Physician-Patient Communications and the First Amendment After Sorrell

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**ABSTRACT**

To what extent are physician-patient communications protected by the first amendment? Because physicians are engaged in a commercial activity and subject to state licensing, courts have subjected the governmental regulation of physician-patient communication to the lower level of scrutiny that they use to analyze restrictions on commercial speech. As a result, states have been free to enact laws that prohibit physicians from discussing certain topics with their patients, as well as laws that require physicians to use state-mandated scripts in talking with their patients. After the U.S. Supreme Court’s decision in *Sorrell vs. IMS Health*, it now appears that the content of commercial speech should be subjected to the higher level of scrutiny that previously had been reserved for political speech. If consistently applied to physician-patient communications, the reasoning in *Sorrell* will provide these communications the higher level of protection that they deserve by virtue of the fiduciary nature of the physician-patient relationship. By protecting physicians’ ability to communicate freely with their patients, patients’ first and fourteenth amendment rights will also be enhanced.

Most physicians probably believe that they are free, within the bounds of professional ethics and prevailing standards of medical care, to communicate with their patients about their patients’ medical treatment. However, state
legislatures are increasingly considering laws that specifically prescribe what physicians may and may not say to their patients. States have tried to prevent physicians from talking with their patients about gun ownership as part of a preventive care discussion\(^1\); they have prevented physicians from warning their patients about information obtained regarding fracking chemicals\(^2\); they have tried to require physicians to tell patients with dense breast tissue that a standard mammogram may be insufficient to diagnose cancer\(^3\); they have required physicians to discuss end of life care with patients who are “terminally ill”\(^4\); and they have mandated that physicians provide a state-mandated script to patients to patients seeking abortions, including controversial information that is not scientifically based\(^5\).

These laws are enacted pursuant to the states’ authority to regulate and license physicians. When challenged on the basis that these laws violate physicians’ first amendment rights to speak freely to their patients, courts have applied standards developed in the context of commercial advertising; no distinction has been made between the rights of physicians to speak freely with their patients and the rights of tobacco manufacturers to advertise

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\(^1\) *Fla. Stat.* Sec. 790.338 (2011).
\(^2\) 58 Pa. C.S. A. Section 3222.1(b)11 (2011).
\(^3\) Va code Ann. Sec. 32.1-229 (2012).
cigarettes. Thus, as in purely commercial cases, courts have tended to uphold the regulation if they determined that the regulation was “rationally related” to a “substantial” state interest. They have given no special consideration to regulations that were content or speaker-based since the courts, before Sorrell, had never afforded special protection to content-based commercial regulations. This “commercial” standard is in stark contrast to the much higher standard required for the government to regulate political speech; in order to restrict the content of political speech, the government must show that a regulation is “necessary” to promote a “compelling state interest”.

However, the U.S. Supreme Court in Sorrell v. IMS Inc. ⁶, for the first time, suggested that a higher standard of scrutiny should be applied to regulations of commercial speech that are content-based or speaker-targeted. The regulations that have aimed at restricting physician-patient communications all fall into that category: they are aimed specifically at a certain type of speaker, i.e., physicians, and they attempt to circumscribe the content of their speech, either by preventing them from talking about certain topics or by compelling them to mouth a state-directed script. As a result, under the

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Sorrell rationale, regulations that are aimed at restricting physician communications with their patients should be analyzed using the same standard that is applied to regulations that restrict the content of political speech. Under this higher standard, it is more likely that many of the laws would be overturned.

When applied to physician-patient communications, the Court’s reasoning in Sorrell will enhance physicians’ first amendment rights so that physicians’ professional speech is treated as it should have been all along: as something more worthy of protection than general commercial speech. As trained professionals with a fiduciary responsibility to their patients, physicians should be distinguished from businesses selling products. Because a free and open dialogue between physician and patient, one that is neither scripted nor prevented by the government, is most likely to lead to good patient care, physicians’ communications with their patients deserve the highest degree of constitutional protection. In expanding the protection of physicians’ first amendment rights, the courts also would be enhancing not only patients’ first amendment rights to receive information, but also their fourteenth amendment due process rights to consent to and refuse treatment.
What kind of speech does the first amendment protect?

The first amendment protects speech to the extent that it is part of the “public discourse” because it is related to a citizen’s right to freely participate “in the process of democratic self-governance.”\(^7\) As a result, the content of “political” speech is afforded the utmost protection: the government will “strictly scrutinize” a regulation and will uphold it only if it is “necessary” to protect a “compelling state interest”.\(^8\) On the other hand, the content of “commercial speech” (e.g., advertising), generally receives less protection, that is, the government is permitted to regulate commercial speech if the regulation has only a “reasonable relationship” to a “substantial state interest”, provided the restriction directly advances that interest and is no more extensive than necessary to serve that interest (known as “intermediate protection”).\(^9\).

