X Ante

**"Social Media, Advertising, & Litigation Financing"**

Presented at:

IADC Corporate Counsel College
Chicago, IL

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Biographical Information:

**Rustin Silverstein**
Rustin Silverstein is the President and founder of X Ante, a data analysis firm that forecasts litigation risk for Fortune 500 pharmaceutical and medical device manufacturers and law firms through comprehensive surveys of attorney television advertising. The firm is a division of Washington D.C.-based crisis management firm The Silverstein Group.

Prior to founding the company, Rustin practiced law at a multinational law firm and worked as a consultant for a global management consulting firm. Rustin is a graduate of Harvard College and Harvard Law School and a member of the District of Columbia Bar and the State Bar of Arizona.

Advertisements soliciting claims for lawsuits against drug and medical device manufacturers comes in many shapes and sizes these days: print media, radio,, internet and social media, and most prominently, television. More than just a nuisance, though, these ads are a key component in driving lawsuits in multidistrict litigation. To adequately anticipate and prepare for this litigation, those tasked with defending against these claims must understand the nature of these ad campaigns. It is equally vital for defendants and their counsel to know what to do about such advertising, how to unearth any non-privileged and discoverable aspects of it, and most importantly, to utilize advertising to the defense's advantage in litigation.

## The State of Mass Tort Advertising

### A. Why advertise?

The simplest answer to the question of why plaintiffs' law firms and others advertise on television is the same as the famous answer that bank robber Willie Sutton reportedly gave when asked why he robbed banks: "Because that's where the money is."

It is estimated that drug and device product liability claims have resulted in over $10 billion in awards and settlements over the past two years. Plaintiffs' attorneys typically collect 25-40% of any award as a contingency fee. To claim a piece of this pie, attorneys seeking to represent the alleged victims must aggressively market themselves. As noted by Oregon University Law Professor Elizabeth Tippett in her study of drug injury lawyer advertising,

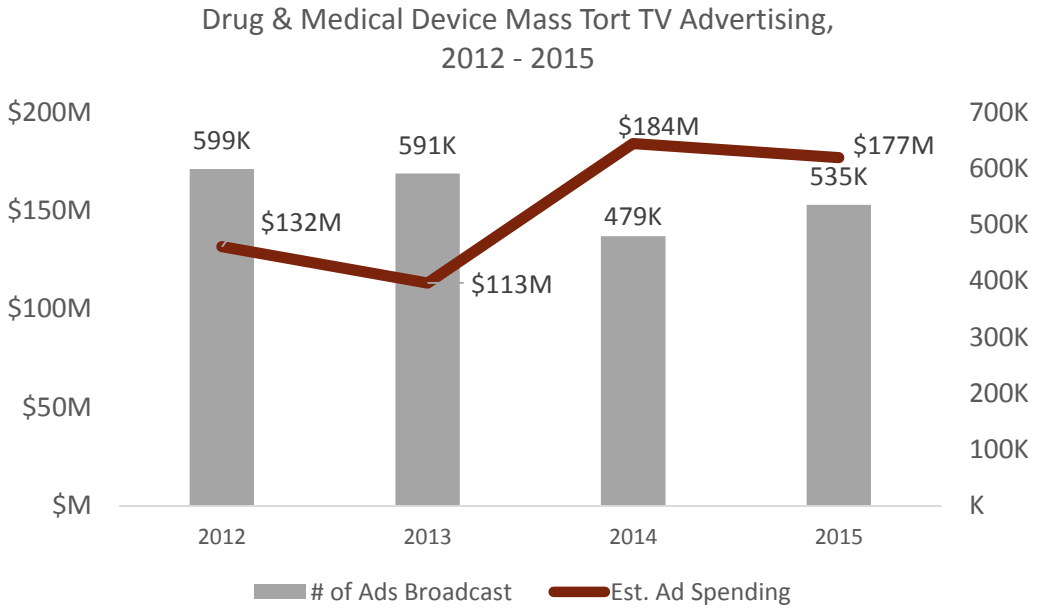
> Drug injury lawsuits are typically brought as mass torts, consisting of thousands of individual claims against the manufacturer of a defective product. Unlike class actions, no single attorney or set of attorneys has a monopoly over representing plaintiffs in such claims. As a result, there is a lively market of lawyers competing over the airways for the attention of a limited number of injured consumers. (Elizabeth ChikaTippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits* (June 4, 2014), 41 Am. J.L. & Med. (forthcoming 2015), available at SSRN: http://ssrn.com/abstract=2445771)

