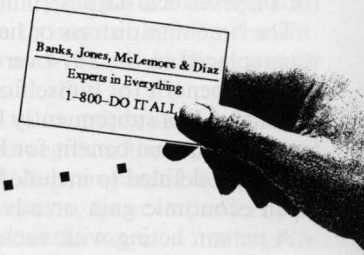
1990

The Crime of Barratry: Criminal Responsibility for a Branch of Professional Responsibility

Gerald S. Reamey
St. Mary's University School of Law, greamey@stmarytx.edu

The Crime of Barratry

Criminal Responsibility for a Branch of Professional Responsibility



Until recently, when lawyers thought of spurious litigation or solicitation of clients by members of the legal profession, they thought only of attorney disciplinary rules and possible sanctions by a grievance committee, or perhaps a tort action for malicious prosecution. And, of course, such conduct by a lawyer or her agent is prohibited by Rules 3.01, 7.02 and 7.03 of the Texas Disciplinary Rules of Professional Conduct.[1] Such misconduct is not, however, merely a breach of professional etiquette or a violation of disciplinary rules. It is also a crime.[2]

The History of Barratry in Texas

Despite the fact that no one seems to know of a case in which a lawyer has been convicted of the offense of barratry,[3] Texas law established the crime as early as 1876. The earliest form merely proscribed institution of a suit by a person having no interest in the litigation if the suit was brought to distress or harass another.[4]

In 1901, the statute was amended to punish attorney solicitation of clients.[5] It was already clear in 1901 that an attorney could be disbarred for barratry and that criminal prosecution for barratry was a sanction that could be sought in addition to professional discipline.[6] The offense was extended in 1917 to solicitation by an attorney's agent.[7]

By Gerald S. Reamey

The 1925 Penal Code was replaced by the 1974 Penal Code, but the crime of barratry was preserved in somewhat simplified form.[8] Subsequent amendments have refined the specific intent requirement; have added a presumption to facilitate proof of that specific intent; and, most recently, have included under certain circumstances an internal enhancement of punishment to the third degree felony level for repeat offenders.

The Modern Crime of Barratry

In a sense, contingent fees, mass disasters, and the potential for huge damage awards to plaintiffs have brought the offense of barratry to life.[9] With stakes so high, and competition for clients so keen, accusations of improper solicitation are inevitable. And since barratry, unlike most forms of professional misconduct, is criminal, the sanctions are more serious and the procedures are often less familiar than for other ethical lapses.

The "intent to distress or harass" required under prior law was replaced in the 1974 version of barratry by "intent to obtain a benefit for himself or to harm another," a specific intent that has subsequently been reduced to "intent to obtain an economic benefit for himself."[10] "Economic benefit" is broadly defined to include "anything reasonably regarded as an economic gain or advantage.[11]

A person acting with such intent violates the statute by committing any one of four prohibited acts. Two of these continue the original proscription against instituting an action in which the person has no interest[12] or instituting an action "he knows is false."[13] The remaining two, and by far the more significant for lawyers practicing in a predatory and competitive environment, forbid solicitation of employment "to prosecute or defend a suit or to collect a claim,"[14] or procuring another to do the actual soliciting.[15]

Intent to obtain an economic benefit from client solicitation is unlikely to be difficult to prove unless the attorney is acting *pro bono.* The current version of the statute, nevertheless, includes a presumption of the specific intent "if the person accepts employment for a fee, accepts a fee, or accepts or agrees to accept money or any economic benefit."[16]

It might be argued that this presumption effectively renders the solicitation form of barratry a strict liability crime. If an attorney, for example, "agrees to accept" an "economic benefit," the jury may be instructed that such evidence would permit an inference of his or her intent to obtain an economic benefit. Should the jury accept the invitation contained in its instructions to employ the presumption, proof of the only culpability required for the crime would be satisfied by proof that the lawyer agreed to accept the benefit.

