

Reconciling the First Amendment with the Regulation of Professional-Client Communications

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Date : January 27, 2017

Claudia E. Haupt, *Unprofessional Advice*, 19 **U. Pa. J. Const. L.** (forthcoming 2017), available at [SSRN](#).

The application of First Amendment principles to professional speech raises a seemingly irresolvable challenge. On the one hand, a core First Amendment principle is that government should not discriminate against speech based solely on its content. On the other hand, it is well settled that physicians and other professionals can be subject to malpractice liability for giving “unprofessional” advice—despite the fact that doing so depends precisely on the sort of content discrimination that the First Amendment normally does not allow. In light of this discrepancy, some have suggested that professional-client interactions should be treated as an exception to normal First Amendment principles, in order to preserve the law’s ability to protect clients from unprofessional advice.

Rejecting that approach, [Claudia Haupt](#)’s forthcoming article, [Unprofessional Advice](#), argues that efforts to limit unprofessional advice are entirely consistent with “the claim that “[p]rofessional speech should receive robust First Amendment protection.” The article builds on Haupt’s previous work, [Professional Speech](#), which set out a comprehensive theoretical and doctrinal framework for understanding professional speech. Taken together, the two pieces provide a coherent and convincing approach to resolving several ongoing policy debates.

Haupt’s argument rests on a novel understanding of what it means to be a professional. She argues that the professions are not simply occupational categories defined by state licensing requirements, but instead “are best conceptualized as knowledge communities whose main reason for existence is the generation and dissemination of knowledge.” Although these knowledge communities are not “monolithic,” they are defined by “shared notions of validity” that “limit the range of opinions that may be found valid within the profession.” Based on this conceptualization, she argues that the First Amendment’s protection of professional speech extends only to “assessments based on the profession’s shared ways of knowing and reasoning.” Individuals who purport to provide professional services while “refusing to follow the shared ways of knowing and reasoning due to exogenous beliefs” have thus forfeited any First Amendment protection by “plac[ing] themselves outside the knowledge community.”

Haupt justifies this distinction by pointing to the “asymmetry of knowledge” that typically characterizes the professional-client relationship, which makes it impossible for most clients to independently assess the validity of professional advice. In light of this asymmetry, clients must simply trust that the professional is providing “competent and comprehensive professional advice in accordance with the professional’s insights.” Professionals who fail to provide advice grounded in the profession’s shared ways of knowing and reasoning have therefore violated the patient’s trust.

This understanding of the scope of First Amendment protection of professional speech has several important implications. For example, it suggests that professional advice based on ways of knowing and reasoning external to the knowledge community—such as a pharmacist’s religiously-motivated refusal to advise clients on the availability of certain contraceptives—should receive no First Amendment protection. Indeed, Haupt goes further by criticizing even voluntary governmental efforts to accommodate these outsider perspectives against accepted professional positions. For example, she criticizes the Department of Education’s attempt to persuade the American Psychological Association’s Committee on Accreditation to maintain an exemption for religious programs that classify homosexuality as a mental disorder. Such efforts, she argues, constitute inappropriate “state interference endorsing the outlier status of certain professionals against the rest of the profession.”

Haupt's approach also supports robust First Amendment protection for advice grounded in the professional community's "shared ways of knowing and reasoning," even for members of the profession whose "alternative assessments based on a shared methodology" lead to recommendations that are not embraced by the profession as a whole. As an example, she cites the Ninth Circuit's decision in [Conant v. Walters](#), which invalidated a federal policy under which physicians who recommended medical marijuana to their patients could lose their licenses to prescribe controlled substances. The Ninth Circuit's decision "protected the scope of professional advice consistent with the knowledge community's emergent knowledge, despite ongoing scientific debate."

Haupt's scholarship appears at an important moment in the application of First Amendment jurisprudence to physician-patient communications. In addition to numerous cases challenging compelled physician disclosures in the abortion context, the Eleventh Circuit is soon expected to issue an [en banc decision](#) in a case challenging a Florida statute prohibiting physicians from routinely asking their patients if they own firearms. The Florida statute is inconsistent with recommendations of numerous professional medical associations, including the [American Academy of Pediatrics](#), which "recommends that pediatricians incorporate questions about the presence and availability of firearms into their patient history." Yet, a panel of the Eleventh Circuit determined that these professional opinions are irrelevant, on the ground that "Florida may regulate professional standards of medical care within its borders—regardless of what medical associations may recommend."

By grounding First Amendment protection of professional speech in the protection of knowledge communities, Haupt provides a powerful basis for resisting efforts to prevent physicians from asking the kind of questions that their professional standards require. At the same time, it leaves ample room for regulating professional communications that fall outside professional norms.

Cite as: Carl Coleman, *Reconciling the First Amendment with the Regulation of Professional-Client Communications*, JOTWELL (January 27, 2017) (reviewing Claudia E. Haupt, *Unprofessional Advice*, 19 **U. Pa. J. Const. L.** (forthcoming 2017), available at SSRN), <https://health.jotwell.com/reconciling-the-first-amendment-with-the-regulation-of-professional-client-communications/>.