Legal Jiu Jitsu: How to Turn the Tables on the Plaintiff Bar's Advertising Juggernaut
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Rustin is the President and founder of X Ante – the premier source for data and analysis on advertising and marketing by plaintiffs' law firms and related entities soliciting claims for mass tort litigation. X Ante serves in-house and outside defense counsel with regular monitoring and comprehensive surveys of trends in mass tort litigation advertising and marketing. Prior to founding the company, Mr. Silverstein practiced law at a multinational law firm and worked for a global management consulting firm. Earlier in his career, he served as a congressional press secretary and television news producer. Mr. Silverstein is a graduate of Harvard College and Harvard Law School. He lives in Washington, DC with his wife and four children.

Introduction

As defense attorneys, we know that legal advertising sponsored by plaintiffs' lawyers and others drives—if not manufactures—litigation. We have all heard stories like the following, which was published by Dr. Evan Levine, a cardiologist practicing in New York:

* * * * *

> I recently had an encounter with a patient who watched, in shock, a television ad portraying this new drug [Pradaxa] as problematic and dangerous. He sat in my waiting room anxiously waiting to see me. He was concerned that I had prescribed a medication, to prevent a stroke, as a result of his irregular rhythm, that could cause him to hemorrhage to death. "It's all over the TV," he told me. "I saw it on the commercials. ***Pradaxa is causing people to bleed to death and I stopped it.*** I don't think I should be taking a drug that can make you bleed like that. People are suing too.
>
> ***He had mistakenly placed himself at risk of a stroke by stopping the drug*** and spent his time and precious money (cost of a cab and the visit), to come to my office because he was convinced by a very convincing Madison Avenue ad that he was taking a dangerous drug.
>
> Since many patients with atrial fibrillation are elderly and perhaps more easily persuaded by these slick ads, ***such ads represent a kind of public health risk.*** It took me an entire visit to educate him, again, about the risks and benefits of Pradaxa compared to Coumadin, and after our visit the patient decided to continue his Pradaxa. Lucky for him he did not have a stroke during the few weeks he was not anticoagulated with Pradaxa.[1]

* * * * *

It is not mere coincidence that advertisements seeking persons injured by medicines, medical devices, sports helmets, or airbags have saturated the airwaves and now also dominate cyberspace. But despite their prevalence and increasing evidence of their impact on litigation, courts have been generally reluctant to allow evidence of the impact of legal advertising into the courtroom.

This presentation will discuss the existing legal precedents on the subject, the evolution and current landscape of legal advertising, new information that is available on legal advertising in this age of "big data," and the ways that defense counsel might use this data to overcome the courts' collective reticence to allow this sort of data into evidence.

[1] Evan Levine, MD, *Your Medication Can Kill You; Call Your Lawyer!*, Leftist Rev. (May 19, 2012) (available online at: https://www.leftistreview.com/2012/05/19/your-medication-can-kill-you-call-your-lawyer/evanlevine/) (last accessed 4/15/2016) (emphasis added).

Current Precedent on the Admissibility of Attorney Advertising

The most common, and obvious, argument advanced against the admissibility of evidence related to attorney advertising is that the risk of unfair prejudice substantially outweighs its potential relevance at trial—the axiomatic Federal Rule of Evidence 401/403 analysis. Typically, defendants attempt to introduce evidence of plaintiff attorney advertising, arguing that, under Rule 401, such evidence is both relevant and necessary evidence of plaintiff's credibility with regard to the circumstances leading up to the filing of the suit. Alternatively, defendants may attempt to offer expert testimony under Rule 702 regarding the effect of legal advertising on the overall number of claims over time. In response, of course, the plaintiffs' bar argues that the introduction of such evidence creates a risk of prejudice under Rule 403 and, as such, is inadmissible at trial.

Reported jurisprudence on the subject is surprisingly limited. The available rulings, however, indicate a hesitancy by courts to allow such evidence absent a concrete link to a key issue in the litigation. Simply suggesting that advertising must have had an impact is not enough. Fortunately, as will be addressed below, better information and resources are now available to arm defense counsel with improved arguments in favor of admissibility—and even short of admissibility, advertising data still provides strategic advantages to defense counsel and corporations in litigation. But first it is important to summarize the limited case law that is available; citations to additional cases can be found in Appendix 1.

In the Norplant litigation[2] (contraceptive implant), defendants sought to introduce expert evidence related to attorney advertising to counter the plaintiffs' suggestion that declining sales of the product was evidence of a defect. The court prevented the defendants from doing so but also barred the plaintiffs from arguments about declining sales. Defendants further sought to introduce evidence of attorney advertisements instigating litigation by offering the "prospect of easy money" to claimants. This, however, the court found to be too prejudicial. The court granted plaintiffs motion to exclude such evidence of "lawyer made litigation," noting that there was a wealth of other evidence available to challenge the plaintiffs' credibility.[3]

A similar judicial attitude was displayed in the Prempro Products Liability Litigation[4] (Prempro, Premphase, and Premarin). Via motion *in limine*, the plaintiffs sought to exclude evidence of attorney advertising. Defendants countered that the advertising was relevant to their statute of limitations defense.[5] The court granted the plaintiffs' motion in part and denied it in part. Notably, it allowed defendants to "refer to information received by Plaintiff at a particular time but cannot indicate that it came from lawyer advertisement."[6] Ultimately, the court opted for a narrow ruling to address the precise arguments by the parties but avoid actually admitting the legal advertising into evidence.

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[2] *In re: Norplant Contraceptive Products Liability Litigation*, 1997 WL 81087 (E.D. Tex. 1997) (MDL No. 1038).
[3] *Id.*
[4] *In re Prempro Products Liab. Litig.*, No. 4:04CV01169, 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007).
[5] *In re: Prempro Products Liab. Litig., Hill, v. Wyeth et al.; Scroggin, v. Wyeth et al.*, 2007 WL 4985957 (E.D.Ark.) (Wyeth's Responses to Plaintiffs' Motions in Limine, p. 2).
[6] *In re Prempro Products Liab. Litig.*, No. 4:04CV01169, 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007).