Because the value of commercial speech is in the information it conveys, the government is permitted to regulate the content of commercial speech, unlike political speech, to ensure that the public is not misled.\(^{10}\) In *Central Hudson*, an electrical utility brought suit in New York State court to

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\(^{10}\) *Id.* at 563.
challenge the constitutionality of a regulation of the New York Public Service Commission that completely banned promotional advertising by the utility. The Court recognized the validity of content-based regulation in the context of commercial speech\textsuperscript{11}, establishing what has become to be known as “the intermediate test” for analyzing the validity of a regulation. The “intermediate test” permitted the government to regulate the content of commercial speech as long as it is not misleading or related to an unlawful activity, and provided that the State could show that: 1) a substantial interest would be achieved by the regulation; 2) the regulation would be in proportion to that interest; 3) the limitation on expression would directly advance the state interest involved; and 4) the governmental interest could not be served as well by a more limited restriction on commercial speech.\textsuperscript{12}

In contrast, regulations that censored the content of political speech or that targeted particular speakers in the political context have been subject to the strictest scrutiny. Thus, in \textit{Consolidated Edison of New York vs. Public Utility Commission of NY}, where an electric utility sought review of order of New York Public Service Commission prohibiting the inclusion by public utility companies in monthly bills of inserts discussing controversial issues

\textsuperscript{11} \textit{Id.} at 564, FN 6.
\textsuperscript{12} \textit{Id.} at 564.
of public policy, the Court noted the difference between regulation that merely regulates the time, place or manner of speech and a regulation that tries to regulate the content of speech, concluding that “when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited “merely because public officials disapprove the speaker’s views.”\(^\text{13}\)

The *Sorrell* Court extended to commercial speech the Court’s historical disfavor of content-based and speaker-targeted restrictions that had previously been reserved for political speech. In *Sorrel*, the Court overturned a Vermont law that restricted the ability of pharmaceutical manufacturers to access physician prescribing information to be used to inform their salespersons of the physicians’ prescription habits to enhance their marketing activities. The Court found the law to be “content-based” because it was directed only to marketing information and “speaker-based” because it targeted pharmaceutical manufacturers. As a result, it concluded that “heightened scrutiny” similar to that used to analyze laws restricting political speech, should be applied. However, the Court didn’t actually apply the most stringent test because it found that even under the

\(^{13}\) 447 US 530, 536 (1980).
“intermediate scrutiny” test advocated by the law’s proponents, the law failed because it wasn’t drafted narrowly enough to achieve the state’s expressed interests in protecting medical privacy, improving public health and reducing health care costs. 14 The three dissenting justices in Sorrell pointed out that the majority’s opinion represented a major departure from a long line of cases that provide less protection to commercial speech, whether or not the regulation circumscribing such speech was “content-based” or “speaker-directed.” 15

The Sorrell opinion suggests that the line between the first amendment protection afforded to political speech and commercial speech is becoming increasingly blurred. At least one federal district court has referenced Sorrell in a case involving a state regulation that attempted to prevent physicians from discussing gun ownership with their patients as part of their routine preventive health inquiries. 16 However, whether the Sorrell reasoning will continue to be applied by courts in the context of physician-patient communication and whether it will be extended to regulations that attempt to compel physician speech as opposed to prohibit it, is not yet clear.

14 Sorrell, supra at n. 6.
15 Sorrell, 131 S. Ct. at 2677, supra at n. 6.
16 Wollschlaeger vs. Farmer, 814 F.Supp.2d 1347.
Authority of the Government to Regulate Professional Speech.

Most of the cases involving the rights of professionals to speak freely in the conduct of their professional practices have arisen in the context of professional advertising. In *Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, Inc.*, consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. For the first time, the Court clarified that speech that is purely commercial is protected by the first amendment, although it can be regulated to prevent the dissemination of information that is false, deceptive, misleading, or which proposes illegal transactions.\(^\text{17}\) The Court weighed the consumers’ rights to freely receive economic information against the professional disciplinary board’s interest in protecting the “professionalism” of pharmacists, concluding that the professionalism of pharmacists would not be adversely affected by the advertising of drug price information, whereas consumers would be adversely affected by being deprived of easily accessible drug pricing information; as a result, it invalidated the statute. The Court limited its ruling to pharmacists whom they viewed as dispensing standardized products,

specifically differentiating them from lawyers and physicians who “render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” 18

In his concurring opinion, Justice Burger suggested that he would give the government more leeway in regulating the advertising of health professionals. Citing Semler v. Dental Examiners19, which involved a ban on advertising by dentists, J. Burger expressed concern about maintaining the professional standards of health practitioners and guarding against “practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.” 20

Ten years later, the Court extended its Virginia Board reasoning to attorney advertising, concluding that the “professionalism” of attorneys would not be adversely affected by advertising geared to a certain type of legal problem or advertising that contained an illustration, provided that the advertising was truthful and non-deceptive. In Zauderer v. Office of Disciplinary Counsel of

