

SUBJECT: Civil action for conduct constituting barratry

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 10 ayes — Jackson, Lewis, Bohac, Castro, S. Davis, Madden, Raymond, Scott, Thompson, Woolley

0 nays

1 absent — Hartnett

WITNESSES: (*Full committee:*)  
For — William R. Edwards; Mike Hull, Texans for Lawsuit Reform; Lee Parsley, EL Parsley; (*Registered, but did not testify:* Ashley Price, Texas Association of Manufacturers; Sabrina Brown, Dow Chemical; Cathy DeWitt, Texas Association of Business; Jon Fisher, Associated Builders and Contractors of Texas; Stephanie Gibson, Texas Retailers Association; Kinnan Goleman, Shell Oil Co.; James Popp, Popp Gray and Hutcheson LLP)

Against — None

On — Mark Kincaid, Texas Trial Lawyers Association

(*Barratry subcommittee:*)  
For — William R. Edwards; Mark Kincaid, Texas Trial Lawyers Association

Against — None

On — Mike Hull, Texans for Lawsuit Reform; Mike Parsley, Texas Civil Justice League

BACKGROUND: Penal Code, sec. 38.12 prohibits barratry, or 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 professional employment in writing, in person, or by telephone, from:

- a person or the relative of a person injured in an accident or disaster before the 31st day after its occurrence;
- 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 its occurrence;
- 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; or
- 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 (up to one year in jail and/or a maximum fine of \$4,000) to a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000), depending on the circumstances involved.

Government Code, sec. 82.065 allows a client to bring an action to void a contingent-fee contract for legal services procured as a result of barratry or conduct violating the laws of Texas.

**DIGEST:**

CSHB 1890 would allow a client to bring an action to void any contract, not just contingent-fee contracts as now, for legal services that was procured as a result of barratry or conduct violating the laws of Texas.

A client who successfully voided a contract for legal services would recover from any person who committed barratry:

- all fees and expenses paid to that person under any voided contract;
- the balance of any fees and expenses paid to another person under the voided contract, less the reasonable value of the person's services, if awarded;
- actual damages caused by the prohibited contract; and
- reasonable and necessary attorney's fees.

The bill also would create a cause of action for a person who did not enter into a contract but was solicited by a person who committed barratry. Available damages from each person who engaged in barratry would include a penalty of \$10,000, actual damages caused by the prohibited

conduct, and reasonable and necessary attorney's fees.

The bill would allow a lawyer to recover the reasonable value of his or her services under a voided contract if the client did not prove the lawyer committed barratry or had actual knowledge, before undertaking the representation, that the contract was procured as a result of barratry by another person. To recover the reasonable value of his or her services, the lawyer would have to have reported the misconduct to the appropriate disciplinary authority, unless another person previously reported the conduct or the lawyer reasonably believed that reporting the conduct would substantially prejudice the client's interests.

The remedies provided by the bill would not be exclusive, except that recovery would not be permitted under both the bill and another law of both damages and penalties for the same act or practice. The bill would be applied to promote its underlying purposes, which would be to protect those needing legal services from illegal solicitation and to provide efficient and economic procedures for such protection.

The bill would take effect on September 1, 2011, and would apply only to a contract entered into on or after the effective date. The bill would also not apply to conduct that occurred before the effective date.

**SUPPORTERS  
SAY:**

A civil cause of action for barratry would reduce its prevalence, since the criminal statute is difficult to enforce. Currently, there is no statutory civil action available to persons adversely affected by barratry to recover damages caused by the conduct. Under CSHB 1890, victims of barratry who entered a contract could recover fees paid, actual damages, and attorney's fees. Victims of barratry who did not enter a contract could recover a \$10,000 penalty, actual damages, and attorney's fees.

The bill also would provide a safe harbor for attorneys who unknowingly became involved with a contract procured as a result of barratry by another person. These attorneys would be able to recover the reasonable value of their services.

Contingent-fee contracts procured through barratry have been voidable since 1989. The enactment of this law did not lead a rash of frivolous lawsuits against attorneys. Furthermore, frivolous lawsuits are brought whether they are based on a valid cause of action or not.

**OPPONENTS**

CSHB 1890 would punish lawyers for the barratry of others. While the bill

SAY: provides for the reasonable value of the lawyer's services, this would typically be significantly less than the agreed-upon fee. It would be unfair for a lawyer to receive a reduced fee because of someone else's wrongdoing.

The bill could allow a client to bring a frivolous lawsuit to escape a fee arrangement simply because the client did not want to pay the attorney. Lawyers practicing in every area of the law could be subject to these claims, even though the problem of barratry is primarily limited to personal injury cases.

NOTES: The committee substitute differs from the original by making any contract voidable, omitting damages for certain anguish, and omitting a provision making a judgment against two or more persons joint and several.

The companion bill, SB 1716 by Duncan, passed the Senate by 31-0 on the Local and Uncontested Calendar and also was received by the House on April 7.