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For the Hearing

Examining Ethical Responsibilities Regarding Attorney Advertising

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Thank you Mr. Chairman for the opportunity to testify before this subcommittee on the issue of attorney drug injury advertising. As a member of the bar, and of the larger legal community, I believe it is our duty as lawyers to take great care in the way that medical information is conveyed to the public through advertising.

I would like to begin by providing some context on drug injury litigation and the market for drug injury advertisements. I will then describe some of the content I observed in drug injury advertisements, and summarize the research to date on how consumers respond to the medical information in these ads. I will then identify the regulatory challenges and opportunities presented by the advertising market, and some possible paths forward.

I. Drug Injury Litigation

The Food and Drug Administration (FDA) is responsible for approving new drugs for the market.¹ For a new drug to be approved, the drug company must show that the drug is safe, efficacious, and that the benefits of the drug exceeds the harm.² Sometimes, the FDA might approve a drug that turns out to have a dangerous side effect not disclosed in the drug's labeling. These side effects are known as "adverse drug reactions."³ For example, if the drug is taken for a long period of time, it might increase the risk that you will develop some other medical problem. Alternatively, the drug might place certain subpopulations - like the elderly or pregnant women - at increased risk of a side effect.

When a patient experiences an adverse drug reaction, they may have a basis for bringing a lawsuit against the drug company for failing to warn them of the side effect. To win a failure to warn case, the patient generally must show that the drug company knew or should have known of the side effect and disclosed it on the drug's label.⁴

A patient seeking to bring a failure to warn claim against a drug company can hire a lawyer and bring a single lawsuit against the drug company. When hundreds or thousands of patients bring these claims they can be consolidated into what is known as a "mass tort claim."⁵

Mass tort claims are different from class action lawsuits. In a class action, a single lawyer or law firm will represent everyone who is affected by the alleged wrongdoing.⁶ If a class member

¹ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (2012).

² *Id.* § 102(d), 104(d).

³ WORLD HEALTH ORG., *INTERNATIONAL DRUG MONITORING: THE ROLE OF NATIONAL CENTERS*, WHO TECH REP. NO. 498 (1972) (defining adverse drug reaction as "a response to a drug that is noxious and unintended and occurs at doses normally used in man for the prophylaxis, diagnosis, or therapy of disease, or for modification of physiological function."). See also Brian Chen, John Restaino & Elizabeth Tippet, *Key Elements in Adverse Drug Reactions Safety Signals: Application of Legal Strategies*, CANCER POLICY: PHARMACEUTICAL SAFETY (CANCER TREATMENT AND RESEARCH) (Eds. June McKoy & Dennis P. West, 2018).

⁴ See e.g., *Pliva v. Mensing*, 131 S. Ct. 2567, 2573-74, 2577 (2011); *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). See also STEVEN GARBER, RAND INST. FOR CIVIL JUSTICE, *Economic Effects of Product Liability and Other Litigation Involving the Safety and Effectiveness of Pharmaceuticals* 19 (2013).

⁵ Deborah Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 107, 115 (2010).

⁶ FED. R. CIV. PRO. 23(g) (2012) (appointing class counsel).

does not want to be represented by that lawyer or wants to file their own lawsuit, they need to opt out.⁷ The lawyer for the class does not need to advertise to get everyone to join the lawsuit; the court will treat all the affected people as part of the lawsuit. By contrast, mass tort claims involve hundreds or thousands of individual plaintiffs, each of whom have their own lawyer.⁸

The average American that has suffered an adverse drug event cannot afford to hire a lawyer on an hourly basis to litigate what will likely be a very complex case. Instead, they typically hire a lawyer on a contingency basis, where the lawyer receives a portion of the amount the client recovers.⁹ The more a plaintiff recovers, the more valuable the case for a lawyer working on contingency. Drug injury cases can be quite valuable because the plaintiff may have suffered a very serious medical problem, or lost a loved one to the adverse medical event. Consequently, there is competition among lawyers to identify potential clients and file individual claims on their behalf in court.

Drug injury advertising is big business in the United States. Based on national advertising data I obtained from Kantar Media, 53,526 drug injury advertisements¹⁰ were run on national cable and national broadcast networks over the one year period spanning July 1, 2015 to June 30, 2016 (hereinafter “2015/2016”).¹¹ Kantar’s data estimates the cost of these advertisements at approximately \$114 million.

Lawyers generally do not make up drug injury claims out of thin air.¹² Instead, they monitor existing systems for identifying and responding to adverse medical events.¹³ The FDA maintains a reporting system for doctors, patients, and the drug manufacturer to report adverse drug events.¹⁴ Data from the adverse event reporting system is available to researchers, and the FDA also

⁷ *Id.* 23(c)(2) (providing for notice to class members of the right to opt out).

⁸ See Paul D. Rheingold, *How Leadership Arises in MTL; Litigation Groups*, LITIGATING MASS TORT CASES § 7:5 (2017) (“Rare is the mass case in which there is only one law firm representing all plaintiffs. In some mass litigations, there may be thousands of law firms[.]”). If the case is consolidated into a Multidistrict Litigation in federal court, a group of lead counsel will be appointed to lead the litigation. *Id.*

⁹ Task Force on Contingent Fees of the A.B.A.’s Tort Trial & Insurance Practice Section, *Contingent Fees in Mass Tort Litigation*, TORT TRIAL & INS. PRAC. L.J. 108 [hereinafter “Task Force”] (describing contingent fee arrangements).

¹⁰ By “advertisements” I mean advertising “spots” that were broadcast.

¹¹ This figure does not include advertising that was broadcast locally.

¹² Paul Rheingold has previously noted ethical issues with respect to “advertising for cases before it is understood what injury a product has caused or whether there was a potential liability case.” Paul. D. Rheingold, *Mass Tort as Big Business*, LITIGATING MASS TORT CASES § 14:25 (2017). See also Daniel Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 333 (2013) (questioning whether “the lawyer’s drive to be ‘first to air’ with commercials preclude[s] a full and complete investigation of the negative study data or new warnings”). My research has not investigated the strict accuracy of the medical claims in mass tort advertising. Instead, my focus is on the way that information is presented to consumers, and whether practices can be improved in that regard.

¹³ Task Force, *supra* note 9. (“[T]he process often begins with a report that a drug or other product has been found to cause injury. Typically advertising by lawyers for potential clients begins almost immediately.”)

