

Harris County Democratic Lawyers' Association

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**Robert S. "Bob" Bennett on "Barratry, Ethics and Keeping your
License"**

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WHY SHOULD BARRATRY BE A CRIME: BARRATRY ETHICS AND KEEPING YOUR TEXAS LAW LICENSE

The term barratry originates from the Anglo-Norman French word “baraterie,” meaning “deception.”¹ It first surfaced in late thirteenth century English society as a term attached to the clogging of court dockets with frivolous lawsuits.² By the fourteenth century, local English courts began to prosecute those believed to be guilty of committing barratry.³ Barrators were generally viewed as trouble makers and by the late sixteenth century, barratry became a blanket term used to denote both vexatious litigation and verbal offenses.⁴ The twentieth century witnessed a shift in the way society viewed barratry. With the passage of section 13(1) (a) of the Criminal Law Act of 1967, it was labeled an obsolete crime and ultimately abolished in England and Wales.⁵ In Australia, the term was used to refer to litigants who brought up frivolous suits; however it has long since fallen into disuse.⁶

Today, barratry is seen as “the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit” (*State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994)). Once referred to as “adjudicative cheerleading” by a national ethics expert, it denotes a wide range of illegal actions taken by attorneys (“Barratry,”). It includes but is not limited to actions such as bringing forth false claims, attorneys trying to get their services

¹ Pllarczyk, I.C. (2012, September 11). [Web Log Message]. Retrieved from <http://iancpilarczyk.com/2012/09/what-is-barratry-a-far-from-frivolous-question/>

² Jones, K. (2006). *Gender and petty crime in late medieval England: The local courts in Kent*. (p. 103). Suffolk, England: Boydell Press.

³ Ibid.

⁴ Ibid.

⁵ Criminal law act 1967. (1967). http://www.legislation.gov.uk/ukpga/1967/58/pdfs/ukpga_19670058_en.pdf

⁶ Barratry, Common Law, 2013. Retrieved from <http://www.herring-irwin.com/barratry>

recruited by potential clients within 31 days of an accident, and enlisting the services of third parties to solicit victims and their families.⁷

New Texas Legislation concerning Barratry goes into effect on September 1, 2013. Besides Barratry being defined under Penal Code 38.12(a), for the first time brings Disciplinary Rule 7.03 into the Penal Statute 38.12. Does that mean that a violation of Rule 7.03 or 7.02 (a) may lead to a criminal prosecution?

Barratry and Your Texas Law License

First enacted in Texas in 1876, Barratry was a civil violation that penalized only those who brought forward unsubstantiated and incommodious law suits.⁸ By 1901, the statute was amended so that it also prohibited attorneys from soliciting clients.⁹ In 1993, the ban was extended to direct-mail solicitation of clients by attorneys, and by 2009 it included in-person solicitation and solicitation via telephone calls.¹⁰ In addition, the Texas barratry statute allows for the prosecution of anyone who violates the law on barratry. In the state of Texas, barratry is a 3rd degree felony. In addition, the guilty party has to contend with the possibility of a lawsuit that could run as high as \$10,000 in damages, as well as the threat of possible disbarment.^{11, 12}

Barratry differs from general marketing in that it usually involves the attorney or a third party directly contacting potential clients to lure them into signing legal contracts.¹³ While a lawyer may place a Texas Bar Advertising Review Committee approved ad in a newspaper or on a billboard without the threat of disciplinary action, it is illegal for him or her to violate these rules in aggressively soliciting clients. Barratry is often linked to other acts of impropriety such

⁷ Davidian, G. (1992, November 21). Barratry widespread and laws against it narrow, lawyers say. Houston chronicle, p. 34.

⁸ Kassabian, K. (2013, April 22). Clients don't come cheap: The unconstitutional texas client solicitation laws may cost practitioners millions. Retrieved from <http://ssrn.com/abstract=2255093>

⁹ Ibid.

¹⁰ Ibid.

