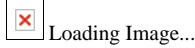


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## The battle for the personal injury dollar

### Canadian Lawyer Cover Story

Written by Shannon Kari

Issue Date: November 2012

Prominently displayed on the web site of a legal marketing initiative called the Personal Injury Alliance are links to three one-minute long commercials featuring people who have suffered catastrophic injuries as a result of accidents. Accompanied by soft music playing in the background and showing the individuals now leading active lives despite their injuries, the video clips also include praise for their unnamed lawyers. They end simply with the person stating his or her name. Glossy, with good production values, and attempting to be inspirational, the videos are stylistically more like the athlete profiles that run continuously during Olympic Games than what they actually are: Commercials for a group of the best-known personal injury law firms in Ontario.

The Personal Injury Alliance is a marketing venture initiated in June by Thomson Rogers, McLeish Orlando LLP, and Oatley Vigmond LLP — three firms that generally compete to represent clients with serious injuries that often lead to high-stakes litigation and potential multi-million-dollar damages awards. Since the summer, the firms have used the videos and radio commercials in an advertising campaign that has raised the profile of what they call the PIA, rather than marketing each firm individually.



The joint venture is believed to be the first of its kind in Canada and a reflection of the new reality of the hyper-competitive personal injury field, especially in southern Ontario. Gone are the days of simply advertising in the Yellow Pages, legal and other publications, and maintaining good relationships with other lawyers and those in the medical profession. “The reason for the alliance is marketing clout,” states Roger Oatley, a founding partner of Oatley Vigmond and long recognized as a leading lawyer in the personal injury bar. “It is expensive and we wish we did not have to do it,” he adds, while admitting the advertising campaign is necessary, even for firms that handle the higher-end cases and are not a volume practice.

These days, understanding terms such as “search engine optimization” are as important to a firm’s success as its skill in the courtroom. Along with the need to be at the top of Google searches is the requirement to market directly to the potential client. Increasingly, advertising for personal injury firms has expanded beyond web sites to radio, television, and newspaper advertisements as well as aggressive niche marketing. There are safety campaigns sponsored by firms, Christmas parties for patients in trauma units, advertisements on in-house television in hospitals, and much more. At the Hospital for Sick Children in Toronto, the barriers that lift as you enter and exit the parking lot in the building both display advertisements for a local personal injury firm.

A report issued by Statistics Canada in 2009 listed the annual cost of personal injuries to Canadian society at \$19.8 billion. Nearly 20 per cent of all injuries requiring hospitalization involved “transportation incidents.” While only a small percentage of these injuries result in litigation, there is still a large and potentially lucrative pool of clients for the personal injury bar.

As a result, advertising campaigns Canadians previously saw on U.S.-based television channels are now cropping up on local radio and TV stations, especially all-news channels. “Get ready. You are going to see plaintiff personal injury ads everywhere,” predicts Todd Reybroek, who heads Reybroek Barristers in Toronto. “It is absolutely the future,” he says, although he notes his own firm’s advertising efforts are still relatively modest and referrals are the most common way new clients are retained.

What many in the personal injury field, including Reybroek, are watching closely is the impact of the Personal Injury Alliance campaign and whether joint advertising is a strategy other firms will need to emulate to maintain a healthy client base. As well, while no one is commenting specifically on its practices, the elephant in the personal injury advertising room in the Toronto area is the firm Diamond & Diamond. David Diamond and his nephew Jeremy Diamond appear to be the largest advertisers in this field in Toronto. It is difficult to listen to sports or talk radio for any extended period without hearing a commercial for the firm. There are also advertisements on television, in prominent spots in the *Toronto Sun* newspaper, as well as on buses and at bus stops. In a video posted on YouTube related to a charity event last year, Isaac Zisckind, the brother-in-law of Jeremy Diamond, suggests his face can “be seen all over the city. In fact, I do not think there is a bus bench anywhere in Toronto you can sit, without having your tuchas on his face.”

