

Legal Advertising and Its Potential Effect on Jury Bias and Verdicts



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INTRODUCTION

The explosive growth of legal advertising¹ across television, radio, and social media platforms has led to a growing concern that it contributes to juror bias against defendants, potentially affecting verdicts, both as to liability and damages. This conclusion is supported by advertising and jury research that shows that modern-day legal advertising has the potential to influence and mislead consumers and therefore ultimately bias jurors.

To address these concerns, courts have permitted inquiry about advertising on voir dire (similar to the inquiry pressed by plaintiffs' counsel over juror knowledge of tort reform), granted venue changes, and barred some forms of legal advertising related to trials. On a broader level, some states have enacted legislation prohibiting misleading statements in legal advertising, and some states have addressed it in lawyer ethics rules.

In this paper, we analyze concepts underpinning effective advertising, discuss the historical journey of legal advertising, and then address advertising's impact on the audience it reaches—consumers who become jurors. Last, we discuss potential solutions—judicial, legislative, and changes in ethics rules—bearing in mind that any solution must strike a balance between preserving the sanctity of the jury trial and protecting commercial speech.

ADVERTISING:

GOALS, PURPOSES, AND ADVERSE EFFECTS

The effects of legal advertising are best understood against the backdrop of marketing and advertising more generally. “[M]arketing is engaging customers and managing profitable customer relationships. The two-fold goal of marketing is to attract new customers by promising superior value and to keep and grow current customers by delivering value and satisfaction.”² A subset of marketing, advertising “involves communicating the company’s or brand’s value proposition by using paid media to inform, persuade, and remind consumers.”³

Advertising establishes a one-way channel of communication, where companies can broadcast non-personal messaging to a general audience. Unlike other types of marketing or even public relations, companies have total control over advertising. When a company pays to place an ad, it has complete control over how the content involved is promoted.⁴

While the goal of advertising is usually seen as a means to sell a product or service, the larger goal is to persuade—“to convince the target to internalize the persuasive argument and adopt this new attitude as part of their core belief system.”⁵ Research demonstrates that internalization influences a person’s decision-making process,

not only at the time of the advertisement, but later when finally making a decision.⁶

Internalization is apparent to anyone who can recite a jingle years after a product has left the market,⁷ readily identify a companies’ logo or mascot,⁸ wears T-shirts and hats with a team or company logo,⁹ or can identify cellular services by the color used by the provider.¹⁰ And most everyone recognizes the “Waltograph” font widely used by Disney across its brands.¹¹

Companies use image advertising to “improve customer perception of brand or culture.”¹² With these things, a brand can elicit emotions, memories, and a connection between the product and the consumer.¹³

Advertisements can also be used to criticize or disparage. Take political attack ads. Instead of trying to convince voters why to elect a candidate, attack ads aim to convince voters, sometimes in stark terms, why the other candidate should not be elected.¹⁴ Pertinent here (and discussed more later), some legal advertisements disparage products as “unsafe” or “hazardous” or attack a company as “greedy” or “uncaring.” When these advertisements reach an audience, their message can be internalized—good or bad—without the average person even realizing it is happening.¹⁵

LEGAL ADVERTISING AND THE FIRST AMENDMENT

The legal profession has had a long and complicated relationship with advertising. On one hand, Abraham Lincoln's law firm advertised in the 1850s.¹⁶ On the other, Lincoln was quoted in the 1908 Final Report of the ABA's Committee on Code of Professional Ethics as saying "[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time. ... Never stir up litigation."¹⁷

Early on, the ABA took a dim view of advertising. The 1908 Code of Professional Ethics essentially banned all forms of advertising beyond business cards (and even those were simply "not *per se* improper").¹⁸ Under the 1908 Code, it was "disreputable" to "breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."¹⁹

Fifty-five years later, the ABA issued an ethics opinion stating that lawyers could not send holiday greeting cards to clients or other lawyers. Even cards to personal friends could not identify the law firm or be signed in a way that identified the sender as a lawyer.²⁰ Most states adopted ethics codes that flatly prohibited lawyers from advertising, directly or indirectly. As the First Amendment's protections were not then understood to extend to commercial speech,²¹ there was little reason to question the constitutionality of such restrictions on legal advertising. Starting in the mid-1970s, though, a series of Supreme Court decisions would change all of that.

In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court held that some level of First Amendment protection extended to commercial speech and



thus protected a pharmacist wishing to advertise prescription drug prices in violation of a Virginia statute.²² The majority opinion pointed out there was no claim the speech at issue was “false or misleading,” an important point because:

Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.²³

The Court reserved the question of whether restrictions on commercial speech by other types of professionals, such as lawyers or physicians, might “require consideration of quite different factors.”²⁴

The very next term, in *Bates v. State Bar of Arizona*, the Supreme Court held the First Amendment’s protections extended to some forms of attorney advertising and overturned Arizona’s categorical ban.²⁵ As in *Virginia State Board of Pharmacy*, the *Bates* Court reiterated that the First Amendment permitted “reasonable restrictions on the time, place, and manner of advertising”²⁶ but would not protect “[a]dvertising that is false, deceptive, or misleading.”²⁷ Just the next year, in *Ohralik v. Ohio State Bar Ass’n.*, the Court addressed restrictions on in-person solicitation by lawyers, and expressly recognized it as different in kind from the advertising “approved in *Bates*.”²⁸

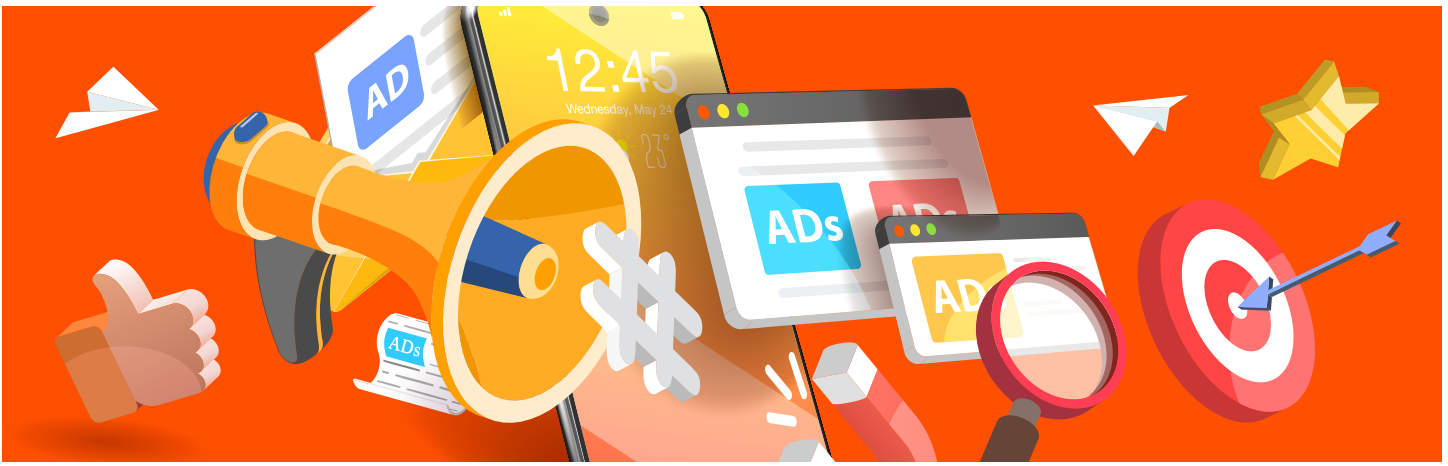
The Supreme Court continued to flesh out the contours of the First Amendment protections for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n.*²⁹ Where commercial speech was neither false nor misleading, *Central Hudson* established a three-part inquiry. First, did the government assert a substantial interest in support of its regulation? Second, could the government demonstrate that the restriction on commercial speech directly and materially ad-

vances that interest? Finally, was the regulation narrowly drawn?³⁰ Thus, *Central Hudson* established an intermediate level of constitutional scrutiny for commercial speech.³¹

Returning to legal advertising, the Court in *Zauderer v. Office of Disciplinary Counsel of Supreme Court* held that the First Amendment protected a lawyer’s newspaper advertisements soliciting clients with potential Dalkon Shield claims (which included an accurate illustration of the device and description of the types of injuries allegedly caused by its use).³² The Court invalidated a public reprimand based on disciplinary rules prohibiting such content in legal advertising, finding “[a]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.”³³ The application of the disciplinary rules to the lawyer’s Dalkon Shield advertisements failed the *Central Hudson* test because, among other things, the rules as applied did not directly advance a substantial governmental interest, nor were they narrowly tailored to advance the State’s supposed interests.³⁴

On the other hand, the *Zauderer* Court upheld part of the reprimand based on the lawyer’s failure to disclose in those same advertisements—which explicitly stated that “if there is no recovery, no legal fees are owed by our clients”—that clients would still be liable for significant litigation costs if their lawsuits were unsuccessful.³⁵ Stating the attorney’s “constitutionally protected interest in not providing any particular factual information in his advertising is minimal,” the Court held the mandatory disclosure of “purely factual and uncontroversial information about the terms under which his services will be available,” was not an infringement on that minimal interest.³⁶ The Court also found the disclosure requirement was “reasonably related to the State’s interest in preventing deception of consumers”³⁷ because a majority of the Court considered it “self-evident” there was a possibility of deception due to the “substantial number” of clients who might not appreciate the technical difference between “fees” and “costs.”³⁸

In later opinions, the Supreme Court contin-



ued to largely protect commercial speech, including in lawyer advertising cases. But in *Florida Bar v. Went for It*, a 5-4 majority upheld a thirty-day ban on direct mail solicitations of potential clients for known injuries (i.e., the mailings went to injured parties or their survivors).³⁹ Applying *Central Hudson*, the Court concluded the ban was constitutional, recognizing for the first time that upholding the integrity of the legal profession was “a state interest sufficient to justify restrictions on attorney advertising.”⁴⁰ The Court explained,

[T]he Florida Bar’s 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar’s proffered study, un rebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.⁴¹

Even then, however, the Court stated “[o]ur lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as

well as in newspapers and other media.”⁴²

These cases demonstrate the Court’s First Amendment jurisprudence extends significant protection to lawyers seeking personal injury clients:

Looking back at almost fifty years of legal advertising since *Bates*, Justice Powell’s dissent there expressed a remarkably prescient prediction of what the future would hold: I am apprehensive, despite the Court’s expressed intent to proceed cautiously, that today’s holding will be viewed by tens of thousands of lawyers as an invitation – by the public-spirited and the selfish lawyers alike – to engage in competitive advertising on an escalating basis.⁴³

Justice Powell’s apprehension about “competitive advertising on an escalating basis” is now of greatest concern today due to advertising’s ability to affect consumers who comprise juries and thus impact the fairness of the judicial system.⁴⁴ The challenge is to balance the First Amendment’s guarantee of free speech with the legitimate goal of prohibiting misleading advertising.

LEGAL ADVERTISING AS PERSUASION: SHAPING PERCEPTION AND ATTITUDES

Like its broader counterpart, legal advertising today can have influence beyond simply touting a lawyer or firm's services—it can shape perceptions of the target audiences. Where companies are targeted, this shaping can influence the audience's perspective as to the company's regard for the safety of its customers and can also influence views as to what constitutes a "reasonable" verdict. These effects are exacerbated when legal advertisements reach potential or actual jurors. Beyond that, advertisements can also affect audiences in foreseeable but perhaps unintended ways. One example (discussed more below) is where users of prescribed medications stop taking them because advertisements warned the medications were "dangerous" or the ads were couched as "government warnings."⁴⁵

Against the backdrop of the overarching goal and purpose of advertising—persuasion—the following sections discuss concerns that advertising (by either side) is adversely affecting both the legal system (by creating juror bias) and consumers (like people who stop taking prescribed medications).

TORT REFORM ADVERTISING BY INSURANCE COMPANIES AND INDUSTRY GROUPS

The first claims that advertisements were affecting juries came from plaintiffs who argued that insurer and industry advertising about tort reform and the effect of large verdicts on insurance rates and cost of products could bias jurors against ruling for the plaintiff or giving fair damage awards. These advertisements were not run by attorneys or parties directly involved, but rather by organizations whose members had some other stake in the outcome of litigation generally. The argument against the advertisements was that the long-term goal was to shape public (and therefore

juror) attitudes in ways that the plaintiffs' bar felt were improper. The basic claim was that the long-term effect of this advertising led the public (including jurors) to internalize the concept that jury awards were out of control.

Several courts addressed the potential effect of insurance or industry advertising on jurors.⁴⁶ Decisions by two courts addressing voir dire on the topic are illustrative.

In *Borkoski v. Yost*, the plaintiff sought voir dire as to "a national campaign by leading insurance companies with regard to jury awards," asserting the insurers for the two physician defendants were "very actively involved"⁴⁷ in advertising that "large jury awards would result in everyone paying higher insurance premiums."⁴⁸ At issue was an advertisement depicting a "judge" holding a "jury instruction" that stated "[w]hen awarding damages in liability cases, the jury is cautioned to be fair and to bear in mind that money does not grow on trees. It must be paid through insurance premiums from uninvolved parties, such as yourselves."⁴⁹ A statement in large type beneath the picture read: "Too bad judges can't read this to a jury."⁵⁰ After describing several cases as illustrative of "windfall" jury awards, the ad listed suggestions to clean up the "mess," including "asking

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juries to take into account a victim's own responsibility for his losses," and to "urge that awards realistically reflect the actual loss suffered -- that they be a fair compensation, but not a reward." And "Insurers, lawyers, judges -- each of us shares [sic] some blame for this mess. But it is you, the public, who can best begin to clean it up. Don't underestimate your own influence. Use it, as we are trying to use ours."⁵¹ The ads ran in *Time*, *Newsweek*, *Sports Illustrated*, and *Reader's Digest* magazines during the approximate time of the impaneling of the jury."⁵²

The trial court denied plaintiff's motion to voir dire prospective jurors about the national advertising campaign,⁵³ and after a defense verdict denied plaintiffs' motion for new trial. On appeal, the Montana Supreme Court affirmed the denial of new trial on harmless error grounds because the jury found for the defendants on liability and the "undeniable" purpose of the advertisements "was to reduce the amount of damages."⁵⁴

But the court found the proposed voir dire should have been permitted, with limitations because "[t]he possibility of serious prejudice resulting to personal injury plaintiffs as a result of the advertising campaign being waged by the insurance companies."⁵⁵

When insurance companies inject the issue of insurance into the consciousness of every potential juror through a high priced advertising campaign, as has been illustrated in this case, they threaten every plaintiff's right to an impartial jury. 1972 Mont. Const. Art. II, § 26. In

such cases, it is only fair that attorneys have some means to secure this right for their clients. Liberal voir dire is the best means to this end.⁵⁶

The Yost court stated that voir dire can include questioning prospective jurors on whether they had business relationships or were policyholders with insurance companies, and whether any had heard or read "anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums for everyone; if so, whether the prospective juror believes such materials; and if so, whether that belief will interfere with the juror's ability to render a fair and impartial verdict."⁵⁷

The Utah Supreme Court adopted Yost's rationale in *Evans v. Doty*, finding the trial judge erred in not questioning the jurors about "magazine or newspaper articles or other literature about medical negligence."⁵⁸ Recognizing the internalization issues discussed above, the court stated, "[r]eason suggests that exposure to tort-reform propaganda may foster a subconscious bias within certain prospective jurors."⁵⁹

It is almost routine that jurors are now asked by plaintiffs' counsel in voir dire if they are aware of tort reform, have heard of outrageous cases like the "hot coffee" case,⁶⁰ or have seen publications like the "Judicial Hellholes"⁶¹ reports, or are members of reform groups like Citizens Against Lawsuit Abuse.⁶² The fact the plaintiffs' bar was the first to address the effect of advertising on jurors, and to pose voir dire and removal of jurors affected by advertising as a solution, presents an interesting backdrop to our current discussion.

LEGAL ADVERTISING BY OR ON BEHALF OF THE PLAINTIFFS' BAR.

More recently, defendants and industry groups have raised concerns about legal advertising run by or on behalf of the plaintiffs' bar, particularly focusing on certain types of litigation, like pharmaceuticals or trucking. One of the primary goals of these ads is "to generate as many 'leads' for lawsuits as possible to fuel mass tort litigation

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and ultimately pressure businesses to settle cases even if the scientific consensus is that the product is safe and beneficial.”⁶³

The amount of money spent on this advertising is staggering. “Between 2017 and 2021, \$6.8 billion was spent on more than 77 million national and local ads.”⁶⁴ In 2017, the U.S. Chamber of Commerce reported that that over the previous decade, the number of lawsuit ads run on television had tripled.⁶⁵ This figure did not include other forms of advertising.⁶⁶ The analysis showed a rise in television ads from 2006 that spikes in 2009 and rises steadily upward until 2017.⁶⁷

According to a February 2022 report by the American Tort Reform Association, trial lawyers spent \$1.4 billion dollars in advertising in 2021.⁶⁸ In 2023, trial lawyers and aggregators spent an estimated \$2.4 billion on more than 26 million advertisements across the much of the media spectrum.⁶⁹ And as of 2023, television advertising alone was reported at \$1.1 billion dollars,⁷⁰ far outpacing the \$250 million estimate of 2006.

Spending in 2024 was slightly higher with more than 500,000 additional advertisements run.⁷¹ On television alone, this amounted to approximately 45,000 ads for legal services per day in 2023, which breaks down to 1,876 ads per hour and one ad every two seconds.⁷² In 2024, the amount spent on legal advertising, excluding digital and print media, increased to over \$2.5 billion dollars.⁷³

Nationwide Data

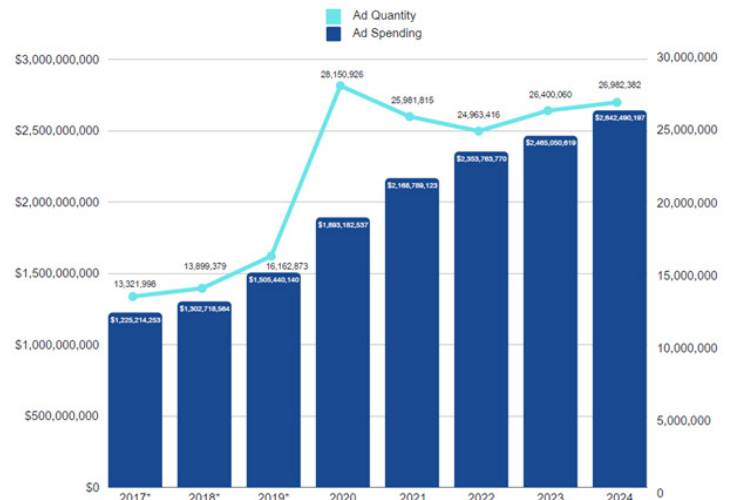


Figure 1 ATRA Legal Services Advertising in the United States 2020-2024 (2017-2019 does not include print or digital).