18 Id. at 773, FN 25.
19 294 U.S. 608, 55 S. Ct. 570 (1935)
20 Virginia State Board at 774, supra at n. 17.
the Supreme Court of Ohio, \textsuperscript{21} the Court found, \emph{inter alia}, that disciplining an attorney for truthful non-deceptive advertising was not justified by the state’s “substantial interest” in banning in person solicitation by an attorney which had a much larger potential of overreaching, invasion of privacy, the exercise of undue influence, and outright fraud\textsuperscript{22}. Neither did it find that the ban was justified by the state’s interest in discouraging meritless litigation.\textsuperscript{23} The court specifically rejected the contention that distinguishing false and misleading information in attorney advertising was qualitatively more difficult than making the same distinction regarding other products or services.\textsuperscript{24} Applying the \textit{Central Hudson} test to the illustration in the appellant-attorney’s advertising, the Court required the state “to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means”.\textsuperscript{25} However, the Court concluded that the state interests in preserving the “dignity” of the profession and preventing emotional manipulation were not served by a blanket ban on illustrations in attorney advertisements.\textsuperscript{26}

\textsuperscript{21} 471 U.S. 626, 105
\textsuperscript{22} \textit{Id} at 641.
\textsuperscript{23} \textit{Id}. at 643.
\textsuperscript{24} \textit{Id}. at 646.
\textsuperscript{25} \textit{Id}. a 647.
\textsuperscript{26} \textit{Id}. at 649.
The *Virginia Board* and *Zauderer* cases illustrate the growing extension of first amendment protection into the professional arena and the Court’s reluctance to permit states pursuant to its power to regulate the professions, to interfere with advertising by professionals. It is ironic, then, that courts have been more willing to permit regulation of professional communication in a non-advertising context, that is, in professionals’ exercise of their professions.

**Authority of the Government to Regulate Professional Communications**

**During the Provision of Professional Services.** While the foregoing cases demonstrate the willingness of courts to grapple with the extent to which the first amendment protects the rights of professionals to advertise their services, they say nothing about whether the first amendment protects the rights of professionals to speak freely in the context of providing professional services. Courts have treated professional communications during the provision of professional services as commercial speech, affording it less protection than that afforded political speech.
In *Gentile, v. State Bar of Nevada*, 27 an attorney challenged disciplinary charges arising out of a press conference he held while his client’s criminal trial was pending, in which he protested police misconduct. The Nevada Bar had concluded that his speech violated a disciplinary rule against attorney speech that has a “substantial likelihood of prejudicing pending legal proceedings”. Rejecting the petitioner-attorney’s argument that the state should be required to demonstrate a ‘clear and present danger’ of “actual prejudice or an imminent threat before disciplining a lawyer who holds a press conference while his client’s trial is pending (the standard applied to the press itself), 28 the Court relied instead on cases involving attorney advertising, observing that these cases “have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses…[rather] we engaged in a balancing process, weighing the State’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest in the kind of speech that was at issue.” 29 Applying a “less demanding standard than that established for regulation of the press,” 30 the Court concluded that “because attorneys have “extraordinary power to undermine or destroy the efficacy of the criminal

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28 *Id.* at 919.
29 *Id.* at 922.
30 *Id.* at 923.
justice system: by virtue of their role as advocates, the “substantial likelihood of material prejudice” standard “constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.”

Thus, like the courts in the professional advertising cases, the Gentile Court applied a lower standard of scrutiny to the speech of a professional acting within the scope of his profession, notwithstanding that the speech in question was described by Justice Kennedy in his concurring opinion as “classic political speech.” It did so because it concluded that attorneys are not entitled to the same level of first amendment protection in the course of the practice of their professions as are “other businesses.” Rather, their speech can be regulated because “the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. “Membership in the bar is a privilege burdened with conditions.”

31 Id. at 923. Although the Court upheld the constitutionality of the Rule, it found that, as applied to the petitioner-attorney, it was void for vagueness since an ambiguity in the Rule’s safe harbor led the attorney to believe that his speech was permitted by the Rule.
32 Id. at 897.
33 Id. at 917.
In contrast to the *Gentile* rationale and in a possible foreshadowing of the Court’s much later decision in *Sorrell*, the Ninth Circuit, in National Association for the Advancement of Psychoanalysis v. California Board of Psychology upheld a statute that required individuals practicing psychoanalysis to hold doctorates in psychology-related fields because it was “content and viewpoint neutral” and therefore did not “trigger strict scrutiny.” The Ninth Circuit observed: “It is properly within the state’s police power to regulate and license professions, especially when public health concerns are affected.” Because the government had not adopted the regulation on the basis of any particular viewpoint, and did not distinguish between prohibited and permitted speech on the basis of content”, the court did not apply strict scrutiny. However, even though the case was decided prior to *Sorrell* at a time when professional speech was considered commercial speech and the content of commercial speech was not generally afforded the protection afforded to political speech, the Ninth Circuit implied that it would apply strict scrutiny if the licensing laws attempted to “dictate what can be said between psychologists and patients during treatment”.