The accumulation of hundreds or even thousands of potential clients also provides plaintiffs' lawyers with added leverage in settlement negotiations with corporate

defendants. (Paul M. Barrett, "Need Victims for Your Mass Lawsuits? Call Jesse Levine." *Bloomberg Business*, December 12, 2013.) Furthermore, a large number of clients can support an attorney's efforts to be appointed by a judge to the potentially lucrative steering committee of lawyers that will oversee all suits. (Michael Freedman, "New Techniques in Ambulance Chasing," *Forbes*, Nov. 12, 2001.)

**B. How much drug and medical device advertising is there?**

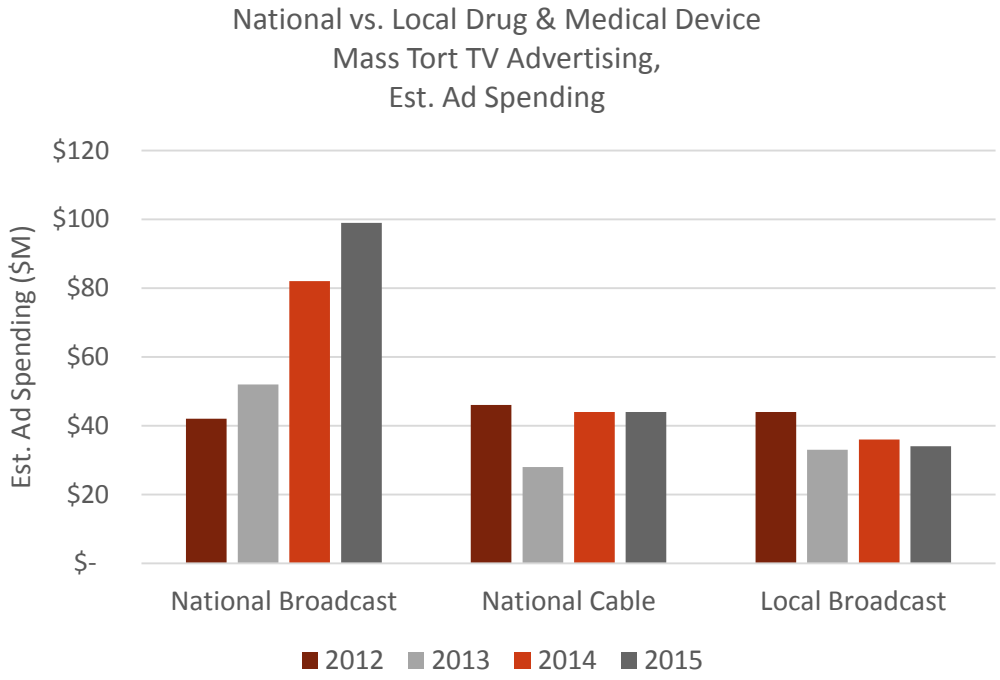
Between 2012 and 2015, an estimated $575 million was spent to broadcast over 2.2 million television ads targeting pharmaceutical and medical device products. In fact, the annual growth in overall TV advertising by the legal services sector (including non-drug and medical device lawyer ads) has outpaced the growth in the advertising sector as a whole in recent years and was one of the few advertising sectors to have *increased* its ad spending during the recent recession. (Kantar Media, "Lawyers Mass Tort Solicitation Advertising," Presentation to U.S. Chamber Institute for Legal Reform, Fall 2011.)




*Source: X Ante*

Drug and medical device mass tort advertising campaigns are increasingly national in scope. Thus, as advertising has shifted from less expensive rates on local broadcast networks to more costly spots during national programming on national

broadcast and cable networks, advertisers are paying more for fewer advertisements – as reflected in the graph below.




