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## The Ambulance Chasing Epidemic in Texas

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# ARTICLE

*Ronald Rodriguez*

## The Ambulance Chasing Epidemic in Texas

**Abstract.** Barratry and solicitation of professional employment is illegal and unethical. The Texas Disciplinary Rules of Professional Conduct define barratry as ethical misconduct and a serious crime. Unfortunately, for citizens and law-abiding attorneys of Texas, the criminal and ethical prohibitions against barratry have rarely been enforced. Consequently, barratry continues to proliferate rapidly throughout South Texas. For lawyers who engage in this unethical practice, the potential for large financial gain proves irresistible given the virtually nonexistent risk of prosecution. The lack of robust and successful prosecutions has created an optimal environment for barratry to proliferate.

This Article discusses the current barratry epidemic in Texas and its harmful consequences on the victims, the legal profession, and the citizens of Texas. It further details some of the root causes of the problem, and what, if anything, is being done by those responsible for enforcing the ethical and criminal laws related to barratry. Finally, this Article suggests recommendations to aggressively treat the ensuing problem.

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This author dedicates this Article to his wife Mari, who is his love and inspiration, and to his children Ron, Jr., Athena and Angelina Meli, his constant source of pride and joy.

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## I. INTRODUCTION

Gordon Gekko, the antagonist in the movie *Wall Street*, said:

The point is, ladies and gentleman, that greed, for lack of a better word, is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit. Greed, in all of its forms—greed for life, for money, for love, knowledge—has marked the upward surge of mankind.<sup>1</sup>

Gordon needed a lesson in history—and ethics. Gordon's greed led to his eventual demise. Greed for power, land, and riches has been the downfall of man and empires since the beginning of time. Greed for money and cases is causing an ambulance-chasing epidemic in South Texas that is threatening the rule of law, the integrity of our civil justice system, and the legal profession's ability to self-police.

This Article discusses the current barratry epidemic in Texas, and its harmful consequences on the victims, the legal profession, and the citizens of Texas. It details some of the root causes of the problem, and what, if anything, is being done by those responsible for enforcing the ethical and criminal laws related to barratry. Finally, it suggests recommendations to aggressively treat the epidemic.

## II. BARRATRY IN SOUTH TEXAS

### A. *The Investigative Process*

This author met with officials from the Office of Chief Disciplinary Counsel (CDC),<sup>2</sup> members of the public, public and lawyer grievance panel members, attorneys, judges, district attorneys, police chiefs, fire chiefs, first responders, and several district attorneys throughout the state of Texas. Statistical information from the CDC and prior Grievance Oversight

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1. *Quotes from Wall Street*, IMBD, <http://www.imdb.com/title/tt0094291/quotes> (last visited Apr. 21, 2017).

2. The Office of CDC is responsible for the attorney discipline system in Texas, "which is designed to be the 'Bar's law office,' and whose work is overseen by the Commission for Lawyer Discipline." *Office of Chief Disciplinary Counsel*, ST. B. TEX., <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/OfficeOfCDC.htm> (last visited Apr. 21, 2017).

Committee (GOC)<sup>3</sup> reports were carefully reviewed. Case law, law review articles, media articles, and the legislative histories of the barratry laws were also studied in preparing this Article.

### B. *Barratry Is a Problem in South Texas*

Barratry, and the solicitation of professional employment (commonly referred to as ambulance chasing<sup>4</sup>), is illegal.<sup>5</sup> Barratry is also unethical.<sup>6</sup> Texas Disciplinary Rule of Professional Conduct 8.04(b) defines barratry as a “serious crime.”<sup>7</sup> This rule also includes crimes of ethical misconduct and moral turpitude.<sup>8</sup> Unfortunately, for the citizens and law-abiding attorneys of Texas, the criminal and ethical prohibitions against barratry have rarely been enforced.<sup>9</sup> Consequently, barratry continues to proliferate rapidly

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3. The Texas Supreme Court created the GOC to “assist the Court in its constitutional and statutory responsibility” in enforcing lawyer discipline and the GOC “is charged with reviewing the structure, function, and effectiveness of the Texas lawyer disciplinary system and reporting its findings to the Court.” GRIEVANCE OVERSIGHT COMMITTEE, <http://www.txgoc.com/> (last visited Apr. 21, 2017). This author is a current member of the GOC. *See id.* (listing the current members of the GOC). However, this Article was prepared in his personal capacity. The views and opinions expressed in this Article are the author’s own and do not reflect the views, opinions or official policy of the GOC, or any other individual or entity.

4. *See* *Babb Real Estate, LLC v. Bennett*, No. 3:10–CV–00119–WMC, 2011 U.S. Dist. LEXIS 135528, at \*4–5 (W.D. Wis. Nov. 23, 2011) (equating barratry with ambulance chasing); *see also* Larry Bodine, *Texas Lawyer’s Barratry Case Dropped*, NAT’L TRIAL LAW. (May 3, 2016), <http://www.thenationaltriallawyers.org/2016/05/texas-lawyers-barratry-case-ropped/> (“Barratry, or illegally soliciting clients, is commonly known as ambulance chasing.”).

5. *See* TEX. PENAL CODE § 38.12(i) (West 2016) (“Final conviction of felony barratry is a serious crime for all purposes and acts, specifically including the State Bar Rules and the Texas Rules of Disciplinary Procedure.”).

6. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 7.03, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2016) (promulgating no lawyer shall solicit, in-person, a non-client who has recently been involved in an accident, and the lawyer also should not pay any person to do the same); *see also* *Tex. Law Shield LLP v. Crowley*, No. 14–15–00705–CV, 2016 WL 7401913, at \*6 (Tex. App.—Houston[14th Dist.] Dec. 20, 2016, pet. filed) (explaining the structure of the barratry statute “protect[s] those in need of legal services against unethical, unlawful solicitation”); *Babb Real Estate*, 2011 U.S. Dist. LEXIS 135528, at \*4–5 (demonstrating concern over barratry and acknowledging it violates ethical codes, causing the legal profession disrepute).

7. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.04(b) (announcing a “serious crime” includes barratry).

8. *Id.* (including “any felony involving moral turpitude” in the category of “serious crime”).

9. *See* Cindy Horswell, *Prosecutors Getting Tough on ‘Ambulance Chasing’*, HOUS. CHRON. (Jan. 3, 2016, 8:47 PM), <http://www.houstonchronicle.com/news/houston-texas/texas/article/Prosecutors-getting-tough-on-ambulance-chasing-6734525.php> (“Until lately, barratry prosecutions were extremely rare, with nobody facing prosecution for this offense until after 1990 . . . .”); *see also* Morgan Smith, *Lawyers Call for Reform of Barratry Laws*, TEX. TRIB. (July 14, 2014), <https://www.texastribune.org/>

throughout Texas,<sup>10</sup> especially in South Texas where tractor-trailer and oilfield-truck-related deaths attract the most brazen outlaws.<sup>11</sup> South Texas has also experienced reluctance from law enforcement officers and prosecutors to actively pursue lawyers and their agents engaging in criminal and ethical misconduct because the cases are difficult to prove.<sup>12</sup> To the criminals and the ethically-challenged lawyers, the potential for large financial gain proves irresistible given the virtually nonexistent risk of prosecution.<sup>13</sup> The lack of robust and successful prosecutions has created a fertile environment for barratry to fester like an untreated infection. The practical effect of not prosecuting barratry cases is that law-breakers are financially rewarded and law-followers are punished.<sup>14</sup> Non-prosecution of barratry cases attacks the rule of law, and undermines the faith and

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2010/07/14/lawyers-call-for-reform-of-barratry-laws/ (“[D]istrict attorneys, already pressed for resources, would rather prosecute violent crimes than white-collar disputes between lawyers.”).