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34 *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F3d 1043 (9th Cir. 2000) at 1054-1055.
35 *Id.* at 1055.
36 *National Association for the Advancement of Psychoanalysis*, supra at n.33.
Both *Gentile* and *National Association for the Advancement of Psychoanalysis* affirm the right of states to regulate and license professions. However, while the Ninth Circuit implied that the state’s power to regulate such professions might not extend to regulations based on the content or viewpoint of professionals as expressed during treatment, the *Gentile* Court seems to permit states to regulate the content of a lawyer’s speech when exercised in his representation of his client as long as the regulation satisfies a “legitimate” state interest and “imposes only narrow and necessary limitations on lawyers’ speech.”

Authority of the Government to Regulate Physician-Patient Communications.

Consistent with the *Gentile* rationale, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, affirmed the state’s ability to regulate the content of physician-patient communications under the state’s licensing authority. In upholding a statute that compelled physicians to give specific information to women seeking abortions about the relevant health risks to her and the “probable gestational age of the unborn child”, the Court

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37 *Gentile* at 923, *supra* at n.27.
explicitly permitted the state to “dictate” what is said by a physician to a patient during treatment. A plurality of the Court concluded that the state could enact legislation that furthered the “legitimate goal of protecting the life of the unborn” through “legislation aimed at ensuring a decision that is mature and informed, even when in doing so the State expresses a preference for childbirth over abortion”. Rather than subjecting the informed consent portion of the state law to the “strict scrutiny” reserved for political speech, the court applied the lesser “commercial” standard since it concluded that the legislation implicated a physician’s first amendment rights only “as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”\footnote{Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed. 2d 674 (1992).}

Under the \textit{Casey} rationale, physicians’ communication with their patients enjoys only the limited protection of commercial speech, not the broader protection afforded to political speech, that is, a court need not subject a regulation restricting physician-patient communications to “strict scrutiny” but only to “intermediate scrutiny.” The government is not required to show that the regulation is necessary to promote a “compelling state interest”, but
only that the regulation is “rationally related” to a “substantial state interest” and the regulation is no broader than necessary to protect that interest.

“Gagged” Physician Speech vs. Compelled Physician Speech

State legislatures have enacted laws both that prohibit physicians from discussing certain topics with their patients and laws that compel physicians to provide specific information to their patients. Courts have been generally been divided as whether there should be a distinction between laws that prohibit speech and laws that mandate speech.\textsuperscript{39} However, it appears that legislatively mandated speech, at least in cases in which a court finds the mandated speech not to be “misleading” is often found to be acceptable, while prohibiting speech altogether is more problematic.

The practical effect of prohibiting physicians from speaking is arguably more deleterious than the practical effect of compelling physicians to speak.

When a physician is compelled by the state to provide certain information to

\textsuperscript{39} “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what not to say. Riley v. Nat’l Fed’n of the Blind, Inc. 487 U.S. 781, 796-797 (1988). Contra, Zauderer, supra at n. 20, at 651, n. 14: “Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed…” But see discussion in Post, supra at n.7, at 973 in which he argues that the distinction between compelling and restricting speech is “not especially salient” since the important question is whether the form of communication has first amendment value in the first place; if it does, the first amendment should protect its restriction.
the patient, the patient is able to weigh the information provided along with other available information to the patient to test the information’s worthiness. Moreover, the physician is usually able to disclaim or at least explain the reason that he is providing the information. On the other hand, when a physician is prevented from speaking altogether, the patient is deprived of the information necessary to engage in this type of deliberation, which may prevent him from making informed decisions regarding his health care. When the “commercial standard” is applied to silence physicians in their communications with their patients, the results have generally favored the physicians who have challenged the regulations.

Laws that Prohibit Physician Communication to Patients

The federal district court judge in *Wollschlaeger vs. Farmer*, cited *Sorrell* in enjoining a Florida state regulation that would have prohibited physicians from asking their patients questions about gun ownership as part of a general preventive health discussion.\(^{40}\) as part of a preventive health discussion. The Florida judge, relying on the expansive protection provided to commercial speech in *Sorrell*, based her conclusion on the fact that the Florida statute

\(^{40}\) *Wollschlaeger*, *supra* at n.16.
was based on the content of the information provided by the physician to the patient and thus was presumptively invalid, absent a compelling state interest. This is the first case, post-Sorrell, in which the expansive protection Sorrell seems to afford commercial speech, was applied to physician-patient communications. The case is currently being appealed.