While the Legislature may dispense directly with culpability requirements for offenses, a due process question is raised by doing so for a sufficiently serious offense.[17] Use of the presumption in a given case may be found to violate due process because barratry may now be a felony offense in at least some circumstances, and the most serious kind of misdemeanor otherwise.[18]

A related concern in any case in which a presumption is employed is whether it unconstitutionally shifts the burden of persuasion to the accused.[19] Since the statutory presumption of specific intent in the Texas barratry law may relieve the state of its burden of proof on an essential element of the offense, the presumption's constitutionality depends upon whether it is properly given to the jury.[20] Texas law requires that presumptions in criminal cases be given in permissive form,[21] and if that prescription is followed, it is unlikely that any due process challenge to the presumption would succeed.[22]

"Solicitation"

Personal solicitation of prospective clients is the evil targeted by the barratry statute. The Penal Code defines "solicit" to include communication "in person or by telephone."[23] However, not all personal solicitation is covered. Written solicitation is not included, and only solicitation of "a claimant or defendant" or "member of the claimant's or defendant's family" is prohibited.[24]

The definition of solicitation also expressly excepts certain situations. If the communication has been requested, it is not within the purview of solicitation.[25] Moreover, the term is inapplicable to communications by a family member, by an attorney with a pre-existing attorney-client relationship, or with a "qualified nonprofit organization for the purpose of educating laymen to recognize legal problems, to make intelligent selection of legal counsel, or to use available legal services."[26]

The latter exceptions seem aimed at bar association referral services and community service agencies dealing with clients in need of legal advice.[27] The exceptions for requested contact and pre-existing clients are much more likely to provide defensive issues for the typical defendant, the practitioner.[28]

The Constitutionality of Prohibiting In-Person Solicitation

The constitutionality of prohibiting solicitation remains unsettled despite the existence of several state and federal cases dealing with the issue.[29] The principal constitutional attack on regulation of solicitation is grounded in the First Amendment.

In *Bates v. State Bar of Arizona,* the United States Supreme Court first recognized lawyer advertising as commercial speech subject to First Amendment protection.[30] While reasonable "time, place, and manner" regulations may be constitutionally imposed,[31] *Bates* made clear that the state's interest in the regulation of commercial speech must justify any limitations.[32] The *Bates* opinion did not, however, decide whether, or to what extent, a state might regulate in-person solicitation.[33] That issue was specifically reserved with a comment in dicta that "[a]ctivity of that kind might well pose dangers of overreaching and misrepresentation not

encountered in newspaper announcement advertising."[34]

When the court did decide its first two solicitation cases, it distinguished the kinds of protection that might be involved. In *Ohralik v. Ohio State Bar Association,*[35] direct, in-person communication by a plaintiff's lawyer with a potential personal injury client was held to be subject to the First Amendment but not protected from disciplinary regulation.[36] The state's interest in prohibiting in-person solicitation is stronger than that involved in print advertising because the potential for abuse is greater.[37] Commercial expression is, however, also subject to at least limited First Amendment protection.[38]

In re Primus,[39] a companion case to *Ohralik,* involved a different kind of solicitation, one that the Supreme Court held could not be prohibited. The ACLU attorney in *Primus* wrote, rather than personally spoke with, the potential client and offered to represent her in a civil rights matter.[40] Because of the nature of the claim, the court characterized the speech as political rather than commercial, and held it subject to greater protection.[41]

Because of the unique nature of the solicitation in *Primus,* the opinion was of limited value in defining the extent to which a state could prohibit impersonal (e.g., mail) solicitation. That issue was later addressed in *Shapero v. Kentucky Bar Association.*[42] The lawyer in *Shapero* submitted to his state bar advertising commission for approval a copy of a letter he proposed to send advertising his legal services to persons who had had foreclosure actions initiated against them.[43] The commission refused to approve the letter although it did not contend that the communication was false or misleading.[44]

The Supreme Court ruled that the absolute prohibition on targeted mail solicitation violated the First Amendment absent a "particularized finding that the solicitation is false or misleading."[45] Targeted mail solicitation, noted the court, is not merely "*Ohralik* in writing."[46] The written solicitation is less subject to overreaching or undue influence;[47] is more easily ignored by the recipient; is less invasive of personal privacy; and is more "conducive to reflection and the exercise of choice. . . than is personal solicitation by an attorney."[48]

The *Shapero* court conceded that even written solicitations, particularly those sent to persons with specific legal service needs, are subject to abuses, but concluded that such abuses could be curbed by preapproval procedures rather than a complete ban.[49] A rough synthesis of *Shapero, Primus,* and *Ohralik* suggests that while personal solicitation for purely pecuniary gain might be banned, some kinds of personal solicitation, including those in writing, cannot be completely prohibited, although they might be reasonably regulated.