The same sentiment appeared in the *In re Welding Fume Products Liability Litigation.*[7] There, defendants sought to introduce evidence of heavy advertising by plaintiffs' attorneys, if the plaintiffs' attorneys were allowed to introduce evidence of other lawsuits.[8] The court excluded both.[9] But the court did provide three limited exceptions when the existence of attorney advertising could be admitted:

(1) If plaintiff saw advertisements describing symptoms before visiting a physician, then plaintiff can be questioned about viewing the advertisements and its content (but the advertisement itself was not admissible);

(2) When questioning neurological experts, the defendants could address the fact that the plaintiffs had seen the advertisements, but they could not show the advertisement to the jury; and

(3) If the plaintiffs' witnesses "open the door" by testifying that potential claimants could not have known that their neurological symptoms were related to welding rod fumes, even after mass advertising by the plaintiffs' bar commenced in 2002.[10]

The court reiterated that even under the enumerated exceptions, however, the advertising itself was not admissible and that "[t]he bottom line is: as much as possible, evidence of other Welding Fume lawsuits and of lawyer advertising will be excluded."[11] It is noteworthy that even this hostile court found some circumstances in which legal advertising would be clearly relevant and admissible. Moreover, the case again demonstrates the strategic advantage in developing such evidence, even if it is not ultimately used at trial (i.e., to sacrifice the evidence, perhaps via motion practice, to secure the exclusion of other troubling that plaintiffs intend to present).

Recent jurisprudence on the subject, however, indicates that a new trend may be developing. In the ongoing Risperdal litigation in Pennsylvania,[12] the court declined to exclude legal advertising evidence. Facing a motion *in limine*, the defendant argued both that the plaintiffs' motion was overly vague and that information concerning the basis on which plaintiffs decided to bring suit against Janssen (i.e., legal advertising) is relevant, not privileged, and not unduly prejudicial.[13] The defendants explained that plaintiffs' attorney advertising was relevant because testimony suggested that the suit was instigated by a television commercial and not medical advice. Additionally, defendants explained that no privilege regarding the advertising has been raised and that, though the evidence was not favorable to the plaintiffs, this did not mean it was prejudicial.[14]

[7] No. 1:03-CV-17000, MDL Docket No. 1535 (N.D. Ohio).
[8] *In re Welding Fume Prods. Liab. Litig*, No. 1:03-CV-17000, 2010 WL 7699456 at *66-68 (N.D. Ohio June 4, 2010).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *In re: Risperdal Litigation; W.C. et al., Plaintiffs v. Janssen Pharmaceuticals*, No. 130301803 (Pa. Com. Pl. 2015).
[13] *Id.* at 2015 WL 1469627.
[14] *Id.*

While not providing a thorough reasoning for the ruling, the court ultimately refused to grant the plaintiffs' motion, though it noted plaintiffs' right to assert specific objections at trial.[15]

This new trend has continued in the *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation*.[16] During the first bellwether trial, counsel for the plaintiff asked the court to lift a previously entered order which barred plaintiff's counsel from mentioning the other cases in the MDL.[17] The defense responded by requesting that the court lift a parallel order barring any reference to the legal advertising campaigns used by the plaintiffs' counsel to solicit clients.[18] The court ultimately allowed both. Plaintiffs' counsel was allowed to mention the existence of other MDL lawsuits surrounding the product, but the court also indicated that it "was likely to allow some testimony about the lawyer advertising."[19] This is a departure from courts' previous reluctance to allow this sort of evidence, and a recognition that if the plaintiffs' bar wants to use evidence of a mass tort at trial (e.g., evidence of other lawsuits, evidence of internal company complaint data, or evidence of adverse events or product failures in scientific or technical literature), then defense counsel should be allowed to respond with evidence that attorney advertising may have had an influence.

Likewise, in the *In re Ethicon Pelvic Repair System Litigation*,[20] the bellwether plaintiffs filed motions *in limine* to exclude references to the plaintiff viewing a television commercial regarding transvaginal mesh litigation before filing suit.[21] In the first bellwether trial, the plaintiff argued that evidence of attorney advertising, including whether it was viewed by the bellwether plaintiff herself prior to filing suit, should be excluded because "the manner in which [plaintiff] learned about the litigation is wholly unrelated to whether [the product] is a defective product or whether [defendant] was negligent."[22] In response, the defendant argued that it should be allowed to offer evidence that the plaintiff did not complain about the product "until after she saw an attorney advertisement" and filed the lawsuit.[23] The court ultimately denied the portion of the plaintiff's motion seeking to exclude attorney advertising evidence, finding that a statement that the plaintiff was "prompted by a television commercial to file suit" was "probative of her credibility regarding her injuries."[24]

The same issue later arose in the third bellwether case of the *In re Ethicon Pelvic Repair System Litigation*. There, the court denied the plaintiff's motion *in limine* to exclude evidence that the plaintiff viewed internet sites about the transvaginal mesh litigation, "even if those sites involved

[15] *W.C. v. Janssen Pharmaceuticals, Inc.*, 2015 WL 1505248 (Pa.Com.Pl.), 1.
[16] *Herlihy-Paoli v. DePuy Orthopaedics Inc. et al.*, no. 3:12-cv-04975 (N.D. Texas).
[17] *See Davis, Jess. Jurors Can Hear About MDL in DePuy Hip Implant Bellwether,* Law360, September 29, 2014. (available online at http://www.law360.com/articles/581821/jurors-can-hear-about-mdl-in-depuy-hip-implant-bellwether) (Last accessed 4/15/2016)
[18] *Id*
[19] *Id.*
[20] In re *Ethicon, Inc., Pelvic Repair System Products Liability Litigation*. 2:12-md-02327 (S.D. W.V.).
[21] *Carolyn Lewis et al. v. Ethicon, Inc., et al.,* 2:12-cv-04301 (S.D. W.V.) (Doc. No. 206); *see also Terreski Mullins, et al., v. Ethicon, Inc., et al.*, 2:12-cv-02952 (Doc. No. 151).
[22] *Carolyn Lewis et al. v. Ethicon, Inc., et al.,* 2:12-cv-04301 (S.D. W.V.) (Doc. No. 206).
[23] *Carolyn Lewis et al. v. Ethicon, Inc., et al.,* 2:12-cv-04301 (S.D. W.V.) (Doc. No. 220).
[24] *Carolyn Lewis et al. v. Ethicon, Inc., et al.,* 2:12-cv-04301 (S.D. W.V.) (Doc. No. 250).

attorney promotion."[25] Even better, the court further denied the plaintiff's entire motion *in limine* to exclude "statements about counsel," which included plaintiff's attempt to exclude assertions that the lawsuit itself was "attorney-driven."[26]

Ultimately, the available jurisprudence demonstrates a trend toward allowing defense attorneys to use evidence of attorney advertising in the courtroom; however, in order to do so, attorneys must still establish a direct and demonstrable link between the ads and a pivotal issue in the case. As defense counsel, we must be able to precisely explain to courts how this advertising is impacting a lawsuit or piece of litigation, and we need concrete data to support our assertions. And despite the trend toward allowing this evidence, proving this direct link is no small hurdle. In order to do so, we need to fully appreciate the current advertising landscape, as well as the new resources that are available to demonstrate the impact of legal advertising in the courtroom.