The Ninth Circuit Court of Appeals also found a governmental policy restricting physician speech to be in violation of the first amendment, although it didn’t explicitly refer to the standard it applied. In Conant vs. Walters, a pre-Sorrell case, the Ninth Circuit concluded that a policy promulgated by the Department of Health and Human Services that would have revoked the DEA licenses of physicians who recommended the use of medical marijuana violated the physicians’ first amendment Rights. Entitled “The Administration’s Response to the Passage of California Proposition 215 and Arizona Proposition 200”, the federal policy declared that a doctor’s act of recommending or prescribing Schedule I controlled substances was inconsistent with the “public, resulting in the revocation of the physician’s registration to prescribe controlled substances. The court concluded “The government policy does, however, strike at core first amendment interests of

41 Conant v. Walters, 309 F. 3d 629 (9th Cir. 2002).
42 Id. at 632.
doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege. …The doctor-patient privilege reflects “the imperative need for confidence and trust” inherent in the doctor-patient relationship. 43 “Being a member of a regulated profession does not, as the government suggests, result in a surrender of first amendment rights. To the contrary, professional speech may be entitled to ‘the strongest protection our Constitution has to offer.’”44 Like the judge in Wollschlaeger, the judge in Conant concluded that physicians’ discussions with their patients merited the highest first amendment protection.

Thus, while the Wollschlaeger court invalidated the Florida gun statute based on the Sorrell rationale that content-based regulations of commercial speech trigger higher scrutiny, the Conant court which decided its case before Sorrell, based its decision on the special nature of physician-patient communications. It is this author’s position that both rationales support the

43 Id. at 636.
44 Id. at 637.
extension of the highest first amendment protection to physician-patient communications during treatment.

The U.S. Supreme Court has ruled in only one case in which physicians challenged a governmental regulation prohibiting them from speaking about certain topics to their patients and in that case, the Court avoided addressing the first amendment directly. In Rust v. Sullivan, the Court upheld a Title X regulation that prohibited physicians (and others) working in federally funded clinics from counseling women about abortion as a “family planning option”. The court rejected the physician plaintiffs’ arguments that the restriction violated their first amendment rights since it held that the government was “simply insisting that public funds be spent for the purposes for which they were authorized…the …regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.” Avoiding a first amendment analysis, the Court based its decision instead on the government’s prerogative to condition its funding on certain behavior.

46 Id. at 198.
The *Wollschlaeger* and *Conant* cases both suggest that, at least in cases in which laws prohibit physicians from speaking about certain content with their patients, courts will strictly scrutinize the legislation. If strict scrutiny is applied, the regulation is less likely to be upheld. However, another way that at least one state legislature has attempted to silence physicians is to first compel them to give a patient certain state-scripted information and then prevent the physician from disagreeing with the information. Thus, a statute that, on its face, appears “merely” to compel a physician to provide certain information to a patient, can be transformed into a regulation that forbids the physician to speak.

South Dakota requires a physician to provide state-scripted information telling a patient that she “has an existing relationship with that unborn human being”, that the abortion will terminate the life of a whole, separate, unique, living human being”, that by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated, among other information. The physician must then “certify in writing” that he is “satisfied that the woman has read the materials” and that he believes she understands the information conveyed. Failure to comply with this law constitutes a class 2
misdemeanor.\textsuperscript{47} It would be inconsistent for the physician to certify, on the one hand, that the woman understands the materials, and on the other, to suggest to the woman that the materials may not be accurate.\textsuperscript{48} And most physicians would probably be reluctant to “test the waters” in view of the criminal penalties involved.\textsuperscript{49}

Ironically, although states have initiated rules that have attempted to silence physician communication with their patients, they have also enacted rules that have protected a free flow of information from physician to patient. In the 1990s, a number of managed care organizations began including in their physician contracts provisions that prohibited physicians from discussing with their patients alternative medical without a plan’s authorization (known as “gag rules”). Since private managed care organizations are not “state actors”, their attempt to interfere with physicians’ speech does not implicate

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\begin{footnote}[	extsuperscript{47}] {Post at 943, \textit{supra} at n.7; S.D. Codified Laws Section 34-23A-10.1.}
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\begin{footnote}[	extsuperscript{48}] {In fact, in enjoining the South Dakota abortion informed consent law in \textit{Planned Parenthood of Minn. V. Rounds}, one of the early rounds of the South Dakota challenges to the SDCL 34-23A-10.1, Jude Schreier observed: “The amendments to \textit{SDCL 34–23A–10.1}, however, contain no provision authorizing doctors to distance themselves from the State’s message that they are forced to convey to their patients, and actually discourages doctors from expressing a view contradicting the State's message. In fact, the South Dakota statute requires the doctor to certify that the woman has read the materials and \textit{understands} them. See H.B. 1166 \S 7(1)(g) (S.D.2005). If a doctor disassociates himself or herself from the materials or disagrees with the materials while reviewing the materials with the patient, the doctor may have a difficult time certifying that the patient understands the materials. By requiring the doctor to express the State's views as if they were the doctor's opinion, the State's viewpoint would in essence be receiving the doctor's imprimatur. The requirement that doctors create a statement in writing that includes the State's message without a provision allowing the doctor to disassociate himself or herself from the materials leads to the conclusion that paragraphs (b), (c) and (d) of the informed consent provisions of the statute are unconstitutional compelled speech, rather than reasonable regulations of the medical profession.”}
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\begin{footnote}[	extsuperscript{49}] {375 F. Supp. 2d 881, 887 (D.S.D.2005)}
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the first amendment. However, in exercising the “power of the purse” over many physicians, these companies have substantial power over physicians’ behavior. As a result of public uproar, numerous states enacted laws preventing managed care organizations from including such clauses in their contracts. Some believe the motivation of the health plans was to prevent patient disputes about denied care. The unpopularity of these clauses may have as much to do with patients’ concerns that they are being deprived of information essential to their health as to physicians’ resistance to the managed care organizations’ interference with their practice of medicine. These laws seem to have been followed without much opposition.