*Source: X Ante*



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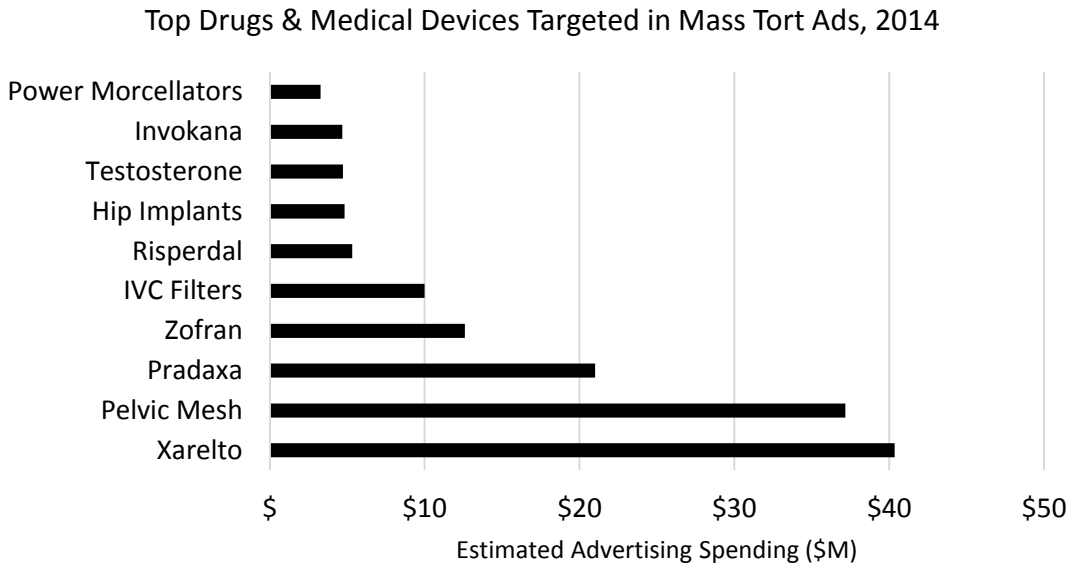
**C. What are the ads saying?**

In 2014, mass tort TV advertisements featured over 30 different drugs and medical devices. However, over 80% of the mass tort advertising spending was devoted to ads targeting the ten products featured in the graph below.




*Source: X Ante*

With nearly $52 million dollars' worth of advertising, pelvic mesh ads alone accounted for over a quarter of all mass tort TV ad spending in 2014. While Risperdal was the most featured drug in mass tort advertising in 2014, Xarelto advertising surfaced in the summer of 2014 and became the most targeted drug for the rest of the year and into the beginning of 2015.

Mass tort drug and device ads typically follow a formulaic script:

> [T]he usual commercial presents the plaintiffs' lawyer speaking authoritatively about new safety information, previously undisclosed by the drug-maker, impacting the warnings associated with the drug or causing its withdrawal from the market. While the information is delivered, the name of the drug and the injuries it is being alleged to cause, along with words like "DEATH," "WARNING," and "DANGER," flash across the screen in bold, enlarged, and colorful fonts. The lawyer, having delivered the sound bite that grabs the attention of the viewer, then altruistically invites the viewer to help "you or a loved one who may have been injured" by seeking out the services of the lawyer's law firm. The viewer is encouraged to call

> the law firm immediately because "time may be running out" to preserve the viewer's rights against the drug company. (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, 335. (Winter 2013- 2014))

