PLAINTIFF ATTORNEY ADVERTISING:

PROTECTED OR PROSECUTABLE?

The barrage of plaintiff-attorney advertisements soliciting plaintiffs for drug and device litigation may spawn calls by executives, board members, and other company decision-makers to find out what can be done to stop them. Although certain categories of advertising are constitutionally protected as "free speech," developing precedent shows that attorney advertising may be susceptible to legal challenges under the Lanham Act. These claims have not been tested in court, but they present a legitimate possibility for manufacturers to mount an offensive attack against certain advertisements. This article provides an overview of the constitutional protections afforded attorney advertising in the United States, followed by an overview of new precedent under the Lanham Act and how it may be applied to combat certain advertising.

CONSTITUTIONAL PROTECTIONS FOR ATTORNEY ADVERTISING

Attorney advertising in the United States is well established as constitutionally-protected commercial speech. In March 1975—when many state bar associations prohibited any form of attorney advertising—two lawyers in Arizona defied their state bar association's regulation prohibiting any form of attorney advertising and placed a newspaper ad that read: "DO YOU NEED A LAWYER? LEGAL SERVICES AT VERY

REASONABLE FEES."[1] When the Arizona State Bar suspended the lawyers for placing the ad, they challenged the disciplinary rule, paving the way for lawyer advertising to become protected free speech under the First Amendment.

The case, *Bates v. State Bar of Arizona,* reached the Supreme Court, which found outright bans on advertising like that imposed by the Arizona state bar to be unconstitutional.[2] The Court specifically rejected the premise that advertising eroded "true professionalism" in the legal field, and determined instead that it was protected commercial speech.[3] *Bates* was the end of absolute bans on attorney advertising.

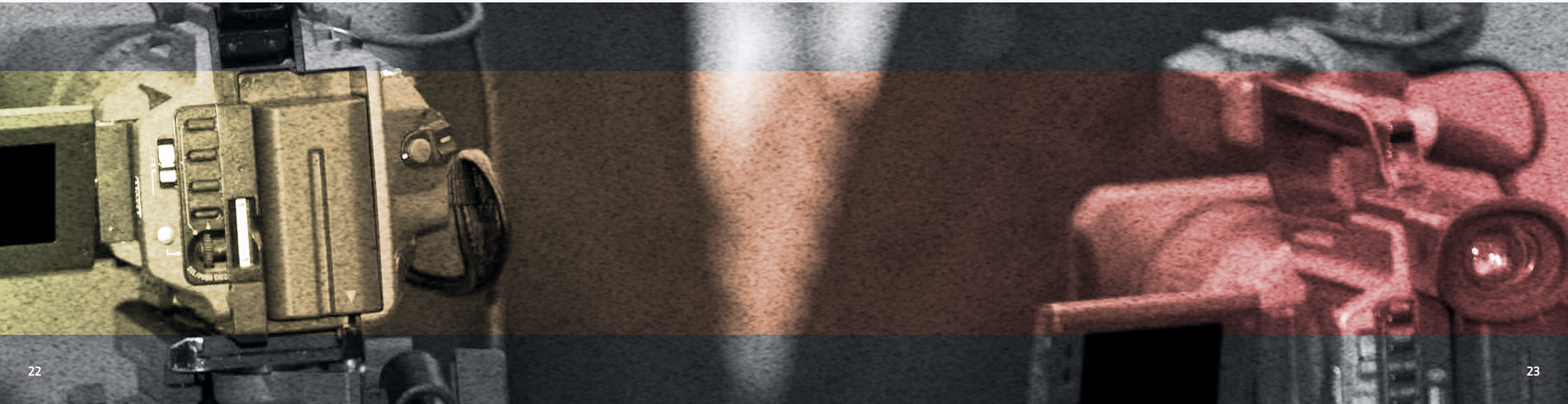
It didn't take long for attorney advertising to develop into a vehicle for mass torts, starting in the 1980s with an attorney's advertisement in 36 Ohio newspapers soliciting women who used the Dalkon Shield Intrauterine Device.[4] This advertisement contained a drawing of the device, asked the question "DID YOU USE THIS IUD?" and claimed that the device was "alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies."[5] The ad offered legal representation, noting that "[i]f there is no recovery, no legal fees are owed by our clients."[6] The Ohio Office of Disciplinary Counsel found such advertising was not sufficiently "dignified" or limited in scope to permissible information under its rules prohibiting illustrations and self-recommendation.[7] It also found the ad violated a rule requiring that contingency-fee rates should disclose whether the percentages were computed before or after costs and expenses.[8] The Supreme Court held that—except with regard to the misleading contingency fee statement—the advertisement's statements and illustration regarding the IUD were not false or misleading and were entitled to First Amendment protection.[9]

