



Advertising & Referrals – Guidelines & Pitfalls

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EDITORIAL NOTE:

Firm advertising practices continue to be a topic of concern for many in the profession in general, and in personal injury more specifically. So much so that it was a topic at the TLABC board of governors' May strategic planning retreat. While solutions are not easily constructed, this article by Michael Thomas and Drummond Lambert provides an interesting perspective we thought worth sharing.

The legal profession has increasingly become a business. At many firms marketing efforts and referral generation are valued as highly as fees. Advertising has become increasingly prominent across the province. One can hardly relieve oneself in a public restroom, sit on a park bench or relax in traffic without being assaulted by advertisements for legal services and competing claims of expertise. Numerator Advertising has reported that the advertising for professional services has increased by over 20% in the last year. Lawyers in BC spend over twice as much as their compatriots in Ontario and three times as much as lawyers in Alberta on Google word, or pay per click, advertising.¹ I understand that one personal injury firm may have budgeted \$1,000,000 in advertising this year.

This increase in advertising, from an optics perspective, could not have come at a worse time. The legal profession has been under attack for “driving up” the value of personal injury claims and profiting too much for the work that they perform for their clients. Several papers have run articles criticizing the monopoly that lawyers have over the provision of legal services. Perhaps it is not surprising that in recent Gallup surveys when asked whether a profession is honest and ethical lawyers have been ranked par with car salesman, politicians and stock brokers; and have lagged behind journalists, realtors and building contractor.²

The fundamental purpose of advertising is to call attention to something. The message, location and context all play an important role in what is called attention to, and how the message impacts the public's perception of our profession.

A similar increase in advertising for legal services occurred in Ontario over 10 years ago. In Ontario the increase in advertising appears to have been sparked by an increased competition for clients, in part triggered by a change in the compensation for people injured in automobile accidents and a decrease in the number of small boutique firms. One of results of increased advertising, in a climate of increasing competition, is a ratchet effect. Advertisements by their nature tend to push the limits and boundaries. With competing pressures and lack of clear guidelines it can be difficult to exercise one's judgment in a clear and professional manner.

In Ontario advertising for legal services came into the limelight when the Toronto Star published a series of exposes into misleading advertising practices for legal services and the related issue of referral fees charged by firms who did not have the resources or expertise to represent the clients that they obtained through their advertising efforts.³ This led to a large public outcry and intense scrutiny of both advertising for legal services and the practice of charging referral fees. Many people were unaware that law firms were selling referrals for 15% – 30% of the total fee charged.

Other firms required lump sum payment of referral fees.⁴

In 2017, response to these concerns, the Law Society of Upper Canada (“LSUC”) put a fee cap on referral fees and instituted a number of transparency measures including a standardized form that the referral lawyer, client and receiving lawyer must sign where the referral fee is clearly stipulated and agreed to. Implementation of these restrictions on referral fees sparked a debate questioning why lawyers were entitled to charge fees for referrals when fees could not be charged or paid to other professionals, including staff and paralegals.⁵ This is a debate that I believe would be worthwhile having in our Province.

In British Columbia the rules governing referral fees mirror the situation in Ontario prior to the 2017 reforms. Section 3.6-6 of the Code of Professional Conduct stipulates that client’s must be informed and consent to the referral fee; there must be no conflict of interest; and the fee must be reasonable and “not increase the total amount of the fee charged.” There is no standardized form or recommended procedure. Section 3.6-7 of B.C.’s Code bars payment of referral fees to people other than lawyers.

The LSUC also imposed further restrictions and clarifications on advertising for legal services. This included providing specific direction with respect to the advertising of awards that were not “bona fide” or likely to mislead or deceive consumers. This remains a contentious issue, a law firm in Ontario is currently under investigation for advertising with respect awards that the firm has received which are prominently displayed on their website.⁶

The LSUC always had provisions in its Code banning marketing that was false, misleading, or inconsistent with the public interest. However, to address concerns with the increase in advertising the LSUC provided detailed commentary to their provisions which specifically identify restricted behavior.

Chapter 4 of British Columbia’s Code, which deals with advertising, is roughly similar to Ontario’s provisions before the 2017 changes. It bans advertising that is misleading or not in the best interests of the public and contains a few specific restrictions (stating you are a “specialist” is impermissible, for example). In other words, the advertising practices that raised concerns in Ontario receive no direct attention, raising the troubling prospect that they could eventually appear in British Columbia.

While Ontario’s problems with referral fees and advertising may not have progressed to the same degree in British Columbia, the LSUC’s changes are still instructive.

BEST PRACTICES WITH RESPECT TO REFERRAL FEES AND ADVERTISING INCLUDE:

- Always confirm with your client before sharing any information for the purposes of a referral.
- Make sure clients acknowledge that they have a choice on this matter and can reject a referral. On the same note, provide clients with at least two options for a referral.
- Keep a record of all the referral fees you charge and receive. Include in your account to clients a record of the referral fee.
- If you would not provide a legal service, do not advertise in a manner suggesting you would.
- Be careful when using awards in advertising; if you do use awards, make sure they have an objective and bona fide basis to them.
- Be cognizant of the specific prohibitive practices; such as stating that you are a specialist.

One of the issues that emerged from the Ontario experience is that the existing rules lacked specificity and/or guidelines. Advertising and referral fees are issues that many professionals do not want to discuss and at times involve an exercise of judgment. Providing greater specificity offers further guidance and can help ensure appropriate conduct in what can be a controversial area. Given the public perception of our profession care must be taken with respect to advertising for legal services and charging referral fees to protect and restore public confidence. **V**

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Drummond Lambert obtained his JD from UBC in 2017 and the following year joined Harper Grey LLP’s Commercial Litigation and Construction & Engineering practice groups after articling with the firm. He has advised clients on a wide range of commercial disputes and he regularly assists senior counsel in defending architects, engineers, and accountants in civil proceedings. He also has experience in insurance and personal injury litigation.

1. “David Eby: Reducing legal costs I critical to the financial health of ICBC”, Vancouver Sun, December 10, 2018.
2. <https://news.gallup.com>.
3. “Diamond and Diamond under Fire”, Toronto Star, December 3, 2016.
4. Law Society of Upper Canada, Professional Regulation Committee, “Report to the Convocation” 23, February, 2017.
5. Law Society of Upper Canada, Professional Regulation Committee, “Report to the Convocation” 27, April 2017.
6. “Personal Injury Lawyer ‘improperly marketed’ legal services, law society alleges.” Toronto Star, February 13, 2019.