Attorney Advertising

Reevaluating the 401/403 Balance in Twenty-First Century Mass Torts

By Kelly Brilleaux and Stephen G.A. Myers

While the plaintiffs' bar will continue to claim unfair prejudice, there are an ever-increasing number of arguments available that should help tip the balancing act closer to a conclusion that evidence of legal advertising is, in fact, admissible.

Much attorney advertising is harmless, if not amusing. Have you been injured and need a tough attorney? If so, why wouldn't you call one who could defend you from a fire-breathing robot? *See* video found at http://alexanderandcatalano.com/video (last accessed 12/6/2013)). Or one who will call your opponent horrible names? *See* http://www.divorcedeli.com/videos-archives.php (last accessed 1/21/2014)). What about one whose head has been Adobe® Photoshopped onto a statue of Abraham Lincoln? *See* http://www.larrythelawyer.com/Home.html (last accessed 1/21/2014).

But some advertising is not harmless. In fact, there is some evidence that attorney advertising—particularly in the realm of pharmaceutical and medical device mass torts—has unleveled the fair playing field that is supposed to exist within the judiciary.

For example, surrounding the Vioxx litigation in 2004, CNN reported on this sort of cross-the-line advertising, which included websites exclaiming, "get your millions" and "benefit from this Once-in-a-Lifetime Opportunity to become a millionaire." Crawford, Krysten, CNN Money, *New Worry for Vioxx Victims—Scams* (Dec. 1, 2004), http://money.cnn.com/2004/12/01/news/fortune500/vioxx_ads/ (last visited Jan. 3, 2014). Likewise, pleadings on file in the ongoing metal-on-metal hip implant litigation describe letters from law firms to surgeons stating, "We are writing to advise you that with respect to any of your patients who we represent and who do not have insurance to cover the cost of the revision surgery, … *we will reimburse you in advance* and in full *for your charges for performing the revision surgery.*" *McCracken v. DePuy Orthopaedics, Inc.*, No. 1:11-dp-20485 (N.D. Ohio 2013) (Rec. Doc. No. 52-1). Yet there are many who still discount the impact of such advertising on litigation or argue that such advertising does not create litigation but rather simply informs injured individuals that they may have a claim.

Over the years, there has undoubtedly been an increase in both the number of mass tort actions filed and the number of claimants in each action. An even more recent phenomenon, however, is the mass tort litigation that is attorney initiated, rather than plaintiff initiated. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort*

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Litigation: The New Private Law Dispute Resolution Paradigm, 33 Val. U. L. Rev. 413, 432–33 (1999). In this scenario, attorneys conceive of the tort, advertise to the public, and find dozens, hundreds, or even thousands of clients to pursue the claims.

The defense bar has always desired to present outlandish personal injury attorney advertisements as evidence during trials for obvious reasons, but these recent trends in the realm of mass torts present new and different reasons why presenting attorney advertising to a jury is not only relevant, but also often the only means to truly level the playing field. In a mass tort bellwether trial, it is now unlikely that even one juror will learn about a supposedly defective product, or the alleged side effects, for the first time in the jury box. Rather, that first exposure most likely occurred months before, while a juror watched television or surfed the Internet. As a result, the juror would assume that there must be a problem and it must be widespread to warrant advertisements on the subject, and he or she would bring that presupposition with him or her when deciding the case. And while jury consultants will quibble about the myth that a majority of jurors make up their minds during the opening statements, there is no doubt that opening statements have a critical impact on trial outcomes. In the current age of attorney advertising, however, opening statements now typically occur through the media before a prospective juror ever arrives at a courthouse.

In this brave new world, courts must reconsider the admissibility of attorney advertising before accepting the traditional, knee-jerk reaction to exclude such evidence. In particular, in a mass tort case, presenting attorney advertising is a cogent and meaningful response to combat the suggestion that the number of lawsuits filed, the number of complaints surrounding a product, the resulting statistical data about product performance, or mere on-air notoriety surrounding a product must be related to a "defect." But courts presented with attorney advertising have almost universally excluded such evidence, often without even providing a rationale.