Current Landscape of Plaintiff Attorney Advertising[27]

The thought of legal advertising by the plaintiffs' bar may first conjure up the image of Saul Goodman from the popular television series Breaking Bad or alternatively any other number of over-the-top and often goofy advertisements that can be found all over the internet.[28]

But the mental image could not be farther from the truth. To the contrary, in fact, a recent report by the U.S. Chamber Institute for Legal Reform examined the subject of advertising by (plaintiffs') trial lawyers and concluded:

> Legal advertising and marketing communications are a multi-prong, highly sophisticated undertaking by trial lawyers that spans broadcast and digital venues.

[25] *See Dianne Bellew v. Ethicon, Inc., et al.,* 2:12-cv-02327 (S.D. W.V.) (Doc. No. 195) (Memorandum of Law in Support of Plaintiff's Omnibus Motion *in Limine*); *see also Dianne Bellew v. Ethicon, Inc., et al.,* 2:12-cv-02327 (S.D. W.V.) (Doc. No. 287) (Memorandum Opinion and Order on Motions *in Limine*).
[26] *Id.*
[27] The data and figures in this section (unless noted otherwise) were provided as courtesy by the X-Ante firm (www.x-ante.com).
[28] *See, e.g.,* "10 Weirdest and Worst Ads for Lawyers" (available online at: http://www.criminaljusticedegreesguide.com/features/10-weirdest-and-worst-ads-for-lawyers.html) (last accessed 4/15/2016).

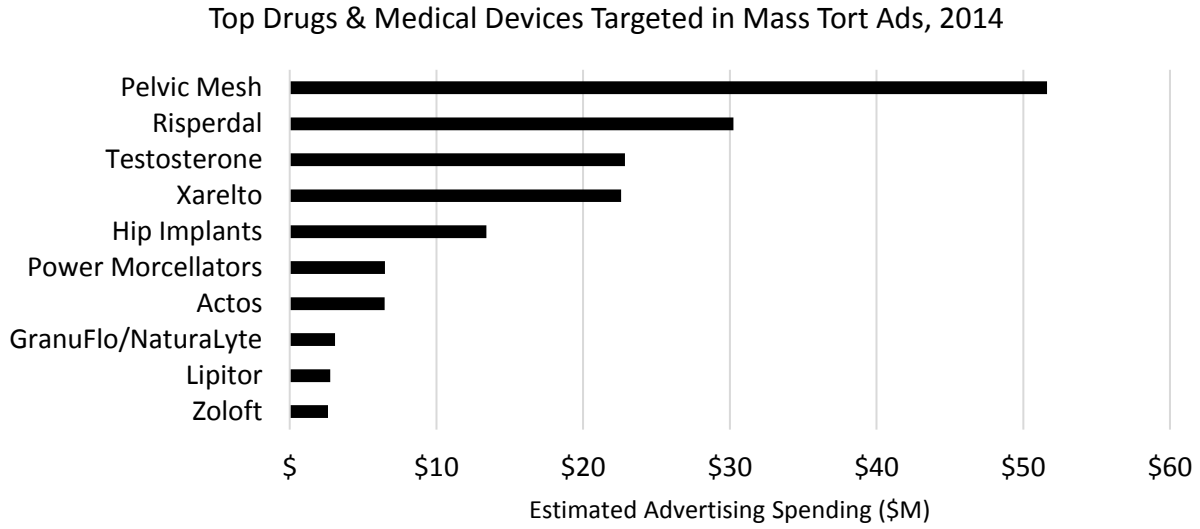
> This is not a resource-starved, grassroots effort but very much a well-funded and coordinated endeavor.[29]

The report then continued with the breadth of the efforts by the plaintiffs' bar, explaining that these firms "take[] advantage of a full set of network, cable, syndicated and spot television options, and a full range of digital tools and systems, including Internet search and social media."[30] This is not Saul Goodman's billboard. It is a highly sophisticated and unbelievably expensive endeavor that is intended to increase revenue for plaintiff firms. Given the recent increases in spending, it certainly seems to be working.

To provide some additional background, the annual growth in overall TV advertising by the legal services sector has outpaced the growth in the advertising sector as a whole in recent years and was one of the few advertising sectors to have *increased* its ad spending during the recent recession. Pharmaceutical and medical-device litigation has been at the fore of this advertising blitz, though the same tactics by plaintiff firms are expanding into other products.

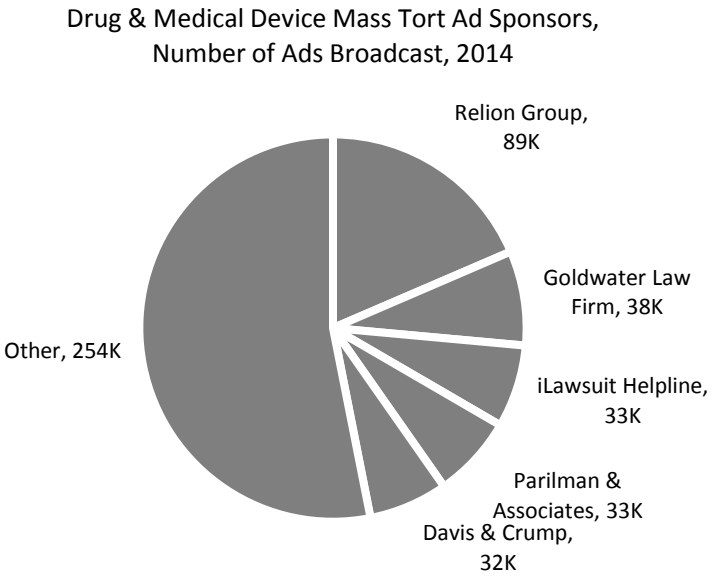
Between 2012 and 2014, there were nearly 1.7 million ads related to drug and medical device mass tort litigation broadcast at an estimated cost of approximately $400M. Additional millions were spent to broadcast ads related to other mass tort litigation cases such as asbestos/mesothelioma, the GM and Takata airbag recalls and the BP oil spill.

The sponsors of these ads cast a wide net in the products they target. For example, in 2014, mass tort TV advertisements featured over 30 different drugs and medical devices. However, nearly 90% of the drug and medical device mass tort advertising spending was devoted to ads targeting the ten products featured in the graph below.