¹⁴ U.S. Food & Drug Admin., FDA Adverse Event Reporting System (FAERS) Public Dashboard, <https://www.fda.gov/drugs/guidancecomplianceregulatoryinformation/surveillance/adversedruggedeffects/ucm070093.htm> (last visited June 19, 2017). See also Brian K. Chen & Y. Tony Yang, *Post-Marketing Surveillance of Prescription Drug Safety: Past, Present & Future*, 34 J. OF LEGAL MED., 193, 201 (2013).

conducts its own analysis.¹⁵ Where researchers discover patterns of adverse events, that information is disseminated through scientific journals and sometimes the news media. Evidence of adverse events might also prompt the FDA to act. The FDA might, for example, demand that the manufacturer relabel the drug, or conduct a formal risk evaluation and mitigation strategy (“REMS”), and post that information on its website.¹⁶

Attorneys appear to be monitoring these information sources to assess whether they could form the basis for drug injury claims. They will then use the new information about adverse drug events in advertising campaigns to recruit potential plaintiffs.¹⁷ A study by David Juurlink and others found that attorney solicitations on the internet increased substantially after the online publication of a study identifying risks associated with a drug.¹⁸ A study I published with Brian Chen from the Arnold School of Public Health at the University of South Carolina revealed that attorney advertising on television tended to peak in connection with FDA safety actions, such as a drug relabeling.¹⁹

Drugs featured in attorney advertising are usually still available on the market.²⁰ It is very rare for FDA intervention to result in pulling a drug from the market completely. More commonly, the manufacturer will add a new warning to the drug label, and maybe even a so-called “black box” warning.²¹ Consequently, a patient who is currently taking a drug (or who might be prescribed that drug in the future) might see an attorney advertisement soliciting viewers for a lawsuit involving that drug. The medical information in these ads will be important to them.

These advertisements offer both public health benefits and costs. We are only in the early stages of understanding how they are affecting Americans and their health decisions. Since much of this testimony is devoted to potential costs, I should note one substantial benefit these advertisements could provide. They disseminate drug safety information. When new scientific evidence comes out, or the FDA issues a drug safety notice, these advertisers take to the airways and transmit that information directly to the public. And they spend their own money to do it. Done right, this type of advertising could be really helpful to consumers. However, as I describe in greater detail below, misleading advertising could be equally harmful.

¹⁵ *Id.*; SENTINEL, *Background*, <https://www.sentinelinitiative.org/background> (last visited June 19, 2017) (“The Sentinel Initiative began in 2008 as a multi-year effort to create a national electronic system for monitoring the performance of FDA-regulated medical products); MA Robb *et al.*, *The US Food & Drug Administration’s Sentinel Initiative: Expanding the Horizons of Medical Product Safety*, 21 PHARMACOEPIDEMOLOGY & DRUG SAFETY 9 (2012).

¹⁶ Chen & Yang, *supra* note 14, 207-08

¹⁷ Task Force, *supra* note 9.

¹⁸ David N. Juurlink *et al.*, *The Effect of Publication on Internet-Based Solicitation of Personal-Injury Litigants*, 177 CAN. MED. ASSOC. J. 1369, 1370 (2007).

¹⁹ See Brian K. Chen & Elizabeth C. Tippet, *Association of Attorney Advertising and FDA Action with Prescription Claims: A Time Series Segmented Regression Analysis*, 38 DRUG SAFETY 1169, 1172 (2015).

²⁰ See Elizabeth C. Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J. L. & MED. 7, 7 (2015) (study of drug injury ads in 2009, finding that “almost all such ads involved drugs or devices that have not been recalled and remain on the market”).

²¹ Chen & Tippet, *supra* note 19, at 1173 (listing safety actions associated with advertised drugs); Chen & Yang *supra* note 14, at 204-05 (describing FDA’s authority to require manufacturers to engage in a Risk Evaluation and Mitigation Strategy).

Regulators and researchers have invested a lot of resources over the years into understanding and regulating direct-to-consumer pharmaceutical advertisements.²² They do so because pharmaceutical advertisements contain health information that influences the medical decisions of Americans. We have a collective interest in ensuring that pharmaceutical companies do not run advertisements that wildly exaggerate the benefits or downplay the risks of medications. It would not be fair to the consumers facing a medical problem and trying to decide what to do.

Drug injury advertising also contains medical information, but sends the opposite message. Instead of sending the message, “take this drug, it will improve your health,” drug injury advertisements tend to send the message, “if you take this drug, something very bad might happen to you.” As I will explain in greater detail below, attorney advertising has not been regulated by the FDA. It is only regulated pursuant to state attorney ethics rules. And state bars do not seem interested in policing those ads.

The American people trust lawyers to self-regulate when it comes to our advertising and we need to take that duty seriously. At minimum, we should know how these ads influence consumers, and provide evidence-based guidance to our advertisers on how to present medical information in a way that is informative and not misleading. As I will explain in greater detail below, some of the key market players in this industry are not individual lawyers but amorphous legal networks of unknown membership, or private companies that are not law firms at all. We need to shine a light on their practices, and if they engage in deceptive advertising, litigators need to vote with their dollars and stop doing business with them.

II. Content of Drug Injury Advertising.

The content of drug injury advertising is likely familiar to anyone that has watched television recently. These ads generally start by identifying a drug and warning that the drug has been associated with a dangerous or serious side effect.²³ Typically, they continue to discuss these side effects throughout the ad.²⁴

Below is a transcript of the audio from the start of a recent advertisement from Knightline Legal, along with a screen shot of some of the visuals.²⁵

“Attention blood thinner users. Thousands of blood thinner users may have been exposed to serious risk by these dangerous medications. If you or a loved one

²² For examples of research involving direct to consumer pharmaceutical advertising, see Richard A. Hansen *et al.*, *Relationship of Pharmaceutical Promotion to Antidepressant Switching and Adherence: A Retrospective Cohort Study*, 61 PSYCHIATRIC SERVICES 1232 (2010); Daniel Hosken & Brett Wendling, *Informing the Uninformed: How Drug Advertising Affects Check-up Visits*, 31 INT’L J. INDUS. ORG. 181 (2013); Michael R. Law *et al.*, *Effect of Illicit Direct to Consumer Advertising on Use of Etanercept, Mometasone, and Tegaserod in Canada: Controlled Longitudinal Study*, 337 BRIT. MED. J. 557 (2008); Barbara Mintzes *et al.*, *Influence of Direct to Consumer Pharmaceutical Advertising and Patients’ Requests on Prescribing Decisions: Two Site Cross Sectional Survey*, 324 BRIT. MED. J. 278 (2002); Bennett Parnes *et al.*, *Lack of Impact of Direct-to-Consumer Advertising on the Physician-Patient Encounter in Primary Care: A SNOCAP Report*, 7 ANNALS FAM. MED. 41 (2009).

²³ Tippet *supra* note 20, at 29, 30.

²⁴ *Id.* at 20-21.

