

JUST WHAT IS BARRATRY, ANYWAY?; A QUIZ FOR THE UNWARY

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Here's a little quiz about what you can and cannot do to solicit clients. We will limit our examination to two sources of rules: (1) § 38.12 of the Texas Penal Code, which is the barratry statute; and (2) the Texas Disciplinary Rules of Professional Conduct, § VII, beginning with Rule 7.01, which are the advertising rules of conduct.

The advertising rules are relevant because § 38.12(c) of the barratry statute provides "an exception to prosecution" (not merely a defense) if the advertising rules of conduct permit the solicitation. So grab a cup of coffee and make yourself comfortable.

Using these two sources, see if you can determine for each of the following examples if the conduct described violates the barratry statute or one or more of the advertising rules. Warning: The cited sources are not exclusive. Other rules or laws may be applicable to the examples. This article focuses only on the barratry aspects of the described conduct.

We haven't provided answers, only questions. We're not sure there are any definitive answers to give.

Example 1

You are a lawyer who concentrates in aviation law. You are a participating partner in the multistate firm of Whiteshoe & Huge. A collision between two commercial airplanes occurs at the international airport outside your city. Coincidentally, you are chairing a Client Development Committee meeting at the same time that news of the collision spreads.

The firm has never represented either of the airlines involved, but has been anxious to develop their business for some time. You suggest calling and telling the CEOs of each company that Whiteshoe & Huge is sending a team of drivers with limousines to the airport to greet officials from both airlines as they arrive in town to respond to the disaster, placing the drivers and limos at the officials' disposal during their stay. You also propose setting up a hospitality suite for the officials at the airport hotel. Copies of the firm's tasteful, full-color brochures will be placed in the seat pockets in the passenger compartment of each limousine and on the coffee table in the hotel suite.

The first issue in this example is whether Whiteshoe & Huge will engage in "in-person" or "telephone" contact to seek professional employment under § 38.12(a)(2) of the barratry statute and Rule 7.03(a) of the advertising rules. Also, is the brochure being "sent" to the officials under § 38.12(d)(2) or "sen[t] or deliver[ed]" under Rule 7.05(a)?

If so, is the brochure a "written communication that concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed" under § 38.12(d)(2)(A) of the barratry statute?

Is the brochure a "communication" that involves "coercion, duress, fraud, overreaching, intimidation, undue influence or harassment" under Rule 7.05(a)(1)? Does Rule 7.05(a)(1) apply to the activity as a whole or only to the brochure? Does it make any difference that the airline officials are sophisticated business consumers? Does it make any difference if you are seeking the airlines' corporate and regulatory business and not their liability defense work? Should it?

Example 2

You are a personal-injury lawyer specializing in mass tort litigation. You are a participating partner in the small, quality firm of Run & Chase. A collision between two commercial airplanes occurs at the international airport outside your city. Coincidentally, you are meeting with your partner about client development at the same time news of the collision spreads.

The firm has never represented any of the individuals who were killed or injured in the collision, but has been anxious to begin another mass tort case since the last one settled six months ago. You suggest calling a hotline set up for the victims and leaving a message that the firm is sending a team of drivers with limousines to the airport to greet family members as they arrive into town to identify the dead, placing the drivers and limos at the families' disposal during their stay.

You also propose setting up a hospitality suite for the families at the airport hotel. Copies of the firm's tasteful, expensive, full-color brochures will be placed in the seat pockets in the passenger compartment of each limousine and on the coffee table in the hotel suite.

This example presents the same questions as Example 1, with one addition: Does it make any difference that the family members are recently bereaved and may be unsophisticated consumers? Should it?

Example 3

You are a banking lawyer attending the same Client Development Committee meeting at Whiteshoe & Huge. The next agenda item is the recent announcement by Alphabet Bank that it is moving its national headquarters to your city and opening 40 new branch banks. The firm has never represented the bank.

The chair of the committee asks if anyone knows anybody at Alphabet Bank. It so happens that the president of Alphabet Bank is your old sorority "big sister," whom you haven't seen since your college days. You suggest that you call her and arrange a meeting between her and the firm's Banking Law Section.

After some discussion, the committee also approves a plan to hire a public relations agency to coordinate a "Welcome Wagon" night for the bank president, her top staff and

members of the Banking Law Section, to be held at the country club, complete with live entertainment by Willie Nelson, of whom you know your big sister is particularly fond.

The public relations agency will place copies of the firm's tasteful, expensive, full-color brochures next to the centerpiece on each table. During dinner, top members of the Banking Law Section will briefly describe the services the firm provides.

Is Whiteshoe & Huge seeking "professional employment concerning a matter arising out of a particular occurrence or event or series of occurrences or events" under Rule of Conduct 7.03(a)? By throwing the Welcome Wagon party, is the firm "pay[ing], giv[ing], or advanc[ing] or offer[ing] to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client" under § 38.12(a)(3) of the barratry statute? Will the firm violate § 38.12(a)(4) of the barratry statute by "pay[ing] or giv[ing] or offer[ing] to pay or give . . . money or anything of value" to its public relations agency "to solicit employment" for the firm? Will the president of Alphabet Bank violate § 38.12(a)(6) of the barratry statute by "accept[ing] or agree[ing] to accept money or anything of value to solicit employment"? Will the public relations agency?

