

SUBJECT: Barring solicitation of professional employment by phone or in person

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson, Riddle

0 nays

4 absent — Christian, Hodge, Vaught, Vo

WITNESSES:

For — (*On original version:*) Albert Betts, Association of Fire and Casualty Companies of Texas; Gary G. Evans, National Insurance Crime Bureau; Kevin Kanz, Texas Chiropractic Association; Allen Rogers, Texas Trial Lawyers Association; (*Registered, but did not testify:* Ben Campbell, Texas Chiropractic Association; Richard Hardy, Accident and Injury Pain Centers Group; Lee Loftis, Independent Insurance Agents of Texas; Donald Oberhoff, Texas Farm Bureau Insurance Companies); (*On committee substitute:*) (*Registered, but did not testify:* Mike Hull, Texans for Lawsuit Reform)

Against — (*On original version:*) Jeff Davis; Desiree Kelly; Valerie Monteiro, The Injury Medical Clinic; (*Registered, but did not testify:* Jon Chicoine; Paul Grindstaff)

BACKGROUND:

Penal Code, sec. 38.12, the barratry statute, prohibits the solicitation of certain legal or professional services by an attorney or other professional. An attorney, chiropractor, physician, surgeon, private investigator, or any person registered by a Texas health care regulatory agency cannot solicit in writing professional employment by:

- a person or the relative of a person injured in an accident or disaster before the 31st day after the date the accident or disaster occurred;
- a person represented by an attorney, when the person directing the solicitation knows or reasonably should know of the representation;
- a person or the relative of a person who has been arrested or issued a summons before the 31st day after the date the arrest or issuance of the summons occurred;

- a person or a relative of a person who is a defendant in a lawsuit of any kind, unless the lawsuit in which the person is named as a defendant has been on file for more than 31 days; and
- a person or a relative of an injured person who has indicated a desire not to be contacted for employment, when the person directing the solicitation knows or reasonably should know about the desire.

The criminal penalty for barratry ranges from a Class A misdemeanor to a third degree felony, depending on the circumstances involved.

DIGEST:

CSHB 148 would expand the barratry statute to apply to solicitations for employment made by telephone or in person by an attorney, chiropractor, physician, private investigator, or any person registered by a Texas health care regulatory agency. The bill would prohibit in-person and telephone solicitations made within a certain time frame for employment relating to services for personal injuries, wrongful deaths, arrests and issuances of summons, and legal representation.

The bill would apply only to an offense committed on or after its September 1, 2009, effective date.

**SUPPORTERS
SAY:**

By extending the barratry statute to include solicitations made in person or by telephone, CSHB 148 would provide the public with further protection from invasive solicitation practices. The current statute contains a loophole that allows unscrupulous individuals and businesses to dodge prosecution for barratry so long as their solicitations are not made in writing. This runs against public policy underlying the barratry statute, which has always sought to deter actors from making improper solicitations or communications that exploit individuals in a vulnerable or grieving state.

The bill also would help ensure that individuals received professional services from the most qualified professionals, rather than the most aggressive. Aggressive solicitors commonly obtain business by trolling for individuals' contact information in police accident reports or in arrest reports. This enables solicitors to exploit individuals before they have had adequate time to choose professional services based on the quality of the services offered. By deterring solicitation made in person or by telephone, CSHB 148 would help victims select services without inference from solicitors.

CSHB 148 would not hinder free speech, because many courts, including the U.S. Supreme Court in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), recognize that solicitations are commercial speech. Commercial speech does not enjoy the same measure of constitutional protection as other types of speech safeguarded in the First Amendment. The court in *Florida Bar* determined that states have a substantial interest in protecting the privacy of individuals who do not wish to receive solicitation and also in protecting the integrity of state-licensed professionals.

Complaints about solicitations by insurance companies, though a valid concern, are not germane to this bill, which would be tailored specifically to address barratry and solicitation of professional employment. The services offered by insurance companies do not fall under the category of barratry or professional services and therefore should not be included in the bill.

OPPONENTS
SAY:

CSHB 148 would criminalize a professional's right to free speech in contacting a person that might desperately want or need professional services. Because some people may have difficulty seeking professional services in the aftermath of an accident, arrest, or lawsuit, the 31-day waiting period could prevent these individuals from acquiring the information they need to address their respective situations. In particular, the bill would deprive accident victims from receiving needed medical attention for their injuries, which could increase complications related to the injuries.

CSHB 148 would create an unlevel playing field between professionals and insurance companies, because the bill would bar in-person and telephone solicitations by the former but not the latter. Unscrupulous liability insurance companies frequently use strong-arm, coercive tactics to persuade unsuspecting accident and disaster victims to settle for amounts that can be considerably less than what the victims could have potentially received through litigation. This bill at least should extend the solicitation restrictions to include solicitations by insurance companies.

NOTES:

The committee substitute included the provisions prohibiting solicitation made in person or by telephone within the existing provisions of the barratry statute, while the original would have created a separate class A misdemeanor offense for such solicitations. The committee substitute would apply the restrictions against in-person and telephone solicitations to all of the existing circumstances under which a person could commit a

barratry offense, while the original bill would have applied the new restrictions only to solicitations of employment to a person or a relative of a person who had suffered a personal injury due to an accident or a disaster.

The substitute also differs from the original by including an attorney among the professionals to whom the barratry statute would apply, while the original bill would not have applied to attorneys.