²⁵ KANTAR MEDIA, KNIGHTLINE LEGAL ADVERTISEMENT (broadcast between July 1, 2015 and July 1, 2016) (dataset on file with author).

used Xarelto or Pradaxa and suffered serious internal bleeding, call right now. Call Knightline Legal to speak with an experienced attorney . . .”

Figure 1. Advertisement from Knightline Legal



This advertisement has a mix of content, some of which is transparent about the purpose of the advertising, and some of which is less transparent. Transparent aspects of the ad include the sponsor’s name, which appears throughout the advertisement. This advertisement also uses the word “attorney” in the audio and in large font text in the middle of the ad - further signaling to the viewer that it is attorney advertising. Competing with this transparent language is the phrase “blood thinner alert” and the word “Attention” which appears at the start of the ad in large letters, which might imply that the advertisement has a different purpose than soliciting claims for a lawsuit. Although I have not tested how consumers respond to this particular ad, I would consider this advertisement “average” in the sense that it contains strong risk-related language but also provides numerous cues to the viewer about its purpose.

Other advertisements are considerably less transparent about their purpose, and may frame their message with language like “warning” and “medical alert”, along with medical and fear-inducing imagery, and fewer cues about the true purpose of the advertising.²⁶ As I documented in previous research, these types of ads look like public service announcements or government warnings.

The advertisement depicted in Figure 2, is one such ad. The sponsor of the ad was not disclosed in any discernable way.²⁷

²⁶ See *Tippett, supra* note 20, at 26-28. See also *Schaffzin, supra* note 12, at 355 (noting the use of cautionary language such as “DEATH” “WARNING” and “DANGER”).

²⁷ See *KANTAR MEDIA, supra* note 25.

Figure 2: Advertisement, Unknown Sponsor



The narration in this advertisement states:

“Have you taken the blood thinner Xarelto? If so, please listen carefully. Xarelto, a new blood thinner on the market since 2011 has caused incidents of uncontrollable bleeding, hemorrhaging, and even death. The makers of Xarelto sold the drug knowing that it had no antidote to reverse its blood thinning effects. If you’ve suffered hemorrhaging, gastrointestinal bleeding, stroke or if a loved one has died after taking Xarelto, call 1-888-294-9999 now to see if your case qualifies for substantial cash compensation.”

The screenshot lists the adverse drug events at issue, along with a gruesome picture. Although it contains a disclaimer not to “stop taking a drug without first consulting your doctor,”²⁸ the disclaimer is the smallest text on the screen.

The advertisement does not identify itself as attorney advertising, nor does it use other language that would signal its persuasive purpose to the viewer, such as the words “sue” or “lawsuit” or a picture of a lawyer or a courtroom. This is problematic, partly because states would have difficulty enforcing ethics rules against an undisclosed sponsor. It is also a problem if some viewers do not recognize it as attorney advertising. Without knowing the intent of the advertisements, or who is sponsoring it, consumers will have trouble critically analyzing the advertising message. Consumers are actually pretty sophisticated at processing marketing messages but they need to be provided enough cues to trigger their preexisting knowledge

²⁸ Id.

structures about advertising and persuasion. While many viewers may nevertheless recognize the content as attorney advertising, my own research suggests that some viewers do not.

Some advertisements invoke scientific research or FDA warnings. Figures 3 and 4 illustrate screenshots from an advertisement involving the drug, Invokana.²⁹

Figure 3. “Medical Warning” language.



Figure 4. Invoking the FDA.



This ad offers the comparative benefit of the displaying firm’s name throughout. Viewers that recognize the name of the firm (or notice that it looks like the name of a law firm), could then contextualize the FDA references and the medical alerts. On the other hand, there is a respect in which the ad leverages the FDA’s status as a credible source of risk information to capture viewers’ attention and persuade them to take the message more seriously. We know from research on marketing and decision-making that warnings, strong imagery and strong language tend to increase

²⁹ Id.

risk perceptions, although they haven't been studied specifically in the context of attorney advertising.³⁰

The use of dire medical warnings is somewhat puzzling because the target audience for the advertisements consists of people that have already been injured by a drug. A warning is of little use to consumers that have already been harmed.³¹ In the course of my research, I had occasion to ask an advertising attorney about the warnings. The attorney explained that advertisers struggle to capture viewers' attention and have only a few seconds to convey their message. To paraphrase, they did what was necessary to connect with injured consumers, who may not even realize their medical condition was related to a drug they took at some point in the past. In other words, it would appear that the cautionary language was not principally intended to influence the prospective medical decisions of uninjured consumers. Any such influence would be, in essence, a side effect of the larger goal of identifying potential clients.

It is important for us as a profession to be honest about the possibility that these ads produce possible "side effects," in the form of risk perceptions that exceed the actual risk these drugs and medical devices present. In 2016, the American Medical Association issued a statement about drug injury advertising. One board member cautioned that drug injury advertising "has the potential to frighten patients and place fear between them and their doctor . . . [b]y emphasizing side effects while ignoring the benefits."³² He concluded that "these ads jeopardize patient care."³³ When the doctors caring for patients taking these drugs are telling us there is a problem, we need to take that seriously.

For example, the birth control drug, Yaz, has been the subject of considerable drug injury advertising, and associated litigation. The increased risk associated with this drug is subject to medical debate. But according to the drug's updated labeling, the risk for a women developing blood clots on most birth control pills is something in the neighborhood of 6 out of every 10,000 women.³⁴ Some studies show that the risk from Yaz is around the same, others show that it's more, maybe almost twice the risk.³⁵ This information is important, and patients might consider asking a doctor about switching to another drug. But the way in which some ads frame the risk-related information suggest the risk is much more acute. To be sure, the drugs featured in these ads vary considerably in their risk profile and the trade-offs they present: the absolute risk may be different, as well as the comparative risk with respect to available substitutes. These drugs also vary in terms of how critical they are to the health of the person taking them. But in my mind, that is all the more reason to approach these ads in a nuanced and data-driven way.

³⁰ See PAUL SLOVIC, *THE PERCEPTION OF RISK*. (2016); Jennifer Argo, & Kelly Main, *Meta-analyses of the effectiveness of warning labels*, 23 J. OF PUB. POL'Y AND MARKETING 193 (2004); Michael Wogalter, Gail Fontenelle & Kenneth Laughery, *Behavioral effectiveness of warnings*, 29 PROCEEDINGS OF THE HUMAN FACTORS SOCIETY ANNUAL MEETING 679 (1985). Judy Edworthy & Austin Adams, *WARNING DESIGN: A RESEARCH PROSPECTIVE* (1996).

³¹ Tippet, *supra* note 20, at 40-41.