¹¹ Marcotte, P. (1990). Barratry Indictments: DA claims four Texas lawyers solicited bus-crash

¹² Holley, J. (2012, Apr 26). Missouri city lawmaker free on bail in barratry case. McClatchy – Tribune Business News.

¹³ Rasansky, J. (2012, July 12). [Web log message]. Retrieved from <http://www.jeffrasansky.com/2012/07/crack-down-on-barratry---ambulance-chasers-on-the-run/>.

as insurance fraud, or attorneys coaxing clients into signing agreements that increase their percentage of the settlement that goes to the attorney.¹⁴ Effective from the 1st of September, 2009, Section 38.12 of the Vernon's Texas Statutes and Codes Annotated states that an attorney commits barratry if with the intent to gain employment, he or she solicits clients either in person, via the telephone, or through written communication, V.T.C.A., Penal Code § 38.12.

Illegal solicitations usually involve the attorney contacting the victim or the victim's relatives within thirty days of an accident. It also extends to cases whereby attorneys solicit potential clients even when it is apparent that the clients already have legal representation. It covers those cases where the injured party or a relative of theirs has indicated a desire not to be hounded by legal representatives; cases involving coercion or containing a misleading claim. According to section 82.065 of the Government Code in Texas, a client can back out of a contingency fee contract if his or her lawyer is guilty of barratry.¹⁵ The client can also take back any monetary fees paid to the attorney, including actual damages, and attorney's fees.¹⁶ A recent amendment to section 82.0651(a) and (b) of the Texas Government Code that goes into effect from September 2013 states that in addition, clients who enter legal contracts after being illegally solicited could recover a penalty of \$10,000 from the guilty attorney. This provides the necessary financial incentive for clients to turn in lawyers they believe to be guilty of barratry.

In 1994, Texas laws on barratry were ruled unconstitutional by a federal district court Judge. In his *Moore v. Morales* ruling, Judge Hittner stated that "states may not regulate commercial speech merely because a recipient of that speech might be emotionally distressed."¹⁷ Among the barratry laws ruled unconstitutional was the prohibition against directly soliciting

¹⁴ Pinkerton, J., & Bragg, R. (1990, April 10). 3 lawyers go to court on bus wreck barratry charges. Houston Chronicle, p. 16.

¹⁵ See Footnote 11, page 2.

¹⁶ Aaronson, B. (2012, Jun 24). Crackdown intensifies on barratry. New York Times.

¹⁷ Urban, J. (1994, January 20). Texas laws on barratry ruled unconstitutional. Houston Chronicle, p. 1.

prospective clients via mail within 31 days of an arrest or summons.¹⁸ In *Ficker v. Curran* (1997), the United States Court of Appeals for the Fourth Circuit ruled that a Maryland law that banned direct-mail solicitation of criminal and traffic violators within thirty days of an arrest was a violation of the attorney's First and Fourteenth Amendment right.

In 1995, Texas barratry statutes were widened to include prohibiting anyone from financing a barratry scheme or soliciting employment.¹⁹ In the past, such offenses were limited to only those in the legal and health-care profession.²⁰ According to section 82.0651(a) of the Texas Government Code, a client can void a fee agreement if his or her attorney is guilty of barratry.²¹ Under this statute, clients can recover all the legal fees paid to guilty attorneys, expenses paid to those lawyers eligible for a quantum meruit award, actual damages, and attorney's fees.²² Section 82.0651(c) of the Texas Government code allows those clients who did not enter into fee agreements with attorneys guilty of barratry to recover a \$10,000 penalty from the guilty lawyer, in addition to actual damages, and attorney's fees.²³

In 1993, Walter Oji, a Houston based lawyer was charged with barratry after sending a paralegal to the family of a deceased accident victim for solicitation.²⁴ In 1989, four Alton Texas lawyers faced barratry charges for soliciting clients after a school bus accident that left twenty one children dead and sixty injured.²⁵ One of the people solicited testified that some lawyers had gone as far as luring her with the promise of lavish gifts.²⁶ In 2012, a Corpus Christi attorney,

¹⁸ Ibid.

