in the fall of 2021 that was dealing with disciplining practitioners for off-duty and COVID misinformation conduct. The webinar focused on whether regulators can and should discipline practitioners, whether that be off-duty or on-duty, for conduct that results in the spread of misinformation or disinformation about COVID-19 and the public health crisis. You can purchase a recording of that webinar on our CLEAR website. Along with the legal perspective and some case examples, the webinar highlighted a statement by the Federation of State Medical Boards about disciplining physicians who generate and spread COVID-19 vaccine misinformation and disinformation.

FSMB has recently updated its "Professional Expectations Regarding Medical Misinformation and Disinformation" policy. Joining us today to talk about the updated policy is Katie Templeton, Recent Past President of the Oklahoma State Board of Osteopathic Examiners and Chair of the Federation of State Medical Boards Ethics and Professional Committee. We're super glad to have you with us today; thank you.

Katie Templeton: Thank you, Line! I'd like to just say 'hello' to all your listeners and thank you for inviting me to join you today. It was an honor to work with CLEAR and other regulators in medicine last fall on your webinar related to misinformation. And I'm happy to be back today to continue this conversation.

Line: We're really happy to have you back with us. And also let me thank our listeners for joining us

today. So, let's get right into it. The FSMB statement that was released in July 2021 reminded physicians of the high degree of public trust placed in them and of their ethical and professional responsibility to share factual and scientifically-grounded information - and that spreading COVID vaccine misinformation could result in disciplinary action.

I noted that there are two distinct terms, as we mentioned in the very beginning. In the statement title, we have "misinformation" and "disinformation." Can you start off by defining the difference between the two terms, and maybe why that difference matters?

Katie: Absolutely! The main difference between the two terms is the "knowingly" component of the incorrect information. Misinformation is information that is false, misleading, or inaccurate. Disinformation is that same misinformation, but it's knowingly spread for some ulterior gain, whether it is financial, political, or otherwise. So, the disinformation has the added element to it of the intent than the misinformation, which may be more innocent in its inaccuracy.

Line: That makes sense. We deal with that a lot of times dealing with insurance and billing issues. So, why has the Ethics and Professional Committee revised or revisited this policy? What has FSMB seen or heard since July 2021 that resulted in a need to update the policy?

Katie: The original statement that came out by the FSMB Board of Directors in July 2021 was done so with a sense of urgency due to the timeliness of the topic. Our policies by the Federation are adopted by the House of Delegates at our annual meeting, which is usually the last week of April. We knew in July that this was a very hot topic and we needed to come forth and make a statement. So the Board of Directors did. The full policy statement was not really a revisiting of that statement but rather a more in-depth and thorough analysis and response to the topic. It was presented at the annual meeting and then adopted by the entire House of Delegates, comprised of the 70 US state and territorial licensing boards. Although the [Ethics and Professionalism] committee had begun its charge of addressing misinformation in July 2021, the Board of Directors recognized that the full policy would not be able to be adopted and then public for another nine months. So at that time, we wanted to put out a statement on this topic before the full policy was adopted.

Line: That makes sense. This was kind of a "heads-up, this is what's gonna happen," but we need to stop some of this stuff immediately before this goes into action.

Katie: Absolutely! We didn't think that we had nine months to stay silent until we could have the full policy ready to go.

Line: Certainly. Well, the statement emphasizes medical professionalism, professional duty, and ethical responsibilities – puts emphasis on all those things. Can you talk about how that comes into play in these situations dealing with misinformation and disinformation?

Katie: Misinformation has become politically charged in many arenas, but when you think about it, it's

tied back to informed consent, which has been an ethical requirement of the practice of medicine for decades. The medical professionalism standpoint encompasses treating patients in an altruistic manner, placing the needs of the patient and the health of the public above any competing interest of the physician. This all ties into the professional duty and ethical responsibilities to be honest and truthful in all patient interactions and when speaking.

I think, in general, people assume misinformation is something new. And in some ways, it is, especially with the advent of social media and the ability to spread information more quickly. But the topics of being truthful to your patient, giving them all of the information that they require to make an informed decision, has been around for decades, and it's an important part of medicine. And when you think about it from that perspective, there's much less disagreement with regard to the topic than when you kind of use these politically charged words, if you will.

Line: Right. Well, can you highlight some of FSMB's recommendations related directly to practitioners?