10. See John MacCormack, *Texas Ambulance Chasers Getting Away with It*, TEXANS FOR LAWSUIT REFORM (May 5, 2009), <https://www.tortreform.com/news/texas-ambulance-chasers-getting-away-it> (“The stealthy, illegal practice of barratry . . . is flourishing in South Texas . . . . In Nueces County, warfare has broken out over barratry.”).

11. See *State v. Mercier*, 164 S.W.3d 799, 819 (Tex. App.—Corpus Christi 2005), *rev'd*, 322 S.W.3d 258 (2010) (detailing all of the cases the defendant was accused of soliciting involved vehicular accidents); see also *The Eagle Ford Shale Oil Boom and the Rise of Deadly Truck Accidents in South Texas*, TATE L. OFF., <https://www.tatelawoffices.com/blog/the-eagle-ford-shale-oil-boom-and-the-rise-of-deadly-truck-accidents-in-south-texas/> (last visited Apr. 21, 2017) (“The increase in local jobs tied to the Eagle Ford boom, coupled with the rise in 18-wheeler traffic has led to an increased number of accidents on Texas highways in the South Texas oil boom areas.”); Cindy Horswell, *supra* note 9 (reporting an instance in South Texas where an attorney approached a mother and wife within hours of her husband and son being killed in a truck accident).

12. See Linda McKenna, *New Law Puts Ambulance Chasers in the Hot Seat*, SE TEX. REC. (Jan. 3, 2012, 4:17 AM), <http://setexasrecord.com/stories/510617613-new-law-puts-ambulance-chasers-in-the-hot-seat> (acknowledging the trend against criminally prosecuting ambulance chasers in South Texas); see also Becca Aaronson, *Crackdown Intensifies on Barratry*, N.Y. TIMES (June 23, 2012), [http://www.nytimes.com/2012/06/24/us/crackdown-intensifies-on-barratry.html?\\_r=0](http://www.nytimes.com/2012/06/24/us/crackdown-intensifies-on-barratry.html?_r=0) (reporting prosecutors have difficulty instituting legal proceedings against persons engaged in white-collar crime such as barratry); John MacCormack, *supra* note 10 (implying barratry is not prosecuted because the state is “under[-]budgeted and understaffed” so the State does not have the resources to “take these things on”).

13. See Cindy Horswell, *supra* note 9 (reporting millions of dollars are exchanged in the illegal solicitations industry); see also Becca Aaronson, *supra* note 12 (noting large-scale barratry schemes lead to “bank[ing] millions off fraudulent insurance claims”); John MacCormack, *supra* note 10 (echoing the crime of barratry has a long history in South Texas, but very few lawyers are ever prosecuted for the crime).

14. See Linda McKenna, *supra* note 12 (arguing barratry is detrimental to the civil justice system in Texas and the attorneys involved assume little risks to obtain a high return).

confidence of the public and lawyers in the Texas grievance and criminal justice system.

C. *Barratry Harms the Public and the Legal Profession*

“Certain other societies may respect the rule of force—we respect the rule of law.”<sup>15</sup> In the days and weeks following a motor vehicle crash, or a tragic occurrence or series of events, victims are usually in a state of emotional shock and distress.<sup>16</sup> The Texas Disciplinary Rules of Professional Conduct recognize that “in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients.”<sup>17</sup> The purpose of the ethical rule is to “unconditionally prohibit those activities only when profit for the lawyer is a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events.”<sup>18</sup> The primary concern is that such contacts “can overbear the prospective client’s will, lead to hasty and ill-advised decisions concerning choice of counsel, and be very difficult to police.”<sup>19</sup>

In a free-market society that strictly enforces existing criminal and civil laws, and applicable ethical rules, prospective clients should be free to choose their attorney based on reputation, experience, and results.<sup>20</sup> On the other hand, when illegally solicited clients are pressured to sign contracts

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15. President John F. Kennedy, Remarks in Nashville at the 90th Anniversary Convocation of Vanderbilt University, (May 18, 1963).

16. *See* *Wheelis v. Backus Corp.*, No. KNLCV146022485S, 2015 WL 7941590, at \*2 (Conn. Nov. 12, 2015) (noting victims might suffer “nervous shock, extreme emotional turmoil and mental distress and anguish” when they witness or learn of “the painful, tragic and untimely death” of their spouse); *see also* *Mattern v. City of Sea Ilse*, 131 F. Supp. 3d 305, 316–17 (D.N.J. Sept. 15, 2015) (acknowledging an “emotional and visibly distraught” reaction to a tragic event is to be expected).

17. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 7.03 cmt. 1, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2016).

18. *Id.*

19. *Id.*

20. *See How Do I Find a Lawyer?*, A.B.A., [http://www.americanbar.org/groups/public\\_education/public-information/how-do-i-find-a-lawyer.html](http://www.americanbar.org/groups/public_education/public-information/how-do-i-find-a-lawyer.html) (last visited Apr. 21, 2017) (claiming prospective clients will end up hiring a lawyer with expertise and experience, which is desirable, if they go through the necessary research); *see also Tips on Choosing a Lawyer*, MASS. B. ASS’N, <https://www.massbar.org/for-the-public/need-a-lawyer/tips-on-choosing-a-lawyer> (last visited Apr. 21, 2017) (alleging reputation is the best indicator of whether or not to hire an attorney and urging prospective clients to seek recommendations from close friends and family); Glenn Curtis, *How to Pick the Right Lawyer*, INVESTOPEDIA, <http://www.investopedia.com/articles/pf/08/picking-lawyer.asp> (last visited Apr. 21, 2017) (listing experience as one of the factors a prospective client should consider when searching for a lawyer to hire).

with unethical lawyers, whose primary concern is their own financial gain and not the client or the rule of law,<sup>21</sup> these clients are being saddled with miscreants as their most trusted fiduciary. Who can be expected to follow the rule of law, if not lawyers? Barratry has a toxic effect on the rule of law and the public's faith on the legal profession's ability to effectively self-police.<sup>22</sup>

### III. STAKEHOLDERS' DUTIES TO CONDEMN BARRATRY

#### A. *Texas Prosecutors and Criminal Prosecutions*

In Texas, District Attorneys are the front line prosecutors for barratry.<sup>23</sup> The Texas Code of Criminal Procedure charges district attorneys with the duty to “represent the State in all criminal cases in the district courts of his district and in appeals therefrom[.]”<sup>24</sup> The Texas Attorney General also has jurisdiction to prosecute barratry offenses.<sup>25</sup> While the Texas “Attorney General has original jurisdiction to prosecute violations of the law,” a large number of criminal prosecutions will be commenced “only upon the request of a local prosecutor.”<sup>26</sup> In the Texas counties that have county attorneys, these officers of the court also have jurisdiction to prosecute misdemeanor barratry offenses.<sup>27</sup>

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21. See Cindy Horswell, *supra* note 9 (reporting millions of dollars are exchanged in the illegal solicitations industry); see also Becca Aaronson, *supra* note 12 (noting large-scale barratry schemes lead to “bank[ing] millions off fraudulent insurance claims”).