[29] Goldstein, Ken, and Dhavan V. Shah. *Trial Lawyer Marketing: Broadcast. Search, and Social Strategies*, U.S. Chamber Institute for Legal Reform, October 27, 2015. (available online at http://www.instituteforlegalreform.com/uploads/sites/1/TrialLawyerMarketing.pdf) (last accessed 4/15/2016).
[30] *Id.*

Much of the TV advertising related to drug and medical device mass tort litigation is sponsored by a small number of firms. In fact, nearly half of all the ads broadcast in 2014 were sponsored by just five firms.



With regard to advertising outside the area of pharmaceutical and medical device mass torts, Silverstein estimates that the majority of money has been spent on asbestos litigation and lawsuit funding, with other prominent topics being loan modification, the Volkswagen recall litigation, the General Motors recall litigation, and "Anti-Energy litigation," which refers to lawsuits against oil and natural gas companies for injuries and health issues caused by drilling and related activities.

2015 Data on Non-Pharmaceutical and Medical Device Mass Tort Litigation[31]	
Topic	**Estimated Expenditure**
ASBESTOS	$50,131,763
LAWSUIT FUNDING	$44,490,497
LOAN MODIFICATIONS	$3,128,490
VW RECALL	$658,398
ANTI ENERGY	$558,972
GM AUTO RECALL	$385,362

[31] Again, this data has been provided as a courtesy by X-Ante (www.x-ante.com).

Beyond television, internet and social media advertising by law firms has exploded in recent years. This sort of advertising takes two distinct forms. The first is Search Engine Marketing (SEM), in which the advertiser purchases keywords from search engines to increase their rankings in search results. The second is Search Engine Optimization, which involves developing a portfolio of sites that are intended to drive internet traffic to the advertiser's main website.

Simply stated, Plaintiffs' firms dominate the world of Search Engine Marketing (SEM). In the first half of 2015, 9 of the top 10 and 23 of the top 25 most expensive Google keyword search terms were directly related to personal injury law firms. These top keyword search terms (and associated prices) included: "18 wheeler accident lawyer" ($419 per click); "Fort Myers DUI lawyer" ($410); "Mesothelioma claim" ($390) – and "San Antonio car wreck attorney" leading the rest at $670 per click.[32]

Plaintiffs' firms also expend significant time and resources in the area of Search Engine Optimization (SEO). While the process and methods employed to improve SEO can become highly technical, one counterintuitive tactic is worth mentioning. Namely, many plaintiff firms are now developing non-branded websites, including blogs and YouTube channels, that neglect to mention the relationship to a law firm and often are designed to appear informational websites or even news organizations.

One such example is nflconcussionlitigation.com. The website is structured in a blog-style format, with "recent posts" updated multiple times a month and a link to the "NFL Concussion Litigation Twitter" in a side panel.[33] The site contains links for "Concussions in the News," "Court Documents," and "Scholarly Articles," but there is no overt mention on the homepage of the website's affiliation to any law firm. Of course, with some additional exploration into the secondary pages on the site, the reader learns that the content on the site is provided by Paul D. Anderson and that:

> Paul D. Anderson is a licensed attorney in the state of Missouri, practicing at The Klamann Law Firm. His practice focuses on sports-injury litigation, advocating for traumatic brain injury victims and Retired NFL Players' rights. If you are a former athlete interested in discussing your rights, you can contact Paul D. Anderson here.

The same approach is also used on the website asbestos.com, which is a creation of The Peterson Firm in Washington, DC. And a final example is "The Ring of Fire" blog, which ostensibly posts "news articles" on topics related to "big pharma" and other "corporate" issues.[34] This blog also has a YouTube channel which offers videos styled as news reports on a variety of topics, including the alleged wrongdoing by pharmaceutical companies, though the on-air hosts are well known plaintiff attorneys.[35]

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[32] Goldstein, Ken, and Dhavan V. Shah. *Trial Lawyer Marketing: Broadcast. Search, and Social Strategies*, U.S. Chamber Institute for Legal Reform, October 27, 2015. (available online at http://www.instituteforlegalreform.com/uploads/sites/1/TrialLawyerMarketing.pdf)
[33] *See* http://nflconcussionlitigation.com/ (last accessed 4/15/2016).
[34] *See* http://trofire.com/ (last accessed 4/15/2016).
[35] *See* https://www.youtube.com/user/golefttv (last accessed 4/15/2016).

Ultimately, while the law firms that sponsor and develop these websites often can be identified through a thorough examination of the website, such source information is buried by design. The law firms are not attempting to garner direct internet traffic as much as they are attempting to generate interest (or perhaps hysteria) surrounding the subject, which inevitably leads to additional searches by the audience, and then leads those same users back to the firms' branded websites.

Are the Advertisers the Ones Actually Representing the Plaintiffs?

Many, if not most, of the sponsors of the ads do not actively litigate the cases they solicit. In fact, many advertisers are not even lawyers or law firms. Some of the advertisers are so-called "settlement mills" – high-volume law practices with little client interaction that settle large volumes of cases quickly without ever filing in court. Others – like the Goldwater Law Firm seen in the chart above – are law firms that refer those who respond to their solicitations to other law firms who actually litigate the cases in exchange for referral fees or a share of contingency awards. Most surprising, however, is that many of the top sponsors of mass tort advertisements are not even law firms. They are "lead generators" – like the Relion Group. This is a business model that advertises for mass tort victims and then simply sells those leads to plaintiffs' firms for a fee.

Non-lawyers also are infiltrating the realm of litigation in ways beyond mere "lead generation." While plaintiff law firms in many jurisdictions have financed the costs of litigation (including medical expenses), for their clients for many years, a new variety of litigation funding has emerged. Namely, hedge funds and litigation finance firms have now entered the market. These non-lawyer firms not only finance traditional litigation expenses, but they are also lending money to law firms so that the borrowing firm can then initiate advertising campaigns for additional clients. For example, Akin Mears, a Houston-based law firm involved in a number of pelvic mesh suits, spent an estimated $25 million dollars in 2014 in advertising and, according to a former employee, nearly $90 million was loaned to them by Gerchen Keller, a litigation finance firm, to acquire interests in new lawsuits.[36] Another litigation finance firm called Counsel Financial has developed a program for smaller firms that are trying to become more involved in mass tort litigation. The lending program is called "Enter Mass Torts" and provides both funding and "mentors" for attorneys getting started in such litigation.[37]

What Data on Plaintiff Advertising is Available and Can Defense Counsel Use it to Their Clients' Advantage?