The most common and obvious argument advanced against admitting evidence related to attorney advertising is that the risk of unfair prejudice substantially outweighs its potential relevance to a trial—the axiomatic Federal Rule of Evidence 401 and 403 analyses. Typically, defendants attempt to introduce evidence of plaintiff attorney advertising, arguing that, under Federal Rule 401, such evidence is both relevant and necessary evidence of a plaintiff's credibility with regard to the circumstances leading up to the filing of the lawsuit. Alternatively, defendants may attempt to offer expert testimony under Federal Rule 702 regarding the effect of legal advertising on the overall number of claims over time. In response, of course, plaintiffs argue that introducing such evidence creates a risk of prejudice under Federal Rule 403, making it inadmissible. As both the anecdotal and statistical information increases in frequency and intensity, however, it is time for courts to reconsider the issue.

This article will examine the available data relevant to attorney advertising, discuss the limited jurisprudence on the admissibility of attorney advertising, and then suggest that perhaps the best regulation of inappropriate advertising is simply to let the juries decide for themselves.

Attorney Advertising: How and Why Did We Get Here?

The subject of attorney advertising has often been approached as one of legal ethics and First Amendment considerations. Before 1977, attorney advertising was widely prohibited; however, in *Bates v. State Bar of Arizona*, the United States Supreme Court struck down a ban on attorney advertising, holding that it was entitled to commercial speech protections under the First Amendment. 433 U.S. 350, 371–72 (1977).

Notably, the Supreme Court cited, among other reasons, that legal advertising would reduce legal costs and increase access to counsel of underserved populations. *Id.* at 377 ("It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer."). Proponents of legal advertising continue to cite these reasons to this day. For example, the traditional wisdom is that attorney advertising provides a societal benefit. Supposedly, it brings down the cost of legal services and provides greater access to the legal system to those that may not otherwise seek counsel. *See, e.g.,* Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, Stan. L. Rev., Vol. 65:633, 634–37 (Working Paper Series, Paper No. 448, Apr. 2011) (summarizing this "conventional wisdom"). In some form, this rationale has been adopted not just by the United States Supreme Court in *Bates*, but also by the Federal Trade Commission and the American Bar Association. *Id.* at 637 (citing Staff of the Federal Trade Commission, Submission to the American Bar Association Commission on Advertising 15 (1994) ("Truthful, non-deceptive advertising promotes competition and consumer choice.") ("[W]hen liberalizing the Model Code's relatively conservative marketing constraints, [the ABA] explicitly credited '[e]mpirical studies of lawyer advertising' that 'indicate that it reduces cost and increases consumer access.'") (internal citation omitted). But this traditional wisdom has been called into question in recent years, and for good reason.

Opponents have long argued that legal advertising does not identify underserved individuals with valid legal claims, but rather that advertising generates baseless litigation or distorts public perception about key topics in litigation, such as product performance or the severity of complications. The available data is admittedly scattered, but there is certainly evidence that the benefits of attorney advertising have been overstated and that the concerns associated with it have not received proper consideration by the courts.

For example, in 2005, The New York State Bar Association formed a Task Force on Lawyer Advertising, for which a committee examined 100 print advertisements, 27 television and radio advertisements, and 54 Internet advertisements. *See* New York State Bar Association, *Report and Recommendation of Task Force on Lawyer Advertising* 46 (Oct. 21, 2005). Interestingly, the empirical evidence demonstrated that at least one-third of the advertisements could be categorized as false or deceptive on their face; many of the advertisements lacked the requisite disclosure with regard to contingency fee agreements; and over half of the advertisements failed to include the advertising firm's name, address, and telephone number. *Id.* at 46–47.

Moreover, commentators have noted that while price reduction theories may hold true for routine legal services such as uncontested divorces often provided by legal clinics, the vast majority of legal advertising is now purchased by personal injury attorneys, and "there is *no evidence* that advertising personal injury lawyers charge less, on a percentage basis, than their non-advertising counterparts." Engstrom, *supra*, at 667 ("Nor is there evidence that, despite the swell of personal injury attorney advertising, contingency fees—the near uniform method of payment for PI services—have dropped over the past four decades [*i.e.*, since the *Bates v. State Bar of Arizona* decision]."). And in fact, the opposite may be true given the unique nature of the personal injury market. Specifically, in the personal injury market

1. Prices typically are not advertised,
2. Although quality matters to consumers, it generally cannot be judged by the consumer given the complexities of the system, and
3. Consumers are not particularly sensitive to costs because contingency fee arrangements convert typical costs into deferred discounts.