Similar to concerns about industry influence raised by the plaintiffs’ bar, plaintiffs’ legal advertising is problematic both as to the touting of large awards and settlements, and to statements urging liability of defendants targeted at specific products, drugs or devices, or types of litigation like trucking. Ironically, the ads can negatively affect the plaintiffs’ underlying claims given certain circumstances, such as when statute of limitations defenses are at issue and a plaintiff claims not to have discovered the existence of a claim during the prescriptive period, or when they influence consumers to alter medical care without consulting their physician.

One of the primary goals of these ads is “to generate as many ‘leads’ for lawsuits as possible to fuel mass tort litigation and ultimately pressure businesses to settle cases even if the scientific consensus is that the product is safe and beneficial.”

FOCUSED CONCERNS ABOUT PLAINTIFFS' ADVERTISING

Plaintiffs' advertising has plainly moved from touting a firm's services or results to persuasion about issues like liability and damages and products (i.e., "x" causes cancer). As we discuss below, this persuasion has its roots in the use of "reptile" and "culture code," and can extend to providing medical advice, and driving unsupportable claims.

REPTILE AND CULTURE CODE

A discussion of the effects of advertising is incomplete without considering the "reptile" approach to litigation that arose from two books published in the early 2000's. In 2006, Clotaire Rapaille, an international marketing expert, published *The Culture Code*. In 2009, plaintiffs' lawyers Keenan and Ball published *Reptile: The 2009 Manual of the Plaintiff's Revolution*, which has since become a staple of plaintiffs' litigation tactics.

Rapaille is credited with developing "a new way to know the audience" by influencing individual's unconscious decision making—their "reptilian" brain.⁷⁴ Rapaille posits that the American "culture code" for money is "PROOF"⁷⁵ meaning, for example, that a person works hard for their money is good and companies that make a profit are bad.⁷⁶ The "reptile" book borrows from Rapaille and recommends appealing to jurors' "reptilian" brain with a series of arguments based on "codes."

When humans feel threatened, the reptilian brain takes charge and controls human conduct. Therefore, if a lawyer can make a juror feel threatened, the lawyer appeals to the juror's primitive reptilian brain and virtually assures a victory. Thus, a lawyer's argument should intensify the juror's

fear that his or her physical survival is at stake as well as that of the juror's family and community. If the lawyer uses this strategy successfully, the jurors will mimic the reptile. Instead of protecting themselves by biting your opponent or curling up into a ball, the jurors will punish your opponent by convicting him or her or by inflicting a large damage award on the corporation.⁷⁷

Reptile's authors admittedly adapted Rapaille's techniques and some of his code words,⁷⁸ and also conducted their own research into codes for use at trial that they then discuss in depth.⁷⁹ Expressly adopting Rapaille,⁸⁰ *Reptile* posits "the best way to sell something (or to persuade) is to start where the audience is, not where you want to get them. You do this by identifying the public's core relationship – the Code – with what you are selling or trying to persuade them about."⁸¹ An example is the common theme of "safety over profits."

While *Reptile* admittedly adapted the "code" method of advertising to its trial techniques,⁸² the authors caution readers more than once that juries should never be told the word "code."⁸³ Knowing the power of persuasion gained by using these codes, plaintiffs' attorneys employ the advertising method in litigation from discovery to arguments before juries.

These same techniques spill over into the media, be it television, radio, print, or digital. Plaintiffs' counsel and others have invested significantly in advertising methodology to make the biggest impact on audiences by using the same code words in the public realm as they would within the courtroom. This fits squarely within the research noting that advertising is implanted in the

human psyche to be recalled later during the decision-making process.⁸⁴ For example, the words “danger” and “substantial compensation” are frequently used in legal advertisements about pesticides. Plaintiffs’ attorneys throw the word “justice” around as if they were the embodiment of the most altruistic form of the word while all others must therefore be “unjust.” By using these techniques, legal advertising has transformed into a vehicle to persuade the public on an issue or party before any trial ever takes place.

ADVERTISING AS MEDICAL ADVICE

Advertisements urging claims related to drugs or medical devices can present a different problem of persuasion when they mislead consumers by masquerading as “medical alerts” or “government warnings.”⁸⁵

Elizabeth Tippet, a frequent author analyzing advertising for drug injury lawsuits, observed “[d]rug injury advertising presents both public health opportunities and risks” because it “informs injured consumers of legal remedies, offers wider access to attorneys, and holds manufacturers accountable,” and disseminates “new information about medical risks from the FDA and medical journals.”⁸⁶ This additional information “can motivate viewers to seek medical care, usefully inform medical decision-making, and improve interactions with physicians,” and “[p]aradoxically, they might even remind consumers to take their medication.”⁸⁷

But “such advertising could also distort consumer medical decisions by causing them to misperceive drug-related risks”—“those misled by drug injury advertising need not consult a doctor to make a medical decision based on the ad. They can simply stop taking the drug featured in the ad

of their own accord.”⁸⁸

Tippet’s conclusions are based on a study of legal advertising related to drugs or medical devices lawsuits in the Boston and Atlanta media markets between June 15, 2009, and January 4, 2010, and focused on television advertising for lawsuits relating to drugs and medical devices. “The purpose of the advertising is to recruit consumers for lawsuits against drug manufacturers. In particular, the ads seek to identify consumers that took a drug or used a medical device and subsequently experienced a particular medical problem that the drug manufacturer failed to disclose.”⁸⁹ The ads reviewed for the study sought “to identify consumers that took a drug or used a medical device and subsequently experienced a particular medical problem that the drug manufacturer failed to disclose,” warned “of the dangers associated with a particular drug or device,” and encouraged “injured consumers [to] contact them for legal representation.”⁹⁰

After seeing advertisements “warning” about litigation involving blood thinner medications, some patients stopped taking their medication without seeking a doctor’s advice because the advertisement appeared to be a warning from an entity of authority.⁹¹ Tippet reported that seven people died, 33 suffered strokes, and 24 others had other serious medical complications.⁹² As these statistics are only of reported events,⁹³ there could have been others not reported and/or are unknown.

Despite the potential to influence patient medical decisions, lawyers’ drug injury advertisements are not subject to complex FDA regulations governing pharmaceutical ads.⁹⁴ Attorney advertising is subject to the jurisdiction of the FTC and state consumer protection law, but neither the FTC nor state attorneys general have a record of actively regulating drug injury advertisements.⁹⁵

ADVERTISING DRIVING UNSUPPORTABLE CLAIMS.

Another concern is that legal advertising results in courts and parties having to deal with unsupportable claims, particularly in mass tort cases.⁹⁶ As Professors Tippet and King hypoth-

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esized,⁹⁷ much of the spending on legal advertising is driven by the business model used to obtain and represent plaintiffs in mass tort litigation.⁹⁸ Evidence supports that premise that the case acquisition model used by some firms in mass tort litigation, driven by significant legal advertising, is a large cause of this recognized problem.⁹⁹

A United States District Judge in Georgia confirmed this in 2016, observing that his experience as a transferee judge in two MDLs led him to believe “the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action.”¹⁰⁰ This is because “[s]ome lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.”¹⁰¹ As a result, “[t]his phenomenon produces the perverse result that *an MDL*, which was established in part to manage cases more efficiently to achieve judicial economy, *becomes populated with many non-meritorious cases that must nevertheless be managed by the transferee judge*—cases that likely never would have entered the federal court system without the MDL.”¹⁰²

Some insight into the process of amassing large numbers of claims comes from a reported complaint filed by a former employee of a Houston law firm (and subsequently sealed by the trial judge) seeking commissions for financing he obtained for the firm. Plaintiff alleged the firm had purchased “inventories” of cases from other firms in the transvaginal mesh litigation, paying some \$40,000,000 for almost 14,000 cases.¹⁰³ As alleged in the complaint, the firm had a straightforward business model:

- (i) borrow as much money as possible;
- (ii) buy as many television ads and/or faceless clients as possible;
- (iii) wait on real lawyers somewhere to establish liability against somebody for something;
- (iv) use those faceless clients to borrow

even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.¹⁰⁴

Another firm that helped generate leads for mass tort plaintiffs’ attorneys published an online guide on the outlook for various mass torts claims in 2021.¹⁰⁵ The guide treated mass tort leads as investments and assessed whether acquirers should be moving quickly or with caution in obtaining such leads.¹⁰⁶

Advertising resulted in large numbers of unsupportable claims was seen in the *In re Taxotere (docetaxel) Multidistrict Litigation*¹⁰⁷ where Plaintiffs alleged that docetaxel, a chemotherapy agent taken as a treatment for breast cancer, caused permanent or persistent hair loss. When the MDL was formed in 2016, there was an influx of attorney advertisements seeking claimants who were dissatisfied with hair regrowth following treatment with docetaxel.

These advertisements successfully identified potential claimants who joined the MDL that at its peak involved more than 15,000 individual claims.¹⁰⁸ But the underlying claims were plagued by myriad problems. Some plaintiffs’ claims post-dated a substantive change in the warning label language that addressed the precise failure-to-warn claims at issue in the litigation; other plaintiffs could not produce proof of their injury, either with a medical diagnosis or with photographs establishing their hair loss.¹⁰⁹ Through a rigorous show cause process culminating in motion prac-

Another concern is that legal advertising results in courts and parties having to deal with unsupportable claims, particularly in mass tort cases.

tice near the end of the litigation, the *In re Taxotere* court ultimately dismissed large portions of the “inventory” affected by these and other issues of proof,¹¹⁰ including thousands of claims where plaintiffs could not establish product identification. In many cases, even if the plaintiff could prove that they had taken docetaxel, they could not identify the correct manufacturer defendant against whom to proceed.¹¹¹ And despite plaintiffs’ attorneys’ efforts on appeal, the dismissals were generally upheld by the Fifth Circuit, which found that “district courts are vested with the power to ‘manage their own affairs so as to achieve the orderly and expeditious disposition of cases[,]’ [which] necessarily includes the ‘power ... to control [the court’s] docket by dismissing a case as a sanction for a party’s failure to obey court orders.’”¹¹²

With the race to obtain, retain, and file, there is little wonder that not all mass tort claims are vetted to determine whether each plaintiff’s claim is viable.¹¹³



ADVERTISING USED AS EVIDENCE

There are examples of attorney advertising being used as evidence supporting arguments that plaintiffs' claims are barred by the statute of limitations or for cross examination on the validity of claims.

In the *In re Taxotere* multidistrict litigation (MDL), plaintiffs sought damages alleging manufacturers knew that treatment for breast cancer with Taxotere caused permanent chemotherapy induced alopecia and failed to warn. Plaintiffs' master complaint defined the alleged injury as "an absence of or incomplete hair regrowth **six months beyond the completion of chemotherapy**."¹¹⁴ This specific definition ultimately proved fatal to many plaintiffs' claims, because advertisements for the MDL—which prompted the filing of lawsuits against defendants—aired several years, not months, after the time during which most plaintiffs underwent treatment with docetaxel. Where plaintiffs' claims were thus untimely on the face of the pleadings, Defendants moved for summary judgment in multiple bellwether cases (and later, across the greater MDL "inventory") arguing the claims were time-barred.

Plaintiffs' counsel tried to avoid dismissal by seeking leave to amend the master complaint to remove the six-month language and change the definition of the alleged injury.¹¹⁵ They also tried to avoid timeliness issues by amending individual plaintiffs' short form complaints to omit prior allegations with specific dates for the onset and duration of their injury, and to allege the first notice of the association between docetaxel and persistent hair loss was because of advertising.¹¹⁶

The court denied the motions to amend, finding it "apparent that Plaintiffs seek to revise their allegations to buttress their claims against statute-of-limitations defenses."¹¹⁷ The court also



did not permit plaintiffs to amend their short form complaints to plead attorney advertisements were their first notice of the association between docetaxel and persistent hair loss.¹¹⁸

Despite these rulings, individual plaintiffs continued to make advertisement-based arguments to survive statute of limitations motions. Most argued that some iteration of the discovery rule (depending on the applicable jurisdiction) applied to start the running statute of limitations from when they saw advertisements. These arguments were largely unsuccessful. For example, three Louisiana bellwether plaintiffs' claims were dismissed as facially untimely by the court on defendants' motions for summary judgment¹¹⁹ over plaintiffs' argument that the equitable tolling doctrine *contra non valentem* tolled the prescriptive period (the statute of limitations) until the plaintiffs saw attorney advertisements indicating that docetaxel could cause permanent hair loss.¹²⁰

The Fifth Circuit affirmed the MDL the dismissals, holding both that the plaintiffs' claims were facially untimely and that *contra non valentem*—which is only applied in exceptional cases—did not apply where plaintiffs had sustained an

injury that “should have caused an inquiry within a reasonable time thereafter.”¹²¹ The Court squarely rejected the argument that plaintiffs were unable to file their claims until after seeing the attorney advertisements linking the chemotherapy agent to the alleged injury. Because medical literature and online articles cited within the plaintiffs' own master complaint established that persistent hair loss caused by docetaxel was “reasonably knowable in excess of one year prior to their filing suit[,]” the court held that the plaintiffs were “charged with knowledge of all that a reasonable inquiry would have revealed.”¹²² The court noted, for example, that a reasonable inquiry by a plaintiff would “likely include consultation with doctors,” but could also involve the plaintiff “searching for the cause herself.”¹²³

Not long after the Fifth Circuit decisions, waves of cases were remanded by the MDL court back to transferor courts in the plaintiffs' home jurisdiction, resulting in more dismissals, followed by settlement negotiations of discrete inventories of cases, and ultimately a *Lone Pine* order (more properly termed a “Medical Diagnosis Order,” for context) an end to the MDL.¹²⁴



EFFECT OF ADVERTISING ON JURIES AND THE JUDICIAL SYSTEM

ADVERTISING AND PRETRIAL PUBLICITY

Issues flowing from pretrial publicity are well-known in the legal profession. Over a century ago, Justice Holmes stated:

A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer . . . would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. **The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.**¹²⁵

As far back as 1908, the ABA Model Rules addressed the effect of pretrial publicity: “Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned.”¹²⁶ Like its more general advertising rules, the contours of the ABA’s pretrial publicity rule have varied over the years, in part due to Supreme Court decisions. Rule 3.6’s current incarnation provides:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should

know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.¹²⁷

Of course, these rules say nothing about lawyers or others (such as lead generators) who are not involved in the litigation, nor do they address the issue of what a trial judge is to do when faced with a claim that lawyer advertising may be impacting the jury pool.¹²⁸

There is a robust body of research on the use of persuasion techniques in advertising. “[A]dvertising researchers study human decision making shortcuts, or heuristics, and fashion models of human decision making, which they call ‘persuasion routes.’”¹²⁹ Then, “advertisers act on these models, using them to create advertisements that steer consumers down particular routes to persuasion.”¹³⁰ There is every reason to think this is

Pre-trial advertisements highlighting findings by prior juries regarding the same defendant or product, post-trial juror comments regarding the defendant’s conduct or the safety of the product, or verdict amounts from those earlier trials can be particularly pernicious when aired during the run-up to a trial.



the case with pre-trial legal advertising, as well, and the effects manifest themselves in a number of ways.

Echoing Rapaille and “culture codes,” pre-trial legal advertising targets the audience by associating something bad (i.e., cancer) with a specific product or a specific entity, such as the manufacturer. When these legal advertisements are run regularly and repeat the same messaging, they precondition the public—including potential jurors—that the corporate defendant is a bad actor that made an unsafe product and not only deserves to pay for what it did, but should also be punished. Jurors who internalize these messages before trial may act on them when it comes time to determine liability, award damages, or even decide whether punitive damages are warranted. This is so because “research has demonstrated that pre-existing biases and intuitive decision processes may have an effect on how jurors make decisions.”¹³¹ Pre-trial publicity “imparts its biasing effects in a multitude of ways, influencing decision making processes, memory, and pre-trial perceptions,”¹³² and “can result in juror bias, memory errors, and biased perceptions, leading to issues within trials and jury deliberation.”¹³³ As one goal of advertising is to persuade, there is certainly evidence suggesting that some advertisements, while cloaked as lawyer advertising, are run primarily for the purpose of persuading potential jurors.

The advent of social media and digital advertising has dramatically changed the landscape that existed during the *Bates* era. Advertisements not only reach wider audiences in different media instantaneously, but both the content and the in-

tent of legal advertising have changed. Traditional lawyer advertisements focused on conventional concepts: “you may have a case and you should hire me for it.” But this traditional form of persuasion has, over time, given way to more nuanced messaging as advertisements can be targeted in many ways to reach specific types of people.¹³⁴ While the content and targets have changed, the purpose remains the same: to persuade consumers to pursue cases, hire counsel, and shape attitudes.

Judging the potential effects of advertising becomes murkier in light of so-called “online behavioral advertising” (“OBA,” and sometimes “interest-based advertising”), which is the practice of “monitoring people’s online behavior and using the collected information to show people individually targeted advertisements.”¹³⁵ This area has exploded with recent developments in marketing technology:

The first development is the Big Data revolution. Although there are a myriad of definitions, a helpful way of understanding it is as a “problem-solving philosophy that leverages massive datasets and algorithmic analysis to extract ‘hidden information and surprising correlations.’” And, from internet browsing history to light bulb usage, advertisers now have an immense and unprecedented volume and variety of data on consumers. Whether alone or paired with traditional repositories of personal information such

as government records, the data let advertisers create detailed profiles of consumers and what motivates them. The second development is the change in how individuals consume media, which has given advertisers the ability to “narrowcast” – that is, to deliver tailored advertisements to specific individuals via internet-enabled devices such as computers, smart phones, and even home televisions. Together, these developments mean advertisers can microtarget (and retarget) specific consumers using information that the consumers did not intend to share and *appealing to unknown, subconscious drivers*.¹³⁶

Ads can be targeted by using geolocation data (much like placing billboards near hospitals). Reportedly, one medical malpractice firm “targets its advertising to Facebook users when they are near nursing homes with bad reviews.”¹³⁷ It is easy to see that the use of OBA coupled with geolocation data to target online users living in the area where a venire will be drawn could allow for targeted advertisements intended to appeal to potential jurors’ “unknown, subconscious drivers.”¹³⁸ The point is that advertising, whether traditional or online, has the ability to subtly (and perhaps subconsciously) impact the venire and ultimately the jurors in ways voir dire is unlikely to unearth.