¹⁹ Staff. (1995, April 1). Closing loophole/legislation would tighten state's barratry statutes. Houston chronicle, p. 30.

²⁰ Ibid.

²¹ Westerheim, S. R. (2011, August). Bill creates new civil remedies for barratry. Retrieved from <http://www.dallasbar.org/content/bill-creates-new-civil-remedies-barratry>

²² Ibid.

²³ Ibid.

²⁴ Makeig, J. (1993, July 15). Houston lawyer arrested on barratry indictment. Houston chronicle, p. 18.

²⁵ See Footnote 11, page 2.

²⁶ Ibid.

Benito Garza, had his law license revoked, after he was found guilty of barratry. In addition, he was made to pay \$6000 in fines, and faced a ten year probation.

Just last year, a Missouri City democrat, Ron Reynolds, was charged with barratry after an allegation was made that a chiropractor firm withheld services from clients until they agreed to sign a contract that appointed Mr. Reynolds as their legal counsel.²⁷ Houston lawyer, Marcela Halmagean, claimed that after she suffered a motor accident, Reynolds used a representative to solicit her.²⁸ Although the case was dismissed, Ron Reynolds once again faces barratry charges. The recent charges were leveled against him on the 25th of March, 2013.²⁹

Seven other Houston based attorneys, including Reynolds allegedly procured the help of a third party to illegally solicit clients involved in auto accidents. The quarter of a million dollars barratry scheme allegedly made payments to a Robert Valdez who in turn went through Houston police records, singling out those related to auto accidents.³⁰ He convinced the accident victim to seek the services of an attorney he was financially indebted to.³¹ A confidential informant stated that she had worked alongside Robert Valdez while he solicited clients for Ron Reynolds and the other attorneys.³² Furthermore, she allegedly witnessed Reynolds handing Valdez an envelope containing hundred dollar bills.³³ Reynolds attorney maintains that Valdez is framing Reynolds in order to receive a less stringent sentence from the criminal justice system.³⁴

Challenges to Texas Barratry Statutes

The Texas legislature has gone to great lengths to criminalize barratry; a crime that has long been deemed obsolete by its originators and declared unconstitutional in a number of

²⁷ See Footnote 16, page 3.

²⁸ See Footnote, page 2.

²⁹ Associated Press. (2013, March 26). Lawmaker accused in alleged ambulance chasing ring. Khou

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

prominent court cases. It fails to consider the fact that barratry may indeed be more helpful than harmful. By soliciting clients either directly or through case runners, attorneys are able to inform prospective clients about their legal rights; rights that clients may have been oblivious to ("Barratry"). This ensures that prospective clients are afforded their Sixth amendment right and are therefore able to make well-informed decisions on how to proceed. Barratry is at par with the concept of a free market society because it fosters competition between attorneys. By providing case runners and attorneys with a steady stream of income, it generates revenue for the economy ("Barratry").

Barring attorneys from seeking out prospective clients to inform them of their legal rights is in direct conflict with an attorney's First and Fourteenth amendment rights. Recently, a Dallas law firm questioned the constitutionality of Texas Barratry laws as they relate to the First and Fourteenth amendments. The challenge was brought against two barratry laws that restrict access to court-held information about criminal defendants thus making it harder for the defendants to receive legal counsel ("Barratry"). The plaintiffs set out to obtain declaratory judgment that would find certain portions of Section 38.12 of the Penal Code unconstitutional ("Barratry,"). Although the suits were dismissed, they serve as proof of the growing discontent with Texas laws on barratry.

