

A state legislature received complaints from traffic accident victims who, in the days immediately following their accidents, had received unwelcome and occasionally misleading telephone calls on behalf of medical care providers. The callers warned of the risks of not obtaining prompt medical evaluations to detect injuries resulting from accidents and offered free examinations to determine whether the victims had suffered any compensable injuries.

In response to these complaints, the legislature enacted a law prohibiting medical care providers from soliciting any accident victim by telephone within 30 days of his or her accident.

Which of the following arguments would be most helpful to the state in defending the constitutionality of the law?

- A. Because the commercial speech that is the subject of the law includes some speech that is misleading, the First Amendment does not limit the state's power to regulate that speech.
- B. Because the law regulates only commercial speech, the state need only demonstrate that the restriction is rationally related to achieving the state's legitimate interests in protecting the privacy of accident victims and in regulating the medical profession.
- C. The law is a reasonable time, place, and manner regulation.
- D. The state has substantial interests in protecting the privacy of accident victims and in regulating the practice of medical care providers, and the law is narrowly tailored to achieve the state's objectives.

### Explanation:

Commercial speech that (1) is **false or misleading** or (2) concerns **unlawful activity** does **not fall under First Amendment protection** and can be freely regulated by the government. But all other commercial speech is entitled to an intermediate level of First Amendment protection. This means that the government can only **regulate protected commercial speech** if the government proves that its regulation **directly advances a substantial government interest** *and* the regulation is **narrowly tailored** to achieve that interest.

Here, the state law prohibits medical care providers from soliciting accident victims by telephone within 30 days of the accident. The phone calls are protected commercial speech since they are only occasionally misleading (ie, most are truthful) and do not concern unlawful activity **(Choice A)**. As a result, the state's best argument is that it has *substantial* interests in protecting the privacy of accident victims and in regulating the practice of medical care providers, and the law is *narrowly tailored* to achieve those objectives **(Choice B)**.

**(Choice C)** The law is *not* a time, place, and manner regulation (ie, content-neutral restriction) since it prohibits phone calls based on what is being said (ie, content-based restriction).

### Educational objective:

Commercial speech that is not false or misleading and does not concern unlawful activity receives First Amendment protection. And any government regulation of that speech must (1) directly advance a substantial government interest and (2) be narrowly tailored to achieve that interest.

### References

- Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (providing the test for determining whether the government's regulation of protected commercial speech is constitutional).

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

## First Amendment speech protections