In mass tort litigation particularly, pre-trial advertisements highlighting findings by prior juries regarding the same defendant or product, post-trial juror comments regarding the defendant’s conduct or the safety of the product, or verdict amounts from those earlier trials can be par-

ticularly pernicious when aired during the run-up to a trial.

One well-known advertisement about Monsanto’s herbicide Roundup flatly stated that a “federal jury unanimously found” that its ingredients were a “substantial cause of cancer.”¹³⁹ The advertisement had dual purpose. While it was arguably aimed at persuading persons with cancer to become clients, the ads also urged only one possible trial outcome regardless of the particular facts of a specific case and essentially invited any prospective juror to automatically find causation without the need to listen to any evidence. The Roundup cases are discussed in more detail below.

Certain studies suggest that some advertisements are aired primarily for the purpose of reaching potential jurors rather than potential clients. The U.S. Chamber of Commerce’s Institute for Legal Reform (“ILR”) conducted an analysis of media advertisements regarding Roundup, a product that plaintiffs’ attorneys allege can cause certain types of cancer including non-Hodgkin’s lymphoma (“NHL”). According to ILR, “[t]he data suggests that a significant driver of spending on Roundup lawsuit advertisements is the proximity of a trial or large verdict.”¹⁴⁰

The ILR report found that in connection with one West Coast trial involving Roundup, the plaintiffs’ lawyers (apparently in recognition of the role pretrial advertising can play in juror persuasion) sought an injunction to prohibit Monsanto from running any advertisements mentioning “safety, testing, or studies related to Roundup.”¹⁴¹ In its response, Monsanto’s counsel pointed to targeted advertising run by the attorneys for the plaintiffs:

Monsanto’s attorneys pointed out the plaintiffs’ lawyers had “bombarded” the jury pool with 2,187 television and radio ads in the local media market alone disparaging Roundup in the four months before trial. One Roundup lawsuit ad aired an average of eight times a day. Just seven days before the [] trial, plaintiffs’ lawyers placed an ad in the *San Francisco Chronicle* alleging a “doubling

Certain studies suggest that some advertisements are aired primarily for the purpose of reaching potential jurors rather than potential clients.

or tripling” of the risk of NHL from Roundup.¹⁴²

The court denied the plaintiff’s motion.

The ILR report cited other examples of advertisements airing as major cases neared trial, particularly in plaintiff-friendly venues: “As documented in this report, lawsuit advertising often rises as cases approach and go to trial. The messaging of some lawsuit ads seems to focus more on broadly conveying to the public that a product is harmful, or that a business engaged in misconduct, than on recruiting potential clients.”¹⁴³

Another example was advertising about the dangers of talc. In a St. Louis talc case, defendants sought a change of venue or a continuance after targeted and pervasive advertisements regarding recent verdicts involving talc products aired in the market from which juries would be drawn in proximity to the trial. The trial court denied the motion.¹⁴⁴ In contrast, in a Colorado case, the defendant was reportedly able to obtain a venue change because of lawyer advertisements.¹⁴⁵

Advertisements that tout a firm’s success in garnering large verdicts are commonplace, with the ostensible goal to draw in the plaintiff who wants to make the most money on a case as possible. But these advertisements go to multiple audiences who can have different responses. Ads touting that a firm has obtained a specific amount of money for a specific type of case may very well attract potential clients but also have the potential effect of influencing jurors.¹⁴⁶ When asked to give a damage award at the time of trial, those jurors, conditioned by the advertisements, may make decisions influenced by the ads they subconsciously absorbed.

This effect can be significant in jurisdictions that permit “anchoring” and allow plaintiffs’ counsel to ask for a certain amount of money for as damages at trial.¹⁴⁷ Florida courts permit plaintiffs “to ask for specific amounts, but not suggest that such amounts are legally acceptable or will withstand subsequent challenges.”¹⁴⁸ Florida also permits “per diem” arguments that suggest mathematical calculations like “x” dollars per day

for pain and suffering.¹⁴⁹ Georgia and Texas also permit anchoring.¹⁵⁰ West Virginia goes the other way and prohibits counsel from both suggesting an amount for pain and suffering¹⁵¹ and making per diem arguments.¹⁵²

Advertisements in general desensitize the public to large numbers and can have the effect of making outlier, even astronomical, verdicts seem more mainstream to jurors. By building upon each larger verdict, the advertisements as a whole likely have the effect of raising the average jury award, which is the same cumulative and subconscious effect the plaintiffs’ bar complained about years ago regarding tort reform campaigns. And while advertisements touting large verdicts may precondition jurors to award higher numbers in any venue, in jurisdictions that allow anchoring, jurors may be especially more receptive to a large damages request.¹⁵³

Attorneys and funders know that advertising can “shape litigation outcomes.”¹⁵⁴ At *Mass Torts Made Perfect*,¹⁵⁵ which “strictly forbids” civil defense attorneys from attending,¹⁵⁶ one of the headliners urged attendees to “build” the next big tort and turn “emerging science and social awareness into a compelling legal narrative” by “enlisting helpful media coverage.”¹⁵⁷ The words of this speaker, however, provide a compelling illustration that the plaintiffs’ bar knowingly uses advertising to shape litigation: “The litigation doesn’t wag the media tail—the media tail wags the litigation.”¹⁵⁸ His firm, which touts his comments on their website notes clearly: Getting the story out early and often—in the press, on social media, and through public interest campaigns—sets the tone **and helps shape jury pools**, regulatory agendas,

This effect can be significant in jurisdictions that permit “anchoring” and allow plaintiffs’ counsel to ask for a certain amount of money for as damages at trial.

and public expectations.¹⁵⁹ “The idea that you’re going to go try a case and that’s all you have to do is ridiculous....If you don’t control the narrative outside the courtroom, you’ve already lost inside the courtroom.”¹⁶⁰ This knowledge that narratives shape jury pools sheds light on the rationale behind those advertisements.

Even for those attorneys who suggest that their advertisements help individuals identify the possibility of a claim, those who see or read that information may become potential jurors or even “spread the narrative” in sharing the content with others.¹⁶¹ This “poisoning of the jury pool” biases the jury before trial begins and further in “not subject to public rebuttal.”¹⁶² Thus, the damage is already done even despite voir dire that focuses on the advertisements.¹⁶³

PUBLICITY DURING TRIAL

Two cases are instructive as to targeted advertising *during* trial by the plaintiffs’ firms and ultimately concluded it could have tainted the jury. In *Kroft v. Viper Trans, Inc.*, a trucking accident case where defendants did not contest liability, the Illinois Court of Appeals granted a new trial, finding that plaintiffs’ targeted advertising about the case *during* trial could have tainted the jury and also finding the trial judge’s voir dire on the issue inadequate.¹⁶⁴

During the retrial, plaintiffs’ firm ran blog and Facebook posts titled “What Jurors Should Know But Don’t,” which included statements that “plaintiff’s condition has gotten much worse since the first trial,” mentioned a brain injury that was “kept from” the first jury,¹⁶⁵ and claimed jurors were “kept in the dark” about reduction of verdicts for repayment of medical expenses, attorneys’

fees and costs, and prior settlements. They suggested readers should write their representatives “to demand that jurors be told the whole truth!”¹⁶⁶ The lawyers also said the first \$43 million verdict “doesn’t come close to making up for the grievous human losses and economic harms caused by defendants’ inexcusable negligence,” and suggested a \$100 million dollar verdict.¹⁶⁷

After the trial court denied defendants’ motion for mistrial due to the advertising, a second jury awarded \$43,825,000. On appeal, the verdict was reversed first because of “the serious effort” made by the plaintiffs’ attorneys during trial “to reach the jury and influence its verdict by communicating information that was highly prejudicial to the defendants’ right to a fair trial,”¹⁶⁸ and second, because of the “clear abuse of discretion in the manner by which the trial court investigated whether the social media posts had in fact come to the attention of any juror.”¹⁶⁹ The court concluded, “[e]nsuring public confidence in the judicial system and in the outcomes of jury trials requires that courts strictly guard against any suspicion that the jury has been subjected to outside influences by the conduct of attorneys, parties, or those acting on their behalf, which might affect the jury’s verdict.”¹⁷⁰

A Georgia state court reached a similar conclusion because of plaintiff’s counsel’s TikTok posts during trial. In *Cartagena v. Milford*,¹⁷¹ the trial judge overturned a \$1,512,000 verdict, including over \$500,000 for a “frivolous defense” claim.¹⁷² A couple of days before the start of the trial, plaintiff’s counsel posted a video on TikTok and Instagram where he discussed putting “final touches” on an opening statement for a car crash case going to trial in Gwinnet County. He said there were “three lies we actively have to tell the jury”—concealing from jurors that defendant had



insurance, which was paying for the defense; that defendant was arrested after the accident; and that defendant offered to settle, showing “she believed she was at fault.”¹⁷³ During the trial, counsel posted two additional videos, one from a stairwell at the courthouse while the jury was deliberating, discussing the case and criticizing the defense.¹⁷⁴

The court found plaintiff’s counsel violated Georgia’s version of ABA Model Rule 3.6 because he made public communications he knew or reasonably should have known would “have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”¹⁷⁵ Counsel “was aware that his comments would be disseminated publicly as he has over 130,000 followers on TikTok and over 30,000 followers on Instagram, “and “[c]ertainly, if his comments were heard by a prospective juror prior to trial or a juror once the trial began, [he] should have been aware that there was a ‘substantial likelihood of materially prejudicing’ the outcome of the trial.”¹⁷⁶

While recognizing the difficulty of balancing “protecting the right to a fair trial with the rights of free speech and free expression,” the court found that counsel’s “videos were not simply his informed expression about legal proceedings in general—they were comments with detailed specificity about this case and thus went well beyond just a ‘matter of general public concern.’”

The Court is deeply concerned with the impact of [counsel’s] social media videos. These videos contained sufficient specificity to determine that he was beginning a jury trial in Gwinnett County on the following Monday. His first video specifically also set out that the defendant had insurance, that the defendant’s insurance carrier paid for his high-priced witnesses, that [the defendant] had been arrested at the scene of the accident and that the defendant had offered to settle this case, thus recognizing that she was at fault. As to the last matter regarding a desire to settle, Rafi is aware that there are a myriad of reasons why a party offers

to settle that do not mean the party is admitting fault.¹⁷⁷

Common threads in *Kroft* and *Cartagena* are the lawyers’ public discussion of the particular cases, where they were being tried, the names of counsel and parties, and evidence excluded by the courts. *Kroft* added discussion of the plaintiff’s worsening condition, the prior verdict, and a suggested “fair” verdict.¹⁷⁸ Both courts recognized these statements for precisely what they were — blatant attempts to influence jurors.

On a macro scale, legal advertisements that discuss specific cases, including prior findings and even broad legal concepts, can supply the public with a preconceived, albeit incorrect, notion of the law. But even without such blatant efforts at what *Kroft* characterized as “jury tampering,” legal advertising can affect prospective jurors in ways that undermine the judge’s role. Corrective instructions, where the judge reminds jurors to disregard specific advertisements, do not “unring” the bell. And studies have demonstrated that conducting voir dire does not undo this bias, nor does it ferret it out.¹⁷⁹

Legal advertising also negatively impacts the court’s ability “to say what the law is.”¹⁸⁰ For example, the repetitive and pervasive advertising tells prospective jurors that Roundup causes cancer and that a jury need not follow the judge’s instructions on attempting to determine causation as it is already established. Viewed in this light, these advertisements invade the province of the court by undermining its role.

Early studies suggested that 45 percent of jurors were unable to follow the judge’s instructions and that to varying degrees, jurors misunderstood the judge’s instructions.¹⁸¹ Yet, given juror attitudes, which are formed well before trial begins, one wonders if the judge’s instructions are of any moment at all. With the potential for legal advertising serving as the basis for a jury’s decision (rather than the judge’s instructions), it is not difficult to see the significant impact of legal advertising upon the justice system.

WHAT JURORS SAY

The underlying premise for conducting advertising, the psychological studies, and the scholarly works all point to the potential for bias. But there is further evidence drawn from the mouths of prospective jurors themselves. The real-life examples discussed below are consistent with studies showing jurors are influenced by what they see and hear in litigation advertisements. For example, one study notes that 90 percent of those interviewed responded that if they saw an advertisement about a lawsuit that claimed a specific product caused injury they would be “somewhat or very concerned.”¹⁸² In that same study, 72 percent of those persons felt that there was probably truth to a claim if there were lawsuits against a company that its product caused harm.¹⁸³

TALCUM POWDER

Voir dire of jurors in *Giannecchini v. Johnson & Johnson*, a talcum powder case tried in St. Louis, Missouri, highlights the ability of advertising to convince potential jurors of arguments to be made at the time of trial.¹⁸⁴

In *Giannecchini*, defendants argued for change of venue and to disqualify jurors because the venue was saturated with advertisements stating talcum powder was harmful and that it caused cancer.¹⁸⁵ They presented evidence that the number and frequency of advertisements suggesting talcum powder caused ovarian cancer rose exponentially leading up to the time of trial.¹⁸⁶ The advertising increase was focused in and around the St. Louis area as trial approached. In the month prior to the trial, over 700 ads related to talcum powder and cancer were run in the St. Louis area.¹⁸⁷ In fact, the advertisements were actually played on the radio of the shuttle that escorted potential jurors from the parking lot to the courthouse.¹⁸⁸

The effect of the advertisement in this one city for this one trial was self-evident based upon the voir dire alone where potential jurors clearly stated their conscious bias against talcum powder.¹⁸⁹ A pool of 142 prospective jurors was brought in for questioning over the course of four

days.¹⁹⁰ Many jurors had not only heard the advertisements, but 75 percent of those interviewed had already formulated their own conclusions that the powder did indeed have a causative effect with respect to cancer.¹⁹¹

Some of the comments made by these potential jurors showed the tainting caused by advertisements:

“You’ll have to change my mind it’s not true.” said one juror who further commented to defense counsel, “I want you to prove that it doesn’t give me cancer.”¹⁹²

Other potential jurors’ comments included:

“That that’s a little scary, since it’s sold.”¹⁹³

“Well, it was upsetting, because, like I said, as a child that did use talc, my sisters used talc, my mother used talc, and when my brothers were younger, my mother had control over what they used, you know.”¹⁹⁴

“I thought, wow. . . . I guess the shock of saying that talcum powder gives you cancer, and I know I had used it as a little girl.”¹⁹⁵

“That they [the manufacturer] would know and still sell a product or not try to do anything about it.”¹⁹⁶

Another aspect of legal advertising that pervades the trial process is the touting of large dollar awards in commercials by lawyers, allegedly in an effort to draw new clients and/or demonstrate their legal acumen.

“Well, I thought, wow, if this is what happens with this product, why is it on the market?”¹⁹⁷

“I guess I was kind of surprised, I never thought of talcum powder as being potentially dangerous. And I guess, you know, as you hear more and more and gather more information, even though it’s, I don’t know what you call, high level information, but I guess on the whole I tended to feel that *the medical evidence*, at least the little that I’ve been exposed to, seemed credible.”¹⁹⁸

One prospective juror said the advertisements contained “medical evidence” — she “learned” from an advertisement using actors that “it was medically diagnosed [that talc] powder caused their cancer” thus believing the “connection.”¹⁹⁹ Many others within the 142 prospective jurors interviewed had similar concerns. Several noted that because of the advertisements, they would have an issue purchasing talcum powder and/or would warn others against its use.²⁰⁰ Many noted that they even recalled the amount of jury awards mentioned in those advertisements.²⁰¹

Despite defense efforts to remove potential jurors, or to change venue (the motion was denied), the bias seeped into the trial. Many of those who expressed bias were permitted to sit as jurors over defense objections. The result was a verdict over \$70 million, of which \$575,000 was in medical damages, \$2 million in compensatory damages and \$65 million in punitive damages.

The jurors’ comments strongly suggest the advertisements achieved the desired because the prospective jurors believed talcum powder caused cancer before hearing any evidence. The advertisements thus frustrated the goal of jurors hearing evidence in an unbiased manner to produce a fair and just verdict and effectively shifted the burden of proof from the plaintiff to the defendants. The ads thus achieved the ultimate goal of persuasion: “to convince the target to internalize the persuasive argument and adopt this new attitude as part of their core belief system.”²⁰²

ROUNDUP

In this same vein, jurors in *Young v. Monsanto Company, et al.*, a Roundup case that was tried to verdict in the summer of 2024 in the Common Pleas Court of Philadelphia remarked about their thoughts on the product based on what they had seen and heard. When asked if she had read or seen anything regarding the safety of Roundup or any other herbicide, a potential juror responded that she had “seen that people do claim that it causes cancer.... Usually on the Internet, Facebook, Twitter, stuff like that.”²⁰³ When further asked about whether that caused her concern about the use of Roundup, she admitted that the things that she had seen and heard could very well color her ability to be fair and impartial in the course of the trial.²⁰⁴

Another panel member, when asked if she or anyone in her family had used Roundup, bluntly responded that “someone close to me pass [sic] this year and I believe that was the cause. She had Stage 4 lung cancer. That was my personal opinion.”²⁰⁵ Another potential juror stated that he stopped using Roundup because of “health concerns” that came from “word of mouth, the media or reading it somewhere along the line.”²⁰⁶ He stopped using Roundup early on before he found out that it could cause cancer. When asked if he could follow the judge’s instructions on the law, the response was that he didn’t think so because he felt it was a “toxic chemical” and “probably does cause cancer damage.”²⁰⁷ Another potential juror had clear opinions about the safety of Roundup, stating he wouldn’t use it because of the defendant’s history of cancer making products.²⁰⁸ Yet another had seen the “headlines” regarding “safety issues” surrounding Roundup.²⁰⁹ “When all the allegations started coming out,” another potential juror noted she had stopped using Roundup.²¹⁰ She had heard “[i]t can cause... cancer. But it was not good for you,” so she stopped using it.²¹¹

Advertising that other lawsuits were filed with respect Roundup also had an effect. Another potential juror in *Young* answered that he used Roundup years ago but then saw something in the news where someone filed a large lawsuit where some “astronomical number” was awarded.²¹² He

knew of the plaintiffs' attorney firm from watching TV and seeing them advertise.²¹³

Another aspect of legal advertising that pervades the trial process is the touting of large dollar awards in commercials by lawyers, allegedly in an effort to draw new clients and/or demonstrate their legal acumen. The communication of these dollar amounts actually serves to create a platform for the next verdict. This was demonstrated during voir dire in *Young v. Monsanto Company, et al.*²¹⁴

One potential juror said, "I had thought I had heard that there was already a billion-dollar settlement of Roundup... I thought I had heard that there was the California lawsuit. I thought it came for billions for Roundup and it was proven that it was causing cancer there. If it's been retried again today, I guess I'm wrong there."²¹⁵ That potential juror admitted to being "biased either way then if I already have that knowledge in my head."²¹⁶ Even

more telling, another panel member told the judge, "I'm glad that I would have the benefit of having potentially witnesses that could testify as to previous award amounts. I know from reading *The Inquirer* that there have been some very large settlements here in Philadelphia in the last month or so, so I would draw on some of that prior knowledge and also the expert testimony and also deliberation and conversation with my fellow jurors."²¹⁷ When asked about what she had previously heard about awards, the response was, "So I was reading *The Inquirer*. I know there was a very large B with a billion-dollar, multibillion dollar settlement that Monsanto would be appealing.... I had been watching Instagram. It was just like some prior knowledge."²¹⁸ She wanted to hear from experts so "she can use that as part of her deliberative process, comparing this case and the verdict that they potentially would give in this case with other verdicts received...."²¹⁹



Against this backdrop, a variety of solutions have been employed or proposed to limit advertising that is false, misleading, or designed to improperly influence juries.