The Supreme Court's opinions leave open questions about solicitation by telephone;[50] personal solicitation for mixed political and pecuniary motives; and personal solicitation of a person, like a family member, other than the claimant or potential client. All of these forms of solicitation are prohibited by the Texas barratry statute.

Solicitation by telephone is subject to some of the same abuses feared from a face-to-face contact. Particularly, lay persons solicited by telephone may be unduly influenced in the selection of counsel and their privacy may be inappropriately invaded.[51] On the other hand, consumers with public telephone numbers can scarcely avoid dealing with telephone solicitors. Their privacy is invaded much more often by non-lawyers than it is ever likely to be by attorneys seeking clients, although recent victims of tragedy may be more offended by legal solicitors. Moreover, consumers have learned to quickly and effectively terminate telephonic solicitations, something that is more difficult to do when confronted with an in-person solicitation.

Decreased likelihood of undue influence also distinguishes in-person or telephonic solicitation of family members or friends of victims from solicitation of the victims themselves. When an attorney approaches an intermediary, he or she is less likely to produce substantial pressure on the potential client to choose the soliciting attorney, and the proffer of assistance is more easily rejected.

Because the Texas barratry statute prohibits all personal and telephonic solicitations, including those directed at family members, the offense may ultimately be held to infringe First Amendment commercial speech rights in at least some cases because, on balance, the consumer's need for information about legal representation outweighs the dangers inherent in some kinds of solicitation. If an outright ban on all solicitation purely for pecuniary gain is not always permissible, reasonable regulation to ensure that the content of the solicitation is truthful and not misleading would almost always be unobjectionable.[52]

Oral solicitation, because of its extemporaneous nature, is concededly more difficult to regulate than the written communication of *Shapero.*[53] A prerecorded telephonic message soliciting prospective clients, however, offers the same opportunity for regulation as the targeted mailings in *Shapero.*[54] Regulation might go so far as to require recording and archiving of telephonic or personal solicitations for post-hoc review in the event allegations of fraud or deceit are made.[55]

In short, the sweeping prohibition of solicitation found

in the barratry statute may go too far to withstand constitutional scrutiny in every prosecution.[56] Personal solicitation in its most basic form has not, however, been viewed any more favorably by the Texas Supreme Court than by the United States Supreme Court.

The Texas Courts' View of Solicitation

Relatively few Texas decisions involve the criminal barratry statute directly.[57] Fewer still have considered the constitutionality or construction of the law.

The most significant Texas decision to date regarding the constitutionality of a solicitation prohibition (but not the criminal statute) is *O'Quinn v. State Bar of Texas,* a suit for injunctive relief from a disciplinary petition filed by the State Bar of Texas.[58] The petition alleged that several nonlawyers had recommended the employment of attorney John O'Quinn to persons who had not requested advice about representation.[59] O'Quinn appealed the denial of injunctive relief to the Texas Supreme Court on the grounds that the disciplinary rules "violate the Texas and United States constitutional rights to commercial free speech, equal protection of the laws, and open access to the courts."[60]

As expected, the arguments in *O'Quinn* pitted the need for information about legal services and protection of victims from "unscrupulous insurance adjusters" against "the potential for fraud and invasion of privacy."[61] The court assumed that "some first amendment protection" exists for "in-person solicitation by a lawyer's runners," but also assumed that the state has a "strong and substantial interest in protecting the public" from the abuses of personal solicitation.[62]

After briefly noting that *Shapero* "involved targeted *mail* solicitation and does not implicate the concerns justifying prohibitions against in-person solicitation of business," Justice Kilgarlin, writing for the majority, held that the disciplinary procedure instituted against O'Quinn did not violate the First Amendment.[63]

The court next turned to the state constitutional claim. Acknowledging that the Texas version of the First Amendment may be broader than its federal counterpart,[64] the court nevertheless held that Article I, Section 8, of the Texas Constitution is not violated by disciplining a lawyer for hiring others to solicit business for pecuniary gain.[65] Because of the legitimate state interest found in banning in-person solicitation of prospective clients, the court also rejected O'Quinn's equal protection claim.[66]

O'Quinn is the latest, but not the only case deciding the constitutionality of the ban on solicitation. In *Barbee v. State,*[67] the Court of Criminal Appeals also considered the issue, but without benefit of *Bates* and subsequent lawyer-commercial speech cases. The defendant, Robert Barbee, was prosecuted under Article 430 of the 1925 Penal Code. He was alleged to have contacted a prospective wrongful death client and urged her to retain a Houston law firm to represent her in the matter.