REGULATORY RESTRICTIONS ON ATTORNEY ADVERTISING

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") serve as a standard for state bar associations, and each of the 50 states and the District of Columbia have adopted some variation of the Model Rules.[10] The initial ethics rules, published in 1908, sought to compile a collection of norms for all attorney conduct.[11] Solicitation by advertisement was deemed "unprofessional" and all forms of "self-laudation" were "intolerable," "defy[ing] the traditions and lower[ing] the tone of our high calling."[12] Indeed, the best advertisement was "the establishment of a well-merited reputation for professional capacity and fidelity to trust."[13]

The ABA Model Rules published in 1983—after *Bates*—permitted attorney advertising through various publication modes, including television.[14] The 1983 Model Rules also put specific limits on lawyers' direct solicitation of prospective clients and on lawyers' statements about certification fields of practice,[15] but several Supreme Court rulings striking down state rules similar to the Model Rules spurred amendments.[16] Further amendments resulted in the key prohibition on attorney advertising being limited to a showing that it is false or misleading speech.[17] Under the Model Rules, an advertisement is "false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[18] The result from the dilution of restrictions on advertising in the Model Rules following *Bates* is that most attorney advertising soliciting drug or device plaintiffs is permitted by state bar associations.

The American Bar Association Model Rules published in 1983 permitted attorney advertising through various publication modes, including television.



CHALLENGING FALSE OR MISLEADING ADVERTISING

Given the unlikelihood that state bar associations will pursue enforcement actions against attorney advertising, challenges by manufacturers must instead be made under common-law theories such as defamation and business torts or statutory claims under the Lanham Act. These claims focus not on statements about the lawyer or the lawyer's services, but on the content of the advertising that relates to a company's products and the impact of the advertisement on those products.

The most straightforward example of advertising that is "false or misleading" and susceptible to challenge is an ad that is obviously false. For example, an ad that claims a drug or medical device has been recalled by the FDA when in fact it has not is false and subject to immediate challenge. Such ads are usually addressed through cease-and-desist letters without the need for litigation.

Other examples of obvious falsity include misstatements about the product itself. For example, in 2011, Zimmer, Inc. sued Pulaski & Middleman, LLC—infamous for its "1-800-BAD-DRUG" ads—for "making false, misleading and defamatory statements about Zimmer and [its] NexGen® Knee System" in television advertisements.[19] Zimmer alleged that the Pulaski Firm's ad was false or misleading by saying: "Reports show the ZIMMER NEXGEN KNEE IMPLANT MAY HAVE A FAILURE RATE OF 9%."[20] Zimmer sued for defamation, tortious interference with business relationships, false advertising under the Lanham Act, product disparagement, and several trademark theories.[21] The parties reached a confidential settlement, summarized by Zimmer in a public statement that the law firms "retracted the misleading claims in their advertisements" and that the firms would run corrective statements on their respective websites for six months. Zimmer's statement also indicated that the law firms either paid a monetary settlement, issued a retraction, or did both.[22] Pulaski & Middleman's statement on its website admitted that it had "determined that the sources we previously relied upon to make claims about the Zimmer NexGen Knee System do not support the statements or implication" in the ads.[23]

While the Zimmer example is informative when an attorney advertisement obviously misstates factual information about a product, the more difficult question arises when an advertisement is not *per se* false, but is arguably misleading. Although claims for defamation and business torts remain options, recent precedent under the Lanham Act suggests that drug and medical-device manufacturers may have a better avenue to combat false or misleading advertising.