In *Ventura v. Morales* (1996), a federal district judge found certain portions of Section 38.12 of the Penal Code unconstitutional. They included the offense of mailing victims or their relatives before the 31st day following the accident, and the offense of soliciting clients via mail before the 31st day following an arrest or summons.³⁵ The Judge did not believe that there were

³⁵ Cornyn, J. Office of the Attorney General - State of Texas, (1999). Opinion no. jc-0022. Retrieved from website: <https://www.oag.state.tx.us/opinions/opinions/49cornyn/op/1999/htm/jc0022.htm>

sufficient grounds to justify such a ban on commercial free speech.³⁶ In *Florida Bar v. Went for It, Inc.* (1995), the Supreme Court made use of a three-part test known as the *Central Hudson test* to ascertain the constitutionality of a ban on commercial free speech when it is neither misleading nor related to some form of illegal activity.³⁷ It deduced that for a speech of that nature to be prohibited, the government must show that it has a substantial interest in such a regulation.³⁸ Secondly, there must be a direct link between the regulation and the government's interest.³⁹ Finally, the regulation must be specific and unambiguous.⁴⁰ While such a test may uphold prohibitions on soliciting clients among accident victims as was the case in *Florida Bar v. Went for It, Inc.* (1995), it would be unable to justify banning attorneys from soliciting criminal defendants.

Prohibiting attorneys from soliciting accident victims may be justified on the grounds that the government has a substantial interest to protect the victims from further emotional trauma that may result from attorney badgering.⁴¹ The same is not the case for criminal defendants as their unique circumstance means that their primary focus would be to find an appropriate legal counsel.⁴² Furthermore unlike accident victims who have up to two years to file a suit, criminal defendants only have thirty days to find legal counsel, after which they lose their rights.⁴³ This therefore means that criminal defendants have a higher incentive to seek legal counsel and benefit from solicitation by attorneys.

In *Ficker v. Curran* (1997), The Court of Appeals for the Fourth Circuit stated that "when the state itself is prosecuting a defendant, it cannot lightly deprive its opponent of critical

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

information which might assist the exercise of even a qualified right" *Id.* at 1155. Penalizing lawyers who solicit criminal defendants would be a violation of the defendants Sixth Amendment right to counsel. The former Attorney General of Maryland stated that "Unlike the typical personal injury plaintiffs, criminal defendants are in litigation against the State. Thus, the effect of the law, if not its intent, is to make it more difficult for our opponents to get legal representation" *See Went For It*, 515 U.S. at 629-32; *Ficker*, 119 F.3d at 1156; *Turnbull*, *supra* note 99, at 1148-49. In the landmark case of *Bates v. State Bar of Arizona*, the Supreme Court rendered unconstitutional a complete ban on client solicitation, recognizing that such a ban would be a violation of an attorney's commercial free speech. It went on to state that any restriction on an attorney's commercial free speech must be reasonable. Prohibiting attorney's from directly soliciting criminal defendants is not reasonable.

State legislatures seem to be overeager to prohibit any attempt by attorneys to draw clients in, regardless of how tame such an attempt might be. In *Zaunderser v. Office of Disciplinary Counsel*, (1985), the United States Supreme Court ruled on the issue of whether a state could sanction targeted advertising.⁴⁴ The case involved an attorney placing an ad in an Ohio newspaper which targeted women that had been injured by a contraceptive device.⁴⁵ The Ohio Office of Disciplinary Conduct maintained that targeted advertising presented the same set of problems inherent in in-person solicitation.⁴⁶ The Court however held that targeted advertising was neither overreaching in nature, nor did it infringe on the privacy of those being solicited.⁴⁷ Furthermore, in March of 2010, a U.S Federal District Court Judge in Austin Texas, Lee Yeakel, lent credence to earlier rulings on direct-mail solicitation of arrestees when he declared that it is

⁴⁴ Footnote 8, page 2.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

unconstitutional to ban attorneys from sending written solicitations to arrestees within thirty days of the arrest.⁴⁸

In 2009, Houston based attorney Christopher Villasana challenged the constitutionality of Texas barratry laws.⁴⁹ He stated that Texas Barratry statutes were too broad and should be limited to only those solicitations that were misleading or deceptive.⁵⁰ He argued that “instead, it operates as a complete and total ban against the proscribed communication, and no warnings or disclosures made with the communication, regardless of how truthful or informative the communication may be, can rescue the communicator from committing an offense under the broad sweep of the prohibitions.”⁵¹ A district court judge ruled in his favor stating that it was unconstitutional to bar attorneys from in-person, written, and telephone solicitation.⁵² The ruling was later reversed by the Fifth Circuit Court of Appeals.⁵³ It remains to be seen why barratry, a term originating from the word “deception,” should be attached to communications that are neither deceptive nor misleading. The only crime being committed by these attorneys is their attempt to eke out a living.