Thus, on the one hand, states have enacted legislation that attempts to silence certain types of physician-patient communication, on the other hand, they have enacted legislation that prevents managed care companies from doing the same albeit for different reasons. The same rationale for preventing managed care companies from interfering with physician-patient communication applies to governmental interference: either type of

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interference potentially interferes with the quality of information available to patients about their health, thus adversely impacting patient treatment.

**Compelling Physician-Patient Communication under the State’s Licensing Authority**

Unlike laws that “gag” physicians, which often have been disfavored, laws requiring physicians to disclose certain information to their patients have usually been upheld. All 50 states have laws that mandate that physicians inform their patients of the risks, benefits and alternatives to treatment. 52 None of those general informed consent laws has been enjoined on the basis that the law violated physicians’ rights to speak, or not speak, as they choose. In fact, physicians are subject to lawsuits and professional discipline, based on their failure to provide the information to patients that is required by statute. And, in response to these statutes, case law, and evolving professional ethics, many physician professional associations include the obligation to obtain “informed consent” in their ethical guidelines for physicians. 53 Of course, these laws only set forth general

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52 See, e.g. N.J.S.A. 26:2H-12.8(d); FLA STAT ANN. Sec. 766.103(4); Wash Rev. Code 7.70.060.
categories of information that a physician is required to convey to his patients; they do not dictate the exact message that the physician must deliver.

However, one type of statutory informed consent requirement has been challenged on numerous occasions: informed consent in the context of abortion procedures. Planned Parenthood of Southeastern Pennsylvania v. Casey is the seminal case in this area. The Pennsylvania statute under challenge required that, at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." While the Court didn’t explicitly apply a commercial first amendment analysis, it can be inferred that this is the standard that the Court applied in view of its reference to the state’s authority to license the professions.

The Court’s reasoning has been followed in several other abortion cases. The South Dakota federal district court in Minnesota v. Rounds, found that the law which required “doctors to enunciate the state’s viewpoint on an

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54 Casey, supra at n. 38.
55 Casey at 881, supra at n. 38.
unsettled medical, philosophical, theological and scientific issue, that is, whether a fetus is a human being” was impermissible under the first amendment.\(^{56}\). However, the Eighth Circuit reversed the lower court, holding that the statute was within the state’s prerogative to “use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.”\(^{57}\) Although the Eighth Circuit didn’t specify that it was applying the less protective commercial standard of analysis, its emphasis on the state’s “significant role … in regulating the medical profession,”\(^{58}\) suggests that it was applying this standard, rather than the “compelling interest” test that is applied in “political speech” cases. Moreover, its reference to “truthful, non-misleading information” is derived from cases that deal with commercial speech, \textit{e.g.} cases that require advertisers to provide accurate information in their advertisements\(^{59}\).


\(^{58}\) \textit{Id.} At 734.

\(^{59}\) Even after \textit{Sorrell}, the Eighth Circuit reaffirmed its reliance on the Court’s rationale in \textit{Casey} that the content of physician speech should be subject to the lesser “commercial” standard of scrutiny when it approved South Dakota’s requirement that physicians inform patients seeking abortions that an abortion leads to an increased risk of suicide. \textit{Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds}, ___F.3d___, 2012 WL 3000616, 8\textsuperscript{th} Cir.(July 24, 2012).
In another abortion-related case, there was a similar split between the federal district court and the Circuit Court of Appeals. In *Texas Medical Providers*, a Texas federal district court decided that physician speech should be afforded special protection under the first amendment; however, that decision was rejected by the Fifth Circuit. Like the federal district court in *Minnesota v. Rounds*, the Texas federal district court in *Texas Providers* applied the “compelling interest” test to physician-patient communications because: (1) “the speech between physician and patient, taken as a whole, implicates a variety of medical ethical, legal, practical, and commercial concerns”; and (2) any commercial concerns are “inextricably intertwined” with the non-commercial components. The court distinguished the compulsory disclosure requirements in *Casey* from those included in the Texas law which required physicians to order sonograms for women seeking abortions and to provide them with detailed descriptions of the fetus or embryo. Rejecting the state’s argument that the government’s power to license and otherwise regulate physicians means that the state can regulate a physician’s speech in any manner in which it chooses, the court held that the physician’s first amendment rights were infringed because he was forced to provide information not just about the risks of, and alternatives to, abortion.