A variety of sources are now available to collect, monitor, and analyze plaintiffs' attorney advertisements and related data. Whereas acquiring actual copies of television advertisements may have previously been a challenge, most plaintiff law firms now post their advertisements both on their websites and on YouTube. These can be easily downloaded and leveraged in litigation in

[36] Fisher, Daniel. *Hedge Funds Pump Up Mass Torts With Loans, Advertising*. Forbes, October 23, 2015. (available online at http://www.forbes.com/sites/danielfisher/2015/10/23/hedge-funds-finance-firms-pump-money-into-advertising-driven-litigation/#5dbb933d5259) (last accessed 4/15/2016).
[37] *Id.*

a variety of ways discussed in more detail below. More sophisticated data is also available for purchase through online marketing and research firms, such as WebpageFX and SemRush, both of which contributed heavily to the recent U.S. Chamber Institute for Legal Reform report.[38] Google Analytics and Google AdWords are available to provide statistics on Google searches being performed in various jurisdictions at different points in time. The X Ante firm even provides analysis and reporting specifically geared toward litigation.

X Ante, for example, gathers its data through both automated and manual television watching. It then reviews and codes of mass tort product liability television advertisements in 210 local broadcast media markets and on 12 national broadcast networks, 8 Spanish-language networks, and more than 80 national cable networks. The mass tort television advertising database is updated in real-time and has records of all ads broadcast since 2005. As such, it is able to report when the mass tort ads were broadcast, where they were broadcast, how often they were broadcast, who sponsored them and an estimate of how much was paid for the ad. Video files of the ads can also be provided.

Specific Applications and Uses of Advertising Data by Defense Counsel and Companies Manufacturing Products

Traditional, Single-Plaintiff Cases

The value of a legal advertisement in a single-plaintiff matter typically centers on whether any of the witnesses have seen the advertisement. Most of them have, either online or on television, [39] but the traditional problem has been that plaintiffs' memories can be notoriously foggy about which advertisement they viewed and when. The new data that is available, however, can help to locate the specific ad and then compare it with critical arguments in the ongoing litigation.

For instance, if written discovery reveals that a plaintiff recalls seeing an advertisement during the channel 6 news at 10:00 pm about the prescription drug at issue in the litigation, but they cannot recall when or the name of the attorney in the advertisement, defense counsel now has an opportunity to do some additional research before the forthcoming deposition. X Ante, for instance, may be able to query their database to identify the television ads that have run in that market over the last four (4) years and provide defense counsel with video files to show plaintiff at a deposition in an effort to identify the specific advertisement. The same can be done with treating physicians or other witnesses. And while the specific uses in any particular case may vary widely, a checklist is provided below to provide some examples of how advertising evidence might prove useful.

[38] Goldstein, Ken, and Dhavan V. Shah. *Trial Lawyer Marketing: Broadcast. Search, and Social Strategies*, U.S. Chamber Institute for Legal Reform, October 27, 2015. (available online at http://www.instituteforlegalreform.com/uploads/sites/1/TrialLawyerMarketing.pdf)
[39] Harris Interactive, Pharmaceutical Liability Study Report on Findings, (July 15, 2003).

Checklist for Single-Plaintiff Matters

1. Statute of Limitations Arguments
   - Did the viewing of legal advertisements start the limitations countdown?
   - Did advertisements prompt the plaintiff to seek legal advice or medical treatment?

2. Knowledge of Risks (by plaintiff, physician, or other key witness)
   - Did the ads inform the plaintiff of pertinent risk information before or during treatment?
   - Did the plaintiff continue to take the medicine or use the product in spite of widespread legal advertisements?
   - Has the prescribing physician seen the legal advertising?
   - Do the ads confirm that product risks were known within the community, including the medical community?
   - Did the ads prompt the physician to re-examine their prescribing practices for a particular medicine?
   - Did the advertising cause the prescribing physician to perform additional medical research on the actual risk profile of a particular course of treatment?

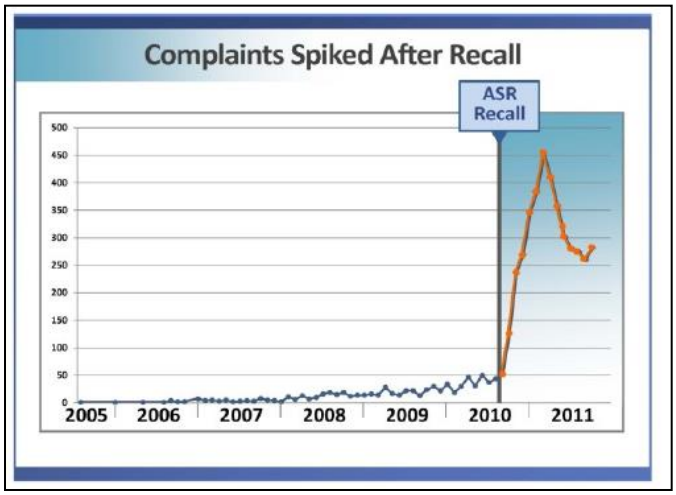
3. Alternative Cause for Symptoms
   - Has the plaintiff seen advertising for the medicine or product in question?
   - Have her symptoms changed, as reported in the medical records, since advertisements began airing?

4. Alternative Cause of Emotional Distress
   - Has the plaintiff seen advertising for the medicine or product in question?
   - Is that advertising truthful, accurate, and non-misleading?
   - Were the advertisements troubling to the plaintiff? (particularly when "fear of" claims are made)

Aggregate-Claim Cases (e.g., Class Actions, Multidistrict Litigation)