³² Am. Med. Assoc., *AMA Adopts New Policies on Final Day of Annual Meeting*, (June 15, 2016), <https://www.ama-assn.org/ama-adopts-new-policies-final-day-annual-meeting>.

³³ *Id.* See also Schaffzin, *supra* note 12, at 355 (characterizing drug injury advertising as a "threatening part of the doctor-patient dialogue").

³⁴ See BAYER HEALTHCARE, *Yaz Full Prescribing Information*, 28 http://labeling.bayerhealthcare.com/html/products/pi/fhc/YAZ_PI.pdf?WT.mc_id=www.berlex.com.

³⁵ *Id.* at 27.

One of the challenges of conducting research in this area is that little is known about how consumers respond to the medical information in these ads, and whether they influence consumer decision-making. Although a large body of research has developed over the years on the influence of pharmaceutical advertising on consumer decision making,³⁶ their findings do not necessarily translate to this context.

I can however, convey to you the current state of the scientific literature on these ads, as well as describe generally the preliminary findings of my ongoing research projects with experts from other disciplines.

First, I am not aware of any large scale observational research that establishes a causal link between drug injury advertising and patient decisions. It is possible that attorney advertising has no aggregate effect on whether consumers decide to discontinue a prescribed medication. Brian Chen and I conducted a study of Medicare prescription reimbursement data over a one year period, and did not find any evidence that increased drug injury advertising volume was associated with a decrease in prescription rates.³⁷ However, the data and contextual limitations of our study prevented us from drawing any strong causal inferences from the results we observed.

Smaller studies provide some support for consumer influence. A study from Janssen Pharmaceuticals identified thirty-one patients that stopped taking their prescription for a blood thinning medication “without consulting their physician after viewing” drug injury advertisements.³⁸ The review reported that 75% of these patients later experienced a stroke, and two died.³⁹ While Janssen Pharmaceuticals is not necessarily an unbiased source on these questions, the study was based on the federal adverse event database.

A few studies have been conducted on the relationship between drug injury advertising and patient perceptions of pelvic mesh, which has been the subject of considerable drug injury advertising in recent years. These studies consisted of patient surveys in urology offices. One study suggested that patients were more likely to express uncertainty about safety of the mesh if they first learned about it through attorney advertising.⁴⁰ Another study found that patients that relied on television for information tended to be more aware of an FDA announcement relating to the mesh.⁴¹ However, they were also more likely to believe (incorrectly) that the mesh was recalled.⁴² My co-authors and I recently completed a small study of 170 female urology patients, which found that about 88% of patients surveyed had seen a drug injury advertisement relating to

³⁶ Id.

³⁷ See Chen & Tippet, *supra* note 19, at 1173.

³⁸ Paul Burton & W. Frank Peacock, *A Medwatch Review of Reported Events in Patients Who Discontinued Rivaroxaban (Xarelto) Therapy in Response to Legal Advertising*, HEART RHYTHM SOC'Y, vol. 2, May 2016, at 248.

³⁹ Id.

⁴⁰ Michelle Elaine Koski et al., *Patient Perception of Transvaginal Mesh and the Media*, 84 FEMALE UROLOGY 572, 576 (2014).

⁴¹ Christopher F. Tenggardjaja et al., *Evaluation of Patients' Perceptions of Mesh Usage in Female Pelvic Medicine and Reconstructive Surgery*, 85 FEMALE UROLOGY 326, 327 (2015).

⁴² Id.

mesh.⁴³ Patients that reported more frequent exposure to the advertising also associated the mesh with higher levels of risk.

I have been collaborating with Jesse King, a marketing professor at Weber State University, on some experimental research testing the effect of different types of advertising content on consumer decisions. I can report preliminarily on the general findings of these unpublished studies. In one of the studies, we tested an actual direct-to-consumer pharmaceutical advertisement, against a drug injury advertisement and a typical consumer product advertisement as a control. Almost everyone (98%) correctly identified the sponsor of the pharmaceutical ad and the control advertisement, but only about 75% were able to recognize the drug injury ad as attorney advertising. We ran another study comparing people's response to a drug injury ad that was very transparent about its purpose to one that contained a lot of cautionary language and did not identify the attorney sponsor of the ad ("low transparency"). The low transparency ad was harder for people to identify as attorney advertising and was associated with a lower reported willingness to fill a prescription.

We also observed some limited evidence that the advertisements may be distorting risk perceptions. We tested a drug injury advertisement involving the antidepressant drug, Paxil. The advertisement claimed that it posed a risk to pregnant women, and in particular, the fetus of pregnant women. Logically, this risk information should have no effect on men. However, after seeing a drug injury advertisement, both men and women in the study indicated that they would be less likely to take Paxil than those who were in the control group or who were shown a pharmaceutical ad.⁴⁴

III. Challenges and Opportunities in Regulating Attorney Advertising.

Attorney advertising is regulated at the state level, through enforcement of attorney ethics rules. Broadly speaking, state ethics rules generally prohibit attorneys from false or misleading advertising. Forty states⁴⁵ use language similar to the American Bar Association's ("ABA") Model Rules of Professional Conduct Rule 7.2, which defines false or misleading as "contain[ing] a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."⁴⁶ Those that depart from the model rules are

⁴³ Elizabeth Tippett, Jesse King, Vincent Lucente, Sonia Ephraim, Miles Murphy & Eileen Taff, *Does Attorney Advertising Influence Patient Perceptions of Pelvic Mesh?* (Working Paper).

⁴⁴ The term of art within the scientific literature for this problem is known as the "spillover" effect, whereby benefit or risk-related information "spills over" to other patient populations to whom the information does not apply. A spillover effect has been observed in connection with FDA warnings and direct to consumer pharmaceutical advertisements. Robert Valuck, et al, *Spillover effects on treatment of adult depression in primary care after FDA advisory on risk of pediatric suicidality with SSRIs*, 164 AMER. J. OF PSYCHIATRY 1198 (2007); E. Ray Dorsey et al. *Impact of FDA Black Box Advisory on Antipsychotic Medication Use*, 170 ARCH. INTERN. MED. 96 (2010); John Calfee, *Public policy issues in direct-to-consumer advertising of prescription drugs*, 21 J. OF PUB. POL'Y & MARKETING 174 (2002); Staci Dusetzina, et al., *Impact of FDA Drug Risk Communications on Health Care Utilization and Health Behaviors: A Systematic Review*, 50 MED CARE 466 (2012).

⁴⁵ Tippett, *supra* note 20, at 32.