In contrast to the PIA radio commercials, which focus on what it says is its ability to restore dignity to the lives of potential clients, the Diamond & Diamond advertisements are of the more traditional personal injury style, stressing a free consultation and lack of fees if the firm does not reach a settlement. The 1-800 number for prospective clients to call ends with the letters HURT. The family firm also does not shy away from long-standing stereotypes about this area of legal practice. On the same YouTube video mentioned above, which is listed as a tribute to Jeremy Diamond and his wife Sandra Zisckind (a personal injury lawyer at Grillo Barristers in Toronto), David Diamond recounts a story about seeing an ambulance and chasing it, since he is a personal injury lawyer. “By the time I was there, guess who was there? Jeremy. Jeremy beat me,” jokes his uncle on the video.

In addition to its advertising, the firm has gained a presence with community groups and in the media, sponsoring the “know your rights” segment on the CP24 news channel, hosted by former Ontario Provincial Police officer-turned TV reporter Cam Woolley. A photo on the firm’s web site shows Jeremy Diamond receiving an Ontario Safety League award from its president Brian Patterson, with Ontario Transportation Minister Kathleen Wynn also in the picture, at the award ceremony.

Diamond & Diamond also periodically issues news releases to comment on the personal injury industry. Such a release from Sept. 14 outlined some of the firm’s marketing strategy: “Diamond & Diamond is not the Walmart of the personal injury industry. There is just a strong focus on doing an effective job of sending the message — not a simple feat in this industry,” said the release that listed Jeremy Diamond as the director of marketing at the firm and “amongst the best marketers” in Toronto. In the release, he also promised to build on the name recognition of the firm and “grow the brand” as “an authority, as well as a trustworthy community member. The goal: gain a following and keep them interested.”

Clearly, the firm has had an impact, despite its relatively small size and litigation experience, compared to its competitors. David Diamond was called to the bar in 1981, while Jeremy Diamond was licensed to practise in Ontario in 2008, seven years after graduating from Thomas H. Cooley law school

in Michigan, according to the firm's web site. While the Diamonds highlight their more than 30 years of experience in the personal injury field, the firm operates primarily as a referral service — sending clients to other firms — rather than as litigators. This is disclosed in smaller print within the “firm overview” section of the Diamond & Diamond web site. “Our firm is primarily a referral source and initial screening assessment agent. Our firm will not represent or suggest that we will act for the client. All retainers are clearly explained and signed with our associate firm who will have complete carriage of your case from start to finish,” states the web site. The referral fees and associate firms are not listed on the web site, although it does stress this information will be explained to every client, as is required by the Law Society of Upper Canada. *Canadian Lawyer* contacted Diamond & Diamond but neither lawyer could be reached for comment.

The advertising campaigns of Diamond & Diamond and other firms in this field have increased the pressure on competitors to respond, even those that focus on serious injury cases rather than volume. At the same time, lawyers such as those at the Personal Injury Alliance prefer to talk about the bigger picture when discussing its marketing venture. “I am not going to comment on any one firm specifically,” says Dale Orlando, a partner at McLeish Orlando. “There are a whole range of firms that have started to advertise.”

The decision to form the Personal Injury Alliance was a response to what Orlando describes as an increase in “business-to-consumer” advertising. “We thought, maybe it is time to take a step in that direction,” says Orlando. The decision to join forces with Thomson Rogers and Oatley Vigmond “was born out of a mutual respect,” Orlando explains. “We have similar practices.” While they have allied on aspects of their marketing, they are still competitors, he stresses. “This isn't a partnership. It is a joint marketing effort. We want to give someone the opportunity with one phone call, to meet three law firms. Over the long run it will all equal itself out.”

Even for firms that specialize in serious injury litigation, having some control over the intake of clients is ultimately going to affect the bottom line. “We decided collectively, it was necessary to get the message out,” says Oatley. “We are regarded as among the best by our colleagues and by people in the rehab industry. But it was the extent of the hard sell advertising directly to consumers that led us to discuss a way to deal with it collectively. Everyone shared the same concern, that unsuspecting, seriously injured people were choosing lawyers based on media and advertising, rather than merit.”

Sloan Mandel, a partner at Thomson Rogers, adds that one of the goals of the marketing alliance is to inform individuals who have been seriously injured that the decision on which lawyer to retain is not one to be made lightly. “We want to get the message out to the public. If you have been seriously injured, do your homework. A catchy jingle is fine. But that is not the way you should choose your counsel. There is objective criteria that the public should consider,” which Mandel suggests should lead potential clients to choose one of the three firms in the alliance.