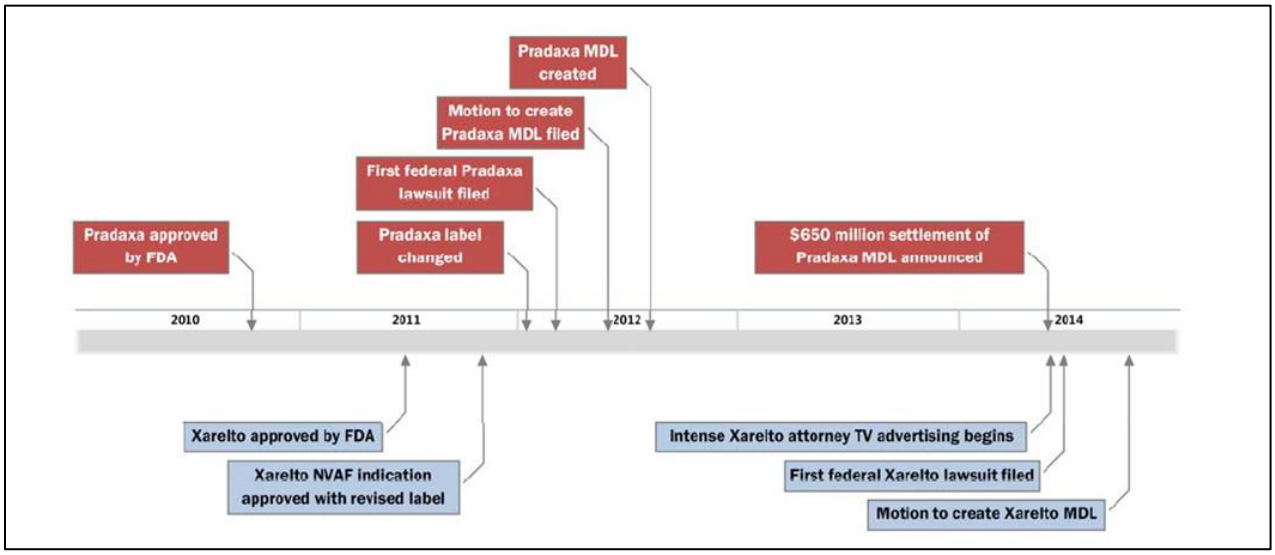
The issues presented in mass torts often better lend themselves to the use of advertising data. As discussed in the earlier section on existing legal precedents on the admissibility of advertising evidence, defense counsel often face the challenge of having to respond to plaintiff arguments that evidence of many other lawsuits or complaints is evidence of a product defect. One possible response by defense counsel is to counter that the lawsuits and/or complaints are, in fact, driven by plaintiff-firm advertising – as opposed to a product defect. To flesh out this argument, data on mass-tort TV advertising by X Ante or data on internet searches by Google Analytics would need to be compared with internal company data on complaints rates, AERs/MDRs, and/or the number of lawsuits being filed. In many instances, the relationship between advertising spending and product complaints is stark.

This sort of argument was made in one branch of the metal-on-metal hip litigation. There, using internal company data, the defendant was able to demonstrate a spike in product complaints following a product recall[40]:



At the time of this litigation, however, data was not available to link the dramatic spike in complaints with an onslaught of product-specific advertising by plaintiffs' law firms and others following the recall.

The same sort of data and analysis was used in a motion by Bayer opposing the consolidation of Xarelto claims into an MDL. The argument advanced by defense counsel was that a recent rash of Xarelto claims was not indicative of a broader mass tort worthy of consolidation – but rather as the result of an advertising campaign by the plaintiffs' bar following a large settlement in the Pradaxa MDL and aimed at Xarelto, which is another blood thinner.



[40] Demonstrative Taken from Briefing, (Rec. Doc. No. 52), p. 4, McCracken v. DePuy Orthopaedic Products, Inc., No. 1:11-20485 (N.D. Ohio 2013).

Like with single-plaintiff matters, there are a variety of potential uses surrounding data on legal advertising. The following checklist is intended merely to provide examples of the sorts of arguments that may be available.

Checklist for Class Actions or Consolidated Mass Torts

1. Alternative Explanation for Genesis of Litigation
   - Are the plaintiffs arguing that the fact of widespread litigation indicates a product defect?
   - How does the number of suits filed over time compare with the levels of legal spending over time?
   - Would a statistician or biostatistician be able to conclude that there is a statistically significant relationship between estimated advertising dollars and number of lawsuits filed?

2. Alternative Explanation for Increases in Product Complaints
   - Are the plaintiffs arguing that large numbers of complaints is evidence of a defect?
   - Again, is there a statistically significant relationship between complaint rates and attorney advertising?
   - Would a biostatistician and/or epidemiologist be willing to so opine?
   - Would a biostatistician be able to demonstrate with advertising data, sales data, and complaints data that counties or states with similar demographics and sales figures demonstrate significantly different complaint rates due to disparities in legal advertising?

3. Alternative Explanation for Decreases in Product Sales
   - Are the plaintiffs arguing that decreased sales indicate a defective product?
   - How do sales compare with legal advertising surrounding that product?
   - Was the manufacturers marketing budget flat over the same time period?

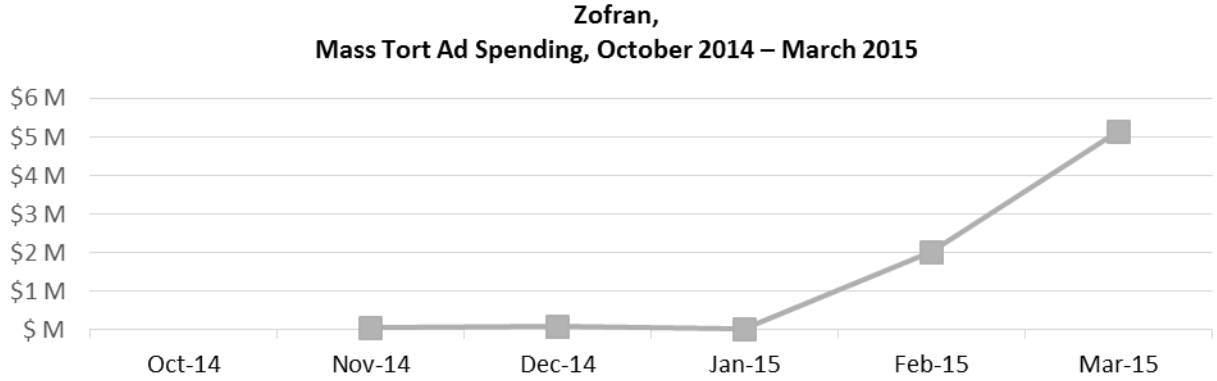
4. Alternative Explanation for Poor Product Performance
   - Same thoughts as above apply.

How Else Can Defense Counsel and Manufacturing Clients Use this Data to Their Advantage?

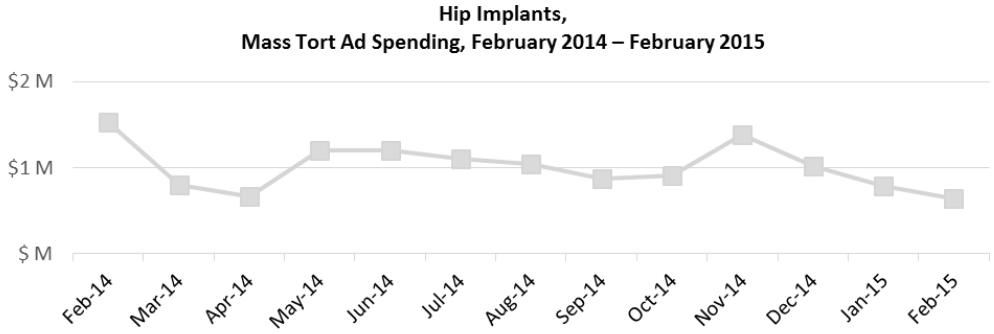
Early Warning and Monitoring Litigation Trajectory

Legal advertising by plaintiff firms provide a benchmark for how viable plaintiffs' attorneys believe litigation surrounding a product to be. By monitoring this sort of activity, manufacturers and their lawyers can forecast the potential for mass torts to develop around existing products. Likewise, month-to-month fluctuations in legal advertising provides insights into whether the worst is over or yet to come.