⁴⁶ Model Rules of Professional Conduct r 7.2 (AM. BAR ASS'N 2016).

somewhat similar, although they tend to offer specific additional examples of what they consider to be misleading content.⁴⁷

The First Amendment places an outer limit on restrictions states can impose on attorney advertising. Attorney advertising qualifies as protected commercial speech, unless it is (1) “inherently misleading”⁴⁸ or (2) “experience has proved that in fact such advertising is subject to abuse.”⁴⁹ If advertising content only qualifies as “potentially misleading,” states cannot impose rules restricting such speech unless it can show a “substantial interest and the interference with speech [is] proportional to the interest served.”⁵⁰ This generally requires some proof that consumers are harmed, and that the rule is no “broader than reasonably necessary to prevent” the harm.⁵¹

The Supreme Court gives states more latitude to impose disclosure requirements on advertising, provided the requirement is “reasonably related to the State’s interest in preventing deception of consumers.”⁵² That said, the Supreme Court generally prefers that states make individual determinations as to false or misleading statements, rather than imposing prophylactic rules, advising “would-be regulators [to incur] the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”⁵³

In prior research, I assess whether some of the content in drug injury advertising might be considered misleading. I conclude that drug injury advertising could be considered misleading when it mimics public service announcements through the use of language like “medical alert,” “warning” or “consumer alert” and other graphics or language that obscure the nature of the advertisements. Such a determination would be consistent with other ethics rulings involving advertising that attempted to obscure its purpose.⁵⁴ It would also be consistent with guidance from

⁴⁷ Tippet, *supra* note 20, at 32. *But see Ass’n of Prof’l Responsibility Lawyers*, 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE 21 (2015) (providing examples of “elaborate” rules and “standards . . . that are presumptive violations of the rules”).

⁴⁸ *In re R.M.J.*, 455 U.S. 191, 203 (1982). Content will sometimes be considered deceptive based on reasonable inferences about how consumers interpret the information. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 652 (1985). For example, the statement “if there is no recovery, no legal fees are owed by our clients” was considered inherently misleading because it “would suggest that employing [the advertising lawyer] . . . would come entirely free of charge” when in fact they would be required to pay for costs. *Id.* Although the statement was technically accurate as a matter of legal terminology, it was unreasonable to expect a layperson to know the difference between legal fees and costs. *Id.* See also *Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311, 321 (7th Cir. 1992) (“*Zauderer* teaches that consumer surveys are not compelled by the first amendment when the alleged deception although implied, is conspicuous.” *Id.*).

⁴⁹ *In re R.M.J.*, 455 U.S. at 203; *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 100 (1990).

⁵⁰ *Id.*

⁵¹ *Peel*, 496 U.S. at 107.

⁵² *Zauderer*, 471 US at 651.

⁵³ *Id.* at 626.

⁵⁴ S.C. BAR ETHICS ADVISORY COMM., ETHICS ADVISORY OP. 13-05, 2013 WL 7196338, at *1 (2013) (use of phrase “legal helpline” or “injury hotline” suggested non-profit or government affiliation); CONN. BAR ASSOC. COMM. ON PROF’L ETHICS, INFORMAL OP. NO. 01-03, 2001 WL 694581, at *3 (2001) (phrase “free public service” suggested advertiser was a non-profit); STATE BAR OF CAL., STANDING COMM. ON PROF’L RESP. & CONDUCT, FORMAL OP. 2004-167, 2004 WL 3079032, at *2 (2004) (“workers compensation relief center” suggested official government status); A.B.A. Comm. on Prof’l Ethics & Grievances, Formal Op. 178 (1938) (demand letter formatted as a summons “palpably misleading”); Fla. Bar v. Doe, 634 So. 2d 160,161 (Fla. 1994) (advertisement labeled “public

the Federal Trade Commission, which considers ads that “mimic the form of new reports, talk shows, or other independent programming” to be deceptive.⁵⁵

However, the question of whether some drug injury advertising qualifies as misleading is, for now, a purely academic question. I am not aware of any instance in which any state has ever sought to discipline any attorney in connection with drug injury advertising. I also found no evidence that the Federal Trade Commission (FTC) or the FDA has ever opined on drug injury advertising, even to provide guidance on best practices.

Suppose however, that states followed the Supreme Court’s guidance to engage in individualized determinations “distinguishing the helpful from the misleading[.]” Their task would be complicated by the third-party aggregators that now dominate the market for attorney advertising.

The market for attorney advertising has produced somewhat of a division of labor between the mass tort attorneys who litigate claims, and those who advertise for potential clients.⁵⁶ In a previous study of drug injury advertising from 2009, I observed that only half of the top ten most prolific advertisers litigated with any frequency.⁵⁷ Advertisers that rarely litigate appear to base their business model on referrals to other lawyers. The advertising market has also become quite concentrated. My analysis of national advertising data from the one-year period between July 1 2015 to June 30, 2016 (“2015/2016”) indicates that the top ten advertisers produce 72% of the national advertising volume. See Table 1. The top three advertisers alone produce half the overall advertising volume.

service announcement” and “not an advertisement” misleading); *Farrin v. Thigpen*, 173 F. Supp. 2d 427, 445 (M.D.N.C. 2001) (disclaimer following deceptive content insufficient to cure deception).

⁵⁵ FTC, FREQUENTLY ASKED QUESTIONS: A GUIDE FOR SMALL BUSINESS, GENERAL ADVERTISING POLICIES (2008), 1998 WL 207800, at *10 (Apr. 1998); see also *FTC Seeks to Halt 10 Operators of Fake New Sites from Making Deceptive Claims About Acai Berry Weight Loss Products*, F.T.C., (Apr. 19, 2011), <http://www.ftc.gov/news-events/press-releases/2011/04/ftc-seeks-halt-10-operators-fake-news-sites-making-deceptive>.

⁵⁶ Task Force, *supra* note 9 (explaining that once a client is recruited through advertising, “the cases will take one of two paths. Some of the lawyers who now have individual clients will make demands or file suit on their behalf to try to recover for the client’s injuries. Others, however, will refer their cases in bulk to other lawyers who specialize in handling mass tort claims. The original lawyers will make the referrals in return for a percentage of the newlawyer’s percentage and perhaps some reimbursement of costs.”) See also Schaffzin, *supra* note 12, 331-32 (describing division of labor).

⁵⁷ Tippet, *supra* note 20, at 8.

