

## Focus PERSONAL INJURY

# The rise of personal injury advertising in Canada



Wendy Moore Mandel

Media advertising by personal injury lawyers in the United States is often described as “over the top,” “ambulance-chasing” and “unprofessional,” among other less flattering descriptors. Advertising by lawyers is generally thought to diminish the public’s already tenuous respect for the legal profession.

Meanwhile, media advertising by personal injury lawyers in Canada, and more particularly by personal injury lawyers in southern Ontario, has increased significantly over the past five years. Although the Law Society of Upper Canada changed its rules in 1987 to allow lawyers in Ontario to advertise in any medium, few personal injury lawyers advertised routinely until the 2000s.

As more and more lawyers advertise their services in the mainstream media, are we destined to head down the same bumpy road as our U.S. colleagues?

The issue begs two questions: Is advertising good for the profession? Is advertising good for the consumer?

Advertising by lawyers in the mainstream media is not a recent phenomenon. Prior to the 20th century, advertising of legal services in the United States was considered generally acceptable. Attorney David Hoffman, author of several legal treatises and texts and a leader in the field of professional ethics, advertised his legal services in newspapers. The ads contained testimonial endorsements from John Marshall, the U.S. Secretary of State, president of the Bank of the United States

and Chief Justice of the U.S. Supreme Court. Abraham Lincoln, considered in his own time and through a historical lens to be a highly ethical lawyer, advertised his law practice in local Illinois newspapers in 1838.

However, the advertisement of legal services was banned by most states in the early 1900s and remained so until a 1977 Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In *Bates*, the Phoenix legal clinic Bates & O’Steen used newspaper ads to publicize its offer of legal services at fixed fees. The law firm was charged with violating Arizona state bar standards preventing lawyers from preparing or using public media in order to attract clients.

The Supreme Court found that the attorneys’ price advertising (commercial speech) was subject to First Amendment protection, and the ban on attorney advertising ended. The high court explained that the belief that lawyers are somehow above trades was an anachronism, and also stated that false and misleading advertising could be prohibited.

Historically, Canadian lawyers have considered the advertising of legal services to be unseemly or unprofessional. This perspective appears to emanate from the concept that law is a profession, not a trade, and that a professional’s reputation is degraded by “hawking his wares.” But has the unseemly become the inevitable in an increasingly competitive market?

Personal injury lawyers represent people. In an increasingly connected social world, shouldn’t lawyers strive to connect to the people they represent? Without advertising, how can lawyers make those essential connections?

Advertising allows personal injury lawyers to talk to people; this is inherently good for a profession that seeks to represent people. In addition, the meth-

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ods by which lawyers seek to connect to consumers are governed by their professional regulatory bodies.

The Law Society of Upper Canada’s Rules of Professional Conduct govern legal marketing, with rule 3.02(2) requiring that marketing be “in the best interests of the public and is consistent with a high standard of professionalism.”

But is this marketing “good” for the public?

Many major personal injury

law advertisers in the United States are simply booking agents. They encourage initial consultations from people who need legal help; they take the call; and then they farm out the case to another law firm, for a fee. Many other legal advertisers take on cases, but if a quick resolution cannot be achieved, they farm out the client to another lawyer to handle the litigation. This type of advertising is “legal” but critics and opponents say it is misleading, that it undermines respect for the legal profession and that it will enable unscrupulous or incompetent lawyers to recruit clients.

Without advertising, though, prospective clients must rely solely on lawyer’s reputations, and unfortunately not everyone has access to that information. Consumers who have never hired a lawyer before, or do not know people who interact with lawyers, are at a distinct disadvantage. Advertising can provide them with information beyond what may be otherwise available.

Skeptics may argue that the public is not sophisticated enough to realize the limitations of advertising. To force ignorance upon a consumer in need of help is not a response to that argument.

In law, as in every other profession, the quantity or quality of advertising doesn’t necessarily reflect the quality of the work. Therefore, whenever possible,

consumers should continue to ask for recommendations or referrals from people they know and respect. They should do their own research when considering a lawyer to hire. Legal advertising can supply some guidance, and provides a starting point for further inquiry.

Today, lawyers advertise by Internet, radio, television, newspapers, magazines, billboards, bus stops, taxi cabs, elevator screens, and any other place where advertising space is sold. The right to advertise is legitimate and helps the profession connect with its consumers. Legal regulatory bodies including the Law Society of Upper Canada, are charged with a role to monitor lawyers and sanction legal advertisers who mislead consumers or offend public sensibilities. This task is likely to increase as the number of lawyers who choose to advertise their services increases. Despite the challenges of regulation, advertising educates the public, presents alternatives and options, and promotes informed decision-making, which is in the public’s best interest.

Wendy Moore Mandel is a partner at Thomson Rogers and is a Director of the Ontario Trial Lawyers Association. She has been identified as a leading practitioner in the area of personal injury law by *L’Expert* and has been selected by her peers for inclusion in *The Best Lawyers in Canada 2013* in the area of personal injury law.



Hemingway Home in Key West, Florida. COMPASSANDCAMERA / ISTOCKPHOTO.COM

## Hemingway cats de-clawed in court

A Florida appeal court has confirmed that the state has the right to regulate the six-toed cats who roam the grounds of Ernest Hemingway Home & Museum, a popular Key West tourist attraction, Today.com reports. Legend has it the cats that live on site are descendants of Snowball, a polydactyl (six-toed) feline who was given to Hemingway while the writer lived at the house in 1931-38. But in 2003, the USDA declared the museum an “animal exhibitor” because, like zoos and circuses, it used the cats as an advertising feature and charged admission. The museum argued to the contrary that the Animal Welfare Act only applied to animals “physically moving in interstate commerce,” while its cats stayed on site. Judge Joel Dubina of the 11th Circuit Court of Appeals ruled that despite the museum’s “somewhat unique situation...the exhibition of Hemingway cats is integral to the museum’s commercial purpose, and thus, their exhibition affects interstate commerce.” —Staff



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