22. See *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 906 (9th Cir. 2005) (referencing the “common law doctrine of barratry” to restrict in-person solicitation because otherwise it would continue to disgrace the legal profession); see also *Bailey v. Morales*, 190 F.3d 320, 323 (5th Cir. 1999) (discussing barratry and accepting the states strong interest in “upholding the reputations and public images of the professionals licensed by the State”); *Babb Real Estate, LLC v. Bennett*, No. 10-cv-119-wmc, 2011 U.S. Dist. LEXIS 135528, at \*4–5 (W.D. Wis. Nov. 23, 2011) (asserting barratry causes “the legal profession to be held in disrepute”).

23. TEX. CODE OF CRIM. PROC. art. 2.01 (West 2005); see also 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, *HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS* § 13:4 (2016 ed.) (recognizing the need to join the district attorney in a suit challenging the criminal enactment of barratry because he is the party “with authority to enforce the statute”).

24. TEX. CODE OF CRIM. PROC. art. 2.01.

25. *Duties & Responsibilities of the Office of the Attorney General*, TEX. OFF. ATTY GEN., <https://www.texasattorneygeneral.gov/agency/duties-responsibilities-of-the-office-of-the-attorney-general> (last visited Apr. 21, 2017).

26. *Id.*

27. See TEX. CODE OF CRIM. PROC. art. 2.02 (charging the county attorney, in the absence of the district attorney, with the duty to “represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case [o]n behalf of the State in the district court”).



Barratry has been illegal in Texas for over 140 years<sup>28</sup> with only a handful of successful barratry prosecutions in the entire state.<sup>29</sup> Until recently, it appears only three attorneys have lost their licenses for committing barratry or conspiring to commit barratry in the history of Texas.<sup>30</sup> In November 2015, the first Texas attorney in recent history was convicted of barratry.<sup>31</sup> It would seem barratry convictions would be prolific in South Texas due to the numerous references to ambulance chasers in Texas, but the convictions are sparse or almost nonexistent.<sup>32</sup> The citizens of Texas and members of the Bar depend on prosecutors to strictly enforce the rule of law.<sup>33</sup> For a district attorney with the moxie and specific drive to prosecute barratry cases, it will be like shooting fish in a barrel. Therefore, it is the duty of the

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28. Act of Apr. 18, 1876, 15th Leg., R.S., ch. 135, § 1, 1876 Tex. Gen. Laws 227, 227. See Gerald S. Reamey, *Crime of Barratry—Criminal Responsibility for a Branch of Professional Responsibility*, 53 TEX. B.J. 1011, 1011 (“Texas law established the crime as early as 1876.”).

29. See generally *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) (reversing the appellate court’s decision to disbar Kilpatrick for barratry); *Laird v. State*, 242 S.W.2d 374, 374–75 (Tex. Crim. App. 1951) (holding testimony which occurred subsequent to the date of the barratry offense was admissible and thus affirming the barratry conviction of Laird); *Ackerman v. State*, 61 S.W.2d 116, 116–17 (Tex. Crim. App. 1933) (affirming the barratry conviction of Ackerman for improper solicitation of services); *Lopez v. State*, 846 S.W.2d 90, 93 (Tex. App.—Corpus Christi 1992, pet. ref’d) (affirming Lopez’s conviction of barratry for improper solicitation).

30. See Cindy Horswell, *supra* note 9 (reporting “attorneys—Eugene Mercier, Patrick E. Clarke and Benito Garza—have [] lost their law licenses” for engaging in barratry); see also *In re Eugene X. Mercier*, TEX. BOARD DISCIPLINARY APPEALS, <http://txboda.org/cases/re-eugene-x-mercier> (last visited Apr. 21, 2017) [hereinafter *In re Eugene X. Mercier*] (“On May 12, 2014 the Board of Disciplinary Appeals signed a final judgment . . . of disbarment against Corpus Christi attorney Eugene X. Mercier . . . [and] affirming Mercier’s criminal felony conviction for conspiracy to commit barratry . . . [where the Texas Supreme Court also] affirmed his disbarment on January 30, 2015 . . . .”); Mary Flood, *16 Texas Lawyers Disciplined on February Bar List*, HOUS. CHRON. (Feb. 24, 2015, 10:04 AM), <http://blog.chron.com/houstonlegal/2015/02/16-texas-lawyers-disciplined-on-february-bar-list/> (“On Nov. 26, 2014, the Supreme Court of Texas accepted the resignation in lieu of discipline of Patrick E. Clarke . . . of San Antonio. At the time of resignation, there were three disciplinary actions pending . . . .”); Martha Neil, *Attorney Loses License, Gets 10-Year Probation in Barratry Case; Runner Gets 3 Years in Slammer*, A.B.A. J. (May 29, 2012, 3:43 PM CDT), [http://www.abajournal.com/news/article/attorney\\_loses\\_license\\_gets\\_10-year\\_probation\\_in\\_barratry\\_case\\_runner\\_gets/](http://www.abajournal.com/news/article/attorney_loses_license_gets_10-year_probation_in_barratry_case_runner_gets/) (“A Texas attorney has lost his license to practice law as part of a plea deal in a barratry case.”).

31. Compare *In the Matter of Ronald Eugene Reynolds*, TEX. BOARD OF DISCIPLINARY APPEALS, <http://txboda.org/cases/matter-ronald-eugene-reynolds> (last visited Apr. 21, 2017) (“On or about November 24, 2015 Mr. Reynolds was convicted . . . of Barratry . . . .”) with *In re Eugene X. Mercier*, *supra* note 30 (showing an earlier conviction date for conspiracy to commit barratry).

32. See MacCormack, *supra* note 10; see also Linda McKenna, *supra* note 12 (quoting Bill Edwards, a lawyer in Corpus Christi, who implies “the lack of policing of barratry . . . [is] why the practice is so prevalent in South Texas”).

33. See SCHUWERK & HARDWICK, *supra* note 23, § 13:4.

prosecutors, including district attorneys, attorney generals, and county attorneys, to condemn and fight against this practice of barratry.