Table 1. Most Prolific National Advertisers, 2015/2016

	Number of advertising spots aired	Percentage of national advertising volume
1. PULASKI LAW FIRM	11,491	21%
2. GOLDWATER LAW FIRM	10,298	19%
3. GOLD SHIELD GROUP	5,538	10%
4. KNIGHTLINE LEGAL	3,636	7%
5. FERRER, POIROT & WANSBROUGH	1,974	4%
6. AKIN MEARS LAW FIRM	1,828	3%
7. DRISCOLL FIRM	1,119	2%
8. GOZA & HONNOLD ATTORNEYS	1,049	2%
9. AVRAM BLAIR & ASSOCIATES	955	2%
10. RELION GROUP	948	2%

The most prolific national advertiser was the Pulaski Law Firm, which sponsored 11,491 advertising spots in the 2015/2016 period. However, the firm appeared in fewer than 20 cases on Bloomberg dockets in the last five years, suggesting it does not litigate much. The second most prolific advertiser, the Goldwater Law Firm, sponsored 10,298 advertising spots, and appeared in a similarly small number of cases on Bloomberg dockets. The firm advertises “co-counsel opportunities” on its website, stating, “We are one of the largest national advertising law firms in the United States and generate in excess of 10,000 new client inquiries per month. We co-counsel with experienced lawyers throughout the country and are always looking for new law firms to work with . . . if you would like to generate more tort cases for your law firm, please call[.]”⁵⁸

Some of the top advertisers are not traditional law firms. The third most prolific advertiser in the 2015/2016 period was listed as the “Gold Shield Group,” a registered trademark of MCM Services Group LLC (“MCM”).⁵⁹ That company advertises itself as a “full-service attorney advertising” company that produces advertising content, intake services, and “lead management” (“retain or refer your leads with 24-hour access”).⁶⁰ MCM uses its “buying power” to provide smaller firms with a “cost-effective and rewarding investment”⁶¹ through advertising. MCM

⁵⁸ *Co-Counsel Opportunities*, Goldwater Law Firm, <http://www.goldwaterlaw.com/co-counsel-opportunities-2/> (last visited June 18, 2017).

⁵⁹ GOLD SHIELD GROUP, Registration No. 4684241.

⁶⁰ MCM SERVS. GROUP, <http://mcmservicesgroup.com/> (last visited June 19, 2017).

⁶¹ *Legal Marketing Services from MCM Turn Your TV, or Search Engine Marketing Campaign into New Revenue*, MCM SERVS. GROUP, <http://mcmservicesgroup.com/lead-generation-services/legal-marketing-services/> (last visited June 19, 2017).

advertises an “ad portfolio” for lawyers to use.⁶² MCM does not appear to be a law firm. A website registered to MCM includes a disclaimer that the “Gold Shield Group does not provide legal advice” and is “an advertising group that represents lawyers solely and jointly advertising their services.”⁶³

Other top advertisers describe themselves as legal networks. Knightline Legal, the fourth ranked advertiser, includes a disclaimer on its website proclaiming that it is “not a law firm or referral service and does not provide legal representation” but that it is a “consolidated group of lawyers offering legal services to those who have been injured by dangerous drugs and medical devices.”⁶⁴ The Knightline Legal trademark is registered to Lucy Business Services LLC DBA Knightline Legal, a California LLC,⁶⁵ whose address appears to correspond to a post office box in Redwood City California.⁶⁶ Another top ten advertiser is Relion Group, whose disclaimer provides that it “is a consolidated group of participatory attorneys throughout the United States” and that a “list of participating attorneys” will be provided upon a written request.⁶⁷ Relion is a Delaware Corporation⁶⁸ with its headquarters in California.⁶⁹

The division of labor between those who produce the advertising and the lawyers who litigate mass tort claims presents both regulatory challenges and opportunities. First, these advertisers do not really fit the model through which attorney ethics rules are ordinarily enforced. Attorney ethics rules are typically enforced through complaints from clients or from competitors. However, drug injury advertisements are unlikely to produce complaints from clients. The consumers most likely to be inappropriately influenced by the ads are those who have not been injured by the drug. These individuals are not clients, and probably don’t know to make an ethics complaint (assuming they were even in a position to identify the lawyer responsible for the ad, and the state that issues the lawyer’s bar license.)

I also find it difficult to imagine that a drug injury advertiser would complain about a competitor in this space, given overall practices in the industry. Advertisers could in theory complain about their competitors but doing so might bring scrutiny of their own practices.

⁶² *Celebrating Fifteen Years of First-Class Law Firm Advertising*, MCM SERVS. GROUP, <http://mcmservicesgroup.com/law-firm-advertising-portfolio/> (last visited June 19, 2017).

⁶³ GOLD SHIELD GROUP, <http://www.herniameshalert.com/disclaimer/> (last visited June 19, 2017); *Notice, Disclaimers, and Terms of Use*, ICANN, <https://whois.icann.org/en/lookup?name=www.herniameshalert.com> (last visited June 19, 2017).

⁶⁴ *Disclaimer*, KNIGHTLINE LEGAL, <http://www.knightlinelegal.com/disclaimer> (last visited June 19, 2017).

⁶⁵ KNIGHTLINE LEGAL, Registration No. 4643581.

⁶⁶ GOOGLE MAPS, <https://www.google.com/maps/place/274+Redwood+Shores+Pkwy+%23441,+Redwood+City,+CA+94065/@37.5232514,-122.2544736,17z/data=!3m1!4b1!4m5!3m4!1s0x808f98a5c7054701:0xfb78acf1f13a697!8m2!3d37.5232472!4d-122.2522796> (last visited June 19, 2017). Knightline Legal’s LinkedIn Profile is also associated with this same address. Knightline Legal, LINKEDIN, <https://www.linkedin.com/company/knightline-legal> (last visited June 19, 2017).

⁶⁷ *Disclaimer*, RELION GROUP, <http://www.reliongroup.com/disclaimer.html> (last visited June 19, 2017).

⁶⁸ DEL. DEPT. OF ST.: DIV. OF CORPS, File No. 5378204, Relion Medial Group, Inc., incorporated Aug. 5, 2013.

⁶⁹ *Disclaimer*, *supra* note 67 (listing address of 32836 Wolf Store Road, Temecula, CA 92592); RELION MEDIA GROUP, Registration No. 3970426 (listed at same address).

Questionable practices by competitors instead provide cover for advertisers to engage in similar practices.

Attorney ethical transgressions are sometimes addressed and enforced through court proceedings, where the unethical conduct relates to the litigation in some way, like failing to preserve important documents. In those cases, the judge might scold attorneys for behaving unethically, or impose some other sanction, like paying for the other side's fees or costs. This enforcement mechanism also doesn't work for drug injury advertising because the lawyers litigating these cases are often different from the lawyers that engaged in the advertising. For example, there was a recent dispute in the news involving litigation over whether talcum powder is associated with ovarian cancer.⁷⁰ The lawyers for Johnson and Johnson claimed that the high volume of attorney advertising in the St. Louis area was tainting the jury pool, and asked the court to move the venue.⁷¹ To the extent that any of the St. Louis advertisements were misleading, it would not help to blame the lawyers representing the plaintiffs – they probably were not the attorneys that sponsored the advertising.