Id. at 691. These factors create a "paradox" of sorts: advertising leads to escalating fees, as opposed to declining fees, which calls into question part of the rationale behind allowing such advertising in the first place. Thus, the presupposition that attorney advertising is a socially valuable endeavor should be reevaluated, or at least tempered.

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Notwithstanding the arguments both in favor of and against the societal benefits of attorney advertising, the Supreme Court decision in *Bates* made it indisputable that such advertising is a protected form of speech under the First Amendment as long as it is not "false, deceptive, or misleading[,]" in which case it is subject to restraint. *Bates,* 433 U.S. at 383.

As such, following the *Bates* decision, bar associations undertook the task of how, exactly, to regulate advertising by their attorneys. *See, e.g., On Petition for Review of Opinion 475 of Advisory Comm. on Prof'l Ethics*, 89 N.J. 74, 89, 444 A.2d 1092, 1099 (1982) ("While fears may prove to be unfounded, concerns about advertising are heightened where television is the medium. This concern is underscored by the United States Supreme Court's recognition in *Bates, supra*, that "the special problems of advertising on the electronic broadcast media will warrant special consideration.") (internal citations omitted). This effort continues and remains a hot-topic issue, particularly in light of the changes in media and technology that have taken place since the 1977 *Bates* Supreme Court holding. *See* Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising,* 17 J. Tech. L. & Pol'y 63 (2012) (describing "the legal profession's ongoing attempts to revise its professional code of conduct to incorporate technological and cultural changes."). If nothing else, the bar associations' efforts to regulate the ethical standards of attorney advertising highlights how such advertising affects both the public and the profession. This is not the only evidence, however, of the influence of attorney advertising.

Legal Advertising Is Ubiquitous and Impacts Data on Product Performance

Although there is no single source of publicly available information that neatly compiles data on attorney advertising, a survey of the data that is available is startling. Immediately after *Bates* in 1977, total spending on legal advertising was estimated to be $377,000 nationwide. Those figures ballooned to $428 million in 2002 and exceeded $750 million in 2012. *See* Nora Freeman Engstrom, *Legal Access and Attorney Advertising.* Am. U. J. Gender & Soc. Pol'y & L. 19, no. 4 (2011): 1083, 1090; The Silverstein Group, Legal Advertising Intelligence Report (June/July 2013), http://www.silversteingroup.net/junejuly-2013-legal-advertising-report.html (last visited Jan. 3, 2014).

And while much legal advertising appears simply to be geared toward locating clients involved in individual, actionable matters, the impact of legal advertising in a courtroom is arguably most prevalent in the realm of mass torts, and drug and medical device litigation in particular. In this arena, the Silverstein Group estimates that on the order of $66 million was spent on legal advertising over the six-month period from April through September 2013. The Silverstein Group, Legal Advertising Intelligence Report (Sept. 2013), http://www.silversteingroup.net/september-2013-legal-advertising-report.html (last accessed Jan. 3, 2014). In fact, legal advertising about specific products or classes of products often exceeded $1 million per month. *Id.*

As of 2001, 94 percent of the population was familiar with attorney advertising, and undoubtedly, that percentage must be closing in on 100 percent today. *See* Michael G. Parkinson & Sabrina Neeley, Attorney Advertising, 24 Services Marketing Quarterly, no. 3, 2003, at 17, 21 (citing Richard B. Schmitt, *Lawyers Try In Your Face Pitches.* Wall Street J., Jan. 12, 2001, at B1). There can be no serious doubt that legal advertising results in an increased number of lawsuit filings. The total spending reported above, as well as the increases in spending over time, dispel any notion to the contrary. But the resulting question is whether legal advertising is simply identifying potential claimants that otherwise would not have pursued legal recourse or whether it is, in fact, generating lawsuits that should not be filed. Again, there is certainly anecdotal evidence to support the latter.