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60 *Texas Medical Providers v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011)
61 *Texas Medical Providers v. Lakey*, 667 F. 3d 570 (5th Cir. 2012).
(as in *Casey*), which would have been *reasonable* requirements, but also information about “the presence of cardiac activity” and the presence of external members and internal organs’ in the fetus or embryo, which the court found irrelevant to any “compelling government interest.” However, the Fifth Circuit Court of Appeals overturned the lower court’s decision, stating that *Casey* did not require the application of a “compelling interest” test, but rather a lower standard more similar to that applied in traditional commercial contexts.

In light of these decisions by the Eighth and Fifth Circuit Courts of Appeals, both relying on *Casey*, it appears that the government has generally had fairly wide latitude in regulating physicians’ speech: as in the regulation of commercial advertising, the government has needed only prove that its regulation is rationally related to a “substantial” government interest, not that it is necessary to promote a “compelling” governmental interest. The Court’s reasoning in *Sorrel*, as followed by the *Wollschlaeger* court may, however, change this approach.

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63 *Texas Medical Providers*, 806 F. Supp. at 974.
64 *Texas Medical Providers*, 667 F. 3d at 575.
Why Physician Communications Should Be Treated Differently from Commercial Speech

One commentator has suggested that physicians’ communications with their patients during the course of treatment should be afforded the same level of protection as political speech because she is imparting the “knowledge of the ‘medical community’” ... and because the patient relies on this information not just in relation to his own medical care but also in relation to his or her views “about the provision of medical care generally, including our views about whether and how the medical system ought to be regulated by the government”. Thus, the information conveyed by doctors to patients during the course of treatment “can become important for enlightened public decision-making in a democracy.”

This logic seems strained, however, since it is not obvious that patients use the information conveyed by their physicians during the course of their treatment to form their political opinions about the health system in general. It makes more sense to take the route suggested by the Conant court, that is, because of the trust-based nature of the physician-patient relationship, communications between physicians and patients should not be

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65 Post at 977, supra at n. 7.
66 Post at 978, supra at n.7.
circumscribed, absent a compelling state interest that can only be achieved through such infringement.

Unlike pure commercial speech which is aimed at increasing the profits of its speaker, a physician’s communication with her patients during the course of treatment is guided by the physician’s fiduciary duty to act in the patient’s best interest. Unlike the commercial vendor, the physician is already obligated to comply with professional ethical standards and can be disciplined for failing to do so. Professional ethical standards require physicians to provide information that is material to the patient’s understanding of his situation, possible treatment and possible outcomes. 67

This doesn’t mean that the state has no role in regulating physician speech. To the extent that physicians advertise their services, their advertisement should be treated as commercial speech, subject to regulation if the state can show that the regulation is narrowly drawn to advance a substantial state interest. On the other hand, to the extent that a physician expresses his political or policy beliefs outside the context of patient treatment, his speech should have the fullest protection that is afforded to political speech.

However, we are focusing on the speech that occurs during a physician’s personal encounter with a patient during treatment and that concerns the patient’s care.

Since even the content of pure political speech can be regulated if the state can demonstrate that such regulation is necessary to achieve a compelling state interest, it follows that the government should be permitted to regulate physician communications with their patients if the regulation is necessary to promote a compelling state interest. Thus, laws like general informed consent statutes that require physicians to provide truthful, accurate information\(^68\) to patients so that they can make informed decisions about their treatment, would generally survive the court’s “strict scrutiny” since the provision of this information to patients would be viewed as promoting the state’s “compelling interest” in patients’ ability to exercise their constitutional rights to consent to or refuse treatment.\(^69\)

\(^68\) Informed consent statutes that apply to abortion are the exception since considerable debate exists as to whether the information required to be conveyed is, in fact, truthful and non-misleading, as opposed to a state-imposed ideological statement. What constitutes a state-approved ideological message may be clarified if the U.S. Supreme Court chooses to review the conflicting cases arising from the Sixth Circuit and the District of Columbia Court of Appeals, emanating from the FDA’s requirement that tobacco companies publish graphic pictures on cigarette packages to warn consumers of the dangers of smoking. The Sixth Circuit in *Discount Tobacco City & Lottery, Inc. v. U.S.* 674 D.3d 509 (6th Cir. 2012),applied the “rational basis” test, finding that the graphic warnings were commercial speech and that the regulation was reasonably related to promoting better public understanding of the risks of smoking. In contrast, because the D.C. court concluded that the warnings were ideological in nature, it applied strict scrutiny to the regulation, which it found the government failed to satisfy. *R.J. Reynolds Tobacco Co. v. F.D.A.* slip op. 11-1482 (D.C. Cir. Feb. 29, 2012)

\(^69\) *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990).
However, state laws like those intended to prevent physicians from talking with patients about gun safety or the benefits of medical marijuana, would not survive strict scrutiny since they are not necessary to achieve any compelling interest of the state. Similarly, laws that require physicians to provide information to patients that is not supported by scientific evidence would not be permitted since the provision of unsupported scientific evidence does not promote any compelling interest of the state.