Second, the threat of discipline under state ethics rules is somewhat theoretical when it comes to these third-party entities. Knightline Legal is a corporate entity with a P.O. Box in California. Whose license is at stake if Knightline Legal sponsors an ad that does not comply with ethics rules? That would not be an easy question to answer. Relion Group makes a list of participating attorneys available, but how would a state select the individual attorney to discipline for any misleading advertising? Third party corporate entities create a similar diffusion of responsibility. State ethics rules would not extend to a corporate entity like MCM, unless they engage in the unauthorized practice of law. States could perhaps discipline attorneys that use MCM's services but that attorney may have only had minimal involvement, if any, in the production of the ad's content. In sum, if a particular advertisement cannot be traced to a lawyer whose license may be under threat for its misleading content, states will have difficulty enforcing ethics rules through disciplinary proceedings alone.

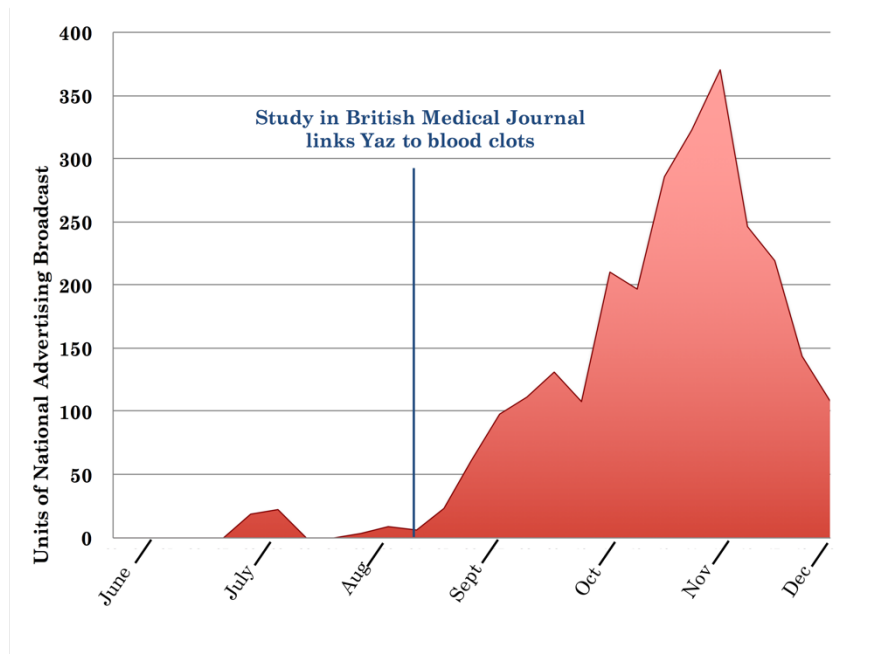
At the same time, the concentrated nature of the advertising market also presents opportunities. Because such a small number of advertisers dominate the market, improving advertising practices within this small group of market players would have a substantial impact on the quality of national advertising overall. In addition, the advertisers in this market are nimble. They can pile into the market quickly and adapt their content quickly. For example, in 2009, the British Medical Journal published a study linking the birth control drug, Yaz, with increased risk of blood clots.⁷² I observed a strong uptick in advertising volume within a few weeks of the publication of that study. See Figure 5.

⁷⁰ Jonathan D. Rockoff & Sara Randazzo, Mass Tort Ads Raise Concerns about Influence on Juries (Apr. 14, 2017, 5:30 AM), <https://www.wsj.com/articles/mass-tort-ads-raise-concerns-about-influence-on-juries-1492162200>.

⁷¹ Id.

⁷² Øjvind Lidegaard *et al.*, Hormonal Contraception and Risk of Venous Thromboembolism: National Follow-Up Study, 339 *British Med. J.* (2009).

Figure 5. Yaz-Related Television Advertising Following Publication of British Medical Journal Study (2009).



Attorney advertising has also reached a high level of sophistication when it comes to testing content and identifying which content produces the most responses. An attorney interviewed by the ABA explained that “every commercial [they] run has a unique phone number” that enables them to “know exactly what works and what doesn’t[.]”⁷³ In reviewing ads from 2009, I also observed substantially similar drug injury advertisements associated with different phone numbers, suggesting that drug injury advertisers are engaged in similar such testing.

In other words, the content in these advertisements is not an accident. It likely represents the culmination of years of testing about what is most effective at generating new clients. Consequently, current practices reflect somewhat of a market failure in that they generate profits for the advertisers but produce a negative externality for some portion of the people that are watching these ads. The ABA and states bars should take greater initiative to address this market failure.

IV. Recommendations.

Because the biggest players in advertising have proven adept at responding to new scientific information, and to market forces, I believe informational and market based interventions could be effective at improving advertising practices overall. Below, I offer some ideas in that regard.

⁷³ Victor Li, *Legal Advertising Blows Past \$1 Billion and Goes Viral*, ABA J., (Apr. 1, 2017, 12:05 AM), http://www.abajournal.com/magazine/article/legal_advertising_viral_video.

1. Offering Guidance on Best Practices to Advertisers.

The ABA could take a leadership role in trying to figure out how consumers are affected by the ads, which types of content tends to lead them astray, and which types of content tends to be more helpful. In doing so, the ABA could invite the FDA and FTC to share their expertise in regulating direct-to-consumer pharmaceutical advertising and misleading advertising, respectively. The ABA could then recommend best practices for advertisers to follow. State bars could also take initiative through guidance and opinion letters.

2. Provide More Information to Litigators about the Quality of the Referrals They Receive.

Right now, there is an information gap between the lawyers or entities that create and sponsor the advertising, and the litigators that “purchase” the referrals (though I use the term “purchase” loosely, because the fee arrangement may not be structured as exchanging dollars for names). The advertisers know which advertising content produced the referrals, but the litigators do not. This gap is structurally similar to other supply chain problems, where a buyer of a t-shirt or coffee might care about whether it was ethically sourced but lacks the information to make purchasing decisions based on the ethics of what they are buying.

It is my belief that litigators care about whether the advertising that produced their referrals is ethical. If provided with that information, they might vote with their dollars and do business with an advertiser that follows best practices. These litigators devote their lives to going after drug companies that provided bad information to consumers. They care about how information is presented. They know that it affects their clients. I would find it very surprising if these lawyers did not have an ethical preference for top of the line advertising over bottom of the barrel advertising.

I think we should get them that information. I would like to see an impartial rating system for advertising, which measures the deceptiveness of the drug injury advertising and is informed by guidance on best practices. Such a rating system should be publicly available on the internet for the drug injury litigators to review. A rating system would thus present a strong market incentive for advertisers to improve their practices.