For instance, the trending below allows defense counsel and manufacturers to forecast a potential onslaught of litigation before lawsuits are filed and adapt accordingly.



Alternatively, once litigation has commenced, continued monitoring of advertising volumes provide insight into the future progression of the litigation, including assistance in answering key questions related to litigation budgeting and when and whether to engage in settlement negotiations. For instance, the data below suggests waning interest by the plaintiffs' bar and a likely decrease in the rate of new suits and claims. Thus, given this data, settlement negotiations may prove more fruitful than at early points in time.

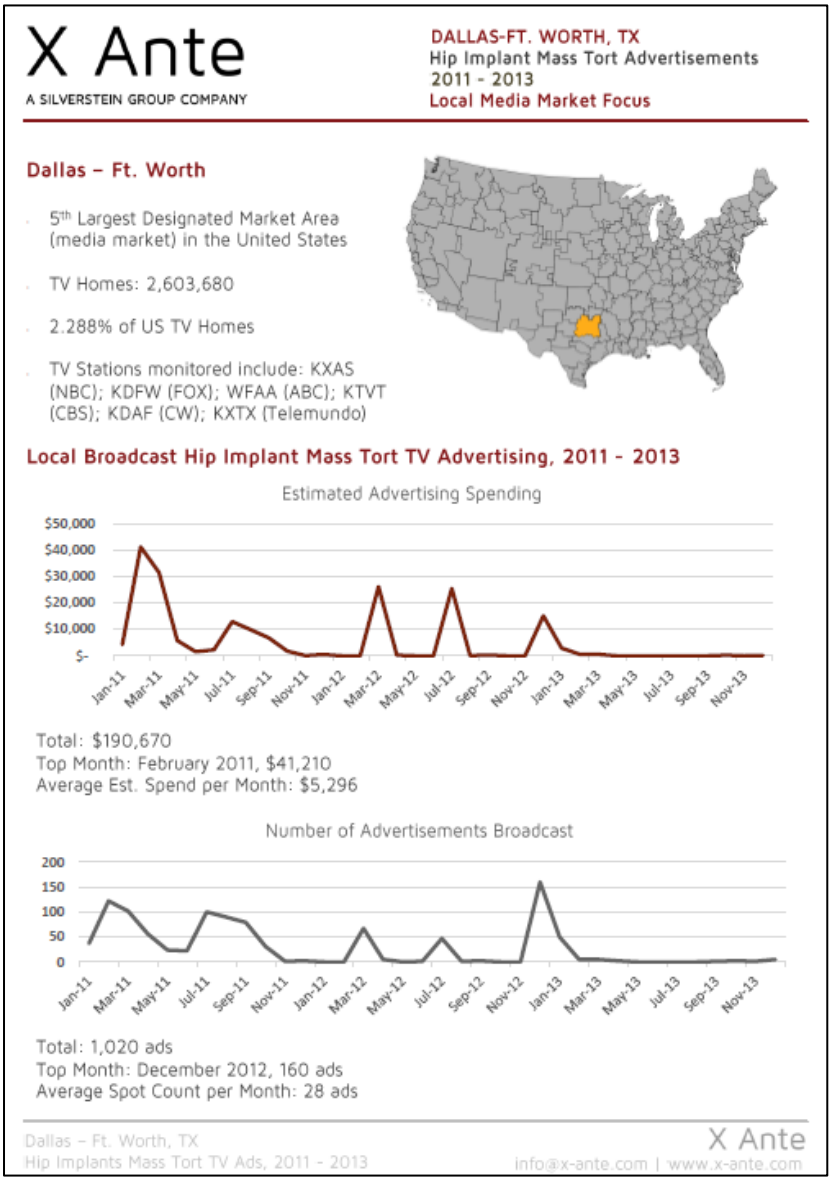


Post-Market Surveillance

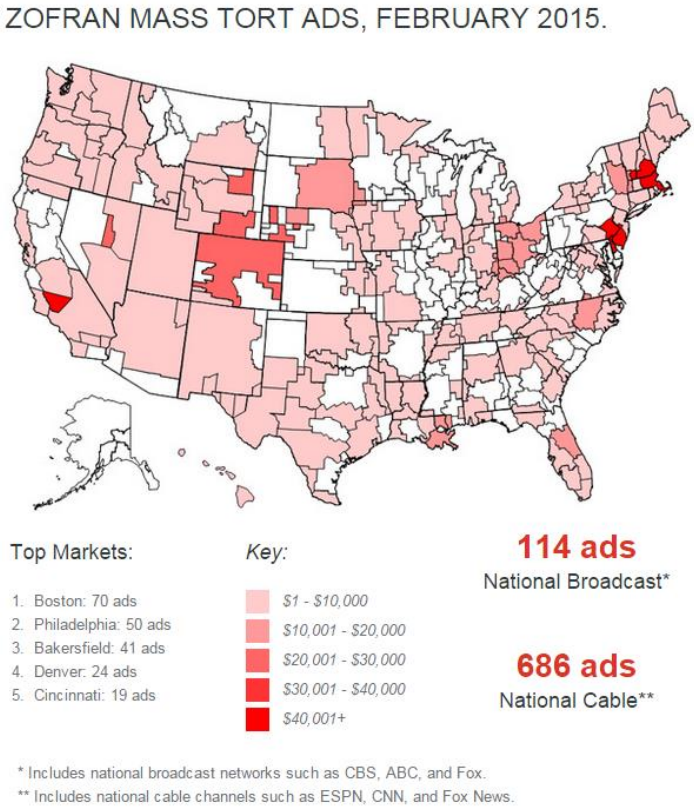
Corporate defendants, particularly manufacturers of pharmaceutical and medical products, dedicate enormous resources to post-market surveillance efforts. Combining traditional methods of tracking product performance with new sources of information, like levels of mass tort litigation advertising can offer greater insight into whether external forces are driving product complaints or whether corrective and preventative action is needed by the company. Likewise, such data can be used by companies to justify decision-making as to recalls or non-recalls to supervising regulatory authorities.