For instance, in 2012 while presenting to the U.S. Food and Drug Administration (FDA) on his clinical experience with metal-on-metal hip implants, one orthopedic surgeon jokingly coined the term "loteriitis" to describe some asymptom-

atic patients' reactions upon learning that their implant had been recalled, which he explained as "a feeling that you just hit the lotto, that you can all of a sudden make a million dollars if you have pain. So that's a very common thing in Miami. There's a big yacht on the harbor, called the *Hip*." Transcript of July 28, 2012 Meeting of the Orthopaedic and Medical Devices Advisory Panel of the Medical Devices Advisory Committee, U.S. Food & Drug Admin., at 555, http://www.fda.gov/AdvisoryCommittees/Calendar/ucm306172.htm (then follow hyperlink at bottom of webpage) (last visited Jan. 3, 2014). The same physician later mentioned that attorney involvement complicates his evaluation of patients. *Id*. at 557 ("One of the things that you've got to find out is if there's a new or the old lawyer involved in the case.").

But beyond direct reports from physicians of this type, there is also interesting data to suggest that media attention significantly affects the rate of reported complications in the context of medical products. Such was the case with the 3M Capital Hip System, which was sold in the United Kingdom in the mid-1990s. *See* The Royal College of Surgeons of England, An Investigation of the Performance of the 3M Capital Hip System, (July 2001), http://www.rcseng.ac.uk/publications/docs/investigation_3m_capital_hip.html (last accessed 12/6/2013). To summarize, the British Medical Devices agency issued a hazard notice "advising that all patients who had received a Capital Hip should be recalled for clinical review" in 1998 after concerns were raised about the performance of the device. *Id*. at 9. Then in 1998, the manufacturer commissioned a full investigation into the product's performance, the results of which were ultimately published by the Royal College of Surgeons of England.

This investigation concluded that the Hazard Notice had a significant impact on the number of surgeries performed to remove the implants, referred to as the "revision rate." *Id*. at 1. Specifically, patients were almost *four times more likely* to undergo a revision surgery after the Hazard Notice than they were before it was issued. *Id*. The relative risk found by the study was 3.78. The study also found that patients had more revision procedures in the two years that followed the Hazard Notice than in the six years that preceded it. Given that the same device had been used in the same population of patients by the same group of surgeons, the investigators could not isolate a scientific cause of the starkly elevated revision rate—and ultimately ended up simply discarding the post-Hazard Notice data from their assessment of the true product performance. *Id*. at 64 ("The uncertainty in interpreting the changes in revision rate after the Hazard Notice led us to focus on the period before it was issued."); s*ee also id*. at 63 ("The increase in the rate of revision immediately after the Hazard Notice is difficult to interpret.").

The Capital Hip investigation also acknowledged that three factors could have played a role in increased revision rates following the Hazard Notice:

1. Increased scrutiny led to the identification of surgical failures that would not have otherwise been noticed, which begs the question of how severe the patient's pain and suffering truly was.
2. The Hazard Notice, "the associated adverse publicity," and the opportunity to have a revision funded by the manufacturers may have reduced the threshold for deciding to proceed with revision surgery among both patients and consultant orthopedic surgeons.
3. The "adverse publicity" may have created a presumption of widespread failure of Capital Hips and public anxiety among those who had received them.

Id. at 63–64. Thus, after thoroughly reviewing all of the available data, a team of scientists and physicians concluded that recalled products face a different level of scrutiny, which seemed to influence data on product performance and result in revisions or complaints that would not have otherwise occurred. Certainly, these three factors identified by the Capital Hip investigators would only be amplified by a media onslaught of the types now seen in U.S. litigation and described in The Silverstein Group's monthly reports. *See* Legal Advertising Intelligence Report (June/July 2013), *supra*.