LITIGATION: PRETRIAL AND TRIAL STRATEGIES ON ADVERTISING AND SOCIAL MEDIA

The all-encompassing nature of advertising places an additional obligation on counsel and the courts to ensure that jurors are not tainted by any advertising (plaintiffs or industry).²²⁰ Parties should be entitled, with a good-faith basis, to (1) discovery related to advertising, (2) the use of juror questionnaires,²²¹ (3) the opportunity for effective voir dire on the topic (including individual questioning of jurors where necessary), and (4) clear instructions to the jury on outside investigation, encompassing traditional and social media advertising.

Determining whether advertising impacts a case starts in discovery. In deposition, the plaintiff should be asked about any advertisement that was viewed and any opinion formed as a result. Plaintiffs should be asked about the quantity and quality information and defendants should seek information via subpoenas on media companies to determine how many times a day the advertisement played, the media through which the plaintiff may have heard or seen the advertisement, what part of the advertisement made the greatest impact, etc. Courts have found that statements related to whether a plaintiff saw an attorney advertisement prior to filing suit are “probative of her credibility regarding her injuries.”²²²

Questions that may demonstrate prejudice, bias and/or motive on that plaintiff’s part might include: What did you do when you saw/heard/read the ad? Did you call a number, click a link,

etc.? When you did so, did someone speak to you? Did that person identify him/her/themself? Who was it? What organization was this person with? Did the person ask you questions? What were the questions? What were your responses? Did the person explain to you what “proper responses” should be? In this conversation, were you told how a lawsuit would progress? What did you learn? Once you were done answering questions, what happened? Did the person ask you to sign anything? What was it? Do you have a copy? At some point, did the person on the phone refer you to an attorney? If so, when? Did you get connected directly to an attorney? Had you asked for one? If you were not referred to an attorney during this conversation, how did you come to have this attorney? Was the attorney connected to the advertising?

Information on advertising effects gained in discovery may assist an expert in the field of advertising about the perception of the average consumer or juror with respect to the advertisement that could be the basis for moving for change of venue (as discussed below). A trial court’s preclusion of such discovery may be grounds for an appeal.

Turning to voir dire, trial courts should permit questioning of the jury panel by the parties to identify bias resulting from attorney or case specif-

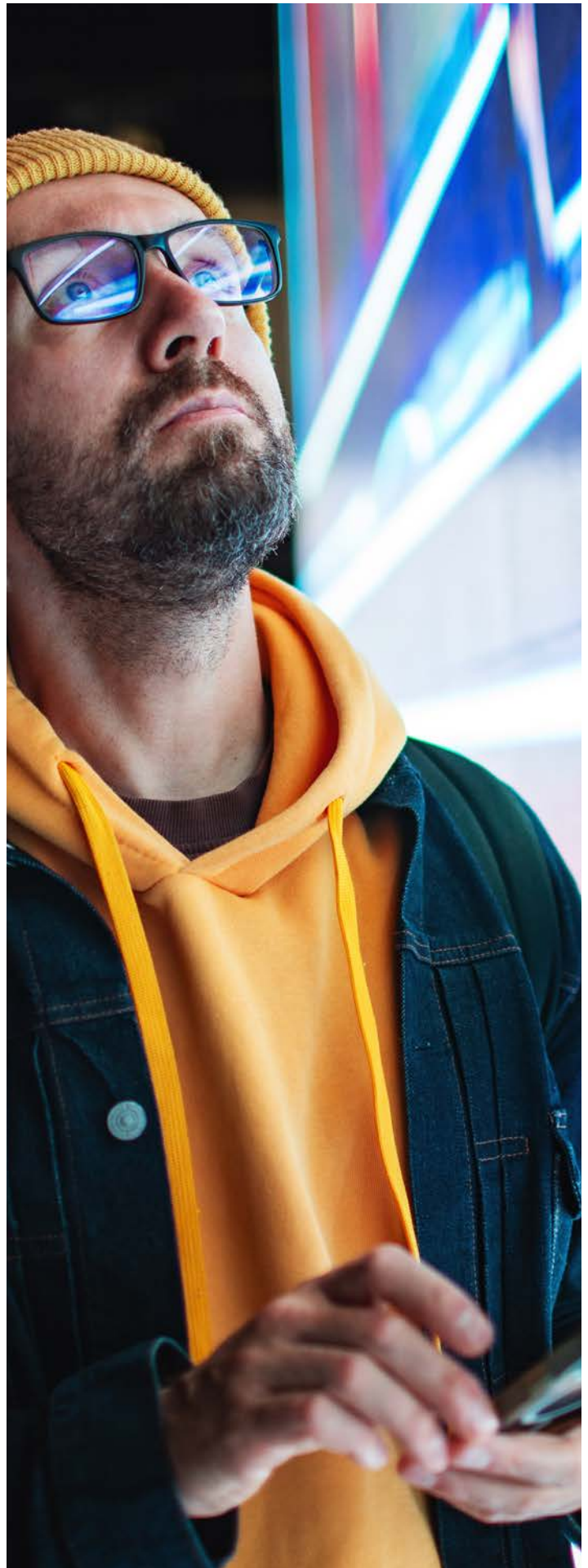


Jurors should be asked if they saw or heard advertisements, their thoughts about them, particularly with respect to the defendant and or its product.

ic advertising, particularly where discovery shows it is a potential issue. Importantly, the impact of advertising is purposefully subtle.²²³ Mere exposure or opinion is not enough to disqualify a juror. “The relevant question is “did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror’s protestation of impartiality have been believed.”²²⁴

Inquiring about knowledge of attorney or other advertising is consistent with the normal questions regarding relationships with a party, witness, or lawyer, which have long been an appropriate subject for voir dire.²²⁵ Plaintiffs are regularly permitted to conduct voir dire about relationships with insurance companies, particularly as to employment, knowledge of tort reform organizations and the like. Defendants should have the same opportunity to probe advertising and other outside influences. This is particularly true where the plaintiff’s law firm is a significant advertiser over the various types of media, or runs ads that comment on the rights of injured persons, the law surrounding injury cases, or about the obligations of jurors. Juries must be instructed to refrain from media to avoid being contaminated by in trial advertising (such as seen in *Kroft v. Viper Trans, Inc.*, and *Cartagena v. Milford*.)

Voir dire is particularly important in cases where discovery demonstrates plaintiff was affected by advertising, such as forming opinions accepting causation relevant to the applicable statute of limitations. In re Taxotere is instructive. Many plaintiffs saw the advertisements, concluded their conditions were caused by the use of Taxotere, and responded to join the litigation. The advertiser’s intent to gain plaintiffs was thus achieved but it could also be said that the various plaintiffs internalized the advertisement and accepted the causal link between the drug and their condition. It follows that the advertisements may have had the same effect on jurors. So, in the presence of extensive advertising, potential jurors must be questioned to determine one of two things: either the advertising had no effect on the potential juror; or the advertising had already persuaded the potential juror who internalized the intent of the ad and thus has pre-established causation.



Jurors should be asked if they saw or heard advertisements, their thoughts about them, particularly with respect to the defendant and or its product. Perhaps even asking if one of them called the number on the screen or clicked the ad bait might be helpful in some instances. If enough jurors show exposure to the advertisements or a preformed opinion or have been, there may be grounds to make or renew a motion to change venue. Denial of a request to ask these questions in voir dire may be grounds for appeal.

Any preformed opinion showing bias or opinion may be grounds to strike for cause. Once exposure to advertising is shown, jurors exposed to and influenced by advertising (like Talc causes cancer) should be struck for cause because they cannot be impartial. And where it is likely the juror has internalized the message, the advertisements almost become evidence of causation, almost like a presumption, effectively shifting the burden of proof to the defendant to disprove it (as seen in the statements of jurors). At the least, it impacts the defendant's right to a fair and impartial jury.

One procedural solution is to move for a change of venue, which is available as a tool under both federal and state law.²²⁶ As demonstrated by cases discussed above, courts are generally reluctant to grant motions to change venue, relying instead on voir dire to root out bias.²²⁷

Another option, on a broader scale, is to move the court to prohibit advertising, like that in

the Roundup and St. Louis talc cases, that may potentially impact jurors.²²⁸ One commentator suggests courts should have (and exercise) this power, stating that Central Hudson permits prohibition on advertising “[w]hen litigants blatantly attempt to influence jurors through image advertising—for example, by sponsoring an ice rink directly outside the courthouse—the First Amendment right to speak should give way to the Seventh Amendment’s guarantee of an impartial jury.”)

Like the Taxotere cases, advertising in some instances becomes evidence – there, plaintiffs whose claims were asserted were time barred because they were not brought within the defined time frame where injuries occurred, but instead after responding to the advertisements. In some instances, it may be effective to cross-examine the plaintiff, in deposition or at trial, to show that symptoms did not arise until the plaintiff saw the advertisement. This suggests plaintiff’s belief, formed only after seeing (and internalizing) the advertisement is not credible. And where the ad is false or misleading, it provides another potential way to attack the credibility of the plaintiff’s claims.

Last, whether to argue the “elephant in the room” to the jury—the presence of ads and the fact they are not proof—is a judgment call. At the least, where there is pervasive advertising, counsel should request limiting instructions to the jury, perhaps early in the case.

FTC REGULATION OF MISLEADING LAWYER ADVERTISING

The Federal Trade Commission “will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer’s detriment.” Unfair or deceptive advertising by lawyers may violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The FTC has warned legal advertisers at least twice about such advertising.

In 2019, the FTC sent warning letters to “seven legal practitioners and lead generators,” expressing concern that “some lawsuit ads may mis-

Legislatures in several states, including Tennessee, West Virginia, Kansas, Florida, Texas, and Indiana, passed consumer protection statutes that prohibit misleading advertisements and place limits on the content of lawyer advertising.

represent the risks associated with certain pharmaceuticals and could leave consumers with the false impression that their physician-prescribed medication has been recalled. Examples included “deceptive or unsubstantiated claims about the risks of taking blood thinners and drugs for diabetes, acid reflux, and high blood pressure, among other conditions.”

The FTC stated advertisers must have “competent and reliable scientific evidence to substantiate their claims about these purported risks.” The FTC also stated that its “Adverse Event Reporting System contains reports of consumers who saw lawsuit ads about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences as a result,” and concluded “lawsuit ads that cause, or are likely to cause, viewers to discontinue their medications might constitute an unfair act or practice.” Thus, “to prevent consumer injury, ... lawsuit ads may need to include clear and prominent audio and visual disclosures stating that consumers should not stop taking their medications without first consulting their doctors.” The letter also cautioned against misleading consumers that the information was a “government-sanctioned medical alert or public service announcement” so “advertisements promoting goods or services should be identifiable as advertising from the beginning.”²²⁹

In a letter dated July 8, 2020, the FTC’s Division of Advertising Practices advised the Relion Group, a lead generator, that it had “conducted an investigation into whether [it] violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. § 45 and 52, in connection with television ads that solicited potential clients for personal injury lawsuits against manufacturers of the pharmaceutical drug Valsartan.”²³⁰ The investigation was “premised on concerns the ads might convey the following false or deceptive claims: (1) FDA has recalled all Valsartan from the market; (2) FDA has warned that Valsartan contains a possible cancer-causing chemical; (3) Valsartan presents a substantial risk of bladder cancer, pancreatic cancer, kidney cancer, colorectal cancer, liver cancer, or liver injury; and (4) the risks from taking Valsartan outweigh its benefits.”²³¹

STATE STATUTES REGULATING MISLEADING LAWYER ADVERTISING

Legislatures in several states, including Tennessee, West Virginia, Kansas, Florida, Texas, and Indiana, passed consumer protection statutes that prohibit misleading advertisements and place limits on the content of lawyer advertising. These statutes regulate lawyer advertisements in two ways, first “by prohibiting certain terms or images that may mislead the public,” and second “by requiring certain disclosures to prevent confusion and protect public health.”²³²

The statutes apply to “solicitation for legal services regarding the use of medications through television, radio, newspaper or other periodical, outdoor display, or other written, electronic, or recorded communications wherein the advertisement solicits clients or potential clients for legal services.”²³³ The statutes target and prohibit misleading claims including:

- The use of terms like “medical alert,” “health alert,” “consumer alert,” “public service announcement” or similar terms that suggest “to a reasonable recipient that the advertisement is offering professional, medical, or government agency advice about pharmaceuticals or medical devices rather than legal services.”²³⁴
- The use of “the logo of a federal or state government agency in a manner that suggests affiliation with the sponsorship of that agency.”²³⁵
- The use of the word “recall” when the drug or product has not been recalled.²³⁶

Some states have addressed misleading advertising through their Rules of Professional Conduct.

The statutes provide for mandatory disclosures, including the identity of the sponsor and “the attorney or law firm that will represent clients, or how cases will be referred to attorneys or law firms that will represent clients...”²³⁷

Texas’s statute also governs the form of the required visual and verbal warnings and disclosures and the standard of judicial review for compliance. Section 81.154 (a) requires “[a] visual statement required by this subchapter to appear in an advertisement must be presented clearly, conspicuously, and for a sufficient length of time for a viewer to see and read the statement.”²³⁸ Under section 81.154 (b), “[a] court may not find that a visual statement in an advertisement is non-compliant with Subsection (a) if the statement is presented in the same size and style of font and for the same duration as a visual reference to the telephone number or Internet website of the entity a responding person contacts for the legal services offered or discussed in the advertisement.”²³⁹ Similarly, section 81.154 (c) applies to verbal statements that “must be audible, intelligible, and presented with equal prominence as the other parts of the advertisement.”²⁴⁰ Texas courts may not find verbal statements are noncompliant “if the statement is made at approximately the same volume and uses approximately the same number of words per minute as the voice-over of longest duration in the advertisement other than information required by this subchapter.”²⁴¹

In Texas, advertisements soliciting clients injured by an FDA-approved prescription drug must include a statement similar to: “Do not stop taking

a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor’s advice can result in injury.”²⁴² Texas also requires that the advertisement disclose “that the drug or medical device remains approved by the federal food and drug administration, unless the product has been recalled or withdrawn.”²⁴³ The West Virginia and Florida statutes also provide protection against the dissemination of protected health information.²⁴⁴

At least one court has upheld similar statutes. The Fourth Circuit found West Virginia’s statute prohibiting misleading advertisements constitutional in *Recht v. Morrissey*.²⁴⁵ In *Recht*, the district court applying strict scrutiny struck down the statute as unconstitutional, noting “even were the Court to apply intermediate scrutiny, the above restrictions cannot pass muster.”²⁴⁶ The Fourth Circuit reversed the district court’s grant of summary judgment:

We now reverse the district court and uphold West Virginia’s law. This statute lies right at the heart of West Virginia’s police power. If West Virginia has one premier duty, it is to safeguard the health and safety of its citizens. And while the State certainly may not abridge basic constitutional protections in exercising that police power, the Supreme Court has long made clear that the regulation of commercial speech invokes lessened First Amendment concerns. In this area, we accord the State some, though not infinite,



leeway in balancing the important state interests against the individual rights involved.²⁴⁷

The Fourth Circuit found the District Court erred in applying strict scrutiny to commercial speech and instead applied an intermediate-scrutiny analysis.²⁴⁸ Applying *Central Hudson*, the Fourth Circuit “conclude[d] that the Act’s prohibitions present no constitutional problem. The Act targets misleading speech and furthers substantial government interests in an appropriately tailored manner.”²⁴⁹ The Act is “narrowly tailored and reasonable” because it “does not strip attorneys of the ability to advertise,” and “does not presume to dictate what attorneys can say about their legal services.” Instead, the Act focuses on a particular problem by reaching “misleading statements about drugs or devices that might give rise to a lawsuit.” In short, “the Act does not ask for much, but instead requires that attorneys present themselves truthfully as attorneys when they advertise.”²⁵⁰

The court upheld the statutes’ disclosure requirements. First, that ads warn against stopping medication without doctor’s advice because it is “directly targeted at promoting the State’s interest ‘in dissipat[ing] the possibility of consumer confusion or deception.’”²⁵¹ “[G]iven this context,” the court said, “the disclosure that patients should consult with their doctor before discontinuing medication simply communicates to the audience the factual and uncontroversial point that the advice of a physician mitigates this risk of injury or death.”²⁵² Second, as disclosing that drugs or devices remain approved by the FDA, “[i]f an FDA-approved prescription drug has not been recalled or withdrawn, it is indisputably the case that the drug remains approved by the FDA.”²⁵³ The court also found the prohibition on use of substantially similar logos was not vague. Language like “suggesting an affiliation” or “substantially similar” has been upheld by other courts in the face of vagueness challenges... We see no vagueness problem here, just run-of-the-mill statutory phrases.”²⁵⁴

The court rejected Plaintiffs’ argument that the state failed to consider alternatives to regulating speech, like an educational campaign focused

on the problem, instead finding the state sought “to ensure that the information others communicate is truthful and not misleading. We thus doubt that a public-awareness campaign ‘might prove to be more effective’ than the Act’s prohibitions. ... It is much more likely that misleading speech would wipe out the potential benefits of such a campaign.”²⁵⁵

STATE BAR REGULATION OF LAWYER ADVERTISING

Some states have addressed misleading advertising through their Rules of Professional Conduct.