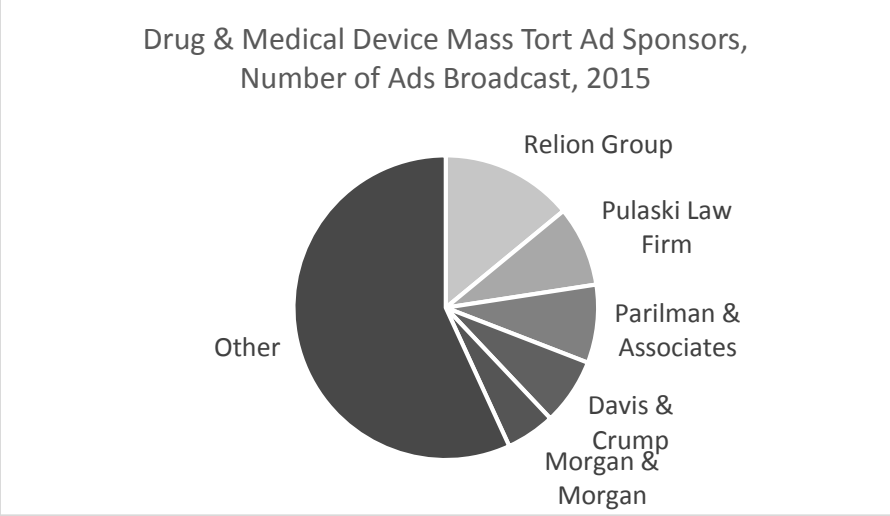
The sponsors of the ads often broadcast them immediately following key developments such as a product recall, an FDA warning, the revelation of previously undisclosed adverse events in a medical journal, a significant jury verdict or the announcement of a sizable litigation settlement. Indeed, these developments are often featured prominently in the ads alongside descriptions of the product's alleged adverse effects. Many of the ads are also designed to look like public service announcements or news reports rather than advertisements for law firms and fail to disclose the true sponsor of the ads until the very end of the broadcast.

*Sample screenshots from mass tort TV ads:*


By emphasizing the potential risks of pharmaceutical products without any context regarding the likelihood of harm and rarely any mention of consulting a medical professional, there is the concern that these advertisements may be harmful to the public health if they frighten consumers into not taking needed medication. A 2003 poll found that a quarter of patients polled said they would immediately stop taking a drug that they saw featured in a legal ad. (Harris Interactive, "Pharmaceutical Liability Study Report on Findings," Prepared for U.S. Chamber Institute for Legal Reform, July 15, 2003, available at www.uschamber.com/sites/default/files/legacy/press/rx_pharmaceutical_liability_study_report.pdf.) A later found that half of psychiatrists surveyed reported that patients had discontinued taking medication as a result of drug injury advertising. (Eli Lilly, "New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illnesses", June 13, 2007 available at https://investor.lilly.com/releasedetail.cfm?releaseid=248836. qtd in Tippet 6.)

**D. Who is sponsoring the ads?**

Much of the TV advertising related to drug and medical device mass tort litigation is sponsored by a small number of firms. In fact, nearly half of all the ads broadcast in 2015 were sponsored by just five firms.




*Source: X Ante*

Many, if not most, of the sponsors of the drug and medical device mass tort ads do not actively litigate the cases they solicit. In fact, many advertisers are not even lawyers or law firms.

Some of the advertisers are so-called "settlement mills" -- high-volume law practices with little client interaction that settle large volumes of cases quickly without ever filing in court. (*See* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 807 (2011).

Others law firm advertisers refer the clients who respond to their solicitations to firms who actually litigate the cases in exchange for referral fees or a share of contingency awards. For example, one of the top advertising firms nationally -- The Goldwater Law Firm -- acknowledges on its websites that "Robert Goldwater ... is licensed to practice law only in Arizona, but associates with attorneys throughout the country. While this firm maintains joint responsibility, cases of this type are referred to other attorneys for principal responsibility." (*See* http://goldwaterbirthcontrolpills.com/, http://goldwateractos.com/) Furthermore, on the firm website, Goldwater presents itself as "one of the largest national advertising law firms in the United States" and invites potential co-counsel to contact the firm "if you would like to generate more tort cases for your law firm." (*See* http://www.bobgoldwater.com/Co_Counsel_Opportunities.aspx. Additional discussion of the Goldwater firm and the nature of law firm advertisers in Tippett.)

Finally, many of the top sponsors of mass tort advertisements are not even law firms. They are "lead generators" -- businesses who sell the names of alleged victims who respond to their advertisements to plaintiffs' attorneys. (Barrett) Indeed, another of the top advertisers noted in the pie chart above -- The Relion Group -- is a subsidiary of Lead Generation Technologies and is funded by the global asset management firm The Carlyle Group. ("*The Upside of Legal Advertising,*" Transcript, *On the Media*, September 16, 2011). Relion's website urges law firms to join their "group advertising model" and "pay only for the qualified leads you receive." (*See* http://www.reliongroup.com/legal-network/)

**E. Who are the ads targeting and when are they airing?**

Mass tort advertising is often directed at those who tend to suffer from more health problems and may not know any attorneys or know how to find one such as the poor, disabled, unemployed, and elderly.. (Michael Freedman, "New Techniques in Ambulance Chasing," *Forbes*, Nov. 12, 2001.) These populations often make attractive targets for mass tort solicitations because they "are more likely to lack comprehensive health and disability insurance and are less likely to benefit from generous paid sick leave policies, putting a premium on the speedy and certain

resolution of claims." (Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1524 (2009).)