Importantly, the Capital Hip experience is not an isolated occurrence. In many instances involving medical products—which mass tort litigation heavily features—recalls, regulatory notices, black-box warnings, or other forms of media attention that increase product scrutiny directly affect product performance data. Thus, when the plaintiffs' bar attempts to introduce this data during trials, as a matter of fundamental fairness to defendants, defense attorneys must be allowed to introduce the fact that widespread plaintiff attorney advertising affects the data. In fact, media campaigns funded by plaintiff attorneys not only provide credible, alternative explanations for the number of claims that balloon into mass tort litigation, but also often directly challenge the plaintiffs' credibility with respect to alleged side effects or symptoms.

Limited Briefing and Rulings on Admissibility of Attorney Advertising Evidence

Recently, in the DePuy Orthopaedic Products metal-on-metal hip implant litigation, in briefing to the court on attorney advertising admissibility, the manufacturer noted that the complaint rate for the product spiked after the device was withdrawn from the market in 2010, jumping from well under 50 complaints per month in 2005 through 2009 to over 450 complaints in a month shortly after the announcement of the recall in 2010. *See* Complaints Spiked After Recall (Def. Br., Rec. Doc. No. 52, at 4, *McCracken v. DePuy Orthopaedic Products, Inc*., No. 1:11-20485 (N.D. Ohio 2013) (demonstrative)).

Thus, the defendant argued, if the plaintiff intended to use complaint rates or revision rates as evidence of a product defect, then the manufacturer should be allowed to present evidence of attorney advertising as an alternative—and perhaps more credible—explanation for the post-recall spike in complaint- or revision-related performance data. Despite these arguments, the court granted the plaintiff's opposing motion *in limine*, preventing the defendant from introducing such evidence.

Similarly, in *In re Norplant Contraceptive Products Liability Litigation*, the defendants argued that because the plaintiffs intended to offer evidence of declining sales of the Norplant contraceptive product to demonstrate widespread side effects, the manufacturer should be entitled to present evidence of attorney advertising as an alternative cause for the decline in sales.

See Mem. in Opposition to Pls.' Mot. *in limine* to Exclude Defs.' Experts' Opinions Regarding "Negative Media Stories" and "Attorney Advertisements," at 3, MDL No. 1038, (E.D. Tex. Jan. 28, 1997). Specifically, the plaintiffs sought to exclude the defendants' expert opinions that negative media stories—including attorney advertising—caused the "surge in requests for Norplant removal[.]" *Id.* at 1.

Apparently unmoved by the defendants' arguments, the court granted the plaintiffs' motion *in limine*, ruling that the danger that the evidence would unfairly prejudice the plaintiffs substantially outweighed the evidence's probative value. *See* Order on Pls.' Mot. *in limine* to Exclude Defs.' Experts' Opinions Regarding "Negative Media Stories" and "Attorney Advertisements," MDL No. 1038, x. (E.D. Tex. Feb. 24, 1997). Specifically, the court noted the defendants' contention that the evidence of negative media stories, including attorney advertising, was relevant "to each plaintiffs' credibility and to rebut Plaintiffs' theory behind declining Norplant sales trend." *Id.* However, the court stated that since it had already excluded the evidence on Norplant sales trends, the evidence that the defendants sought to introduce was only relevant to challenge the plaintiffs' credibility—a topic on which a "wealth of evidence" was available from other sources that the court believed it had already admitted. *Id.*

In the *In re Welding Fume Products Liability Litigation*, which arose from claims of personal injuries similar to those caused by Parkinson's disease and allegedly caused by exposure to welding fumes, the defendants sought to introduce evidence of heavy advertising by plaintiff attorneys seeking clients for the lawsuits, as well as expert evidence on the efficacy of this type of advertising. *In re Welding Fume Products Liab. Litig.*, 1:03-CV-17000, 2010 WL 7699456, at *66–68 (N.D. Ohio June 4, 2010). The defendants argued that the evidence would ultimately demonstrate an alternative reason for the thousands of *Welding Fume* lawsuits filed by other welders. *Id.* In response, the plaintiffs moved to exclude the evidence of lawyer advertising and the evidence of the efficacy of lawyer advertising, arguing that the evidence was excessively prejudicial compared to its limited relevance. *Id.*