Example 4

Meanwhile, back at Run & Chase, you also know that Alphabet Bank is moving to town and opening 40 new branch banks. You recently read in The Wall Street Journal that bank-teller employees of Alphabet Bank have been complaining about the toxic effects of a theft-deterrent coating the bank requires them to spray on the money in their cash drawers.

Unless the tellers wash their hands every two hours, the coating permanently dyes their skin. The idea is that bank robbers won't know to wash after handling the money and will be caught red-handed. The bank tellers appear to be experiencing adverse health effects from repeated exposure to the coating. The firm has never represented any of the bank tellers, who are unionized.

It so happens that your brother-in-law is president of the United Bank Tellers' Local. You offer to call him and arrange a meeting with the UBTL. After some discussion, you and your partner also approve a plan for you to hire your brother-in-law to coordinate a "Welcome Wagon" night at the ballpark for UBTL members, complete with free autographed programs. Copies of the firm's tasteful, expensive, full-color brochures will be placed inside the programs. During the seventh-inning stretch, you and your partner will briefly describe the services the firm provides.

Run & Chase is faced with the same questions as Whiteshoe & Huge in Example 3. Also, if Run & Chase is seeking "professional employment concerning a matter arising out of a particular occurrence or event or series of occurrences or events," does it make a difference under Rule 7.03(a) of the advertising rules of conduct that you initiated the contact with your brother-in-law, who is a family member? Will the firm violate § 38.12(a)(4) of the barratry statute by "pay[ing] or giv[ing] or offer[ing] to pay or give . . . money or anything of value" to your brother-in-law "to solicit employment" for the firm? Will your brother-in-law violate § 38.12(a)(6) of the barratry statute by "accept[ing] or agree[ing] to accept money or anything of value to solicit employment"? Does it make a difference that your brother-in-law isn't a public relations agency? Should it?

Unknown Answers

If you've been struggling with the barratry statute and the advertising rules of conduct to figure out what, if anything, in these examples is permissible, you are not alone. Each example is designed to underscore the tension between the commercial free-speech rights of lawyers, the state's interest in regulating the conduct of lawyers and the privacy rights of individuals who are or may be the objects of attorney solicitation.

A lawyer's right to solicit business is constitutional in magnitude. Commercial speech is subject to First Amendment protection. To determine whether a regulation of commercial speech survives First Amendment scrutiny, the regulation must satisfy a three-prong test set out by the U.S. Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* (1980): (1) The state must assert a substantial interest supporting the regulation; (2) the regulation must directly and materially advance that interest; and (3) the regulation must be narrowly drawn to advance that interest.

The governmental interest in prohibiting barratry has been described by the U.S. Supreme Court in *Ohralik v. Ohio State Bar Ass'n* (1978) as "a legitimate and indeed compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation [and] overreaching. . . . Protection of the public from these aspects of solicitation is a legitimate and important state interest." For challenges under the First Amendment, the appropriate level of scrutiny hinges upon whether a statute distinguishes between prohibited and permitted speech on the basis of content. For the state to enforce a content-based exclusion, the high court in *Frisby v. Schultz* (1988) said it must show not only that the regulation is necessary to serve a compelling state interest, but also that it is narrowly drawn to achieve that end.

The U.S. Supreme Court has also recognized in *Florida Bar v. Went For It Inc.* (1995) that the interest expressed must be more than "mere speculation and conjecture," and that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

With this constitutional framework in mind, the Texas Court of Criminal Appeals has held in *State v. Mays* (1998) that the barratry statute does not "define 'solicit employment' in such a way as to implicate 'inherently innocent' activities. The statute clearly outlines the activities [that] constitute barratry, and its parameters fall within historical bounds of barratry by solicitation."

The Austin Court of Appeals in *Mays* had disagreed, holding that the mere tracking of the statutory language "solicit employment" in an indictment was too vague to constitute adequate notice of the charged conduct. In its opinion, the Austin court cited this example of activity apparently prohibited by the barratry statute:

Attorney's next-door neighbor tells attorney that his child had a hot bowl of soup poured in his lap at a restaurant and is now in the hospital having skin grafts on the burned skin. Attorney says, "Neighbor, you should take legal action. If you need help let me know or I can refer you to someone who specializes in that type of law."

To underscore how difficult barratry issues are to analyze, Court of Criminal Appeals Judge Charles F. "Charlie" Baird only concurred in the judgment in Mays, stating, "I cannot join the majority opinion because I do not believe the conversation described in footnote 1 a., ante at 408, is an illegal solicitation sufficient to constitute the offense of barratry."

Even appellate court judges cannot agree about whether specific conduct violates the barratry statute. How can the rest of us be expected to understand the finer points of these regulations?

As these examples illustrate, once you get beyond the realm of splitting fees with case runners to bring in car wreck victims, barratry issues can be very complex. The difficulty is created at least in part by the barratry statute's "exception to prosecution," which cross-references to the advertising rules of conduct even though ethical rules are not usually drafted with the specificity required of criminal statutes. Would you (or your clients) be under felony indictment right now if you engaged in any of the conduct outlined in these examples? Even if not criminally prosecuted, could a civil disbarment action be filed against you?

Who knows? And isn't that a problem?

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