B. *The Grievance System in Texas*

“The Texas attorney discipline system is administered by the [CDC], which is designed to be the ‘Bar’s law office,’ and whose work is overseen by the Commission for Lawyer Discipline.”<sup>34</sup> The CDC is charged with enforcing the Texas Disciplinary Rules of Professional Conduct and prosecuting violations of those rules.<sup>35</sup>

The GOC<sup>36</sup> is a panel of volunteers, including six attorneys and three members of the public “appointed by the Texas Supreme Court.”<sup>37</sup> The primary purpose of the GOC is to review “the structure, function, and effectiveness of the Texas lawyer disciplinary system and [to report] its findings to the Court.”<sup>38</sup>

The barratry section of the GOC’s 2016 Biennial Report was much more thorough than the prior GOC reports<sup>39</sup> and the GOC made progress in identifying the issues and recommending solutions to remedy the problem.<sup>40</sup> Specifically, the Grievance System and Barratry section of the GOC 2016 Biennial Report concluded that “barratry has not been effectively addressed through the attorney–client disciplinary system as currently structured.”<sup>41</sup> As one of the recommendations, the GOC’s 2016 report also proffered the following to address public knowledge or awareness:

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34. *Office of Chief Disciplinary Counsel, supra* note 3.

35. *See id.* (“Each Regional Office is responsible for the investigation and prosecution of disciplinary matters within its region and is managed by a Regional Counsel.”).

36. This author would like to thank the extraordinary members of the 2016–2017 GOC for their dedicated service to the citizens of Texas.

37. *Other Programs Supporting the Grievance System*, ST. B. TEX., <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/OtherPrograms.htm> (last visited Apr. 21, 2017).

38. GRIEVANCE OVERSIGHT COMMITTEE, <http://www.txgoc.com/index.html> (last visited Apr 21, 2017).

39. *Compare* GRIEVANCE OVERSIGHT COMMITTEE’S 2016 BIENNIAL REPORT 19–20 (Jun. 1, 2016) [hereinafter GOC’S 2016 BIENNIAL REPORT], *with* GRIEVANCE OVERSIGHT COMMITTEE’S 2014 BIENNIAL REPORT 2–3 (Jun. 1, 2014), *and* GRIEVANCE OVERSIGHT COMMITTEE’S 2012 BIENNIAL REPORT 2–3 (Jun. 1, 2012).

40. *See* GOC’S 2016 BIENNIAL REPORT, *supra* note 39 (offering explanations for the lack of barratry prosecutions under the Texas barratry laws and outlining potential solutions to the CDC and State Bar to better deal with barratry).

41. *Id.*

[R]esources to the development of brochures to be distributed to the public, and public service announcements, in print and broadcast media, aimed at raising the general public's ability to recognize barratry, and the process to report it to the proper authorities. Such public service announcements, especially in South Texas, should be in English and Spanish and placed in media outlets most likely to reach the intended audiences. . . . [and] track barratry-related grievances as a separate category.<sup>42</sup>

The GOC then recommended the definition of the term “sanction” under the Texas Rule of Disciplinary Procedure 1.06(Z) be revised to include fee forfeiture as a potential sanction used by the CDC in certain cases, including those involving barratry.<sup>43</sup> This recommendation is new and specific. It addresses an important issue—criminals and unethical lawyers should forfeit their ill-gotten fees, presumably to the clients, and be punished for their crimes.<sup>44</sup>

### C. *The Texas Judiciary*

The judiciary has a duty to closely examine cases that may be infected with barratry.<sup>45</sup> Jurists are in a unique position to probe litigants and interrogate counsel, especially on cases that require court approval such as probate matters, and cases involving minors.<sup>46</sup>

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42. *Id.* at 21.

43. *See id.* (suggesting fee forfeiture as a potential sanction for an offense of barratry).

44. *See* TEX. PENAL CODE § 38.12 (West 2016) (codifying the crime of barratry and outlining what constitutes an offense of barratry); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 7.03, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (West 2016) (stating the limitations on solicitations and payments for lawyers when they engage in the solicitation of clients); *Id.* at R. 8.04 (defining what constitutes misconduct on the part of a lawyer).

45. *See* TEX. CODE JUD. CONDUCT, Canon 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2016) (charging judges with the duty to enforce high ethical standards); MODEL CODE OF JUD. CONDUCT preamble (AM. BAR ASS'N 2011) (“The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society.”).

46. *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 59–60 (3d Cir. 1942) (“One of the natural parts of the judicial function . . . is the judge's power and duty to put to the witnesses such additional questions as seem to him desirable to elicit the truth more fully. This just exercise of his function was never doubted at common law . . . .” (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA, 152–53 (3rd ed. 1940))).

Texas district court judges are attorneys whose conduct is governed by Texas Disciplinary Rule of Professional Conduct 8.03.<sup>47</sup> All judges and attorneys have a duty to self-police and report attorney misconduct to the State Bar of Texas.<sup>48</sup> Specifically, Texas district court and county court at law judges are governed by the Texas Code of Judicial Conduct.<sup>49</sup> The Texas Code of Judicial Conduct provides, in pertinent part, that judges have the duty to uphold the integrity of the judiciary.<sup>50</sup> It charges judges with the duty to notify “the Office of the General Counsel of the State Bar of Texas or take other appropriate action” when they have knowledge that “a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>51</sup>

Barratry-contaminated attorney–client contracts are voidable.<sup>52</sup> Attorneys cannot recover their attorneys’ fees under void contracts.<sup>53</sup> A finding of contractual illegality compels Texas courts to apply the rule that a court will not aid either party to an illegal contract, but instead will leave the parties where it finds them.<sup>54</sup> As more specifically noted by the Fifth Circuit:

[E]quitable claims survive a determination of contract illegality under two circumstances: (1) when the party seeking restitution is not *in pari delicto*]; and

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47. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03.

48. See TEX. CODE JUD. CONDUCT, Canon 1 (“A judge should participate in establishing, maintaining and enforcing high standards of conduct . . .”); TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04 (defining what constitutes misconduct on the part of a lawyer).

49. TEX. CODE JUD. CONDUCT, preamble.

50. *Id.* at Canon 1.

51. *Id.* at Canon 3(D)(2).

52. TEX. GOV'T CODE § 82.065(a) (West 2016); see also *Villanueva v. Gonzalez*, 123 S.W.3d 461, 464 (Tex. App.—San Antonio 2003, no pet.) (examining the legality of a contract formed between parties not *in pari delicto*).

53. TEX. GOV'T CODE § 82.065(b); see also *Davis v. Taylor*, 344 S.E.2d 19, 21 (N.C. Ct. App. 1986) (holding plaintiff's attorneys cannot recover fees for the reasonable value of services rendered pursuant to employment contract because the contract was void).

54. See *Lewis v. Davis*, 199 S.W.2d 146, 151 (Tex. 1947) (noting the general rule “denies relief to an illegal contract”); see also *Woolsey v. Panhandle Ref. Co.*, 116 S.W.2d 675, 678 (Tex. 1938) (“If the contract has been voluntarily executed and performed, a court of equity will not, in the absence of controlling motives of public policy to the contrary, grant its aid by decreeing a recovery back of the money paid . . . . The illegality constitutes an absolute defense.” (quoting *Davis v. Sittig*, 65 Tex. 497, 501–02 (1886)); *Villanueva v. Gonzalez*, 123 S.W.3d 461, 464 (Tex. App.—San Antonio 2003, no pet.) (“A contract to do a thing which cannot be performed without violation of the law violates public policy and is void.”).