To reach this disproportionately homebound audience, the ads are predominantly broadcast during the day or late at night. In 2010, 56% of legal ad spending was devoted to ads that ran between 9:00 in the morning and 6:00 in the evening. By comparison, only 22% of non-legal services ad spending was spent during that time. (Kantar Media "Lawyers Mass Tort Solicitation Advertising," Presentation.)

**F. What type of solicitations are occurring online?**

While television advertising remains the predominant method of soliciting clients for mass tort litigation, many firms also attempt to reach potential clients via online marketing. This represents an opportunity for those soliciting clients on TV to expand their reach and provides a less expensive method of advertising for smaller and less established firms to access.

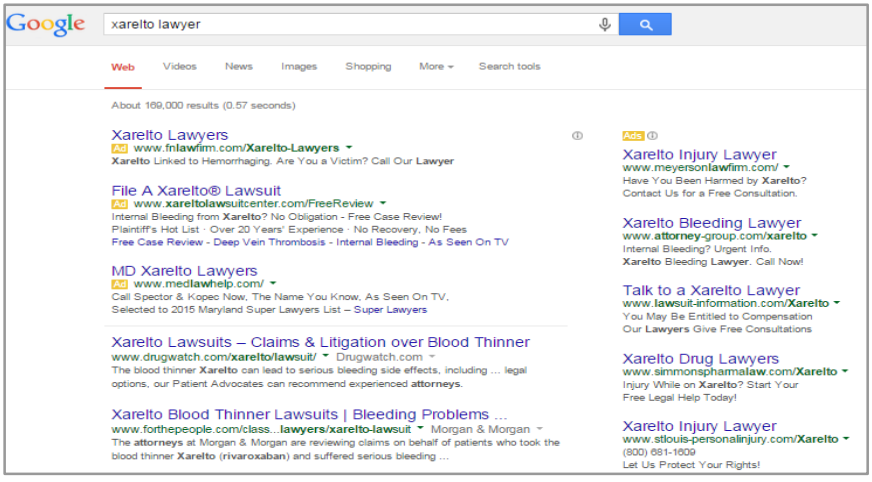
As more viewers watch television with a "second screen" such as a smart phone, tablet, or laptop, advertisers want to be sure to capture the attention of viewers who search for additional information about a drug or medical device after viewing a mass tort television ad. To accomplish this, many plaintiffs' mass tort law firms and lead generation companies aggressively place ads on search engine result pages related to searches about drug and medical device injuries, lawsuits and lawyers. A 2012 report found that trial lawyers are spending more than $50 million on Google search keyword advertising annually, more than three times the total amount that the 2008 Obama presidential campaign spent for all online advertising and considerably more than the keyword advertising that Apple spent on the iPad and iPhone. (New Media Strategies, *The Plaintiffs' Bar Goes Digital*, Prepared for the Institute for Legal Reform, January 2012, available at http://www.instituteforlegalreform.com/uploads/sites/1/The_Plaintiffs_Bar_Goes_Digital_2012_0.pdf.)

In addition to paid search engine marketing, those soliciting clients for mass tort litigations are also relying on search engine optimization (SEO) strategies to ensure high placements of their websites in organic search results. Many times, these search results direct the searchers to a variety of sites with vague and misleading names that

> [A]ppear as informational sites or patient support groups for specific types of diseases, counseling services for people who might have been assaulted or injured, and even web sites and chat rooms that appear to the casual viewer as official government sites or advocacy organizations. The affiliations of law firms are often buried deep within the websites or, in some cases, are non-existent. The goal of these marketing tactics is to gain contact information from potential plaintiffs for lawsuits." (U.S. Chamber of Commerce, "First-of-Its-Kind Study Finds Plaintiffs' Lawyers' Online Marketing Tactics Among Most Sophisticated, Expensive," press release, February 29, 2013, available at https://www.uschamber.com/press-release/first-its-kind-study-finds-plaintiffs%E2%80%99-lawyers%E2%80%99-online-marketing-tactics-among-most.)