Katie: Practitioners have a duty to maintain professional standards at all times, and this includes conveying information that is based on the best scientific evidence available, and they have a duty to convey all relevant information, risks, benefits, and alternatives. Treatment options should be based on available scientific consensus, and they should proceed cautiously in the absence of the same. Sometimes we may not have all the answers, but we do have some answers and we do have some evidence. And we need to be basing our decisions on that scientific evidence that is available. Practitioners also need to be prepared to handle difficult conversations with patients who may present misinformation and proceed calmly and respectfully in addressing the misinformation. Many patients come to practitioners with a fear that they've heard somewhere else, and practitioners need to be ready. It can be frustrating for practitioners, but they need to be ready to calmly address it with their specific patient to get to the root of the truth and provide the best care that they can to their patients.

Line: I think that's brilliant to add that aspect. I think that's where a lot of problems happen – people read things on the internet and on Facebook or whatever it is and maybe a friend that they respect has forwarded that, so they take it at face value. And it certainly can be a very politically charged sentiment. I'm glad that you are pointing that out.

Katie: Absolutely! I once heard that fear is the strongest emotion in driving behavior, and we really see that in this context, especially COVID-19 and the arena we're in now. Fear can really drive people more than anything else.

Line: Absolutely – it's a monumental amount of misinformation or disinformation that we have to deal with on a daily basis. I think from our membership, they probably are most interested in the considerations and recommendations for healthcare regulators and medical boards. A lot of medical boards are receiving complaints about practitioners sharing misinformation and disinformation. And of course we've seen accounts of such conduct in the news, even if it hasn't been formally submitted

to the board as an actual complaint. FSMB's policy statement lists five specific recommendations for state medical boards. Let's talk about each of these.

This is a quote here: "State medical boards are encouraged to adopt a policy that clarifies board expectations regarding the dissemination of misinformation and disinformation by licensees." Let's start there.

Katie: With the advent of social media and the ability to easily spread misinformation, the landscape has truly changed in this regard. Even looking at five years ago, ten years ago, not that long ago – the way people communicate has changed; the way people receive their news and information and medical data has really changed. Many boards do not have policies related to this issue. Boards are encouraged to adopt policies to provide the framework of expectations upon their licensees with regard to misinformation and disinformation. Many have more catch-all ethics and professionalism, which does cover this, but with the landscape changing, we really do encourage boards to address this head-on and provide their licensees with that expectation.

Line: The next recommendation is that "state medical boards must retain their legislated authority to regulate the professional conduct of licensees in order to effectively protect the public."

Katie: We feel strongly that state boards should retain their autonomy to regulate professional conduct and protect the public in their specific state or territory. State boards are the single best entity to protect the public, and this authority should not be negated. We have seen some state legislatures try to abrogate that authority, and it puts the public at risk. We have seen state attorneys general opine that boards should not interfere with the physician-patient relationship, and while their intent was addressing something specific to the current environment and COVID-19, they failed to understand the downstream consequences that sexual boundary violations, overprescribing of opioids, and other situations that boards regularly address are in fact addressing the physician-patient relationship.

So, we want to make sure that those state boards have the authority and the autonomy to protect the public, handle their licensees – be it discipline, education, or other remediating measures – without the overreach of some state legislatures trying to tell them how to do it. We need those state boards to remain autonomous and have that authority.

Line: Very good. Related to these cases, "state medical boards are encouraged to consider the full array of authorized grounds for disciplinary action in their Medical Practice Acts."

Katie: Since, as I mentioned earlier, these issues are all related to and can fall under the umbrella of professionalism and ethical duties, boards can address these issues under that purview as opposed to needing specific language related to misinformation. Most practice acts aren't going to have something specific to COVID-19, misinformation, social media, etc., but we have these ethical duties and standards that are required of all of our licensees. And this component of telling the truth and

informed consent all fall under that ethical responsibility. And boards can use that as a tool in addressing the discipline and the rehabilitation of their licensees on this topic

Line: OK, the next one is, “when appropriate, state medical boards should consider whether there are options that do not involve disciplinary action that could help a licensee understand the ethical basis of their duty to convey accurate information to patients and the public and change or remediate their behavior appropriately.”

Katie: So, discipline is a significant component of what boards do. But the actual goal is to stop or prevent the offending behavior or conduct. Most of the time, discipline may be required to effectuate that change. But sometimes it can be in other avenues such as education. Especially with misinformation that does not have the same knowing or intentional component as disinformation, boards are encouraged to look for educational or rehabilitative methods to correct the conduct. The important factor is to prevent the misinformation and disinformation and to support and restore the public trust in the institutions of medicine while protecting the public. The goal at the end of the day is public protection. So, if we can reach that goal by educating our licensees and other rehabilitative measures that don't necessarily involve discipline, then that's what we wanna do. Because we've gotta keep our eye on the prize at the end of the day, which is protecting the public.