(2) when the parties are *in pari delicto*, but the public interest in ensuring that one party to the illegal contract is not unjustly enriched at the expense of the other outweighs the public interest in refusing to aid a wrongdoer.<sup>55</sup>

Case runners<sup>56</sup> and their agents do not get to recover their illegal fees under either exception<sup>57</sup> because they are *in pari delicto*.<sup>58</sup> There is no public interest in case runners getting paid for their crimes; certainly not at the expense of victim clients who are vulnerable, and most often have little knowledge of the applicable laws.<sup>59</sup>

Lawyers who file cases based on illegal contracts should not only forfeit their fees and be reported to the State Bar by the presiding judge, but they should also be sanctioned.<sup>60</sup> “Courts possess inherent powers to discipline attorney behavior through the imposition of sanctions *sua sponte* in appropriate cases.”<sup>61</sup> Courts are also endowed with the power to sanction lawyers for bad faith abuses if doing so will assist “in the exercise of [their] jurisdiction, in the administration of justice, and the preservation of [their] independence and integrity.”<sup>62</sup> Judges possess this power even when there are no applicable rules or statutes.<sup>63</sup> The inherent power to sanction allows

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55. *Orthodontic Ctrs. of Tex., Inc. v. Wetzel*, 410 Fed. Appx. 795, 797 (5th Cir. 2011).

56. Case runners have been defined as “any person . . . acting in any manner or in any capacity as an agent for an attorney at law . . . in the solicitation or procurement of business for such attorney at law.” *Hutchins v. Mun. Ct. of Santa Monica*, 132 Cal. Rptr. 158, 160 (Cal. Ct. App. 1976) (quoting CAL. BUS. & PROF. CODE § 6152 (West 2016)).

57. *Compare id.* (referencing section 6152 of California’s Business and Professions Code where it is “unlawful for any person . . . to act as runner or capper for any attorneys”), *with* *Rubin v. Green*, 847 P.2d 1044, 1055 (Cal. 1993) (Baxter, Ju., concurring and dissenting) (explaining how the majority’s decision fails to enforce legislative intent to make the use of a runner or capper by an attorney a criminal offense).

58. *See* *Thatcher v. Meck*, 195 N.E. 254, 256 (Ohio Ct. App. 1934) (holding *in pari delicto* applies and the court “will leave the parties as it finds them” where the parties agree that one will act as an “ambulance chaser” while the other pays a hefty fee).

59. *See* *Villanueva v. Gonzalez*, 123 S.W.3d 461, 464 (Tex. App.—San Antonio 2003, no pet.) (describing the utility behind voiding a contract in violation of public policy).

60. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.01, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2016) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.”); MODEL CODE OF PROF’L RESPONSIBILITY DR 2-109 (AM. BAR ASS’N 1980) (declaring a lawyer shall not bring a claim “not warranted under existing law”).

61. *Roberts v. Rose*, 37 S.W.3d 31, 33 (Tex. App.—San Antonio 2000, no pet.); *see* *Clark v. Bres*, 217 S.W.3d 501, 512 (Tex. App.—Houston [1st Dist.] 2006) (identifying the trial court’s power to discipline attorney behavior via the imposition of sanctions).

62. *Roberts v. Rose*, 37 S.W.3d 31, 33 (Tex. App.—San Antonio 2000, no pet.) (quoting *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997)).

63. *Id.*

a court “to effectively perform its judicial functions and to protect its dignity, independence, and integrity.”<sup>64</sup> The core functions of the court include “hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, rendering final judgments, and enforcing judgments.”<sup>65</sup> Under its inherent power, a trial court may therefore “sanction a party who makes a false statement of material fact to the court, like an attorney falsely claiming the right to legally represent the client in court on a contingent fee contract.”<sup>66</sup> Barratry is reprehensible, and like other sanctionable conduct, “if tolerated, breeds disrespect for and threatens the integrity of our judicial system.”<sup>67</sup>

It has long been the jurisprudence of this state that trial courts are vested with broad discretion in protecting minors who are before the court.<sup>68</sup> Additionally, “[t]he bringing of a suit by next friend for a minor in no way changes his status; his disabilities are not removed or suspended by bringing such suit and his interests must, in good faith, be fully protected; he is *non sui juris* and altogether under the court’s protection.”<sup>69</sup> Thus, trial courts

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64. *In re* Estate of Perez-Muzza, 446 S.W.3d 415, 424 (Tex. App.—San Antonio 2014, pet. denied) (quoting *Union Carbide Corp. v. Martin*, 349 S.W.3d 137, 147 (Tex. App.—Dallas 2011, no pet.); *see also In re* Tex. Dep’t of Family & Protective Servs., 415 S.W.3d 522, 529 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (“A trial court has inherent power to sanction bad faith conduct during the course of litigation that interferes with the administration of justice or the preservation of the court’s dignity and integrity.”).

65. *In re* Estate of Perez-Muzza, 446 S.W.3d at 424 (discussing the court’s core functions).

66. *Id.* The Court’s inherent “power may be exercised to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the traditional core functions of the court.” *In re* Tex. Dep’t of Family and Protective Servs., 415 S.W.3d at 529.

67. *In re* Bennett, 960 S.W.2d 35, 40 (Tex. 1997); *Babb Real Estate, LLC v. Bennett*, No. 10-cv-119-wmc, 2011 U.S. Dist. LEXIS 135528, at \*4–5 (W.D. Wis. Nov. 23, 2011) (expressing concern that barratry will discredit the legal profession).

68. *See Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 (Tex. 1986) (expressing the trial court’s duty to protect a minor’s interest when they are before the court); *see also Gibson v. Blanton*, 483 S.W.2d 372, 374 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) (“But [minors] are lay wards of the court, and it is the duty of the court, as we conceive it, to see that their interests are protected.” (quoting *Eckert v. Stewart*, 207 S.W. 317, 323 (Tex. Civ. App.—Amarillo 1918, writ ref’d)); *Peters v. Allen*, 296 S.W. 929, 932 (Tex. Civ. App.—San Antonio 1927, no writ) (“It must be remembered that the doctrine that minors are wards of the court, whose interests the courts shall protect, is as ancient as the common law, ‘where the memory of man runneth not to the contrary.’” (citation omitted)).