Texas attorney Bobbitt, of the *Sullo & Bobbitt* law firm recently challenged the constitutionality of section 82.0651 of the Texas Government Code as it relates to section 38.12 (d)(2)(C) of the Texas Penal Code. He claimed that such a statute violates attorneys First and Fourteenth amendment rights to commercial free speech. It appears that although the court in *Moore v. Morales* held that the criminal barratry statute prohibiting direct-mail solicitation is unconstitutional, the Texas Legislature has gone ahead to ignore the court's ruling. The

⁴⁸ Fikac, P. (2010, March 27). Doc, lawyer solicitation ban tossed. My San Antonio.

http://www.mysanantonio.com/news/local_news/article/Doc-lawyer-solicitation-ban-tossed-788777.php

⁴⁹ Tennissen, M. (2011, June 28). [Web Log Message]. <http://www.tortreform.com/news/appeals-court-ruling-upholds-texas-ban-ambulance-chasing>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

legislature still holds attorneys financially liable to clients that are solicited through direct mail. This means that attorneys that solicit their clients via direct mail could potentially be sued under the civil barratry statute.

The case was brought before a federal district court in Dallas. Failing to address the issue being contested, the court declared that “federal courts can not consider the merits of a case unless it presents an actual controversy, as required by Art. III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.” *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (quoting *Steffel v. Thompson*, 415 U.S. 452, 458 (1974)). It is interesting to note that the Attorney General’s argument was completely founded on Bobbitt’s lack of an Article III standing as opposed to any concrete evidence that invalidated *Bobbitt’s* claim. The federal district court dismissed Bobbitt’s claim on the grounds that there was no actual injury and that a declaratory judgment was unlikely to address the issue.⁵⁴ He was however granted leave to replead and The *Bobbitt* case is presently on the docket of the Fifth Circuit Court of Appeals.⁵⁵

The Texas legislature has turned a blind eye to earlier court rulings and opinions that have found the Texas Criminal barratry statute to be unconstitutional. By giving solicited clients the go-ahead to sue their attorneys, the Texas legislature deliberately ignores the *Moore v. Morales* ruling which declared that it was indeed a violation of an attorney’s commercial free speech to curtail direct-mail solicitation of clients. Attorneys have found themselves in a tough spot due to the contradictory facts surrounding section 82.0651 of the Texas Government Code. It makes no sense for the Texas Legislature to continue to back a statute that has been declared unconstitutional by the courts. By enacting a civil penalty directed at attorneys who solicit clients

⁵⁴ Footnote 8, page 2.

⁵⁵ Ibid.

via direct-mail, the legislature ignores precedent set forth in court cases like *Ficker v. Curran* and *Moore v. Morales*.

One of the reasons why the Texas legislature continues to uphold barratry statutes is to protect the moral values of the legal profession. If this is indeed true, the legislature needs to start entertaining the notion that barratry laws may be having the exact opposite effect. The civil penalty attached to barratry has led to an increase in lawsuits brought against attorneys by their fellow colleagues.⁵⁶ This does not paint a good portrait about the legal profession; on the contrary, it fosters widespread discord among attorneys. Barratry is basically the criminalization of actions that are a fundamental part of a litigious society like the United States.⁵⁷

⁵⁶ Morris, A. (2011, September 12). Battling Barratry; Lawyers publicize new law, predict its impact. *Tex. Lawyer*.

⁵⁷ Footnote 1, page 1.