Line: Alright, perfect. And the final recommendation addresses a big concern for regulators. “State medical boards should not be dissuaded from carrying out their duty to protect the public by concerns about potential challenges to disciplinary decisions when these decisions are based on sound regulatory considerations for public protection.” Can you break that one down a little for us?

Katie: Yes, absolutely. In short, the fear of a potential challenge or appeal of a disciplinary action should not dissuade boards from doing the right thing to protect the public. When the decision is based on sound regulatory considerations for public protection, the board should feel confident moving forward. One of the hot topics that we see or concerns that people have is kind of this free speech component – “our hands are tied because of free speech.” But when you look at the process as a whole, if it's related to a physician-patient relationship one-on-one, then you can address the issues between the physician and the patient. Things have been asked, “what if it's outside the context of the physician-patient relationship?” In most instances, any healthcare provider that is spreading misinformation outside of the context of the healthcare setting is also doing the same within the healthcare setting. So, they're very much more tied together than when you think of it as distinctly free speech over here on the right and over here on the left the ethical responsibilities of the practice of medicine. And most people who are spreading misinformation or disinformation specifically are doing so to gain something. They're selling something; they're trying to get patients to come to their clinic – there's something else going on which also ties it into the practice of medicine. They're not going to be saying one thing over here but then not spreading the medical misinformation inside the clinical setting. And that's when there's far greater overlap than when you think of them as two distinct First Amendment free speech over here versus ethical duties to our patients over there.

Line: So, do you think that, looking at this from misinformation or disinformation that occurs in the clinical setting versus completely separate and outside of the clinical setting such as personal social media – do you think it's been more rampant in one area than the other?

Katie: I think because of the ease of spread of information via social media, it certainly feels like it's happening more there. The algorithms of social media – the more it's clicked, liked, and engaged with in social media, the more other people will get to see it in their feeds. I think it's going on equally in both places, but I think there's a few people causing a lot of spread of misinformation in the social media arena, so that's what we're seeing more of or that's what we feel like we're seeing more of.

Line: Yeah, and this seems to tie in with a lot of the stuff we've been recently talking about with regard to social media and talking about that white coat that you put on and take off when you leave the practice. Practitioners that violate this, spreading misinformation on their own personal social media but don't necessarily present that information at the clinic – are they disciplined differently?

Katie: Can you ask me that again?

Line: Sure! So if you have a practitioner that is maybe on his or her own personal media spreading misinformation or disinformation but then puts the white coat back on and goes into the clinic and doesn't present those same viewpoints, or doesn't counteract them or is not active in it, does the practitioner get disciplined equally?

Katie: I'm not sure that I would use the word "equally." It would be looking at it from a different component, focusing on the ethical standards of why you're spreading something that you likely know to be false if you're also not telling your patients that in the clinical setting, versus the standard of care that you might be looking at if you were just in the clinical setting in the misinformation component. Boards discipline lots of things outside the practice of medicine, be it sexual boundary violations that may have not been with a patient, addiction, DUIs. There are a lot of things that fall under this ethical umbrella under medical practice acts that boards face all the time in every jurisdiction on a regular basis. Keeping in mind that boards do have the authority to address things on the basis of the ethical duty in and of itself allows you the ability to address this, where maybe it's not inside the clinical setting as significantly as they're spreading it elsewhere but they still have that duty upon them.

Line: Brilliant! I think this has been a great update on a very timely and important topic. Thank you, Katie, for speaking with me today.

Katie: Absolutely! It's been a pleasure, and I look forward to seeing how our boards handle this going forward.

Line: Absolutely; it will definitely be interesting to see. And we'd love to continue this conversation on CLEAR Communities. The podcast episode will be posted there, and you can reply with your comments. Here are some additional questions to think about: Has your board dealt with complaints

about practitioners disseminating misinformation or disinformation? Does your board have a policy on board expectations regarding dissemination of misinformation and disinformation by licensees? Do you feel that your board has legal grounds for disciplinary actions? What concerns do you have in this area? Please share your comments on CLEAR Communities.

I also want to again thank our listeners for tuning in for this episode. We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. If you're new to this podcast, please subscribe to us. You can find us on Podbean or any of your favorite podcast services. If you've enjoyed this podcast episode, please leave a rating or comment in the app. Your reviews help us improve our ranking and make it easier for new listeners to find us. Feel free to visit our website at www.clearhq.org for additional resources and a calendar of upcoming programs and events.

Finally, I'd like to thank our CLEAR staff, specifically Stephanie Thompson, Content Coordinator and editor for our program. Once again, I'm Line Dempsey, and I hope to be speaking to you again very soon.

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