69. *Missouri-Kansas-Texas R.R. Co. v. Pluto*, 156 S.W.2d 265, 268 (Tex. 1941) (emphasis added) (quoting *Greathouse v. Fort Worth & Denver City Ry. Co.*, 65 S.W.2d 762, 765 (Tex. 1933)); *accord Gallegos v. Clegg*, 417 S.W.2d 347, 352 (Tex. Civ. App.—Corpus Christi 1967, writ ref’d n.r.e.) (asserting an action by a next friend on behalf of a minor “is within the control of the court?” therefore, a court may take actions to protect minor’s interest).

have the duty to carefully review all settlements involving minors and estates.<sup>70</sup>

A “next friend,” in representation of a minor, may only compromise suits and agree to judgments “*with the approval of the court.*”<sup>71</sup> Similarly, estates require express court approval: “If a personal representative considers it in the interest of the estate, the representative may, on written application to the court and *if authorized by court order . . .* make a compromise or settlement in relation to property or a claim in dispute or litigation.”<sup>72</sup>

It follows that barratry and illegal solicitation of the underlying case can and should be considered by trial courts in declining approval of settlements related to minors and estates. Judges have the absolute, independent right and duty to protect the minors and the estate by interrogating counsel and investigating the documents at settlement hearings involving minors and estates.<sup>73</sup> Judges also determine whether a contract involving minors or an estate was procured illegally, in addition to determining if any case runners were involved.<sup>74</sup> As per judgment and fees, the role of the judge is to question how the attorney fees are to be split; determining if any expenses

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70. *See Doe v. Tex. Ass’n of School Boards*, 283 S.W.3d 451, 463 (Tex. App.—Fort Worth 2009) (indicating “an appellate court should evaluate whether the minor’s interests have been properly protected” (quoting *Am. Gen. Fire & Casualty Co. v. Vanderwater*, 907 S.W.2d 491, 492 (Tex. 1995))); *Eckert v. Stewart*, 207 S.W. 317, 323 (Tex. Civ. App.—Amarillo 1918, writ *ref’d*) (finding—in a suit involving minors—if there is a question of a deed’s delivery, it is the duty of the court to protect the interests of minors).

71. TEX. R. CIV. P. 44(2) (emphasis added); *see Woodfin v. Coleman*, 931 S.W.2d 383, 385 (Tex. App.—Austin 1996, writ denied) (referencing Rule 44 to hold that a district court “had jurisdiction to render its order approving [a] settlement” entered into by a next friend on behalf of a minor); *Am. Gen. Fire & Gas Co. v. McDonald*, 796 S.W.2d 201, 204 (Tex. App.—San Antonio 1990, writ denied) (acknowledging the need to submit to the court for approval a settlement agreement entered into by a next friend of a minor).

72. TEX. EST. CODE § 351.051(a)(4) (West 2014) (emphasis added).

73. TEX. R. CIV. P. 44(2); TEX. EST. CODE § 351.051(a)(4). *See also* *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 59–60 (3d Cir. 1942) (quoting JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA 152–53 (3rd ed. 1940)) (describing the judge’s power to subject officers of the court to additional questioning at the judge’s discretion in order to elicit the truth).

74. TEX. R. CIV. P. 44(2); TEX. EST. CODE ANN. § 351.051(a)(4). *See also Hutchins v. Mun. Ct. of Santa Monica*, 132 Cal. Rptr. 158, 166–67 (Cal. Ct. App. 1976) (illustrating a case where the judge decided whether there were case runners involved); *Eckert v. Stewart*, 207 S.W. 317 (Tex. Civ. App.—Amarillo 1918, writ denied) (deciding the sufficiency of a contract involving minors).

claimed are unreasonable, and whether the settlement is in the best interest of the minors, and/or estate, as applicable.<sup>75</sup>

In the event that the court determines a contract was procured through barratry, the court can void the contract—while still approving the settlement and distribution of attorneys' fees—provided that the client or personal representative are not *in pari delicto*.<sup>76</sup> In fact, trial court judges do not have to approve settlements involving illegal contracts involving minors or estates, just as they do not have to approve payment of attorneys' fees to criminals who procure cases in violation of Texas laws or disciplinary rules—each of which prohibit barratry and case solicitation.<sup>77</sup>

Similarly, trial courts have the inherent power to hold unethical counsel accountable for abuse of the judicial system, and strictly scrutinize split-fee agreements when the settlement involves minors or estates.<sup>78</sup> Trial courts certainly have the right to deny payments to case runners, and demand that those proceeds go instead to minors who are unable to protect themselves and who depend on the courts to protect them.<sup>79</sup> Essentially, trial and appellate courts need not tolerate the violations of the rule of law by case runners and the damage they inflict upon the judiciary and innocent Texans.

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75. TEX. R. CIV. P. 44(2); TEX. EST. CODE ANN. § 351.051(a)(4). *See also* Davis v. Taylor, 344 S.E.2d 19, 21 (N.C. Ct. App. 1986) (determining collection of fees unreasonable when services rendered were void as against public policy); Eckert v. Stewart, 207 S.W. 317, 323 (Tex. Civ. App.—Amarillo 1918, writ denied) (affirming a judgment that was in line with the best interests of the minors involved).

76. TEX. GOV'T CODE ANN. § 82.0651 (West 2013) (providing a contract voided due to barratry may still allow for a recovery of certain fees surrounding that contract). *Cf.* Villanueva v. Gonzalez, 123 S.W.3d 461, 464–66 (Tex. App.—San Antonio 2003, no pet.) (finding a contract involving bail bonds void because of an agreement to split fees between a licensed individual and an unlicensed individual when only the licensed individual may legally step in as a representative for purposes of the bond, and thus to not void the contract would leave the parties as they stood—ultimately giving force to an illegal transaction).

77. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04(b), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (West 2016) (promulgating barratry as a “serious crime”); *Id.* at R. 7.03 (prohibiting the solicitation of a person who has just been in an accident). *Cf.* Villanueva v. Gonzalez, 123 S.W.3d 461, 464–66 (Tex. App.—San Antonio 2003, no pet.) (refusing to award fees when fees would be split with an unauthorized representative, because splitting fees as such would be an illegal transaction).

78. *But see* *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 436 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (indicating the district court judge did not have authority to scrutinize an attorney fee agreement because there was no claim that the agreement was illegal or improper or that a party was a minor in need of protection).

79. *See* Lewis v. Davis, 199 S.W.2d 146, 151 (Tex. 1947) (addressing refusal of fees in contracts involving *in pari delicto*, yet suggesting judges may award a party despite unjust enrichment of said party if public policy compels it).



This author respectfully suggests that when there is a question of a barratrous contract in cases that come before it, the judiciary exercise its independent powers to carefully review all aspects of the proposed settlement, including case procurement, attorney–client contract formation, split-fee agreements, referral agreements, work performed by the attorneys claiming fees, results obtained, fund distribution including expenses charged, in addition to all matters required by law and Texas Disciplinary Rule of Professional Conduct 1.04. Consequentially, counsel should be interrogated, if appropriate. If the court finds counsel has engaged in barratry, counsel should forfeit attorneys’ fees from illegal barratrous contracts and severe sanctions should be imposed on errant parties and their attorneys. These remedies are needed to condemn barratry, prevent criminals from benefitting from their illegal conduct, and protect the civil justice system and victimized clients, some of whom are minors in need of protection.

#### D. *Lawyers and the Public*

Lawyers have a duty to self-police, and to educate the public.<sup>80</sup> Lawyers also now have a civil cause of action to attack barratry.<sup>81</sup> The cause of action addresses clients:<sup>82</sup>

A client who enters into a contract described by this subsection may bring an action to recover any amount that may be awarded . . . even if the contract is voided voluntarily. A client who prevails . . . *shall* recover from any person

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80. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.03 cmt. 1–2 (concluding a lawyer has obligations to self-report and to report others for the purpose of flagging a violation); see also *Winter v. Hous. Chronicle Publ’n Co.*, 795 S.W.2d 723, 731–32 (Tex. 1990) (asserting license revocation is a possible sanction for attorneys who fail to report unethical conduct that is harmful to the public); *Townsend v. State*, No. 14-96-01571-CR, 1999 WL 1267255, at \*3 (Tex. App.—Houston [14th Dist.] Dec. 30, 1999, pet. ref’d) (using Texas Disciplinary Rule of Professional Conduct 8.03 to hold that lawyers must “inform the appropriate authority if the lawyer has knowledge that another lawyer has committed a violation of applicable rules of professional conduct”).

