

ANSWER TO QUESTION 8

While it will probably prove unsuccessful, Dr. Glitter's best argument is to challenge the constitutionality of the rule as a violation of the free speech guarantee of the First Amendment to the United States Constitution, applicable to the state through the Fourteenth Amendment. *Gitlow v New York*, 268 US 652 (1925). The First Amendment provides that government shall make no law abridging the freedom of speech.

Here, the Michigan Board of Medicine has implemented a rule that prohibits physicians from soliciting hospitalized clients. Generally, speech that "propose[s] a commercial transaction" is deemed commercial speech, *Board of Trustees of the State Univ of New York v Fox*, 492 US 469, 473 (1989), and is protected by the First Amendment from "unwarranted governmental regulation." *Central Hudson v Public Service Comm of New York*, 447 US 557, 561 (1980).

While commercial speech is not entitled to the same scope of protection as political speech or expressive speech, *Rochester Hills v Schultz*, 459 Mich 486, 489 (1999), it does enjoy constitutional protection under an "intermediate scrutiny" analysis. *Florida Bar v Went For It*, 515 US 618, 623 (1995). The test used to ascertain the constitutionality of regulations imposed on commercial speech "turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, 447 US at 563. Commercial speech may be regulated if the government satisfies a four-prong test: (1) the speech must be protected by the First Amendment. For commercial speech, it must concern lawful activity and not be misleading; (2) the government must assert a substantial interest in support of its regulation; (3) the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and (4) the regulation must be "narrowly drawn" to serve the substantial interest. *Florida Bar v Went For It*, 515 US at 624. The state has the burden of establishing the validity of its commercial speech regulation under the *Central Hudson* test. *Cincinnati v Discovery Network, Inc.*, 507 US 410, 416 (1993).

(1) In this case, the speech subject to restriction concerns the promotion and sale of cosmetic surgery procedures, a lawful activity. The facts do not indicate, and no reasonable argument may be advanced, that providing truthful information regarding available cosmetic surgery procedures is misleading. Therefore,

the speech is protected by the First Amendment.

(2) The government interests that caused the State Medical Board to enact the rule are substantial. In fact, "[s]tates have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v Virginia State Bar*, 421 US 773, 792 (1975). Moreover, protecting the privacy of potential clients is also a substantial state interest, as commercial speech may not be used to "intimidate, vex, or harass the recipient." *Endenfield v Fane*, 507 US 761 (1993). Lastly, the United States Supreme Court has noted that "[u]nlike a public advertisement, which simply provides information and leaves the recipient **free** to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 457 (1978). Thus, the asserted governmental interests in support of the regulation are substantial.

(3) The third prong of the *Central Hudson* test is a closer question and requires the government to demonstrate that the restriction on commercial speech directly and materially advances that interest. To satisfy this prong, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," and may not rely upon "mere speculation or conjecture." *Edenfield* at 770-771. While a state is not required to submit empirical data "accompanied by a surfeit of background information" in order to satisfy the third prong, *Florida Bar*, 515 US at 628, the commercial speech restriction must "target[] a concrete, nonspeculative harm." *Id.* The asserted dangers are "significantly greater" where an "unsophisticated, injured, or distressed lay person" is personally solicited. The lay person may place trust in the professional "simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Ohralik* at 465-466. In contrast, where the clients are "sophisticated" and "far less susceptible to manipulation," in-person solicitation "poses none of the same dangers." *Edenfield* at 774-775. Because the rule at issue here involves a doctor who is soliciting potential patients in their hospital rooms--a situation involving people who are especially vulnerable to persuasion by a professional whom the patient is inclined to trust--a court is likely to consider the Michigan Board of Medicine rule closer to the *Ohralik* circumstances than the *Edenfield* circumstances.

(4) Under the fourth prong of *Central Hudson*, a court

considers "whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans Broadcasting v US*, 527 US 173, 188 (1999). A state is not required to select the least restrictive means; rather, what is required is a reasonable fit between the state's goal and the means chosen to accomplish that goal. The means chosen must be "in proportion to the interest served," and "narrowly tailored to achieve the desired objective." *Florida Bar v Went For It*, 515 US at 632. Here, one could easily argue that the rule prohibiting the solicitation of hospitalized clients is narrowly tailored to serve the state's substantial interest. The solicitation ban is limited to a relatively brief period of time--the duration of the potential client's hospitalization. Moreover, there are numerous other ways for hospitalized patients seeking plastic surgery to learn about the availability of plastic surgeons while they are hospitalized, including television, radio, newspapers, the internet, telephone directories, and physician referral services. Because the prohibition is narrowly tailored to the period of hospitalization, and ample alternatives exist for receiving information about the availability of plastic surgery, the constitutionality of the rule should be upheld.