

A number of psychotherapists routinely send mailings to victims of car accidents informing the victims of the possibility of developing post-traumatic stress disorder (PTSD) as the result of the accidents, and offering psychotherapy services. Although PTSD is a possible result of a car accident, it is not common.

Many accident victims in a particular state who received the mailings complained that the mailings were disturbing and an invasion of their privacy. These victims also reported that as a result of the mailings, their regard for psychotherapists and for psychotherapy as a form of treatment had diminished. In response, the state enacted a law prohibiting any licensed psychotherapist from sending mailings that raised the concern of PTSD to any car accident victim in the state until 30 days after the accident. The state justified the law as an effort to address the victims' complaints as well as to protect the reputation of psychotherapy as a form of treatment.

Is this law constitutional?

- A. No, because the law singles out one type of message for prohibition while allowing others.
- B. No, because the mailings provide information to consumers.
- C. Yes, because mailings suggesting the possibility of developing PTSD as the result of an accident are misleading.
- D. Yes, because the law protects the privacy of accident victims and the public regard for psychotherapy without being substantially more restrictive than necessary.

Explanation:

Commercial speech encompasses all types of economically-oriented expression (eg, advertisements). And it receives **intermediate First Amendment protection** so long as it is not false or misleading and does not concern unlawful activity. Therefore, government regulation of protected commercial speech is only constitutional if it (1) directly advances a **substantial government interest** and (2) is **narrowly drawn**—ie, not substantially more restrictive than necessary—to serve that interest.

Here, the state law prohibits psychotherapists from sending mailings about PTSD (including offers of services) to car-accident victims within 30 days of their accidents. These commercial mailings concern a lawful activity and are not false or misleading since they only suggest the possibility (not the likelihood) of developing PTSD (**Choice C**). And since a 30-day waiting period (1) directly advances the state's substantial interests in protecting victims' privacy and psychotherapy's reputation and (2) is not substantially more restrictive than necessary, the law is constitutional.

(Choice A) Laws that prohibit one type of message while allowing others (ie, content-based restrictions) are generally struck down under *strict* scrutiny. But since the state law concerns commercial speech—which only undergoes *intermediate* scrutiny—it permissibly targets PTSD mailings.

(Choice B) The mailings are protected commercial speech because they seek to provide consumers with information about PTSD—not to mislead them. But the government can still regulate the content of the mailings because the regulation meets intermediate scrutiny.

Educational objective:

Commercial speech that is false/misleading or concerns unlawful activity can be freely regulated. But any other commercial speech can only be regulated if the government shows, under intermediate scrutiny, that its regulation (1) directly advances a substantial government interest and (2) is narrowly drawn to serve that interest.

References

- Fla. Bar v. Went for It, Inc., 515 U.S. 618, 634–35 (1995) (upholding a state bar rule prohibiting attorneys from mailing solicitations to car-accident victims for 30 days after their accidents).

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First Amendment speech protections