81. See TEX. GOV’T CODE § 82.0651 (West 2013) (asserting barratry as prohibited conduct); Tex. Ethics Comm’n, Ethics Advisory Op. No. 637 (2013) (establishing an attorney’s duty to report another lawyer to the appropriate disciplinary authorities “if the nature of the alleged barratry violation raises a substantial question as to the other lawyer’s honesty, trustworthiness, or fitness as a lawyer”).

82. “A client may bring an action to void a contract for legal services that was procured as a result of . . . barratry . . . .” TEX. GOV’T CODE ANN. § 82.0651; accord *Cobb v. Stern, Miller & Higdon*, 305 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (“A client may void a contingent fee contract that violates section 82.065 by expressing his intent to do so before the attorney has fully or substantially performed.” (citing *Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 359 (Tex. App.—Dallas 2001, pet. denied))).

who committed barratry: all fees and expenses paid to that person under the contract; the balance of any fees and expenses paid to any other person under the contract, after deducting fees and expenses awarded based on a quantum meruit theory . . . ; actual damages caused by the prohibited conduct; a penalty in the amount of \$10,000; and reasonable and necessary attorney's fees.<sup>83</sup>

A prevailing party “shall recover from each person who engaged in barratry: a penalty in the amount of \$10,000; actual damages caused by the prohibited conduct; and reasonable and necessary attorney's fees.”<sup>84</sup>

Courts have wisely determined that clients can sue to void contingency-fee agreements procured by barratry and seek the remedy of rescission, restitution, and the return of all attorney fees paid under a barratrous contingency-fee agreement—even if the attorney has fully performed the agreement.<sup>85</sup> Furthermore, if clients show: 1) that law breaking attorneys breached fiduciary duties by failing to disclose the use of a deceptive barratry scheme in attaining the right to represent the client, and 2) that the miscreants benefited from said fiduciary breach by collecting attorney's fees in the underlying case, then under *Burrow v. Arce*,<sup>86</sup> the clients may be entitled to recover some or all of those fees through fee forfeiture.<sup>87</sup>

#### IV. CONCLUSION AND RECOMMENDATIONS

Barratry in Texas has become an epidemic.<sup>88</sup> It has festered and spread like a malignant cancer. At this point, this author believes compliance,

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83. TEX. GOV'T CODE ANN. § 82.0651 (emphasis added).

84. *Id.*; *accord Barratry in Texas Always a Crime; Now a Cause of Action!*, ST. B. TEX. (June 30, 2011), <http://gbkh.com/wp-content/uploads/2015/09/2011-Barratry-in-Texas-Always-a-Crime-Now-a-Cause-of-Action.pdf> (emphasis added) (asserting *anyone* who enforces a remedy under the statute may recover attorney fees).

85. *Neese v. Lyon*, 479 S.W.3d 368, 382 (Tex. App.—Dallas 2015, no pet.) (“Rescission is an equitable remedy that operates to extinguish a contract that is legally valid, but must be set aside because of fraud, mistake, or some other reason to avoid unjust enrichment.” (citing *Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 410 (Tex. App.—Dallas 2006, no pet.)); *see also Helms v. Swansen*, No. 12-14-00280-CV, 2016 WL 1730737, at \*7 (Tex. App.—Tyler Apr. 29, 2016, no pet.) (opining a party's “contingency fee method cannot support the trial court's fee award”).

86. *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

87. *See, e.g., Neese v. Lyon*, 479 S.W.3d at 387–88 (finding summary judgment is precluded where an issue of material fact exists as to whether an attorneys benefitted from his fiduciary breach by obtaining fees in the principal case after failing to “disclose that [he] had obtained the right to represent the Client . . . through a deceptive barratry scheme”) (citing *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999)).

88. *See Gerald S. Reamey, supra* note 28 (citing Brenda Sapino Jeffreys, *Prosecutor Tries to Beat Odds in Barratry Cases*, TEX. LAW., April 16, 1990, at 20) (“Despite the fact that no one seems to know

accountability, and deterrence can only be achieved through vigorous investigation, prosecution, and punishment.

Prosecutors, the CDC, the judiciary, attorneys and the public must take prompt and decisive action to attack the plague of illegal solicitation. Because barratry most often is committed by a criminal enterprise with many players involved,<sup>89</sup> like any other criminal enterprise it must be attacked thoroughly and comprehensively including an increase in laws, penalties, and coordinated efforts by law enforcement.

Additionally, new, creative, and innovative approaches to the barratry problem must be explored because the current efforts are clearly inadequate.<sup>90</sup> Neither the current penal statutes nor the current disciplinary rules that involve barratry or case solicitation specifically require the forfeiture of attorney fees,<sup>91</sup> and this financial incentive for outlaws must be removed.

The following are a few prescriptions and specific recommendations respectfully submitted to treat the epidemic:

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of a case in which a lawyer has been convicted of the offense of barratry . . .”). *But see* State Bar of Texas v. Kilpatrick, 874 S.W.2d 656, 659 (Tex. 1994) (disbarring an attorney for engaging in a single act of solicitation which constituted barratry); Lopez v. State, 846 S.W.2d 90, 97 (Tex. App.—Corpus Christi 1992, pet. ref’d) (affirming a trial court’s conviction of an attorney for barratry); Laird v. State, 242 S.W.2d 374 (Tex. Crim. App. 1951) (holding an attorney was rightfully found guilty of barratry); and Ackerman v. State, 61 S.W.2d 116 (Tex. Crim. App. 1933) (finding an attorney engaged in client solicitation which constituted barratry and thus affirmed a conviction and fine for barratry).

89. *See* Gerald S. Reamey, *supra* note 28 at 1014 (suggesting larger organizations’ involvement in barratry); Brenda Sapino Jeffreys, *Texas Lawyers Face Fresh Accusations Over BP Spills Suits*, TEXANS FOR LAWSUIT REFORM (Sept. 7, 2016), <https://www.tortreform.com/news/texas-lawyers-face-fresh-accusations-over-bp-spill-suits> (discussing a lawsuit for barratry which involves over fourteen attorneys, law firms, and other individuals and 389 plaintiffs); David Yates, *Barratry Case Against Speights & Worrich Refiled, Expert Says Some Lawyers Turning a Blind Eye to Hail-Suit Feeding Frenzy*, SE TEXAS RECORD (Aug. 16, 2016, 11:30 AM), <http://setexasrecord.com/stories/510995766-barratry-case-against-speights-worrich-re-filed-expert-says-some-lawyers-turning-a-blind-eye-to-hail-suit-feeding-frenzy> (commenting on a large scheme by non-lawyer case-runners, solicitors, roofers, public adjusters, and attorneys across San Antonio and North Texas to take advantage of storm victims by obtaining from them a retention agreement and signing them up for lawsuits).