The United States District Court for the Eastern District of Ohio granted the plaintiffs' Motion to Exclude Evidence of Efficacy of Lawyer Advertising in full and granted the plaintiffs' Motion to Exclude Evidence of Lawyer Advertising in part. It held that "a jury's time would not be well-spent sifting through expert opinions regarding the efficacy of lawyer advertising and debating the viability of thousands of lawsuits that are not before it." *Id.* Therefore, it concluded that it was "necessary and appropriate to exclude both types of evidence, to the extent possible, because of its limited relevance, possibly prejudicial effect, and also as a matter of prudent trial management." *Id.*

In the holding, however, the court adopted three limited exceptions to the inadmissibility of the evidence of attorney advertising. First, it held that if the evidence demonstrated that a plaintiff saw an advertisement or a letter from a plaintiff's attorney that listed potential symptoms, and if the plaintiff saw this before visiting a doctor, then the defendants could ask the plaintiff about seeing the advertisement; however, under those circumstances, the defendants could not show the advertisement to the jury because the advertisement itself was nonetheless inadmissible evidence. Second, the court held that in questioning the plaintiffs' neurology experts, the defendants could address the fact that the plaintiffs had viewed advertisements that listed certain neurological symptoms. Once again, however, the defendants could not show the advertisement itself to the jury.

Third, and finally, the court held that if defendants elicited testimony from plaintiffs' employers on the historically low rates of claims by welders for neurological injury, the plaintiffs could then seek to elicit responsive testimony to establish both that the welders did not know how to make such claims and that they were not aware that such injuries were work-related. If the plaintiffs, however, did not limit their questioning of the employer to the time before 2002, then the "door would be opened for defendants to bring out the fact that, after 2002, the mass advertising by the plaintiffs' bar would have given welders more knowledge that their neurological injury was, in fact, possibly work-related. *Id.*

Although the court's conclusion in *In re Welding Fume Products Liability Litigation* excluded the lawyer advertising to the greatest extent possible, the exceptions adopted by the court have opened the door—albeit slightly—to making such evidence admissible. Thus, while this opinion is a step in the right direction for the defense bar, it is still problematic in that the court allowed questioning on attorney advertising while still excluding the evidence itself, despite the direct relevance of the advertisement under the exceptions.

The Evolution of Mass Torts Now Alters the Analysis and Weighs in Favor of Advertising Admissibility

Notwithstanding the apparent reticence of the judiciary to allow evidence of attorney advertising before a jury, there are logical, anecdotal, and statistical reasons to support admitting this evidence as described earlier, for instance, in the metal-on-metal, *Norplant*, and *In re Welding Fume* litigation.

In the medical-device litigation scenarios discussed above, the statistics beg a simple question: if the medical product is a constant both before and after a market withdrawal, then what explains the wide variance in product complaint data before and after a recall? Or, stated slightly differently, if a product has a complications rate of 1 percent before an onslaught of advertising but has a complication rate of 4 percent afterward when the product has not changed at all, is it reasonable to believe that 400 percent more people simply happened to complain, often of severe and disabling injuries, after the media barrage? Our defense attorney intuition tells us that this is farfetched, but courts obviously want more than intuition before allowing attorney advertising into a courtroom.

In pharmaceutical and medical device litigation specifically there is research that directly links both critical medical literature and product recalls to attorney advertising. In *The Effect of Publication on Internet-Based Solicitation of Personal-Injury Litigants*, the authors concluded: "We found that the publication of a study concerning the adverse drug events associated with gatifloxacin led to a rapid, dramatic, and sustained increase in Internet-based solicitation for litigants for personal-injury

claims." Juurlink, Park-Wyllie, & Kapral, 177 *Canadian Medical Association Journal* 1369, 1370 (2007). More specifically, in that study, the authors used advanced Internet search tools to track the number of websites soliciting legal claims related to the antibiotic gatifloxacin (Tequin, a drug of Bristol-Myers-Squibb) before and after an article was published in the *New England Journal of Medicine* finding an association between use and the development of hypo- and hyperglycemia in patients. *Id.* In fact, the research found increases in the number of websites advertising for plaintiffs after online publication, print publication, and withdrawal of the product from the market. *See* Juurlink, Park-Wyllie, & Kapral, The Effect of Publication on Internet-Based Solicitation of Personal-Injury Litigants, 177 *Canadian Medical Association Journal* 1369, 1370. And the increased web activity continued for at least a one-year period after the article reporting the research became available. *Id.*