Identification of Problematic Venues and Jury Pools

During the management of a mass tort, the first trials (whether in federal or state court) often set the tone for the duration of the litigation and the ultimate settlement discussions. The identification of geographic regions where plaintiff advertising is particularly intense allows counsel and clients to avoid bad venues. This information can be used to support change-of-venue motions, trial-continuance motions, briefing before the Judicial Panel on Multidistrict Litigation (JPML), voir dire questions, and even bellwether-case settlement values (when settlement would shift the epicenter of the litigation to a more favorable venue). *See*, *e.g.*:



Moreover, the data is available at both the nationwide or local level, which can be used to identify potential litigation hotspots, as well as favorable and unfavorable venues for mass tort consolidation.



Conclusion

The landscape of advertising surrounding litigation has changed dramatically in the last decade and will continue to do so as advertising continues its growth into internet and social media platforms. It is unquestionably a growing industry that is now even being populated with non-law firms, hedge-fund financiers, and marketing agencies. But this expansion is occurring simultaneously with an equally unprecedented expansion of internet-tracking data and media analytics. Consequently, the advertising juggernaut that exists also provides opportunities for defense counsel to be creative and, at times, use this ever-present advertising backdrop against its own sponsors and to the advantage of their own manufacturing clients in litigation.

APPENDIX 1
OTHER NOTEWORTHY FACTS OF PLAINTIFF-ATTORNEY ADVERTISING

- 86% of consumers have seen drug-injury advertising.[41]
- 21% of consumers have seen such advertising about a medicine they were taking.[42]
- 25% of respondents would "immediately stop taking" a prescribed medicine if they saw a drug-injury ad on TV.[43]
- In a study by Eli Lilly, half of surveyed psychiatrists reported that patients had discontinued their prescribed medicines as a result of drug-injury advertising.[44]
- In the 15 years following the 1977 U.S. Supreme Court decision in *Bates v. State Bar of Arizona*[45], television advertising by lawyers increased from less than $100,000 to more than $113 million.[46]
- Total spending on legal advertising was estimated to be $428 million in 2002.[47] It exceeded $750 million in 2012.[48]
- The factual backdrop of the *Daubert* precedent involved the medicine Bendectin, which was a combination of vitamin B6 and doxylamine (an anti-histamine) that was used to treat nausea in pregnant women. After a National Enquirer article suggesting a link between the medicine and birth defects, the medicine became the focus of widespread litigation and was ultimately removed from the market. In retrospect, the science now indicates that the medicine was safe and effective for pregnant women. The American College of Obstetrics and Gynecologists currently holds the position that taking Vitamin B6 plus doxylamine is safe and effective and should be considered a first-line treatment. This is based on "consistent scientific evidence."[49]

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[41] Harris Interactive, Pharmaceutical Liability Study Report on Findings, (July 15, 2003).
[42] *Id.*
[43] *Id.*
[44] Eli Lilly, "New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illness," June 13, 2007 (available at: https://investor.lilly.com/releasedetail.cfm?releaseid=248836) (last accessed 4/15/2016).
[45] 433 U.S. 350, 371-72 (1977).
[46] Michael P. Stone & Thomas J. Miceli, *Optimal Attorney Advertising*, 32 INT'L REV. L. & ECON. 329, 329 (2012).
[47] Engstrom, Nora Freeman. *Legal Access and Attorney Advertising*. AM. U. J. GENDER & SOC. POL'Y & L. 19, no. 4 (2011): 1083, 1090.
[48] Legal Advertising Intelligence Report – June/July 2013, The Silverstein Group (available at http://www.silversteingroup.net/-junejuly-2013-attorney-advertising-report.html (last accessed 12/6/2013)).
[49] American College of Obstetricians and Gynecologists (ACOG). Nausea and vomiting of pregnancy. Washington (DC): American College of Obstetricians and Gynecologists (ACOG); 2004 Apr. 13 p. (ACOG practice bulletin; no. 52).

APPENDIX 2:
CASES ADDRESSING THE ADMISSIBILITY OF LEGAL ADVERTISING

1. *In re: Norplant Contraceptive Products Liability Litigation*, (E.D. Tex. 1997) (MDL No. 1038) (court ruling at 1997 WL 81087) (discussed above).

2. *In re: Silica Products Liability Litigation,* 398 F. Supp.2d 563, 596-604 (S.D. Tex. June 30, 2005) (MDL No. 1553) (discussing advertising efforts by plaintiffs' attorneys though not directly ruling on admissibility at trial).

3. *In Re: Prempro Products Liability Litigation, Hill v. Wyeth et. al.; Scroggin v. Wyeth et. al.*, MDL No. 4:03-CV-1507-WRW.; No. 4:04-CV-01169 (E.D. Ark. 2007) (defense briefing at 2007 WL 4985957; court ruling at 2007 WL 3125106) (discussed above).

4. *Deutsch v. Wyeth*, No. MID-L-0998-06MT (N.J. Super. L 2007) (Plaintiff motion at 2007 WL 4615753; defense opposition at 2007 WL 4856457; motion ultimately mooted when summary judgment was entered).

5. *In re Welding Fume Prods. Liab. Litig*, No. 1:03-CV-17000, 2010 WL 7699456 at *66-68 (N.D. Ohio June 4, 2010) (MDL No. 1535) (discussed above).

6. *McCracken v. DePuy Orthopedic Products, Inc.*, No. 1:11-20485 (N.D. Ohio 2013) (motion at Rec. Doc. No. 52, p. 4) (ruling at Rec. Doc. No. 68).

7. *In re: Risperdal Litigation; W.C. et al., Plaintiffs v. Janssen Pharmaceuticals,* No. 130301803 (Pa. Com. Pl. 2015) (briefing at 2015 WL 1469627) (ruling at 2015 WL 1505248) (discussed above).

8. *Herlihy-Paoli v. DePuy Orthopaedics Inc. et al.,* no. 3:12-cv-04975 (N.D. Texas) (discussed above; court indicated that it would allow some evidence of plaintiff advertising).

9. In re *Ethicon, Inc., Pelvic Repair System Products Liability Litigation*. 2:12-md-02327 (S.D. W.V.) (motion at Rec. Doc. No. 1419) (discussed above).

10. *Carolyn Lewis et al. v. Ethicon, Inc., et al.,* 2:12-cv-04301 (S.D. W.V.) (motion at Rec. Doc. No. 206) (opposition at Rec. Doc. No. 220) (ruling at Rec. Doc. No. 250) (discussed above).

11. *Terreski Mullins, et al., v. Ethicon, Inc., et al.*, 2:12-cv-02952 (motion at Rec. Doc. No. 151) (discussed above).

12. *Dianne Bellew v. Ethicon, Inc., et al.,* 2:12-cv-02327 (S.D. W.V.) (motion at Rec. Doc. No. 194-195) (ruling at Rec. Doc. No. 287).

APPENDIX 3
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