LANHAM ACT DEVELOPMENTS AND CHALLENGES TO ATTORNEY ADVERTISING

The Lanham Act provides a federal cause of action akin to unfair competition claims. The Act's provision regarding false advertising states:

> (1) any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any . . . false or misleading representation of fact which—
>
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of . . . another person's goods services or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act."[24]

Traditionally, a false-advertising claim under the Lanham Act arises when "one competito[r] directly injur[es] another by making false statements about his own goods [or the competitor's goods] thus inducing customers to switch."[25] This underscores that any Lanham Act false-advertising claim must be framed around economics—the manufacturer is losing business on the drug or device because of the defendant law firm's false advertising about that drug or device.

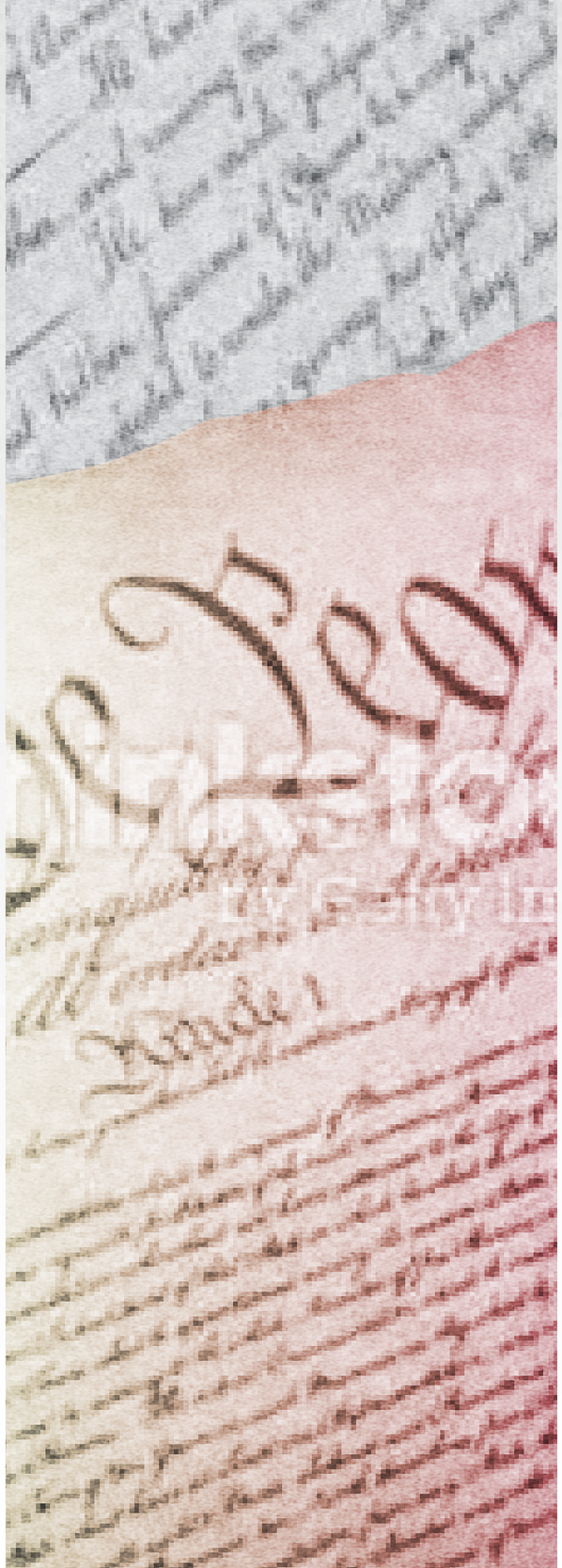
STANDING

The initial hurdle under the Lanham Act is standing to sue. Federal courts are prohibited from hearing cases in which the plaintiff has not "suffered or been imminently threatened with a concrete and particularized 'injury in fact'" that is traceable to the defendant's action.[26] In 2014 the Supreme Court, in *Lexmark International, Inc. v. Static Control Components, Inc.*, resolved a split in the Circuit Courts of Appeal as to the proper test for standing under the Lanham Act.[27]