In 2022, the Texas Supreme Court amended its rules on lawyer advertising about verdicts and settlements (shown in bold) to provide:

10. A communication about legal services may be misleading because it omits an important fact or tells only part of the truth. A lawyer who knows that an advertised verdict was later reduced or reversed, **or never collected**, or that the case was settled for a lesser amount, must disclose **those facts the amount actually received by the client** with equal or greater prominence to avoid creating unjustified expectations on the part of potential clients. A lawyer may claim credit for a prior judgment or settlement only if the lawyer played a substantial role in obtaining that result. This standard is satisfied if the lawyer served as lead counsel or was primarily responsible for the settlement. In other cases, whether the standard is met depends on the facts. A lawyer who did not play a substantial role in obtaining an advertised judgment or settlement is subject to discipline for misrepresenting the lawyer’s experience and, in some cases, for creating unjustified expectations about the results the lawyer can achieve.²⁵⁶

Kansas similarly governs the issue in its Ethics

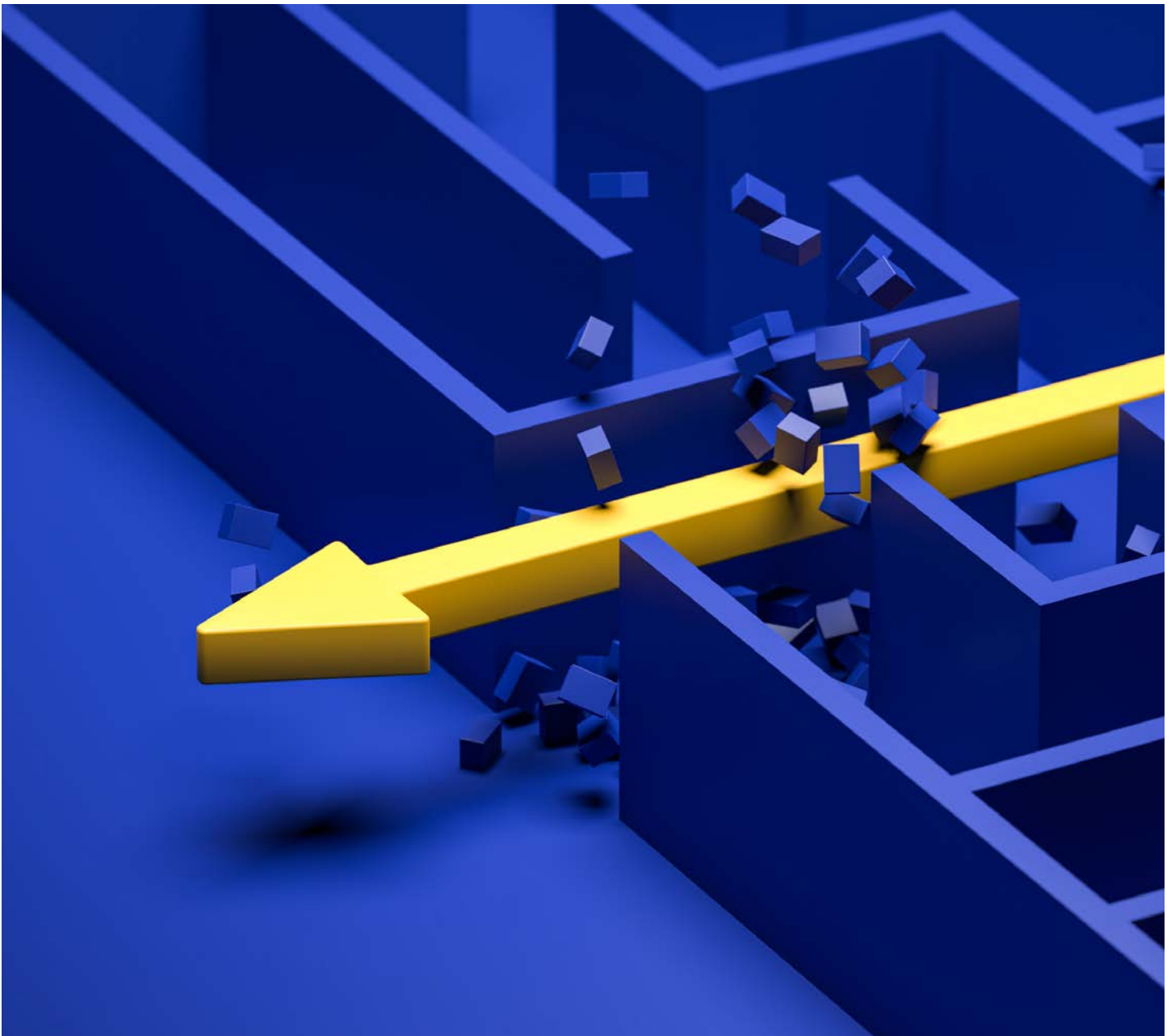
Rule 7.1, which provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the

lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.²⁵⁷



FINAL THOUGHTS

The task to devise a method that effectively addresses improper attorney advertising aimed at persuading consumers, and thus prospective jurors, is neither easy nor clear. The weighing of one constitutional right (speech) against another (right to jury trial) is never taken lightly. However, there is evidence—either through the statistics and studies cited here or simply the admission of the plaintiffs’ bar through its arguments against corporate advertising—that legal advertising influences jurors.

Attorney advertising can lose First Amendment protection where it is false or misleading. Legislative, judicial, and bar efforts to balance both sides of the equation have been undertaken, but more must be done.

Identifying bias created by advertising is only the first step. It is incumbent upon the legal profession to ensure that fair and impartial jurors may be seated. This requires due attention to identifying bias and keeping jurors who cannot be impartial from serving—a role for both the courts and counsel. More broadly, all branches of the government have a role—whether by Rule, statute, regulation, or bar enforcement—in eliminating prejudicial advertising practices that create bias and partiality. Until that is accomplished, and as long as jurors can be influenced by this type of advertising, we will not be able to assure fair and impartial jurors, the hallmark of our legal system.



APPENDIX:

STATE STATUTES GOVERNING MISLEADING ADVERTISEMENTS

Against the backdrop of the first amendment,²⁵⁸ legislatures in Tennessee, West Virginia, Kansas, Florida, Texas, and Indiana passed consumer protection statutes that prohibit misleading advertisements and place limits on the content of lawyer advertising.

TENNESSEE

Tennessee led the statutory charge²⁵⁹ on the regulation of misleading attorney advertisements with its enactment of SB 150, which took effect on July 10, 2019.

During a Tennessee Senate Commerce and Labor Committee meeting,²⁶⁰ the bill's sponsor, Senator Richard Briggs addressed multiple concerns that arise from advertisements that seek consumer information. First, Briggs addressed the lack of transparency that is commonly associated with these types of advertisements, noting that the information collected by the entities running the advertisements are sold to law firms without disclosure to the consumer. Second, Briggs stated that the bill is concerned with an entity's collection of privileged health information. Fourth, Briggs addressed instances where the advertisements use phrases such as "recall" where there has been no actual recall of the drug.²⁶¹ The concern is that persons currently prescribed to the drug may stop using the drug without consulting with their physician. Briggs noted that people can experience life-threatening illnesses when they stop the use of certain medications without first consulting with their physician.

The Tennessee statute provides:

(a) A person shall not do any of the following in a legal advertisement:

(1) Fail to disclose at the beginning

of any recorded advertisement or display in a conspicuous location on any printed or electronic written legal advertisement that the legal advertisement is a paid advertisement for legal services;

(2) Present a legal advertisement as a "medical alert," "health alert," "consumer alert," "public service announcement," or other similar language;

(3) Display the logo of a federal or state government agency in a manner that suggests an affiliation with or the sponsorship by that agency;

(4) Use the word "recall" to refer to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency;

(5) Fail to identify the person responsible for the legal advertisement; or

(6) Fail to identify the attorney or law firm that will represent clients, or to disclose that cases may be referred to another attorney or law firm to represent clients if the sponsor of the legal advertisement does not represent persons responding to the legal advertisement.

(b) A person shall not use a legal advertisement to solicit clients who may allege an injury from a prescription drug or medical device approved, cleared, or the subject of a drug monograph authorized by the United States food and drug administration unless the legal advertisement also includes the information required in this section.²⁶²

Like other statutes, the Tennessee statute requires that legal advertisements provide specific disclosures and warnings:

(c) A legal advertisement soliciting clients who may allege an injury from a prescription drug approved, cleared, or the subject of a drug monograph authorized by the United States food and drug administration must:

(1) Include the following warning: “Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor’s advice can result in injury or death.”; and

(2) Disclose that the drug or medical device remains approved by the United States food and drug administration, unless the product has been recalled by a government agency or through an agreement between a manufacturer and government agency.²⁶³

The Tennessee statute also prohibits the unauthorized use or disclosure of protected health information: “[a] person shall not use, cause to be used, obtain, sell, transfer, or disclose protected health information to another person for the purpose of soliciting an individual for legal services without written authorization from the individual who is the subject of the information.”²⁶⁴ Moreover, the statute provides penalties for the unauthorized use of health information:

(b) In addition to any other remedy provided by law:

(1) A person who willfully and knowingly uses, causes to be used, obtains, sells, transfers, or discloses protected health information in violation of this section commits a Class A misdemeanor, punishable by a fine of one thousand dollars (\$1,000), imprisonment, or both; and

(2) A person who violates this section with the intent to use, cause to be used, obtain, sell, transfer, or disclose protected health information for the purpose of financial gain commits a Class C felony, punishable by a fine not to exceed two hundred fifty thousand dollars (\$250,000), imprisonment of not less than three (3) years nor more than ten (10) years, or both.

(c) This section does not apply to the use or disclosure of protected health information to an individual’s legal representative in the course of any judicial or administrative proceeding, or as otherwise permitted or required by law.²⁶⁵

WEST VIRGINIA

As part of its Consumer Protection Act, West Virginia enacted the “Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act,” W. Va. Code §§ 47-28-1, in 2022.

Leading up to the passage of the “Act, the West Virginia Senate Judiciary Committee reviewed the bill during multiple committee meetings²⁶⁶ and heard testimony that patients—after viewing these ads—stop taking prescribed medications against the advice of their physician, and that bill, if passed, would not violate the free speech protection of the First Amendment.²⁶⁷

Similar to the Tennessee statute, West Virginia’s Act provides:

(1) A person engages in an unfair or deceptive act or practice if, in a legal advertisement, the person does any of the following:

(a) *Specifically prohibited legal advertising practices.* — A person engages in an unfair or deceptive act or practice if, in a legal advertisement, the person does any of the following:

(1) Fails to contain the state-

ment: “This is a paid advertisement for legal services”;

(2) Presents a legal advertisement as a “consumer medical alert,” “health alert,” “consumer alert,” “public service health announcement,” or substantially similar phrase suggesting to a reasonable recipient that the advertisement is offering professional, medical, or government agency advice about pharmaceuticals or medical devices rather than legal services;

(3) Displays the logo of a federal or state government agency in a manner that suggests affiliation with the sponsorship of that agency;

(4) Uses the word “recall” when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency;

(5) Fails to identify the sponsor of the legal advertisement; or

(6) Fails to indicate the identity of the attorney or law firm that will represent clients, or how potential clients or cases will be referred to attorneys or law firms that will represent clients if the sponsor of the legal advertisement may not represent persons responding to the advertisement.

Like other statutes, the West Virginia statute requires specific disclosures and warnings:

(b) *Disclosures and warnings for protection of patients.* —

(1) A legal advertisement soliciting clients for legal services in connection with a prescription drug or medical device approved by the U.S. Food and Drug Administration shall include the following warning: “Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a

prescribed medication without your doctor’s advice can result in injury or death.”

(2) A legal advertisement soliciting clients for legal services in connection with a prescription drug or medical device approved by the U.S. Food and Drug Administration shall disclose that the subject of the legal advertisement remains approved by the U.S. Food and Drug Administration, unless the product has been recalled or withdrawn.

(c) *Appearance of required statements, disclosures, and warnings.* — Any words or statements required by this section to appear in an advertisement must be presented clearly and conspicuously.

(1) Written disclosures shall be clearly legible and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and fully read the disclosure or disclaimer.

(2) Spoken disclosures shall be plainly audible and clearly intelligible.

W. Va. Code § 47-38-3(d) provides “[a] person who willfully and knowingly violates this section engages in an unfair and deceptive act or practice in violation of §46A-6-101 et seq. of this code.”

The West Virginia statute prohibits the wrongful use of protected health information: “A person shall not use, cause to be used, obtain, sell, transfer, or disclose to another person without written authorization protected health information for the purpose of soliciting an individual for legal services regarding the use of medications.” W. Va. Code § 47-38-4 (a). A violation of the section “is a violation of West Virginia’s health privacy laws or §46A-6-101 et seq. of this code, *id.* at § 47-38-4 (b) (1), and “in addition to any other remedy provided by law, a person who willfully and knowingly violates this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000 or confined in jail not more than one

year, or both fined and confined.” *Id.* at § 47-38-4 (b)(2).

Section 47-28-4 “does not apply to the use or disclosure of protected health information to an individual’s legal representative, in the course of any judicial or administrative proceeding, or as otherwise permitted or required by law,” *id.* at § 47-38-4 (c), and “[n]othing in this section creates or implies liability on behalf of a broadcaster who holds a license for over-the-air terrestrial broadcasting from the federal communications commission, or against a cable operator as defined in 47 U.S.C. §522(5).” *Id.* at § 47-38-4 (d). Section 47-28-5 provides “This article does not limit or otherwise affect the authority of the judiciary or the Lawyer Disciplinary Board to regulate the practice of law, enforce the West Virginia Rules of Professional Conduct, or discipline persons admitted to the bar. W. Va. Code § 47-38-5.”

KANSAS

Adding to its chapter on Unfair Trade and Consumer Protection, Kansas enacted its statute²⁶⁸ to restrict deceptive legal advertising, which took effect on July 1, 2022. The statute provides:

(a) A person engaging in legal advertisement within this state shall:

(1) Disclose the following at the outset of the advertisement: “This is a paid advertisement for legal services.”;

(2) not present an advertisement as a “medical alert,” “health alert,” “consumer alert,” “public service announcement” or similar terms;

(3) not display the logo of a federal or state governmental agency in a manner that suggests affiliation with or the sponsorship of that agency;

(4) not use the word “recall” when referring to a product that has not been recalled by a governmental agency or through an agreement between a manufacturer and governmental agency;

(5) identify the sponsor of the advertisement;

(6) indicate the identity of the attorney or law firm that will represent clients, or how cases will be referred to attorneys or law firms that will represent clients;

(7) if the advertisement is soliciting clients

who may allege an injury from a prescription drug approved by the federal food and drug administration, include the following warning: “Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor’s advice can result in injury.” and

(8) if the advertisement for a lawsuit soliciting clients who may allege an injury from a prescription drug or medical device approved by the federal food and drug administration or from a medical device substantially equivalent to an approved medical device, disclose that the drug or medical device remains approved by the federal food and drug administration, unless the product has been recalled or withdrawn.²⁶⁹

Like other statutes, the Kansas statute requires specifications as to the form of disclosures or warnings: “(b) (1) [a]ny words or statements required by this section to appear in an advertisement shall be presented clearly and conspicuously.”²⁷⁰ More specifically, “(2) [w]ritten disclosures shall be clearly legible and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and fully read the disclosure or disclaimer. (3) Spoken disclosures shall be plainly audible and clearly intelligible.”²⁷¹ The statute provides that a violation of the above section “constitute[s] an unlawful and deceptive trade practice as provided in K.S.A 50-623 et seq., and amendments thereto.”²⁷²

The Kansas statute also regulates the use of protected health information:

(a) A person shall not use, cause to be used, obtain, sell, transfer or disclose to another person without written authorization protected health information for the purpose of soliciting an individual for legal services.

(b) (1) Any violation of this section shall constitute an unlawful and deceptive trade practice as provided in K.S.A. 50-626, and amendments thereto, and shall be subject to the penalties provided for in K.S.A. 50-623 et seq., and amendments thereto.

(2) In addition to any other remedy provided by law, a person who knowingly violates this section shall be guilty of a class A nonperson misde-

meanor.²⁷³

The Kansas Senate Judiciary Committee heard testimony²⁷⁴ in support of the bill from a representative of the United States Chamber of Commerce who pointed to statistics from the FDA showing over 60 reports of persons discontinuing the use of a prescriptions without consulting with their physician.²⁷⁵

FLORIDA

In 2023, Florida passed HB 1205²⁷⁶, which provides a that person or an entity that issues an advertisement for legal services may not do any of the following:

- (a) Present the advertisement as a *medical alert, health alert, drug alert, or public service announcement* or use *any substantially similar phrase* that suggests to a reasonable consumer that the advertisement is *offering professional or medical advice or advice from a state or federal governmental entity or an entity approved by or affiliated with a state or federal governmental entity*.
- (b) Display the *logo of a state or federal governmental entity* in a manner that suggests to a reasonable consumer that the advertisement is *presented by a state or federal governmental entity or an entity approved by or affiliated with a state or federal governmental entity*.
- (c) Use the term “*recall*” when referring to a *product that has not been recalled* in accordance with applicable state or federal regulations.

1205 (emphasis added).

Any ad that solicits clients injured by a drug or medical device must contain in both written and verbal formats language stating “[t]his is a paid

advertisement for legal services,” at the beginning of the advertisement, identify the sponsor of the advertisement, and the identity of the attorney or law firm “primarily responsible for providing the solicited legal services,” or “an explanation of how a responding consumer’s case will be referred to an attorney or a law firm if the sponsor of the advertisement is not licensed to practice law.” The ad must also contain statements that “the prescription drug or medical device approved by the United States Food and Drug Administration remains approved unless it has been recalled,” and “[c]onsult your physician before making any decision regarding prescribed medication or medical treatment.”

The statute extends protection to Protected Health Information, stating:

- (7) A person or an entity *may not use, cause to be used, obtain, sell, transfer, or disclose a consumer’s protected health information to another person or entity for the purpose of soliciting the consumer for legal services without written authorization from that consumer*. This subsection does not apply to the use or disclosure of protected health information to an individual’s legal representative in the course of any judicial or administrative proceeding or as otherwise permitted or required by law.

