

## Legal advertising under the microscope

Some lawyers want ban as law society looks at amending the rules

BY TALI FOLKINS

Law Times

**D**arcy Merkur has had enough. Whether it's misleading information about the amount of experience a law firm has on display with apparent pride on the side of a bus or phallic innuendo suggestive of big settlements strategically placed above men's urinals at the Air Canada Centre, legal advertising in Ontario, in his view, has gotten out of hand.

"It's everywhere. It's misleading at various times regarding trial experience, overall experience. It's a real problem," says Merkur, a personal injury lawyer and partner at Thomson Rogers.

"We think the public has been misled. We'd love some solutions."

The problem is particularly acute in personal injury law, he says, because of the frequency of contingency-fee arrangements in that area. Generating new files becomes extremely important to firms, leading to intense competition for clients and, in turn, advertising that some lawyers believe has spun out of control.

The worst offenders, in Merkur's view, are firms that boast about extensive trial experience when in fact they have very little.

John McLeish, a founding partner of McLeish Orlando LLP, agrees that something needs to change. For McLeish, misrepresentations about lawyers' experience and the settlements they can achieve pose a real threat to many people struggling with how to cope financially after an injury.

"The average person on the street doesn't know how or doesn't have time to do due diligence," he says. "So they're vulnerable."

On top of that, he says, much of the advertising is offensive and is "sullyng the profession."

"For the most part, it's tasteless and tacky and I would describe it as a race to the bottom," he says.

The concerns arise as the Law Society of Upper Canada prepares to take another look at the issue. Last month, Convocation agreed to a call for input around a set of proposed changes to its existing regulations on advertising. Interested parties have until mid-October to comment on whether the law society should make the proposed changes, leave things as they are or consider other options.

Among the proposed changes are additions to existing commentary that give examples of marketing practices that would contravene the law society's rules. They include "failing to disclose that the legal work is routinely referred to other lawyers for a fee rather than being performed by the lawyer;" "misleading about the size of the lawyer's practice or the areas of law in which the lawyer provides services;" "referring to fee arrangements offered to clients without qualifications;" and "advertising awards and endorsements from third parties without disclaimers or qualifications."

The commentary also refers, in language dealing with



Darcy Merkur wants to see a total ban on advertising in the legal industry.

Photo: Robin Kuniski

instances of "marketing practices which may be inconsistent with a high degree of professionalism," to "images, language or statements that are violent, racist or sexually offensive, take advantage of a vulnerable person or group or refer negatively to other lawyers, the legal profession or the administration of justice."

For Merkur, the proposed changes are a step in the right direction but they don't go nearly far enough. He wants to see a total ban on advertising in the industry.

McLeish agrees. "I would be the first one to put up my hand for a total ban," he says.

Maia Bent, president of the Ontario Trial Lawyers Association, calls the proposed changes a good first step in addressing a lack of transparency in much of Ontario's legal advertising. She hopes the law society will strictly enforce the changes if it approves them.

"The most important element is going to be enforcement," says Bent. "There's a sense that some firms are breaking rules because they can get away with it."

The law society is assuring us [enforcement] is going to be a point of emphasis for them and we're definitely welcoming that."

Some advertising can be useful, she says, adding a complete ban "wouldn't be necessary if the most egregious conduct was brought under control." But calls for a ban, she says, do "speak to the frustration of people who would like all advertising to be tasteful and with integrity."

Trevor Farrow, a professor at Osgoode Hall Law School who specializes in professional and judicial ethics, says there are tensions that require balancing when it comes

to regulating legal advertising. On the one hand, says Farrow, the more aggressive advertising that has emerged in recent years puts a heightened obligation on law societies to ensure lawyers properly follow the ethical principles they've adopted.

On the other hand, he says, advertising can be an element in increasing access to justice by "empowering people to understand what services are available, what they are, where they can go, who they can talk to, and what they can cost." For example, he says, many people may be aware it's possible to pay for legal services on a contingency-fee basis only because they've seen ads to that effect.

But advertising, he notes, can be a double-edged sword.

"Advertising can be done in tasteful ways, in fair ways, and in the alternative, in ways that bring the profession in disrepute. That's the line that the law society needs to walk because the public needs to have confidence in lawyers' ability to fairly and properly and honourably regulate themselves."

Whatever the solution may be, an all-out ban isn't it, says Farrow. "I think banning advertising is impractical at this stage," he says.

"It's out of touch with modern social and business realities, and I think if advertising is done honourably and well and with integrity, it can be a tool among many that help people understand and access legal services that they need. If we can't speak to the public, if we can't be out there in different ways, how is the public going to know what we do?"

LT