**Patient’s First and Fourteenth Amendment Rights**

We have been focusing on physicians’ first amendment rights, but a corollary to physician’s speech rights is the right of patients to receive information from their physicians. As physicians are restricted from approaching certain subjects or compelled to provide state-scripted information which is unsupported by scientific evidence, their patients are prevented from receiving the full panoply of information that might be helpful to their assessment of their treatment options.

In her review of the *Rust* and *Casey* cases, Paula Berg argues that in viewing government restriction of the content of physician speech solely from the
perspective of physicians, the Court overlooks the impact such regulation has on patient’s receipt of medical information, and thus the ability of patients to exercise autonomous, informed decision-making about their care. Thus, any infringement on physician’s ability to speak freely with their patients about their patients’ medical conditions and alternative treatments has implications beyond the first amendment rights of the physicians themselves; it potentially impacts patient’s rights, as well as the quality of their care.

The Court’s analysis in Virginia Board focused on the first amendment rights of the recipient of information, writing “Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.” There, the plaintiff-consumers challenged the pharmacy board’s ban on the advertising of drug prices and the court noted that they “were asserting an interest in their own health that was “fundamentally deeper than a trade consideration.” Information about drug prices, according to the Court, “could become…. more than a convenience. It could

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71 Virginia Board at 757, supra at n. 17.
72 Virginia Board at 755, supra at n. 17.
mean the alleviation of physical pain of the enjoyment of basic
necessities.”

The Virginia Board Court’s observations are even more applicable in the
context of physician communications with their patients. Regulations that
either prohibit physicians from providing information to their patients or
compel physicians to provide information that is not scientifically based or
that promotes a state ideology, not only infringes upon the patient-recipient’s
first amendment rights to receive information, but may interfere with a
patient’s ability to made informed decisions about his health care.

Inhibiting a physician’s ability to communicate freely with his patient also
implicates his patients’ fourteenth amendment rights to due process. As the
Court held in Cruzan v. Missouri Dep’t of Health, a competent person has a
constitutional right under the due process clause of the fourteenth
amendment to refuse medical treatment. An individual cannot make an
informed decision about whether to consent or refuse medical treatment
without an open discussion with his physician.

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73 Virginia Board at 764, supra at n. 17.
74 Cruzan at 278, supra at n. 69.
Because of the special nature of their relationship with their physicians, it has been suggested that to withstand first amendment scrutiny, a governmental regulation must: 1) have a medical purpose as opposed to an ideological purpose; 2) not advance a particular viewpoint regarding medical treatment or how the patient ought to respond to a particular diagnosis; 3) contain truthful, factually verifiable information; and 4) avoid excessive government entanglement in determining the content of doctor-patient discourse.\(^{75}\)

Unduly restricting physician communications with their patients not only infringes physicians’ first amendment rights, but also infringes patients’ first and fourteenth amendment rights. Moreover, from a public policy perspective, such restrictions are likely to adversely affect the public’s health by interfering with the kind of open communication that is likely to lead to informed health care decision-making.

**Conclusion**

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\(^{75}\) Berg at 260-261.
The government currently has the authority to regulate the content of physician communications with their patients under the government’s licensing authority. Historically, because physicians are “in the business” of providing medical care, physician communication with their patients during treatment has been considered “commercial speech”, subject to less first amendment protection than political speech. However, the *Sorrell* Court suggests that content-based and speaker-targeted regulation of commercial speech should now receive the heightened scrutiny generally afforded to political speech. As applied to physician-patient communications, the *Sorrell* reasoning would require the regulation of physician communications with their patients to survive heightened scrutiny, notwithstanding the fact that physician speech has historically been classified as commercial speech.

The *Sorrell* decision should mean that the regulation of physician-patient communication is likely to receive the benefit of heightened scrutiny, a standard that should have been applied to physician-patient communications all along because of the fiduciary nature of the physician-patient relationship and the implications of physician-patient communications on patients’ exercise of their constitutional rights. Thus, before being able either to compel or prohibit physician-patient communication, the government should
be required to show that a particular regulation is necessary to promote a compelling state interest. This rule is essential not just to protect the first amendment rights of physicians, but to protect both the constitutional rights and the health interests of their patients.