The section “does not apply to an advertisement that has been reviewed and approved by an ethics or disciplinary committee of The Florida Bar in accordance with its rules of professional conduct.” And “[a] violation of this section is deemed a deceptive and unfair trade practice subject to enforcement under part II of this chapter.”

TEXAS

Texas passed a similar bill, S.B. No. 1189, which applies “only to a television advertisement that promotes a person’s provision of legal services or solicits clients to receive legal services,” Sec. 81.151 (a), and does not apply “to an adver-

tisement by a federal, state, or local government entity. *Id.* § (b). The statute provides that “[a]n advertisement for legal services may not,”

(1) Present the advertisement as a “medical alert,” “health alert,” “drug alert,” “public service announcement,” or substantially similar phrase that suggests to a reasonable viewer the advertisement is offering professional, medical, or government agency advice about medications or medical devices rather than legal services;

(2) Display the logo of a federal or state government agency in a manner that suggests to a reasonable viewer the advertisement is presented by a federal or state government agency or by an entity approved by or affiliated with a federal or state government agency; or

(3) Use the term “recall” when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency.

81.152. The statute requires that any advertisement include the statements, both “verbally and visually,” “[t]his is a paid advertisement for legal services,” and identify the sponsor of the advertisement and either “the identity of the attorney or law firm primarily responsible for providing solicited legal services to a person who engages the attorney or law firm in response to the advertisement,” or “the manner in which a responding person’s case is referred to an attorney or law firm if the sponsor of the advertisement is not legally authorized to provide legal services to clients.” 81.153 (1-3). If the advertisement solicits clients related to prescription drugs approved by the FDA, it must contain a “verbal and visual statement” that says “[d]o not stop taking a prescribed medication without first consulting a physician.” 81.153(b).

Section 81.154 governs the form of the required visual and verbal warnings and disclosures and the standard of judicial review for compliance. Section 81.154 (a) requires that “[a] visual

statement required by this subchapter to appear in an advertisement must be presented clearly, conspicuously, and for a sufficient length of time for a viewer to see and read the statement.” Under section 81.154 (b), “[a] court may not find that a visual statement in an advertisement is noncompliant with Subsection (a) if the statement is presented in the same size and style of font and for the same duration as a visual reference to the telephone number or Internet website of the entity a responding person contacts for the legal services offered or discussed in the advertisement.”

Similarly, section 81.154 (c) applies to verbal statements that “must be audible, intelligible, and presented with equal prominence as the other parts of the advertisement.” Courts may not find verbal statements are noncompliant “if the statement is made at approximately the same volume and uses approximately the same number of words per minute as the voice-over of longest duration in the advertisement other than information required by this subchapter.” 81.154 (d).

Violations of the subchapter are considered a “deceptive act or practice” actionable under Subchapter E, Chapter 17, Business & Commerce Code, solely as an enforcement action by the consumer protection division of the attorney general’s office or by a district or county attorney as provided by that subchapter. All remedies available under that subchapter are available for a violation of this subchapter.” 81.155(a). The subchapter does not create a private right of action. 81.155 (b).

The statute provides some protection if the advertisement is pre-approved as “in compliance” with “this subchapter and the applicable advertising standards in the Texas Disciplinary Rules of Professional Conduct.” 81.155(c). Then, the attorney general or county attorney “may not pursue an action,” unless:

- (1) The consumer protection division or the district or county attorney demanded that the sponsor of the advertisement cease further dissemination of the advertisement;
- (2) The sponsor of the ad-

vertisement is given a reasonable amount of time to ensure the advertisement is withdrawn from dissemination to the public; and

(3) The sponsor of the advertisement fails to ensure the advertisement is withdrawn from dissemination to the public within the time provided.

81.155 (c) (1-3). And the subchapter “may not be construed to limit or otherwise affect the authority of the Supreme Court of Texas to regulate the practice of law, enforce the Texas Disciplinary Rules of Professional Conduct, or discipline persons admitted to the state bar.” 81.156.

The Texas Act took effect September 1, 2019, Section 3, and applies prospectively. “The change in law made by this Act applies only to an advertisement that is presented on or after the effective date of this Act. An advertisement presented before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.”

ENDNOTES

- 1 In this paper, we use the phrase "legal advertising" to refer to the broader efforts to reach audiences by law firms, third-party litigation financiers, and so-called "lead generators," both through traditional media outlets as well as social media advertising and postings.
- 2 Philip Kotler and Gary Armstrong, *Principles of Marketing* 24 (17th Ed., 2018).
- 3 Id. at 450.
- 4 Id.
- 5 Kendra Cherry, "How to Become a Master of Persuasion: Persuasion Techniques That Really Work," *Persuasion: Persuasion Techniques* (2007).
- 6 See, Robert Trager, Sandra Moriarty, and Tom Duncan, *Selling Influence: Using Advertising to Prejudice the Jury Pool*, 83 Neb. L. Rev. 685, 700 (2004).
- 7 See, Isabela Dogaru, Adrian Furnham, Alastair McClelland, *Understanding How the Presence of Music in Advertisements Influences Consumer Behaviour*, *Acta Psychologica*, Volume 248, 2024, ("[S]tudy investigated how consumer behaviour is influenced by music's emotional valence (sad vs. happy) in advertisements.") (available at <https://www.sciencedirect.com/science/article/pii/S0001691824002105?via%3Dihub>, last visited Oct. 5, 2025).
- 8 See, Jonathan Luffarelli, Mudra Mukesh and Ammara Mahmood, *A Study of 597 Logos Shows Which Kind Is Most Effective*, *Harvard Business Review*, Sept. 12, 2019 ("A well-designed logo can offer substantial benefits to brands. It can help pique the interest of consumers, differentiate brands from competitors, facilitate brand recognition, influence investors' decisions, and convey what a brand is all about.") (available at <https://hbr.org/2019/09/a-study-of-597-logos-shows-which-kind-is-most-effective>, last visited Oct. 5, 2025).
- 9 See, Regan A. R. Gurung, Rosalyn Stoa, Alese Nelson & Devan Schultz, *The Influence of T-Shirt Graphics on Perceptions and Behavioral Intentions*, *The Journal of Social Psychology*, July 2018 (file:///C:/Users/tjh/Downloads/Tshirtgraphics_Gurungetal.2018.pdf).
- 10 See, Phone Carriers Color Palette, online at <https://www.color-hex.com/color-palette/38465>. "Colors have dramatic and profound effect on consumers' thoughts, feelings, and behaviors; so, marketers have long employed color as a visual mnemonic device to support cognition and thought and grasp consumers' attention"; Mohebbi, Behzad, *The Art of Packaging: An Investigation Into the Role of Color in Packaging, Marketing, and Branding*, 3 *International Journal of Organizational Leadership*, 92–102, (2014) (available at https://web.archive.org/web/20220708131627id_/https://openscholar.dut.ac.za/bitstream/10321/3129/1/RAMLALLK_2018.pdf, last visited Oct. 5, 2025).
- 11 Bobeico, Alina, *Typography in design*, Technical Scientific Conference of Undergraduate, Master, PhD students, Technical University of Moldova, Vol. IV, 2321, 2324 (2024) ("The Walt Disney logo adopts 'Waltograph,' a script font that captures the whimsical and enchanting essence of the brand.").
- 12 See, American Marketing Association, *Marketing versus Advertising* (Undated) (available at <https://tinyurl.com/5auy9df5>, last visited Oct. 5, 2025).
- 13 See, Hudson, S., & Hudson, D., *Branded entertainment: A new advertising technique or product placement in disguise?*, *Journal of Marketing Management* 489 (2006).
- 14 See, Vincenzo Galasso, Tommaso Nannicini, and Salvatore Nunnari, *Positive Spillovers from Negative Campaigning*, *American Journal of Political Science*, Vol. 67, No. 1, Pp. 5–21, January 2023 ("[T]he academic debate on the effectiveness of negative ads in persuading voters is still open. Indeed, despite its popularity among practitioners, the empirical evidence on whether negative ads are more or less effective than positive ones is ambiguous.") (Online at <https://pmc.ncbi.nlm.nih.gov/articles/PMC10078752/pdf/AJPS-67-5.pdf>).
- 15 See, Trager, et al., *supra* n. 11.
- 16 See, e.g., *Daily Ill. State J.* at 1 (December 2, 1857) (front page ad for "LINCOLN & HERNDON, Attorneys and Counsellors At Law"); see also, Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 *Marquette L.R.* 547, 547–49 (1982) (discussing Lincoln's advertising efforts); William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development*, 37 *Ariz. St. L.J.* 255, 262 (2005) ("Lawyer advertising was not uncommon in the nineteenth century, when lawyers utilized the media of the day - handbills and newspaper ads. ...").
- 17 Report of The Thirty-First Annual Meeting of the American Bar Association, 33 *A.B.A. Report* at 574 (1908) (quoting Abraham Lincoln).
- 18 Canon 27, *ABA Code of Professional Ethics* (1908).
- 19 Canon 28, *ABA Code of Professional Ethics* (1908).
- 20 *ABA Comm. on Ethics and Pro. Responsibility*, *Formal Op.* 309 (1963).
- 21 That is, "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).
- 22 425 U.S. 748 (1976).
- 23 425 U.S. at 771–72 (citing to a Virginia statute criminalizing untrue, deceptive, or misleading advertising).
- 24 425 U.S. at 773 n.25.
- 25 433 U.S. 350 (1977). Notably, in *Fla. Bar v. Went For It*, 515 U.S. 618 (1995), the Association of Trial Lawyers of America (ATLA) urged in an amicus brief that Bates be overturned because "advertising for legal services would prejudice potential jurors" against lawyers who advertise. *Clashes of Class and Cash*, *supra* n. 21, at 294 n.205 (citing *Brief of Amicus Curiae The Association of Trial Lawyers of America* at 14, *Fla. Bar v. Went For It*, 515 U.S. 618 (1995)). "[E]vidence indicates that Rule 4-7.4(b) would reduce at least one source of prejudice on the part of potential jurors against personal injury plaintiffs. The Rule thus directly and materially advances the State's substantial interest in affording a fair and impartial jury to civil litigants." *Id.* "In other words, the trial lawyers advanced the notion that the state had a substantial interest to restrict truthful, nondeceptive lawyer advertising because jurors may not award their clients as much money as they would if lawyers were not permitted to advertise...." *Id.* at 294.
- 26 433 U.S. at 384.
- 27 433 U.S. at 383.
- 28 436 U.S. 447, 455 (1978). The Court upheld the Ohio Supreme Court's affirmation of a sanction against a lawyer who visited an injured client in the hospital after an accident and procured her oral agreement to his representation. *Id.*
- 29 447 U.S. 557 (1980).
- 30 447 U.S. at 564–65.
- 31 In contrast, of course, where the speech at issue is

considered within the core of the First Amendment, the applicable standard is “strict scrutiny,” which “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

- 32 471 U.S. 626 (1985).
 33 471 U.S. at 647.
 34 471 U.S. at 639–49.
 35 *Id.* at 650–53.
 36 471 U.S. at 651.
 37 471 U.S. at 651. The Court further noted that “all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech.” 471 U.S. at 651 n.14 (citing *Central Hudson*, 447 U.S. at 565).
 38 471 U.S. at 652–53. Justices Brennan and Marshall dissented from this portion of the decision. 471 U.S. at 656.
 39 515 U.S. 618 (1995). In an amicus brief, the American Trial Lawyers’ Association argued in part that “communications sponsored by those dedicated to tort reform have had an adverse impact on jury decisions.” *Clashes of Class and Cash*, *supra* n. 21, at 294.
 40 Kent Harrell, A New Direction in Attorney Advertising: *Florida Bar v. Went for It, Inc.*, 22 North Carolina Central Law Review 220 (1996).
 41 515 U.S. at 635. In dissent, Justice Kennedy (joined by Justices Stevens, Souter, and Ginsburg), concluded that the Florida Bar rule failed all three prongs of the *Central Hudson* test, stating:

Today’s opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court’s opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. The general rule is that the speaker and the audience, not the government, assess the value of the information presented. By validating Florida’s rule, today’s majority is complicit in the Bar’s censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

- 515 U.S. at 645 (Kennedy, J., dissenting) (internal citations and quotations omitted).
 42 515 U.S. at 633.
 43 433 U.S. at 403 (Powell, J., dissenting) (emphasis added).
 44 See, W. Ward Reynoldson, *The Case Against Lawyer Advertising*, 75 A.B.A.J. 60 (Jan. 1989).
 45 *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* at 5, 62, U.S. Chamber Institute for Legal Reform (April 2020) (https://instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf).
 46 See, *Babcock v. Nw. Mem’l Hosp.*, 767 S.W.2d 705 (Tex. 1989) (Reversing defense verdict where trial court denied voir dire on the “liability insurance crisis”). See, Megan M. La Belle, *Influencing Juries in Litigation “Hot Spots,”*

- 94 *Indiana Law Journal* 901 (2019) (“Companies have also used image advertising as a means of influencing the outcome of litigation. The idea is that such ads will instill in the public—that is, potential jurors—a favorable perception of the company that will persist if and when that company is involved in a lawsuit.”) This article focuses on civil cases. The effect of pretrial publicity in criminal cases has also been the subject of study and comment. See, Christine L. Ruva, Stephanie E. Diaz Ortega, and Kathleen A. O’Grady, *What Drives a Jury’s Deliberation? The Influence of Pretrial Publicity and Jury Composition on Deliberation Slant and Content*, 28 *Psych. Pub. Pol.* and L. 32 (2022); Elise E. Walthall, *The Practical and Procedural Implications of Jury Misconduct in the Third Circuit*, 39 *Vill. L. Rev.* 1005 (1994); Newton N. Minow and Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, Symposium Issue on the Selection and Function of the Modern Jury, 40 *Am. U.L. Rev.* 631 (Winter 1991).
 47 182 Mont. 28, 30, 594 P.2d 688, 689 (1979).
 48 *Id.* at 30, 594 P.2d at 689.
 49 *Id.* at 30, 594 P.2d at 689.
 50 *Id.* at 30, 594 P.2d at 689.
 51 *Id.* at 30, 594 P.2d at 689–90.
 52 *Id.* at 31, 594 P.2d at 690.
 53 *Id.* at 31, 594 P.2d at 690.
 54 *Id.* at 41, 594 P.2d at 695.
 55 *Yost*, 182 Mont. at 32, 594 P.2d at 690 (Internal record citations to national ads omitted). The Court cited “[a]s evidence of the possibility of prejudice,” a psychological study conducted by Dr. Elizabeth Loftus and previously reported in the *ABA Journal*. Elizabeth Loftus, *Insurance Industry Advertising and Jury Awards*, 65 A.B.A.J. 68 (1979). The study involved exposing study participants to an insurer advertisement entitled, “You really think it’s the insurance company that’s paying all those large jury awards?” The next day, when asked to act as a hypothetical juror in determining compensation for an automobile accident victim, the exposed participants awarded a lower amount in damages than unexposed participants. *Id.* at 69.
 56 *Id.* at 39; 594 P.2d at 694 (citations omitted); cf., *Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litigation)*, 2016 U.S. Dist. LEXIS 72774 at *9 (E.D. Pa. June 3, 2016) (refusing to issue a gag order prohibiting the defendant from engaging in reputational marketing prior to trial and stating that less restrictive alternatives included “a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors”).
 57 *Id.* at 40, 594 P.2d at 694.
 58 824 P.2d 460, 462–63 (Utah Ct. App. 1991). The Court found no abuse of discretion in the trial court’s refusal to question the jurors about a 1986 *Time Magazine* article entitled “Sorry, Your Policy Is Cancelled” because, at the time of trial, the article was three years old. *Id.*
 59 *Evans v. Doty*, 824 P.2d 460, 467 (Utah. App. 1991), cert. denied 836 P.2d 1383 (Utah 1992). See also, *Babcock v. Nw. Mem’l Hosp.*, 767 S.W.2d 705 (Tex. 1989) (reversing defense verdict where trial court denied voir dire on the “liability insurance crisis”); *Kozlowski v. Rush*, 121 Idaho 825, 830-31, 828 P.2d 854 (1992) (A party may properly make a good faith inquiry into whether jurors were exposed to media accounts about the effect of jury awards on insurance costs and the “medical malpractice crisis”); Irish