3. Consider Further Deregulation of Attorney Referral Fees.

In my view, restrictions on attorney referral payments may have contributed to some of the problems I observed with respect to the transparency of the advertising. Prior to 2012, the ABA Model Rules essentially prohibited referral payments, unless it was part of a non-profit lawyer referral service, or mere reimbursement for advertising costs.⁷⁴ These rules serve as a template for state bars, which look to the Model Rules for guidance and will sometimes borrow their language.

These older rules made business complicated for entities that wanted to specialize in marketing and referrals. It would not make sense to base a business on mere “reimbursement for advertising costs,” which leaves no room for profits. As an outsider, I cannot say with certainty

⁷⁴ Model Rule of Prof'l Conduct r. 7.2 (Am. Bar Ass'n 2016).

how advertisers structure their business arrangements. However, a report by the ABA’s Task Force on Contingent Fees of the Tort Trial & Insurance Practice Section explained that some advertisers “will refer their cases in bulk to other lawyers who specialize in handling mass tort claims. The original [advertising] lawyers will make the referrals in return for a percentage of the new lawyer’s percentage and perhaps some reimbursement of costs.”⁷⁵

These complex referral arrangements may have a follow-on effect on advertising content. When lawyers engage in complicated transactions to receive get what is functionally a referral fee, it is really hard to explain that transaction someone watching a TV ad. In one of our experiments, we tried to include some educational content before the ad that explained the business model for attorney referrals. It was very complex, and pretty long. It did seem to help people process the advertisements, but there is no easy way to include that kind of explanation in a disclaimer that people would actually read. And without a disclaimer, there is no way for a viewer to figure that out the financial motives of the advertiser – that entity x is sponsoring this ad in order to share a portion of the fees eventually recovered in a settlement litigated by some other lawyer. I would prefer a much more straightforward story for consumers about the advertiser’s motives. Ideally, a consumer watching these ads would be able to figure out, “this is an ad from a legal referral agency that makes money from referring cases to lawyers.” Consumers could then assess the medical information in that context.

In 2012, the ABA modified the commentary to its rules, explaining that payments for lead generation services are permitted.⁷⁶ However, it imposed a number of conditions, including that the service cannot “state, impl[y] or creat[e] a reasonable impression that it is recommending the lawyer” or that it has “analyzed a person’s legal problems when determining which lawyer should receive the referral.”⁷⁷ These conditions may not be compatible with existing business practices. For example, the advertising entity may be accustomed to engaging in some intake work prior to the referral. And under the prior fee-sharing business model, lawyers receiving the referral may be accustomed to being the only firm recommended by the aggregator. The ABA’s conditions on lead generation services may ultimately push advertisers back to older, more complex fee-sharing models.⁷⁸

⁷⁵ Task Force, *supra* note 9. In a recent interview in the ABA Journal, the marketing law firm Sokolove Law explained that they “maintain a co-counsel relationship on all [their] cases and that it continues to work with clients and get information from them while the case is ongoing. In the mass tort business, client acquisition is the more critical part...Litigation is also critically important, but that’s a different type of work over a longer time period. It’s not like the initial rush where you’re trying to acquire as many clients as possible.” Li, *supra* note 73. A co-counsel relationship would allow the advertising firm to receive part of the attorneys’ fees recovered in the case.

⁷⁶ MODEL RULES OF PROF’L CONDUCT r 7.2[5] cmt. (AM. BAR ASS’N 2017). The amendment appears to have been intended for online lead generation, but I see no reason why it could not be applied to lead generation through television ads.

⁷⁷ *Id.*

⁷⁸ States also regulate fee-sharing arrangements, exemplified by ABA Model Rule 1.5, which only permits fee sharing between firms if “(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.” MODEL RULES OF PROF’L CONDUCT r 1.5(e).

In addition, only some state have adopted the “lead generation” exception;⁷⁹ others have not.⁸⁰ Without uniform rules, national advertisers operate in an uncertain ethical space, where they continue to use co-counsel arrangements and may be hesitant to fully disclose the nature of their referral arrangements in their advertising.

In my opinion, consumers deserve to know the financial motives of whoever is sponsoring the advertising. It’s a lot easier to convey that information if these advertisers are clearly allowed to receive referral fees. I would urge states to revisit their referral rules, and whether their benefits exceed their costs.

Even as I primarily recommend informational and market-based approaches, states still have a role to play in enforcing ethics rules against attorneys within their jurisdiction that engage in blatantly false or misleading advertising. Ultimately, if informational resources and market forces do not adequately rein in bad actors that fall outside of the jurisdiction of state bars, it may make sense for the Federal Trade Commission to take action.

V. Conclusion

In conclusion, I urge the ABA and state bars to take this issue seriously, and invest their expertise and resources into understanding this issue and providing high quality advice to lawyers and advertisers - so that they can, in turn, improve the way they deliver medical information to consumers. To quote mass tort expert Paul Rheingold, “The duties of attorneys cannot be narrowly construed according to the canons of ethics. Disciplinary rules only create outer limits on what can be done. In dealing with [mass tort litigation], one should be concerned with what constitutes good, professional behavior established by the wisdom that comes from experience and common sense, not alone by behavior required or sanctioned by any rules.”⁸¹

A nuanced, data-drive approach should respect advertisers’ legitimate interest in identifying injured consumers, capitalize on its beneficial role in disseminating drug safety information, and reduce the prevalence of misleading content. The ABA does not need to figure out this puzzle alone. It can draw on the expertise and experience of doctors, social scientists, and experts at the FDA and FTC. The ABA should also draw upon the expertise of advertisers themselves, and the lawyers that litigate these cases. I have every confidence that we as a profession are capable of figuring this problem out, and making substantial progress. I hope we will commit to doing so.

⁷⁹ See e.g., Wash. Rev. Code Ann. Rules of Prof’l Conduct 7.2 cmt. 5 (West 2017) (adopting ABA language); Ohio rev. Code Ann., Rules of Prof’l Conduct r 7.2 (West 2017). Cf. Or. Rev. stat. Ann. Rules of Prof’l Conduct r 7.2 (West 2017) (remove the word “not-for-profit” in exception that permits the use of a lawyer referral service).

⁸⁰ See e.g., MD. CODE ANN., MD RULES ATTORNEYS, r 19-307.2 (West 2017); VA. CODE ANN. RULES OF PROF’L CONDUCT r 7.3 (Sest 2017); N.J. STAT. ANN. RPC 7.2 (West 2017); N.M. STAT. ANN. NMRA 16-701 (West 2017).

⁸¹ Paul. D. Rheingold, *Generally*, LITIGATING MASS TORT CASES, § 14:1 (2017).