The Personal Injury Alliance campaign, with its greater production values and softer sell in its commercials, backed by the good reputations of the firms involved, is provoking discussion among other lawyers with similar practices. So far though, it has just been discussion. “It is a novel concept. Everyone took notice,” says Brian Grant, managing partner of the Toronto litigation office of Lerner LLP. “We have to define our understanding of our market position, to reach who we want to reach.”

Lerner decided to increase its online presence in terms of content, SEO, as well as more publications by its lawyers. “Our experience when ramping up Google is you get an increase in calls. You don't necessarily get an increase in good calls,” says Grant. “It will be interesting to see what change, if any, the Personal Injury Alliance advertising campaign will have on their referral experience,” he says.

Other firms such as PI boutique Carranza LLP in Toronto are advertising, but in a more targeted way, primarily in ethnic publications. It bills itself as the largest ethnic personal injury law firm in the city. “We speak 24 languages. That attracts a number of clients,” says Joseph Campisi, a lawyer at the firm and adjunct professor at Osgoode Hall law school. “We are encouraged to be in the community and part of charitable organizations.” The firm still receives most of its clients from referrals and in its limited direct advertising, “we try to be as tasteful as possible,” says Campisi.

If there is one marketing aspect that personal injury firms of all styles and sizes are engaged in regularly, it is sponsoring specific charity events or safety campaigns. At the Ontario Safety League, its president Brian Patterson regularly turns to lawyers and law firms to sponsor events, such as one trying to increase awareness of the importance in wearing bicycle helmets. “This group of lawyers has been instrumental in raising the safety message. Personal injury lawyers have made a real difference,” says Patterson, effusive in his praise for an area of the legal profession that is often maligned by the public. The safety and charity events, usually sponsored in conjunction with local communities or hospitals, create goodwill for the firms and a form of marketing personal injury firms have participated in for a number of years.

It may also be one of the few things in common for those who practise in southern Ontario and lawyers in other provinces. The high-volume advertising by personal injury lawyers in the U.S. and now in the Toronto-area does not appear to be in vogue elsewhere. Rose Keith, a former president of the Trial Lawyers Association of British Columbia, says she is aware of only a limited amount of advertising on television, mostly during the daytime. “In terms of attracting clients, the web has changed everything,” says Keith, who practises in Vancouver. While most of her clients are still retained through referrals, a lawyer's web site and the quality of its content is very important, even after the initial meeting. “People are much more savvy consumers” and if a lawyer does not have a web site or if its online presence looks unprofessional, “it says something about you,” says Keith.

In Alberta, statutory changes that reduced caps for minor injuries have made it more difficult to have a volume practice. As a result, advertising is still limited in the province, says Craig Gillespie at Cuming & Gillespie in Calgary. “We spend a lot of time on our web site content and lots of [legal] blogging. We have a Facebook page and Twitter account. At the same time, it is still reasonably traditional,” says Gillespie. Similar to their counterparts in Ontario, he says his firm is involved in significant charity work. “You want your name in a favourable light with brain injury rehabilitation groups.”

So, for now at least, U.S.-style personal injury marketing campaigns appear to be only an Ontario phenomenon in this country. Advertising and referral fees are clearly good for the bottom line of local media outlets and some law firms, but whether these relatively new activities are good for the profession as a whole and ultimately for clients is not something that is actively being analyzed by the province's legal regulator.

The Law Society of Upper Canada's Rules of Professional Conduct for marketing services are fairly general in nature. Among the requirements are that the marketing is “neither misleading, confusing, or deceptive” and that it is in “the best interests of the public and is consistent with a high standard of professionalism.” Changes to the Rules were made about a decade ago in Ontario (and other provinces) to permit referral fees from lawyer to lawyer. The LSUC requires the fee is “reasonable,” is disclosed to the client, consented to by the client, and does not increase the overall fee charged by the lawyer. The web sites of a number of personal injury firms in the province trumpet their willingness to pay between 15 to 20 per cent of their final compensation for successful referrals. Susan Tonkin, communications adviser at the law society, says there is no suggested percentage for a referral fee. “This is not an area that is a source of complaints from clients or the public.” In terms of monitoring advertising of law firms, the LSUC is

“generally aware of advertisements by our licensees and we would look into an advertisement that appeared to offend our Rules.”