In the more general product liability context, there are similar—if not more egregious—examples of attorney-driven mass tort litigation. In *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, the author described a case from south Texas in which attorneys sought certification of a class of rifle owners based on claims relating to an alleged defect in the control and locks of a certain model. *See* Mullenix, *supra*, at 434–35 (citing *Remington Arms Co., Inc. v. Luna*, 966 S.W.2d 641 (Tex. App. 1998) (review denied)). In that case, the appellate court ultimately "concluded that 'a careful reading of the entire record suggests a lack of interest beyond the four named plaintiffs and even some indifference among them.'" *Id.* at 435. The author reasoned that solicitation of claimants by plaintiff attorneys has effectively changed the way that claims in both mass torts and consumer class actions are created, opining that "[t]he concept of the party-plaintiff has been diluted, and this in turn contributes to the idea that the attorneys in these litigations essentially are free agents who identify the problem, broker and draft the legislative compromise, and then seek ratification of the court." *Id.* at 435.While this may, at first blush, appear to be an extreme take on the issue, it highlights an important point: the landscape of litigation has, indeed, changed, and the impetus for a not-insubstantial number of mass tort actions now appears to be attorney advertising. As such, despite the perceived prejudice surrounding the admission of legal advertising evidence at trial, such evidence is more relevant now than ever expected, particularly in the mass tort product liability context. Moreover, while courts may be reluctant to discard the notion of the "social benefit" aspect of attorney advertising to which the Supreme Court alluded in *Bates*, the available data suggests that such advertising may not actually provide the benefits initially anticipated. These considerations weigh in favor of reevaluating the Rules 401 and 403 analyses on admissibility of legal advertising evidence.

In sum, it is time for the courts to more seriously consider admitting this evidence. The era of one-off litigants and uncompromised jurors has passed. In the current advertising-fueled environment, statistics show that jurors have been exposed to, and likely influenced by, hundreds of millions of dollars worth of advertising before they ever reach the courthouse doors. Therefore, now more than ever, it is imperative that jurors be presented with complete information about the impetus behind the mass tort litigation and the potential effect that attorney advertising may have played—particularly when expert evidence is proffered on the subject.

In urging the courts to do so, the arguments that favor admissibility under Federal Rules of Evidence 401 and 403 may be best framed around the following: (1) increased scrutiny of a product leads to an increase in complaints, adverse events, or both, which, in turn, alters the data on actual product performance; (2) legal advertising by personal injury law firms increases scrutiny of product performance; and (3) legal advertising by personal injury law firms seeking clients is known to increase after medical literature reports risks or product recalls.

Rather than relying on mere intuition, we have research and data to bolster the first and third arguments above. And the second is such a common-sense framework that it strains credulity for a plaintiff's attorney to argue the contrary. It must be true that legal advertising increases awareness and identifies claimants. Otherwise, it would not amount to a $750 million a year industry.

Conclusion

We are under no illusion that evidence of attorney advertising can easily be brought before a jury. With the shift in the manner that mass tort litigation is being initiated, however—particularly in pharmaceutical and medical device product liability litigation—such evidence is increasingly relevant to a jury's determination of a plaintiff's claim. In a world of massive personal injury advertising budgets, it should no longer be sufficient for a plaintiff attorney simply to argue ipso facto that a product must be defective because it was recalled or because of an elevated rate of consumer complaints. Research shows that such data can be—and likely has been—manipulated. Thus, while the plaintiffs' bar will always argue that the risk of unfair prejudice to plaintiffs outweighs the probative value of introducing evidence of legal advertising, there are an ever-increasing number of arguments available that should help tip the Federal Rule of Evidence 401 and 403 balancing act closer to the conclusion that such evidence is, in fact, admissible. Given the available data, it certainly should garner more than a perfunctory denial by the courts. FD

In many instances involving medical products—which mass tort litigation heavily features—recalls, regulatory notices, black-box warnings, or other forms of media attention that increase product scrutiny directly affect product performance data.