90. *See Barratry in Texas Always a Crime; Now a Cause of Action!*, *supra* note 85 (reporting “previous efforts at stopping barratry had been declared unconstitutional” until the Fifth Circuit ruled otherwise in 2011); *see also* SENATE COMMITTEE ON BUSINESS & COMMERCE, INTERIM REPORT TO THE 85TH LEGISLATURE 15 (2016), <http://www.senate.state.tx.us/cmtes/85/c510/c510.InterimReport2016.pdf> (reporting two attorneys “reached a consensus that barratry laws are in statute, but adequate enforcement remains a problem” in various contexts).

91. *Compare* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.04, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (West 2016) (failing to mention the forfeiture of attorney’s fees), *with* TEX. PENAL CODE § 12.01 (West 2015) (failing to specifically do the same).

1. State Prosecutors and the CDC should establish and follow robust, thorough, and aggressive written policies and procedures so to prioritize, investigate, and prosecute all barratry-related cases.
2. State Prosecutors and the CDC should establish and follow a written policy to screen all barratry-related complaints, mandating all investigators and lawyers be specially trained in the laws and nuances of barratry-related cases.
3. State Prosecutors and the CDC should establish a separate designated task force to address barratry-related complaints. This task force should separately investigate, prosecute, monitor, and report to both Texas lawmakers and the Supreme Court of Texas the effectiveness of their efforts in addressing barratry in Texas.
4. State Prosecutors and the CDC should establish joint task forces by coordinating law enforcement agencies on a local, state, and federal level to join resources in barratry prosecution, including conducting joint sting operations.
5. CDC should amend its complaint form to include the question: "*How did you originally find or hire your attorney?*"
6. CDC should receive additional funding to implement the GOC's recommendations.
7. The Supreme Court of Texas should enact changes to disciplinary rules, requiring the forfeiture of attorney fees to the State Bar of Texas upon either the final judgment of a criminal barratry conviction or the finding of misconduct in a disciplinary proceeding. A self-funding, special barratry task force fund should be created so that the CDC and other law enforcement personnel specially tasked with prosecution and investigation of barratry can use such forfeited funds to address any claimed lack of resources.
8. The Supreme Court of Texas should enact changes to the disciplinary rules prohibiting district attorneys, assistant district attorneys, federal prosecutors, and their respective employees or agents from engaging in paid referrals or splitting of fees.
9. The Texas Legislature should enact more thorough and specific laws that further define criminal acts of barratry, and increase penalties for employees and agents of tow truck businesses, funeral homes,

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emergency medical personnel, and others having a special right of immediate access to crash sites.

10. The Texas Legislature should enact more thorough and specific laws both expanding the definition of official misconduct and including increased penalties for public servants, first responders, medical examiners, law enforcement personnel (city, county, state or federal), and their agents who engage in barratry or who, as a result of either providing information or having access to victims they are entrusted to protect and serve, receive financial compensation or benefit.
11. The Texas Legislature should enact more thorough and specific laws creating joint task forces among state and federal law enforcement (with a system of checks and balances between the agencies), and providing the Texas Attorney General with original jurisdiction to enforce Texas criminal barratry law.
12. The Texas Legislature should enact more thorough and specific laws to address barratry as a criminal enterprise, including forfeiture laws specifically designed to permit the forfeiture of attorney's fees.
13. The Texas Legislature should revise chapters 18 and 59 of the Texas Code of Criminal Procedure to include a forfeiture of fees.
14. The Texas Legislature should expand the civil barratry laws to increase monetary penalties, specifically provide for disclosure of financial information related to the offense, and expand those who have standing to bring claims.
15. The Texas Legislature should enact laws that specifically prohibit district attorneys, assistant district attorneys, federal prosecutors, and their employees or agents from engaging in paid referrals or splitting of fees.
16. The Supreme Court of Texas should amend the Texas Disciplinary Rules of Professional Conduct to require disclosure of all barratry claims and suits to the State Bar of Texas.<sup>92</sup>

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92. In 2013, the Texas Ethics Commission issued an opinion holding that a lawyer against whom a claim is filed under the Texas civil barratry statutes is not required by the Texas Disciplinary Rules (namely Rule 8.03(a)) to report the claim to the disciplinary authorities. *Tex. Ethics Comm'n, Ethics Advisory Op. No. 637 (2013)* (citing *TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03, reprinted in TEX. GOV'T CODE*, tit. 2, subtit. G, app. A (West 2016)). That same opinion permits lawyers to settle with (former) clients raising civil barratry claims without having to disclose those claims to the State Bar. *Tex. Ethics Comm'n, Ethics Advisory Op. No. 637 (2013)*.

17. The Supreme Court of Texas should amend the Texas Rules of Civil Procedure to require that all settlements requiring court approval be reviewed and certified by the trial court, ensuring that the case was legally and ethically procured.
18. The Supreme Court of Texas should amend the Texas Rules of Civil Procedure to require plaintiffs' attorneys to certify under penalty of perjury in the initial petition filed with the court that the case was legally and ethically procured.
19. The Supreme Court of Texas should amend the Texas Rules of Civil Procedure to provide standing for parties, not just clients, to challenge attorneys-fee awards on barratry-infected claims.
20. State Prosecutors, the CDC, the Supreme Court of Texas, and the Texas Legislature should develop a joint task force to develop a strategic plan that restores the public and State Bar's confidence in both the grievance and justice system on barratry related issues.

As Albert Einstein expertly articulated, "Three great forces rule the world: stupidity, fear and greed."<sup>93</sup> As a self-policing body, the State Bar of Texas has a duty to address all three of these great forces; each of which are playing some role in the current barratry epidemic in Texas.

Currently, there are approximately 100,000 attorneys in the state of Texas and most are honest, ethical professionals who obey the law.<sup>94</sup> Injury victims, the public, and our state's honest attorneys deserve strict enforcement of criminal and civil barratry laws. The ambulance-chasing epidemic in Texas must be aggressively treated through collaborative, proactive efforts of all stakeholders—with enforcement of existing laws and implementation of revolutionary strategies—to protect the citizenry, the rule of law, and the Texas judicial system.

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93. Julia Kollewe, *Fear is the New Mindset in the Irrational World of Finance*, GUARDIAN (Oct. 23, 2008, 8:30), <https://www.theguardian.com/business/2008/oct/23/recession-market-turmoil-psychology-stress>.

94. Compare STATE BAR OF TEX. DEPT OF RES. & ANALYSIS, STATE BAR OF TEXAS MEMBERSHIP: ATTORNEY STATISTICAL PROFILE (2015–16) 1 (TEX. BAR ASS'N 2015) (showing 87,957 active, practicing attorneys in the State Bar of Texas), with STATE BAR OF TEX., SCOPE OF THE TEXAS ATTORNEY DISCIPLINARY SYSTEM 3 (TEX. BAR ASS'N 2015–2016) (showing 344 attorneys were sanctioned, and 38 were disbarred).

