

SUBJECT: Offense for lawyer failure to report barratry and employment solicitation

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson, Vaught, Vo
0 nays
3 absent — Christian, Hodge, Riddle

WITNESSES: None

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 family member of a person injured in an accident or disaster before the 31st day after the date the accident or disaster occurred. The criminal penalty for barratry ranges from a Class A misdemeanor to a third-degree felony, depending on the circumstances involved.

DIGEST: HB 3515 would create a new offense of failure to report barratry or solicitation of employment. A lawyer would commit an offense if the lawyer, while representing a client:

- acquired knowledge that would reasonably cause a lawyer to believe that another lawyer or person had committed barratry or solicitation of employment under Penal Code, sec. 38.12; and
- failed to report the knowledge to the appropriate prosecuting attorney and the State Bar of Texas within two business days after the lawyer acquired the knowledge.

The new offense would be a class C misdemeanor (maximum fine of \$500).

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009.

**SUPPORTERS
SAY:**

HB 3515 would provide victims of accidents and disasters with additional protection from invasive solicitation by requiring attorneys to promptly report such offenses. Barratry is a serious crime that reflects poorly upon professionals, but many offenses go unreported because an accident or disaster victim who received a solicitation within 30 days of the event may not have known that the solicitation constituted an offense. Creating an affirmative duty for an attorney to report barratry would result in more prosecutions and deter unscrupulous professionals from preying on grieving, vulnerable victims.

The bill also would help ensure that accident and disaster victims received professional services from the most qualified professionals, rather than from the most aggressive. Aggressive solicitors commonly obtain business by exploiting victims' emotional vulnerability shortly after an accident or disaster. This allows solicitors to exploit victims before they have had adequate time to choose professional services based on the quality of the service offered. By deterring improper solicitation, HB 3515 would help enable victims to select services without interference from solicitors.

HB 3515 also would increase public confidence in the legal profession's integrity by encouraging lawyers to police themselves. The integrity of any profession depends to a large extent on the conduct of the profession's members. In recent years, the public's perception of lawyers and the legal profession in general has deteriorated, due in part to the widespread proliferation of so-called "ambulance chasers," attorneys that aggressively solicit their services to accident victims. The bill could help reverse this trend by requiring lawyers to report criminal solicitation. Attorneys and their clients are often in the best position to discover instances of barratry, so HB 3515 would apply specifically to attorneys.

**OPPONENTS
SAY:**

HB 3515 would impose an improper and burdensome affirmative duty that would essentially require attorneys to act as informants for the state. By threatening criminal penalties for any attorney who failed to report a possible instance of barratry, the bill would foster an atmosphere of suspicion and create a perverse incentive for attorneys to report any

conduct that even slightly resembled an offense. This would impose a burden on members of the legal profession, who would have to scramble to report any potential offenses within the two-day time frame, and on the State Bar of Texas, which would have to grapple with the administrative task of processing and investigating potentially hundreds of reports.

HB 3515 would inscribe unnecessarily into statute what the legal profession already regulates on its own. The State Bar of Texas prescribes ethical standards of conduct for licensed attorneys, including conduct related to barratry and solicitation. The State Bar also may take disciplinary action, including suspending an attorney's license to practice law in Texas, if it determines that certain unethical or illegal conduct has occurred. Given the legal profession's strong incentive and demonstrated capability to police itself, there is no need for new legislation that would create a statutory offense.

The bill would single out the legal profession unfairly by requiring attorneys and only attorneys to report barratry offenses committed by members of *all* professions. It is unclear why only attorneys should have such a duty because attorneys do not stand in a special position to detect barratry offenses. If the bill's purpose is to prosecute and deter barratry, then it should at least require all professionals to report offenses.

OTHER
OPPONENTS
SAY:

HB 3515 should require members of all professions to report instances of barratry. This would ensure maximum deterrence and prosecution of professional barratry. Since the current law barring written solicitation includes other professions in addition to the legal profession, the criminal offense covered by the bill should contain identical provisions for all professions.