Referral fees are not a bad thing, suggests Grant, at Lerner. “There is always the potential for abuse. But the referral relationship is to be guided by the best interest of the client. If the system works, the file ends up where it should.” Where he does think the law society might play a greater role is in its oversight of legal advertising. “I don’t think they have been giving much guidance so far.” It is a view shared by Roger Oatley, even if his firm is somewhat reluctantly a part of a large-scale, albeit softer-sell, advertising campaign. “I think the law society is doing an inadequate job of regulating in this area,” says Oatley. The explosion in hard-sell advertising, he says, “has done the perception of our profession harm. Something ought to be done to ensure good taste, to ensure that consumers are not misled.”

### The loosening of ad rules

In striking down an Arizona law that prohibited advertising by lawyers, the United States Supreme Court noted in a 1977 ruling that the historical underpinnings of these restrictions had more to do with “etiquette” than legal ethics. “Early lawyers in Britain viewed the law as a form of public service, rather than as a means of earning a living and they looked down on ‘trade’ as unseemly,” wrote Justice Harry Blackmun.

Keeping these restrictions in place would only serve to deny consumers information, the court said. “The argument assumes that the public is not sophisticated enough to realize the limitations of advertising and that the public is better kept in ignorance,” wrote Blackmun.

Following a similar court challenge, the Law Society of Upper Canada changed its rules in 1987 and allowed lawyers in Ontario to advertise in any medium. A quarter century later, legal advertising is permitted across the country — but it has moved from the Yellow Pages to the Internet, radio, newspapers, television, the tops of cabs, and wherever advertising space is sold.

However, the guidelines that govern what type or style of advertising is permitted — and are virtually identical in every province — appear to be inspired by the original British notion of the profession.

The provincial rules of professional conduct all state legal advertising must be consistent with maintaining public confidence and respect for the administration of justice. In Alberta, the commentary accompanying the rules advises against a firm describing itself as “the best” in a certain area because this cannot be proven. The Law Society of Manitoba also advises against lawyers claiming even to be aggressive. In New Brunswick, its law society warns lawyers should not imply they can achieve better results than others.

Clearly, the various regulators in Canada have decided not to enforce these broad principles strictly, or else the only advertising that would be permitted would be that which provided no more than contact information for a lawyer or firm.

### Additional Info

#### Comments

# **what "objective criteria" - pray tell** — Brian 2012-11-12 09:54 +2

RE: " There is objective criteria that the public should consider," which Mandel suggests should lead potential clients to choose one of the three firms in the alliance."

So what are these "objective criteria"? It would be nice if somebody had thought to mention them. So far the "battle" has adopted the "subtle" advertisers versus "crass" advertisers lexicon - without so much as a single word by way of useful criteria to help "consumers" find a "good lawyer". What about searching the track record of pi lawyers at FSCO and CANLII - is that a good idea?

[Reply](#) | [Reply with quote](#) | [Quote](#)

# **Partner** — Sloan Mandel 2012-11-15 15:28 -2

Brian,

The objective criteria to which I referred would include:

Are you certified by the Law Society of Upper Canada as a Civil Litigation specialist?

Have you been identified as a leading practitioner in peer review publications (L'Expert, Best Lawyer)?

Have you been published or recognized as an authority in the field, and by whom?

Have you successfully prosecuted cases through Trial/Appeal?

How long have you exclusively practiced in the field of personal injury?

Regards

[Reply](#) | [Reply with quote](#) | [Quote](#)

# **RE: Partner** — Brian 2012-11-15 16:16 0

Mr. Mandel,

Thanks for this concrete list. It is helpful. Too often the injured are told to "ask questions" and to "do research" when hiring a lawyer. This merely begs the question (ie. what questions //research on what). Should Ontario auto accident victims (and/or their families) search CANLII and FSCO to get a sense of the lawyer's success/thoroughness? If so - what should they look for? Challenging the opposing