These websites are often created and published immediately following the publication of a medical study highlighting the risk of an adverse event associated with a drug or medical device. (David Juurlink, Laura Park-Wyllie, and Moira Kapral, *The effect of publication on Internet-based solicitation of personal-injury litigants*, 177:11 CANADIAN MEDICAL ASSOC. J. 1369, 1369 (2007))

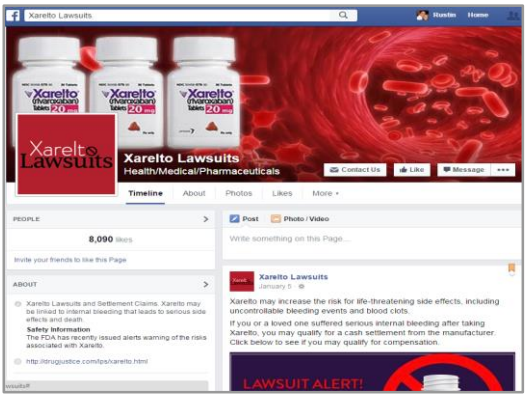
*Google search page reflecting search engine advertising, SEO strategies, and the publication of solicitation websites:*

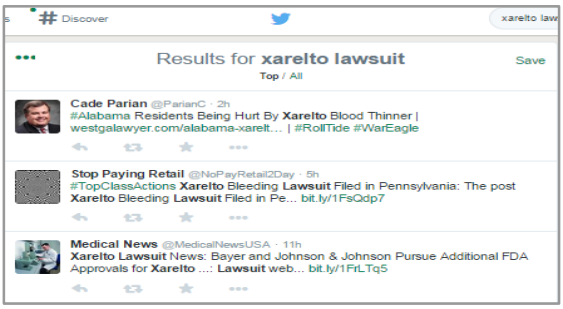


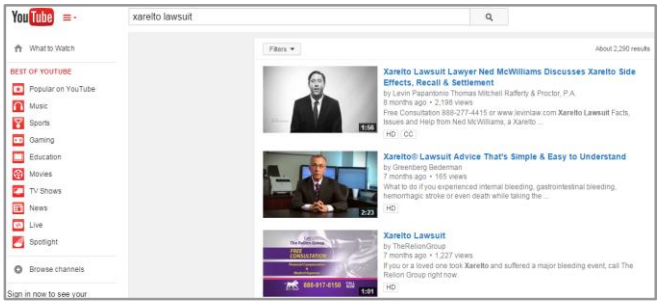

Mass tort law and lead generation firms are also employing social media and YouTube to spread their message and attract clients. Firms set up Facebook pages and groups devoted to particular lawsuits and sponsor paid advertising targeting individuals who have "liked" topics or groups of relevance to the firms' cases. They also have created handles on Twitter that appear to be related to consumer safety

announcements. Finally, these firms post videos on YouTube to ensure that their content appears in the search results of those seeking out information about product liability lawsuits. (New Media Strategies, *The Plaintiffs' Bar Goes Digital,* 19-23)

*Sample pages from social media and YouTube:*



## Applications

Plaintiff attorney advertising—whether through television, print media, radio, internet, or social media—has become an integral part of mass tort litigation and is only likely to increase in the future. In order to combat advertising by plaintiff's firms, defendants and their counsel should actively monitor the advertising and use it to their advantage.

In the pre-litigation context, active monitoring of plaintiff advertising can assist clients in:

- Forecasting future litigation costs
- Tracking and analyzing adverse events and
- Preventing advertisements that are false, deceptive or misleading.

During litigation, discovery specifically aimed at the attorney advertising a plaintiff has viewed can be valuable in:

- Dismissing a case on statute of limitations grounds
- Demonstrating a plaintiff's motivations for filing a lawsuit and
- Unearthing unsavory practices by the Plaintiff's bar.

Furthermore, data on attorney advertising for a product can provide critical information in picking a venue and jury.

At trial, data on attorney advertising can be used to affirmatively refute plaintiffs' attempts to mischaracterize a large number of lawsuits or complaints as indicating a problem with a product's safety or efficacy.