

SUBJECT: Disallowing publishing rights as compensation for legal service

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 7 ayes — Brimer, Rhodes, Corte, Elkins, Giddings, Janek, Solomons
0 nays
2 absent — Dukes, Woolley

WITNESSES: For — Linda Sue Jones
Against — None

DIGEST: CSHB 2633 would prohibit attorneys from making or negotiating an agreement with a client, a prospective client, or former client that would provide the attorney with literary or media rights to a portrayal or account based in substantial part on information relating to that representation. This prohibition would apply before the conclusion of all aspects of the matter that gave rise to the attorney's employment. Such an offense would be a Class A misdemeanor, punishable by a maximum penalty of one year in jail and a \$4,000 fine.

CSHB 2633 would allow any person, including a victim of the crime or the victim's estate, to sue an attorney who accepted publishing rights as compensation for legal advice if it harmed the person bringing suit. Plaintiffs would be entitled to recover the greater of \$1 million or actual damages caused to the person bringing the suit, exemplary damages, reasonable attorney's fees, and court costs. CSHB 2633 would not limit or restrict another action against an attorney by the same or another person.

CSHB 2633 would take effect September 1, 1997, and would apply only to agreements made after that date.

SUPPORTERS
SAY:

CSHB 2633 would make sure that not only criminals but also their attorneys could not profit from crime. It would establish criminal penalties for attorneys who sought to make money from sensational crimes, authorizing penalties of \$1 million or more when the evidence showed that they traded legal representation for publishing rights. This type of “business” arrangement is tantamount to ambulance chasing, a practice prohibited by all legal standards of conduct. Yet in the current media climate that feeds on sensational crimes and will pay top dollar for the rights to publish or dramatize them, unscrupulous attorneys may be tempted to cash in on sordid stories.

A recent example is a report that the movie and publication rights involving the story of the two military academy cadets accused of murdering a Mansfield teenage may have been signed over to help fund their legal defense. Criminals are restricted by law from profiting from their crimes; their attorneys likewise should be subject to this restriction.

CSHB 2633 would mirror the current State Bar rule that prohibits lawyers from negotiating with a client for literary or media rights to deter lawyers from accepting publishing rights as payment in highly publicized cases. Imposing a criminal penalty and allowing victims of the crime or others harmed by these actions to sue and receive a damage award of at least \$1 million would be clear disincentives against engaging in this sort of unscrupulous behavior.

CSHB 2633 is narrowly tailored to prevent unethical attorneys from cashing in on the tragedies of others without infringing any free speech rights. The State Bar guidelines regarding this issue have not been challenged. In support of the rights and interests of crime victims, the Legislature should pass this bill and allow any potential constitutional challenges to be decided by the courts.

OPPONENTS
SAY:

CSHB 2633 would make too broad a sweep in allowing persons to sue and possibly win \$1 million for proving that an attorney accepted publishing rights as payment for representation. An attorney may wish to tell a criminal's story to educate or inform the public, not to profit from the crime. In such a situation, anyone claiming harm could go to court and win \$1 million just for pointing out this arrangement.

CSHB 2633 would buck current efforts aimed at tort reform in Texas by statutorily providing for actual and exemplary damages of at least \$1 million. This is an excessive amount to impose simply because an attorney accepted publishing rights as payment. The judgment should be relevant to the actual damages involved.

CSHB 2633 is constitutionally questionable because it would limit the right to publish, rather than income from publishing rights. It could also be construed as a government restriction on the content of speech, a violation of free speech rights under the First Amendment of the U.S. Constitution. The 1991 U.S. Supreme Court decision *Simon & Schuster v. New York Crime Victims Bd.*, 112 S.Ct. 501, struck down as an overly broad government restriction on free speech New York's "Son of Sam" law that sought to bar accused or convicted criminals from profiting from selling the story of a crime.

OTHER
OPPONENTS
SAY:

CSHB 2633 is unnecessary; the State Bar already prohibits attorneys from accepting literary or media rights from a client. Attorneys who violate this rule can face disbarment and exemplary damage penalties from the State Bar.

NOTES:

HB 2633 was considered by the House on second reading on April 21 and recommitted on a point of order.

The committee substitute eliminated a section in the original version of the bill directing the State Bar of Texas to adopt a rule prohibiting an attorney from accepting publishing rights as compensation. The committee substitute also changed the description of prohibited acts to specify that attorneys, before the conclusion of all aspects of a matter that gives rise to the attorney's employment, could not make or negotiate an agreement with a client, a prospective client, or former client that would provide the attorney with literary or media rights to a portrayal or account based in substantial part on information relating to that representation.