- v. Gimbel, 1997 Me. 50, ¶ 30, 691 A.2d 664, 675 (Maine 1997) (Upholding as within the trial court's discretion the court's voir dire questions about whether any juror was "so offended" by advertising or whether any jury or felt strongly about tort reform that it would affect their ability to be fair.)
- 60 Georgene Vairo, The Role of Influence in the Arc of Tort "Reform" +, 65 Emory L.J. 1741, 1753 (2016) ("Los Angeles County plaintiffs' lawyers, for example, always ask potential jurors about whether they have heard about the hot coffee case. Of course they all have. Paraphrasing Arthur Miller, that case is the cosmic anecdote which purportedly shows rampant frivolous litigation and runaway juries. The plaintiffs' lawyers then talk to the jury about the case.")
- 61 "Judicial Hellholes" is a yearly publication of the American Tort Reform Foundation which "identif[ies] and document[s] places where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner, generally to the disadvantage of defendants." Judicial Hellholes 2025–26, https://judicialhellholes.org/wp-content/uploads/2025/12/ATRA_JH25_text_05.pdf. There is disagreement over the accuracy of the reports. Compare, Victor E. Schwartz, Sherman Joyce and Cary Silverman, West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts, 111 W. Va. L. Rev. 757, 758 (2009), with Elizabeth G. Thornburg, Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia, 110 West Virginia Law Review 1097 (2008).
- 62 See, Lisa Blue, Screening Jurors in the Age of Tort Reform, 34 Trial 58–61 (April 1998).
- 63 Testimony of Cary Silverman, Esq., Shook, Hardy & Bacon L.L.P., On Behalf of the U.S. Chamber Institute for Legal Reform in Support of S.B. 150 Before the Kansas Senate Judiciary Committee, February 16, 2021. See also, Alex Anteau, What Makes a Good Personal Injury Billboard?, law.com (Sept. 21, 2026) (Quoting lawyer regarding billboards: "What I'm trying to do is hold their attention and be remembered.") (online at <https://www.law.com/2026/09/21/what-makes-a-good-personal-injury-billboard/>; subscription required).
- 64 Id. at 5. Authors of a 2017 study of drug and medical device advertising by plaintiffs' lawyers noted "Drug injury advertising, which solicits consumers for lawsuits against drug and medical device manufacturers, is a \$ 114 million business." Jesse King and Elizabeth Tippet, Drug Injury Advertising, 18 Yale J. Health Pol'y L. & Ethics 114 (2019) (Article drawing from testimony at a hearing of the House of Representatives Judiciary Committee, Subcommittee on the Constitution and Civil Justice, June 23, 2017). 114.
- 65 U.S. Chamber of Commerce Institute for Legal Reform, Bad for Your Health: Lawsuit Advertising Implications and Solutions, October 2017 (citing X Ante), <https://instituteforlegalreform.com/research/bad-for-your-healthlawsuit-advertising-implications-and-solutions/>.
- 66 Id.
- 67 Id.
- 68 American Tort Reform Association, Legal Services Advertising in the United States at 4, Feb. 2022 (available at <https://tinyurl.com/2p847z7z>, last visited Oct. 5, 2025).
- 69 American Tort Reform Association, Legal Services Advertising, 2020–2024 at 5 (available at <https://tinyurl.com/34uejm4e>, last visited Oct. 5, 2025). The data analyzed did not include social media but did include other digital advertising. Id. at 4.
- 70 American Tort Reform Association, Legal Service Advertising Report 2017–2024, <https://www.atra.org/wp-content/uploads/2025/03/Legal-Services-Advertising-Report-%E2%80%932017-2024.pdf>.
- 71 Id. at 5.
- 72 Allen Laman, Expert: 'Unceasing Onslaught' of Legal Ads Worth Your Attention, Insurance Journal (April 1, 2024), [Expert: 'Unceasing Onslaught' of Legal Ads Worth Your Attention](https://www.insurancejournal.com/news-north-carolina/2024/04/01/1014111.htm), <https://www.insurancejournal.com/news-north-carolina/2024/04/01/1014111.htm>.
- 73 American Tort Reform Association, Legal Services Advertising in America 2020–2024, March 2025, <https://atra.org/white-paper-and-repo/legal-services-ads-2020-2024/>.
- 74 Ball and Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution, p. 75.
- 75 The Culture Code at 124.
- 76 Id.
- 77 Louis J. Sirico, Jr., The Trial Lawyer and the Reptilian Brain: A Critique, 65 Cleveland State Law Review. 411, 412 (2017). There aren't many cases describing the propriety of the reptile strategy because it is largely addressed at the trial court level and on appeal under an abuse of discretion standard. Kenneth S. Abraham, Shadow Tort Law: Lessons from the Reptile, 122 Columbia Law Review Forum 110 (2022). See, e.g. Biglow v. Eidenberg, 369 P.3d 341 (Kan. Ct. App. 2016) (Trial court ruling prohibiting plaintiff from using words "patient safety" and "needlessly endangering the patient," was not abuse of discretion; "it cannot be said that the district court abused its discretion in determining that the probative value of this evidence was outweighed by the potential that it could mislead the jury with respect to a physician's legal duty of care."); Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc., 487 Mass. 507, 511, 168 N.E.3d 361, 367 (2021) (Affirming mistrial based on plaintiffs' arguments including "so-called 'reptile' litigation tactics aimed at triggering in the jurors a fear of harm to their community.")
- 78 Sirico, supra n. 82, at 75–82.
- 79 Reptile, supra n. 79, at 77.
- 80 Id.
- 81 Id. at 76.
- 82 Id. at 77.
- 83 Id. at 8, 78, 95.
- 84 See Lee J. Curley, et al., Verdict Spotting: Investigating the Effects of Juror Bias, Evidence Anchors and Verdict Systems in Jurors, 29 Psychiatry, Psychology and Law 323 (2002) (discussing criminal trials).
- 85 Elizabeth Tippet, Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits, 41 Am. J.L. & Med. 7, 8 (2015).
- 86 Id. at 7, 8. See also, King and Tippet, supra n. 69, at 114 ("We also find that deceptive drug injury ads have a stronger influence on consumer risk perceptions and behavioral intentions, such as intentions to use the medication or seek additional information.")
- 87 Id.
- 88 Id.
- 89 Id. at 8.
- 90 Id. at 7, 8.
- 91 Gaming the System, supra n. 45, at 23–24. One study of medical events reported to MedWatch, the FDA safety and adverse event reporting system, examined patients who "were prescribed rivaroxaban and subsequently discontinued their anticoagulant without consulting their physician after

viewing negative rivaroxaban legal advertising.” Burton and Peacock, A Medwatch Review of Reported Events in Patients Who Discontinued Rivaroxaban (XARELTO) Therapy in Response to Legal Advertising, *HeartRhythm Case Rep.* 2016 Feb 16; 2(3):248–49 (online at National Library of Medicine, <https://pmc.ncbi.nlm.nih.gov/articles/PMC5419767/pdf/main.pdf>) (discussed in Behrens and Garry, Alert: Deceptive Plaintiff Lawyer Advertising is Harmful to Public Health... and States are Taking Action, IADC Civil Justice Response and Drug, Device And Biotechnology Committee Newsletter (June 2019) (online at https://www.iadclaw.org/securedocument.aspx?file=1/19/Civil_Justice_Response_June_2019_-_Joint_with_DDB.pdf.)

92 See Tippet, *supra* n. 85.

93 *Id.*

94 Of note are the “warning letters” sent on September 9, 2025, by the FDA to “all application holders” stating: “For far too long, FDA has permitted misleading direct-to consumer (DTC) prescription drug advertising. Today, FDA is taking action to rein in violative ads. Going forward, FDA intends to take aggressive action and ensure conformity with the law. You are hereby directed to remove any noncompliant advertising and bring all promotional communications into compliance.” Letter, U.S. Food and Drug Administration, Sept. 9, 2025 (emphasis in original) (available at <https://www.fda.gov/media/188616/download?attachment>, last visited Oct. 8, 2025). In fact, the FDA recognized “[a]n increasing reliance on digital and social media channels, including undisclosed influencer promotion, has blurred the lines among editorial content, user-generated media, and pharmaceutical advertising, making it increasingly difficult for patients to distinguish between evidence-based information and promotional material.” *Id.*

95 *Id.*

96 The authors use the phrase “unsupportable claims” because it mirrors the language in the MDL Subcommittee’s 2018 report to the Federal Rules Advisory Committee regarding a proposed rule of civil procedure specific to multi-district litigation (MDL) proceedings:

There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations – perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices – a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigation it may be as high as 40% or 45%. MDL Subcommittee Report, Advisory Committee on Civil Rules Agenda Book at 143 (Nov. 1, 2018).

97 King and Tippet, Drug Injury Advertising, *supra* n. 69, at 123.

98 See, e.g., Gaming the System, *supra* n. 50, at 1–6.

99 A recent book details an investigation into the involvement of third-party broker/funders in the Pelvic Mesh litigation. Lynn A. Baker, *The Pain Brokers: How Con Men, Call Centers, and Rogue Doctors Fuel America’s Lawsuit Factory* (2026). Three non-lawyers formed a “law firm” that was actually a “call center that generated client leads.” From a call center

in Fort Lauderdale, and “army of employees,” *id.* at 7, cold called over 100,000 women who had mesh implants. The women were told of the implants were dangerous and had to be removed (“Get your mesh removed quickly, or you might die.”) They women were recruited as clients of an associated law firm (a partnership with lawyers in Washington, D.C., which permits non lawyer ownership of law firms). Then, “she was immediately transferred to [a] ‘different’ company [owned by the same people], often during the same phone call” and asked if they would like to be referred to the “right” doctor for removal of the implant. They were provided transportation, lodging and medical expense for the removal by a doctor in Florida (touted as a board-certified specialist, “the only one who can do it”), paid with a loan from a funder (at high interest rates). The medical practices performing the removal also sold the unpaid bills at a discount to a related medical funder.

100 *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

101 *Id.*

102 *Id.*

103 See, Daniel Fisher, Lawsuit Details How Law Firms Borrow and Pay Millions to Get Mass Tort Cases, *Forbes* (Oct. 20, 2015) (online at <https://tinyurl.com/mwrpt5c>, last visited Oct. 5, 2025).

104 *Complaint, Shenaq v. Akin*, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015) ¶ 76.

105 Legal Growth Associates, 2021 State of Mass Torts, <https://legalgrowthassociates.com/mass-torts-2021/> (last accessed Jan. 24, 2021; website no longer active when most recently accessed on June 22, 2022). A law firm blog, the Lawsuit Information Center Blog, posted Mass Torts to Watch In 2022 (<https://tinyurl.com/3fkfeh6b>), which outlined “the mass tort class action lawsuits with the highest predicted settlement payouts.” The same blog has posted then-current costs to purchase various mass tort leads, which the author believed was a “barometer for which mass torts have the greatest potential for success.” Lawsuit Information Center Blog, <https://tinyurl.com/y2tybfkp>.

106 See also Sara Randazzo and Jacob Bunge, Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits, *Wall St. J.* (Nov. 25, 2019).

107 *In re Taxotere*, U.S.D.C. for the Eastern District of Louisiana, MDL No. 2740.

108 See United States Judicial Panel on Multidistrict Litigation, MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending, September 2, 2025, available at https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-September-2-2025.pdf (last visited September 18, 2025).

109 *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. MDL 16-2740, 2024 WL 718698 at *1 (E.D. La. Feb. 21, 2024) (“As Sanofi points out, approximately half of the cases selected as bellwethers were removed or disqualified from the pool for, among other things, failure to establish product identification or failure to provide requisite photographs of the alleged hair loss injury.”).

110 See, e.g., *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 837 F. App’x 267 (5th Cir. 2020); *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 966 F.3d 351 (5th Cir. 2020).

111 *Id.*

112 966 F.3d at 356–57 (citing *Woodson v. Surgitek, Inc.*, 57

- F.3d 1406, 1417 (5th Cir. 1995)); see also 837 F. App'x 267 at 274–75. The show cause hearings in Taxotere mirrored a similar process utilized in an earlier MDL pending in the same district—the In re Xarelto MDL. There, the MDL court entered a protocol to assist in addressing deficient Plaintiff Fact Sheets that did not comply with the Court's Orders. See In re Xarelto (Rivaroxaban) Prods. Liab. Litig., No. 14-02592 (E.D. La. Jan 25, 2017) available at https://www.laed.uscourts.gov/sites/default/files/xarelto/PTO%2031_0.pdf.
- 113 Similarly, in the Transvaginal Mesh MDL, which addressed claims related to urologic mesh implants, direct advertising to potential clients by call centers funded by third party litigation funders and lead generators became an issue. Defendants filed motions seeking discovery regarding the recruitment of plaintiffs by third parties who funded corrective surgeries. In re Am. Med. Sys. Pelvic Repair Sys. Prod. Liab. Litig., 2016 U.S. Dist. LEXIS 84838, *2 (S.D. W.Va. 2016) (holding that the defendant “produced evidence demonstrating that the nonparties compiled a database of women who received mesh implants and used that database to provide leads to funding companies and referrals to doctors in order to arrange corrective surgeries”).
- 114 In re Taxotere (Docetaxel) Prods. Liab. Litig., No. 16-15319, 2020 WL 6888282, at *1 (E.D. La. Sept. 22, 2020). (emphasis added).
- 115 Id.
- 116 Id.
- 117 Id. (internal citations omitted).
- 118 Id.
- 119 In re Taxotere (Docetaxel) Products Liability Litigation, 995 F.3d 384, 387 (5th Cir. April 21, 2021). A fourth Louisiana MDL bellwether plaintiff appealed a similar ruling, arguing that her claims were distinct because of conversations she had with her doctors; however, the Fifth Circuit affirmed the dismissal. In re Taxotere (Docetaxel) Products Liability Litigation, 860 Fed. Appx. 886 (5th Cir. June 9, 2021).
- 120 995 F.3d at 387, 304–05.
- 121 995 F.3d at 392 (internal citations omitted).
- 122 Id. at 394–95 (internal citations omitted).
- 123 Id. at 393.
- 124 In re Taxotere (Docetaxel) Prod. Liab. Litig., No. MDL 16-2740, 2024 WL 718698 at *1 (E.D. La. Feb. 21, 2024). The Order expressly recognized the impact of the MDL's settlement posture on the timing of the Medical Diagnosis Order's entry, the decision also acknowledged Sanofi's “goal of winnowing non-compliant cases from the MDL.” Id. at *2, *4.
- 125 Patterson v. People of State of Colorado ex rel. Attorney Gen. of State of Colorado, 205 U.S. 454, 462 (1907) (emphasis added).
- 126 ABA Canon of Professional Ethics 20 (1908).
- 127 ABA Model Rule of Professional Conduct 3.6. The Supreme Court rejected a constitutional challenge to Nevada's implementation of this Model Rule by holding that the “substantial likelihood” standard struck an appropriate balance between the right to a fair trial and an attorney's free speech rights. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). In that case, the Justices stated that standard was acceptable because, “[i]nterpreted in a proper and narrow manner,” [it] can “prevent an attorney ... from releasing information of grave prejudice on the eve of jury selection.” Id. at 1036.
- 128 The authors do not address here the increasing involvement of nonlawyers in the provision of legal services to the public and the nonlawyer ownership of law firms. See Marta Schnabel, Susan Gunter, and Thomas J. Hurney, Jr., Nonlawyer Investment in the Legal Economy, DRI Center for Law and Public Policy (2022) (available at https://www.dri.org/docs/default-source/dri-white-papers-and-reports/abs-white-paper-final.pdf?sfvrsn=512533f1_7 (last visited Jul. 10, 2026)).
- 129 Sarah C. Haan, The “Persuasion Route” of the Law: Advertising and Legal Persuasion, 100 Colum. L. Rev. 1281, 1282 (2000). Id. at 1282.
- 130 Curley, supra n. 89, at 323 (discussing criminal trials).
- 131 Marisa Franks, The Effects of Pre-trial Publicity on the Predictions of Duration of Jury Deliberation 7 (2022) (unpublished M.A. Forensic Psychology thesis, University of Central Oklahoma), <https://shareok.org/server/api/core/bitstreams/c6ab7720-1c74-4869-a104-e636b1abbffb/content>. See also, Curley, supra n. 89 (“Pre-trial publicity has consistently been shown to bias juror judgments in mock trials”).
- 132 Franks, id., at 4. Juror attitudes about corporations have long been a concern. Michael T. Burr, Re-Channeling Juror Anger, The Corporate Legal Times / Persuasion Strategies Jury Research Project, April 2004 (<https://www.hollandhart.com/blue/CLTPersuasionStrategies.pdf> (last visited Oct. 5, 2025)) (Of 500 persons surveyed, “[m]ore than 86 percent of jury-eligible respondents in the Persuasion Strategies study agreed with the statement, “Executives of big companies often try to cover up the harm they do.” More than three-fourths of respondents agreed that if a major corporation could benefit financially by lying, it probably would... Likewise, nearly 73 percent agreed that if someone sues a major corporation, the case must have some merit.”).
- 133 In 2012, the United States Chamber of Commerce Institute for Legal Reform released a white paper entitled “The Plaintiffs’ Bar Goes Digital: An Analysis of the Digital Marketing Efforts of Plaintiffs’ Attorneys & Litigation Firms,” which discussed the proliferation of keyword and other targeting social media advertising. The report is available online at https://instituteforlegalreform.com/wp-content/uploads/2020/10/The_Plaintiffs_Bar_Goes_Digital_2012_0.pdf (last visited Oct. 5, 2025).
- 134 Sophie C. Boerman, et al., Online Behavioral Advertising: A Literature Review and Research Agenda, 46 Journal of Advertising 363 (2017).
- 135 Seth Katsuya Endo, AD Teach and the Future of Legal Ethics, 73 Ala.L.Rev. 107, 119–20 (2021) (emphasis added).
- 136 Id. at 110.
- 137 And online “advertising” is more likely to fly below the radar of traditional monitoring on traditional media because it is less likely to come to the attention of the parties than broadly run television, radio, or print advertisements.
- 138 The ads also touted large prior verdicts. “In the four months preceding a trial that led to a \$2 billion verdict, defense lawyers expressed concern that plaintiffs’ lawyers had ‘bombarded’ the jury pool with television and radio ads in the local media. The most widely aired local TV ad, which ran an average of eight times per day in the weeks leading up to trial, touted a recent award of ‘nearly \$300 million’ in a prior Roundup case.” Cary Silverman and Christopher E. Appel, Nuclear Verdicts Trends, Causes, and Solutions, U.S. Chamber of Commerce Institute for Legal Reform 26–27 (Sept. 2022) (available at <https://tinyurl.com/32ndyrkj>, last visited Oct. 5, 2025)).