Before *Lexmark*, a widely used limitation on Lanham Act claims was the "direct-competitor test," which required a plaintiff be in direct competition with the defendant in order to have standing. Under this test, a pharmaceutical or device manufacturer would not have standing to sue a law firm which would not be in competition with it. *Lexmark* rejected this approach, concluding that "a rule categorically prohibiting all suits by noncompetitors would read too much into the Act's reference to 'unfair competition.'"[28] The Court noted that when the Lanham Act was adopted, noncompetitors could sue one another under the common-law tort of unfair competition. Thus, it would be "a mistake to infer that because the Lanham Act treats false advertising as a form of unfair competition, it can protect *only* the false-advertiser's direct competitors."[29]

The *Lexmark* Court determined that where a federal statute—like the Lanham Act—creates a cause of action, the plaintiff must fall within the "zone of interests" of that statute to have standing. To be "within the zone of interests in a suit for false advertising under [the Lanham Act], a plaintiff must allege an injury to a commercial interest in reputation or sales."[30] Plaintiffs must also show that their injuries are proximately caused by violation of the statute. Therefore, a manufacturer would have to show "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff."[31]

.



ELEMENTS OF A CLAIM

Assuming that the Supreme Court's ruling in *Lexmark* gives pharmaceutical and medical-device manufacturers *standing* to pursue a Lanham Act claim, they must still prove the elements of the claim itself. Generally, a plaintiff must prove "(1) the defendant has made false or misleading statements of fact concerning his own product or another's; (2) the statement actually or tends to deceive a substantial portion of the intended audience; (3) the statement is material in that it will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; and (5) there is some causal link between the challenged statements and harm to the plaintiff."[32]

First and foremost, the focus of the claim must be that losses are suffered because a *false* statement influenced a consumer's *purchasing decision*. The fact that the advertisements result in an increase in litigation is not relevant to any claim under the Lanham Act.

An actionable statement in an advertisement "must be based upon a statement of fact, not of opinion,"[33] and a plaintiff must show that the advertisement "is literally false or that it is true yet misleading or confusing."[34] If a statement is literally false, the plaintiff need not show actual deception of consumers; if a statement is literally true yet misleading, the plaintiff must show that consumers' decisions to purchase were actually influenced.[35] Thus, the word "bad" next to "drug" in "1-800-BAD-DRUG" would be evaluated in context to determine whether it misleads consumers. Some courts apply a presumption of damages where the deception was willful, but this presumption only applies "to cases of comparative advertising where the plaintiff's product was specifically targeted."[36] Therefore, a pharmaceutical manufacturer suing a noncompetitor law firm would likely have to present "evidence of the public's reaction through consumer surveys,"[37] showing "that a significant portion of the consumer population was deceived."[38] These proof requirements are not easily satisfied, and consumer surveys that satisfy the Lanham Act's requirements are both expensive and time consuming..

LIMITS

A pharmaceutical or device manufacturer will face two hurdles in bringing this type of Lanham Act claim. First, it must prove its standing to bring the claim—that it comes within the zone of interests of the statute. Although the Supreme Court's 2014 decision in *Lexmark* indicates that noncompetitors may bring claims under the Act, lower courts have not yet considered the standing of noncompetitors who are in different industries altogether. Second, pharmaceutical and device manufacturers must prove all of the elements of the Lanham Act claim itself, including deception of consumers and actual reliance.

The First Amendment's protection of commercial speech allows plaintiff law firms to solicit clients through advertisements that are not false or misleading...

CONCLUSION

The First Amendment's protection of commercial speech allows plaintiff law firms to solicit clients through advertisements that are not false or misleading, and states' rules of professional responsibility generally only prohibit false or misleading statements by an attorney. The Lanham Act and other common-law defamation causes of action may be available, but their proof requirements are strenuous. While the Supreme Court's *Lexmark* decision suggests that Lanham Act claims may be available against plaintiff law firms, those claims have not been tested. And, even if lower courts apply *Lexmark* to permit Lanham Act claims by manufacturers against plaintiff-firms, drug and device manufacturers still face an uphill battle in combating all but patently false advertisements. ■