- 140 Gaming the System, *supra* n. 45, at 46.
 141 *Id.* at 47.
 142 Gaming The System, *supra* n. 45, at 47 (footnotes omitted).
 143 Gaming The System, *supra* n. 45, at 62. As an example, the report pointed out that while St. Louis is only the 23rd largest media market in the country, it nonetheless was “the top area for lawsuit ads targeting talc-based products in 2016—the same period that St. Louis courts returned a series of multi-million-dollar talc verdicts.” Gaming The System, *supra* n. 50, at 63 (footnote omitted). And that amount of advertising cannot be accounted for simply by the number of potential plaintiffs given that St. Louis County trial courts have notoriously liberal venue rules. James M. Beck, Awful Missouri Venue/Joinder Ruling Offers Way Out – Take It!, Drug & Device Blog (Nov. 21, 2016) (Discussing *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795 (Mo. 2017) as “a poster child for venue and joinder run amok”).
- 144 *Order, Slemp v. Johnson & Johnson*, Cause No. 1422-CC09326-01, Twenty-Second Judicial Circuit Court (City of St. Louis) (April 1, 2017) (Denying motions to dismiss and “Motion to Transfer Venue or Continue the April 6, 2017, Trial Date Based on Jury Pool Taint.”). Following jury’s award of compensatory and punitive damages, the defendants appealed on multiple grounds, including the denial of the venue motion. The appellate court vacated the judgment in favor of the out-of-state plaintiff because the trial court lacked personal jurisdiction over the defendants on that plaintiff’s claim and did not reach the other issues raised on appeal, including venue. *Slemp v. Johnson & Johnson*, 589 S.W.3d 92 (Mo. Ct. App. 2019). In Missouri, a defendant must prove that venue was improper and that failure to transfer was prejudicial. *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 799 (Mo. 2017) (This Court declines to hold Abbott was prejudiced simply because a fair judge and jury in the city of St. Louis rendered the judgment and verdict rather than a fair judge and jury in St. Louis County.)
- 145 *Trager, et al.*, *supra* n. 11 (discussing motion and advertisements in some detail). See also, *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 52 (Miss. 2004), as modified on denial of reh’g (Aug. 5, 2004) (holding venue was improper in county where, among other things, there had been “attorney advertisements, attorney-organized meetings and plaintiff-propelled gossip” regarding the pharmaceutical product at issue). The court in *Bailey* also stated it had “previously recognized the ineffectiveness of voir dire in detecting juror bias created by pre-trial publicity.” *Id.* In *Bayer Corp. v. Reed*, 932 So. 2d 786, 790 (Miss. 2006), decided two years later, however, the defendant unsuccessfully sought a change a venue based on, among other things, pervasive legal advertising in the county where the action would be tried. In affirming the denial of that motion, the Mississippi Supreme Court stated that the defendant had “presented extensive evidence that there was pre-trial publicity regarding prescription medication in general; however, no evidence has been presented to link the publicity specifically with Bayer, Baycol or this particular lawsuit.” *Id.*
- 146 See, John C.S. Pierce, et al., Social Inflation - Legal System Abuse: Observations and Solutions to Support the Right to Fair and Impartial Dispute Resolution 13, DRI Center/NAMIC (2023) (available at <https://tinyurl.com/yc4fb8jd>, last visited Oct. 5, 2025) (“Advertisements can generally be broken into two categories: advertisements to recruit clients and advertising to influence jurors.”).
- 147 Georgia Code §9-10-184 (2022) specifically allows for the use of anchoring to argue worth of pain and suffering to the jury. In 2024, Georgia juries handed down 64 nuclear verdicts totaling \$6 billion. ATRA, Judicial Hellholes 2024–2025, (available at <https://www.judicialhellholes.org/hellhole/2024-2025/georgia/>, last visited Oct. 5, 2025). Anchoring resulted in a \$39 million verdict in Texas that was struck down by the Texas Supreme Court because the anchoring argument used was not rationally connected to the evidence. *Gregory v. Chohan*, 670 S.W. 3d 546 (Tex. 2023).
- 148 *Domino’s Pizza, LLC v. Wiederhold*, 248 So. 3d 212, 226-27 (Fla. 5th DCA 2018). In *Wasden v. Seaboard C. L. R. Co.*, 474 So. 2d 825 (Fla. Dist. Ct. App. 1985), review denied, 484 So. 2d 9 (Fla. 1986), an appeals court reversed the trial court’s grant of defendant’s motion for new trial. Defendant challenged plaintiff’s counsel’s “anchoring” argument that “I can’t tell you and I won’t tell you what others have done, but I will tell you that this verdict should be in the range of \$1,750,000.” The court found “[n]othing in the Code of Professional Responsibility or the case law prohibits an attorney from suggesting to the jury the size of a damage award, and counsel’s prefacing comment that he could not tell the jury about awards in similar cases must be taken at face value and not as an underhanded attempt to prejudice the jury.” *Id.* at 831. But in *City Provisioners, Inc. v. Anderson*, 578 So. 2d 855, 856 (Fla. 5th DCA 1991), the appeals court ordered a new trial on damages in part because plaintiff’s counsel improperly commented on the court’s ability to reduce an excessive verdict, reasoning: “It’s what you guys give is what he’s going to get. If you give him too much money, the judge can take away some of that money. It’s to be -- he can order remittitur or cut it down. If you don’t give Mr. Anderson enough money, he can’t order more money. This is the only shot.”
- 149 See, *Allred v. Chittenden Pool Supply, Inc.*, 298 So. 2d 361, 365 (Fla. 1974) (“Argument of a plaintiff’s counsel to the jury regarding various elements of damages, especially where pain and suffering are involved, based on a mathematical formula of calculable value or on a per diem basis may be helpful to the jury in its final deliberations.”).
- 150 Georgia permits anchoring by statute, Ga. Code §9-10-184 (2022), which permits argument about the worth of pain and suffering to the jury. In 2024, Georgia juries handed down 64 nuclear verdicts totaling \$6 billion. ATRA, Judicial Hellholes 2024-2025, available at <https://www.judicialhellholes.org/hellhole/2024-2025/georgia/>, last visited Oct. 5, 2025. In Texas, anchoring resulted in a \$39 million verdict, which was subsequently stricken by the Texas Supreme Court because the anchoring argument was not rationally connected to the evidence. *Gregory v. Chohan*, 670 S.W. 3d 546 (Tex. 2023).
- 151 *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618, 629 (W. Va. 1974) (“[T]he better practice would be to withhold any monetary figure from the jury’s consideration which might be suggestive of amounts of damage not proven in evidence...”).
- 152 *Crum v. Ward*, 146 W. Va. 421, 423, 122 S.E.2d 18, 20 (1961) (“[A]n argument of counsel to the jury based on a mathematical formula, or fixed-time basis, suggesting a money value for pain and suffering, is not based on facts, or reasonable inferences arising from facts, before the jury, and constitutes reversible error.”)
- 153 “Numerous studies establish that the jury’s damages decision is strongly affected by the number suggested by the plaintiff’s attorney, independent of the strength of the actual

- evidence (a psychological effect known as ‘anchoring’).” John Campbell, Bernard Chao, Christopher Robertson, David V. Yokum, Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments, 101 Iowa L. Rev. 543 (2016) (citing Cass R. Sunstein et al., Punitive Damages: How Juries Decide (2002)). The ‘anchor’ proposed by the plaintiffs’ lawyer creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to difficult-to-define damages such as pain and suffering.” Nuclear Verdicts Trends, supra n. 144, at 26–27. See also, Pierce, et al., supra n. 151, at 13 (“Years of experience talking to jurors and watching them deliberate have taught us that the amount [jurors] award in damages (after finding for a plaintiff) is almost always influenced by the amount of the demand.”)
- 154 Plaintiffs’ Firms Manufacture Lawsuits and Seek to Control Media – and They’re Proud of It, U.S. Chamber of Commerce, Institute for Legal Reform Newsletter, June 10, 2025, <https://instituteforlegalreform.com/blog/plaintiffs-firms-manufacture-lawsuits-and-seek-to-control-media-and-theyre-proud-of-it/>. See also, [Building a New Project Like Ultra-Processed Foods: Lessons in Leadership, Vision, and Collaboration from MTMP Spring 2025](https://buildinganewprojectlikeultraprocessedfoods.com/lessons-in-leadership-vision-and-collaboration-from-mttmp-spring-2025/), Levin Law, May 12, 2025, <https://levinlaw.com/newsroom/build-a-project-like-upf/>.
- 155 MTMP – Mass Torts Made Perfect – Where plaintiff lawyers come to unite. <https://mttmp.com/>.
- 156 MTMP – Mass Torts Made Perfect restricts attendance at seminars and webinars to plaintiffs’ counsel. “Attendee Restrictions” for the annual seminar states: MTMP conferences are exclusively for professionals engaged primarily in civil plaintiff or criminal defense work. Individuals or firms involved in any defense-related work connected to the case types discussed at MTMP are strictly prohibited from attending, except for defense attorneys attending the Judicial Panel session only. Attendees must also confirm they do not work for or with any company that seeks reimbursement from plaintiff settlement proceeds (medical, secondary payer, or subrogation liens). MTMP Registration, <https://mttmp.com/register/>. The same restrictions apply to MTMP webinars.
- 157 Plaintiffs’ Firms Manufacture Lawsuits and Seek to Control Media – and They’re Proud of It, ILR, n. 159 supra.
- 158 Id.
- 159 Id. (emphasis added).
- 160 Id.
- 161 Kochan, Donald J., Litigation Without Romance: An Incentives Story (March 03, 2026). George Mason Law & Economics Research Paper No. 26-04, Available at SSRN: <https://ssrn.com/abstract=6337418> or <http://dx.doi.org/10.2139/ssrn.6337418>
- 162 Id. at 20.
- 163 Id.
- 164 2025 Ill. App. (1st) 240220, 2025 Ill. App. LEXIS 638, 2025 WL 953039 (Ill. App. Mar. 31, 2025). Kroft was tried twice. The trial court granted a retrial after a \$43 million dollar verdict due to plaintiff’s counsel’s misconduct.
- 165 The full statement claimed that both the worsening condition and the “brain injury” were kept from the first jury. In fact, plaintiff was barred from raising the brain injury claim during the first trial solely because of plaintiff’s counsel’s failure to disclose any evidence of it prior to trial and, per the opinion, this worsening condition was not even discovered until after the first trial. Kroft, 2025 WL 953039 at 2, 12.
- 166 Kroft, 2025 WL 953039 at 3–4.
- Id. at 3 (internal citations omitted).
- Id. at 7.
- Id.
- Id.
- No. 20C-4779-4, 2023 Ga. State LEXIS 1385 (Gwinnett County State Court, June 16, 2023).
- A Georgia statute, O.C.G.A § 9-11-68(e) “is designed to make whole, through ‘damages,’ a party that had to defend against a frivolous claim or overcome a frivolous defense.” Showan v. Pressdee, 922 F.3d 1211, 1224–25 (11th Cir. 2019).
- Cartagena, 2023 Ga. State LEXIS 1385 at *3.
- Cartagena, 2023 Ga. State LEXIS 1385 at *3–4.
- Id. at *7–8.
- Id. at 4.
- Cartagena, 2023 Ga. State LEXIS 1385 at *8.
- Kroft, 2025 WL 953039 at *10.
- Trager, et al., supra n. 6, at 701–02.
- Marbury v. Madison, 5 U.S. 137 (1803).
- See Jury Instructions: What Jurors Understand | Capital Punishment in Context
- Juror surveys conducted by Trial Partners, Inc.
- Id.
- Giannecchini v. Johnson & Johnson, et al., Circuit Court of the City of St. Louis, MO, Case No 1422-CC09012-2.
- Id.
- Id., Defendant’s Renewed Motion for Mistrial and Motion to Transfer Venue, filed October 04, 2016, Exhibit “A.”
- Id. at 2.
- Id. at 5.
- See Motion pp. 1–16.
- Id.
- Id.
- Id. at 1, citing Tr. 685:20-23, 687:11–12.
- Id. at 7, citing Tr. 936:17–18.
- Id., citing Tr. 485:10–15.
- Id., citing Tr. 410:18–24.
- Id., citing Tr. 1054:17–22.
- Id., citing Tr. 718:15–19.
- Id. at 8, citing Tr. 457:15–24 (emphasis added).
- Id. at 11, citing Tr. 347:8–13, 349:10–18.
- Id. at 9–14.
- Id. at 6.
- Cherry, supra n. 5.
- Young v. Monsanto Company, et al., Philadelphia Court of Common Pleas, June Term 2022, No. 2432, N.T. 8/16/24, Vol.2 at p. 27.
- Id. at 27–28.
- Id. at 37.
- Id. at 43.
- Id. at 45.
- Id. at 49.
- Id. at 84.
- Id. at 100.
- Id. at 101.
- Id. at 112–13.
- Id. at 114.
- Young v. Monsanto Company, et al., Philadelphia Court of Common Pleas, June Term 2022, No. 2432.
- Id., N.T. 8/15/24, Vol. 1 at pp. 19–20.
- Id. at 21.
- Id. at 43–44.
- Id. at 45.
- Id. at 48.

- 220 La Belle, *Influencing Juries*, supra n. 51 at 951 (Advocating voir dire to “weed out” jurors biased by exposure to advertising).
- 221 Thomas J. Hurney and Randall Sellers, *Techniques for Jury Selection and Use of Jury Questionnaires*, 75 *Int’l Ass’n. of Defense Counsel Journal* 370, 377 (Oct. 2008) (Available online <https://tinyurl.com/5av9fp86>).
- 222 *Lewis v. Ethicon, Inc.* (In re *Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*), 2014 U.S. Dist. LEXIS 14971 (S.D.W.Va. 2014).
- 223 La Belle, *Influencing Juries*, supra n. 51 at 952.
- 224 *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).
- 225 *Hubbard v. Rutledge*, 57 Miss. 7, 1879 Miss. LEXIS 2 (“The juror, Berry, was not above all exception as a juror, and should have been rejected by the court. He was in the service of the defendant as a clerk, and that made him incompetent.”); *Yarborough v. Columbia R. G. & E. Co.*, 100 S.C. 33, 84 S.E. 308, 1915 S.C. LEXIS 13 (1915) (affirming trial judge’s discretion to excuse two jurors who worked for the defendant).
- 226 28 U.S.C. § 1404. See, e.g., *W.Va. Code* §56-1-1; 231 Pa. Code Rule 1006; *Texas Rule* 86.
- 227 Choice of venue matters. “The name of the game is forum-shopping. In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome.” Kevin M. Clermont & Theodore Eisenberg: *Exorcising the Evil of Forum-Shopping*, 80 *Cornell L. Rev.* 1507, 1508 (1995). The authors pose that statistically, venue transfers lead to more accurate outcomes than those in forums chosen by plaintiffs as more sympathetic (and inconvenient to defendants). Compare, David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 *Wash. U. L. Q.* 1479 (1997) (“Professor Clermont and Professor Eisenberg have written a clear and original article. And I disagree with almost all of their conclusions.”) Venue also matters in criminal cases. See, *Jordan Gross, If Skilling Can’t Get a Change of Venue, Who Can? Salvaging Common Law Implied Bias Principles from the Wreckage of the Constitutional Pretrial Publicity Standard*, 85 *Temp. L. Rev.* 575 (2013).
- 228 La Belle, *Influencing Juries*, supra n. 51 at 947.
- 229 Press Release, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits*, Sept. 24, 2019 (available at <https://tinyurl.com/yc33ux36>, last visited Oct. 5, 2025). See, Jeffrey A. Holmstrand, *In Search of Mass Tort Plaintiffs: Advertising and Its Impact on the Targeted Populations, Potential Jury Pools, And Our Clients*, 89 *Defense Counsel Journal* 1 (*Int’l Ass’n. of Defense Counsel*, Oct. 2022).
- 230 Letter, *Federal Trade Commission Div. of Advertising Practices*, to counsel for Relion Group, Inc., July 8, 2020 (available at, <https://tinyurl.com/2bxj22h8> last visited Oct. 5, 2025).
- 231 *Id.* Another letter dated September 19, 2019, expressed similar concerns.
- 232 *Recht v. Morrissey*, 32 F.4th 398, 405 (4th Cir. 2022).
- 233 See, *W. Va. Code* § 47-28-2(1); *Fla. Stat.* § 501.139 (1) (a); *Texas Code* § 81.151.
- 234 See, *W. Va. Code* § 47-28-3(a)(2); *Tenn. Code Ann.* § 47-18-3002(a)(1)–(6)(b); *Kan. Stat. Ann.* § 50-6, 144(a)(2) (2022); *Fla. Stat.* § 501.139 (2)(a).
- 235 See, *W. Va. Code* § 47-28-3(a)(3).
- 236 *W. Va. Code* § 47-28-3(a)(4).
- 237 *W. Va. Code* § 47-28-1(a) (5-6) (2022); *Texas Code* § 81.152 (1-3); *Tenn. Code Ann.* § 47-18-3002(a)(5-6); *Kan. Stat. Ann.* § 50-6, 144(a)(5-6) (2022.)
- 238 *Texas Code* §81.154 (a).
- 239 *Texas Code* §81.154 (b).
- 240 *Texas Code* §81.154 (c).
- 241 *Texas Code* §81.154 (d).
- 242 *Texas Code* §81.153(b).
- 243 *Id.*
- 244 *W. Va. Code* § 47-38-4 (a). According to the statute, a violation of the section “is a violation of West Virginia’s health privacy laws or §46A-6-101 et seq. of this code,” *id.* at § 47-38-4 (b)(1), and “in addition to any other remedy provided by law, a person who willfully and knowingly violates this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000 or confined in jail not more than one year, or both fined and confined.” *Id.* at § 47-38-4 (b)(2). See also, *Tenn. Code Ann.* § 47-18-3003(a); *Fla. Stat.* § 501.139 (7)–(8). 32 F.4th 398, 405 (4th Cir.), cert. denied, 143 S. Ct. 527, 214 L. Ed. 2d 301 (2022).
- 245 *Recht v. Morrissey*, No. 5:20-CV-90, 2021 WL 5260297, at *5 (N.D.W. Va. May 13, 2021), reversed, 32 F.4th 398 (4th Cir. 2022), cert. denied, 143 S. Ct. 527, 214 L. Ed. 2d 301 (2022).
- 246 *Id.* at 405.
- 247 *Id.* at 408.
- 248 *Id.*
- 249 *Id.* at 414.
- 250 *Id.* at 417.
- 251 *Id.*
- 252 *Id.* at 418.
- 253 *Id.* (citations omitted).
- 254 *Id.* at 415.
- 255 Supreme Court of Texas, Misc. Docket No. 22-9011, Order Amending Comment 10 to Rule 7.01 of the Texas disciplinary Rules of Professional Conduct (amendment in bold).
- 256 Rule 7.1 - Information about Legal Services: Communications Concerning a Lawyer’s Services, *Kan. R. Rel. Disc. Att.* 7.1.
- 257 See, *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (Reprimand for use of Dalkon shield illustration in ad violated lawyer’s first amendment rights. “The advertisement’s statements concerning the Dalkon Shield were neither false nor deceptive, and the governmental interests that were found to be sufficient to justify a ban on in-person solicitation of legal business in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, are not present here.”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449, 98 S. Ct. 1912, 1915, 56 L. Ed. 2d 444 (1978) (“[T]he State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.”); *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 138, 114 S. Ct. 2084, 2086, 129 L. Ed. 2d 118 (1994) (Bar discipline of lawyer for displaying her valid CPA license and CFP certification was “incompatible with First Amendment restraints on official action.”)
- 258 See generally, *Tenn. Code Ann.* §§ 47-18-3001 to 3006 (West 2019).
- 259 *S. Com. & Lab. Comm.*, 2019 Leg., 111th Gen. Assembly (Tenn. 2019) (introduction of SB 150 by Sen. Richard Briggs), https://tnga.granicus.com/player/clip/16347?view_id=414&redirect=true.
- 260 *Id.*
- 261 *Id.*

- 262 Id. § 47-18-3002(a)(1)–(6)(b) (West 2019).
 263 Id. § 47-18-3002(c)(1)–(2) (West 2019).
 264 Id. § 47-18-3003(a) (West 2019).
 265 Id. § 47-18-3003(b)–(c) (West 2019).
 266 S. Jud. Comm., 2020 Sess., 84th Leg. (W. Va. 2020)
 (introduction of S.B. 136 and testimony of Dr. Elie Ghareeb),
[https://sg001-harmony.sliq.net/00289/Harmony/en/
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