The Court of Criminal Appeals, in its decision on defendant's motion for rehearing, found no constitutional violation in the conviction.[68] The decision simply announced the result without discussion, citation to authority, or analysis.[69] Because *Barbee* was decided before *Bates* and for reasons not revealed in the opinion, it is of doubtful continuing validity.[70]

Punishment

The offense of barratry is a Class A misdemeanor[71] unless punishment is enhanced by a prior conviction and special circumstances.[72] Solicitation or procuring another to solicit may be a third degree felony in such cases.[73]

Felony prosecution for barratry is very unlikely, however. Not only must the defendant have been previously convicted under subsection 38.12(a)(3) or (a)(4), the solicitation subsections, and be subsequently prosecuted under one of these subsections, he or she must also be shown to have solicited under very limited circumstances.[74]

These special circumstances include solicitation in a "hospital,[75] funeral establishment,[76] or public or private cemetery or at the scene of an accident."[77] Other circumstances which enhance punishment upon subsequent conviction include solicitations by employees of the state,[78] a political subdivision,[79] or hospital or funeral establishment,[80] or solicitations by persons impersonating "a clergyman, public employee, or emergency assistance worker or volunteer."[81]

The barratry statute provides that final conviction for *felony* barratry is a "serious crime" for purposes of the State Bar Rules.[82] This subsection is an obvious legislative attempt to include felony barratry as a basis for discipline for professional misconduct.[83] The effort is, at best, redundant since the rules specifically include "engaging in conduct which constitutes barratry as defined by the law of this state" within the statutory grounds for discipline.[84] Moreover, the provision within the barratry statute implies that only "felony barratry" is a serious crime for these purposes, while the State Bar Rules' inclusion of "conduct which constitutes barratry" encompasses acts punishable as a misdemeanor offense.

It is also noteworthy that barratry is expressly included within the grounds for suspension or revocation of an attorney's license.[85] The statute does not distinguish between

"felony" barratry and "misdemeanor" barratry.[86] An attorney may be disbarred or suspended from practice in addition to, or in lieu of, any criminal sanction sought or obtained.[87]

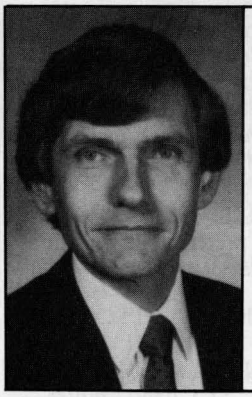
Conclusion

In order for criminal prosecution for solicition of clients by attorneys to become more commonplace in Texas, hard questions of constitutionality and statutory construction must be addressed. Despite the venerable age of the offense, it is a "new" statute in terms of usage, and it has been made even "newer" by the post-*Bates* advertising cases.

Lacking some unanticipated course change by the United States Supreme Court, the Texas ban on in-person solicitation will withstand First Amendment scrutiny.[88] Beyond *Ohralik* lies uncharted territory bounded only by the mail solicitation case, *Shapero*. Considerable ground lies between the two. And since the barratry offense absolutely prohibits rather than merely regulates solicitation, there may be less constitutional ground beneath the statute than had previously been supposed.

Free speech is certainly not the only defensive issue within barratry. Equal protection and due process attacks remain, and more prosaic concepts of criminal responsibility may be brought to bear. No doubt all of these issues, and more, will be explored when that first Texas lawyer is successfully prosecuted for barratry.

The author gratefully acknowledges the research assistance and comments of Linda Daniels, a member of the Class of 1992 at St. Mary's University School of Law, and the suggestions made by Professor Vincent Johnson of St. Mary's University School of Law and Virginia Coyle, J.D.



Gerald S. Reamey is professor of law at St. Mary's University School of Law. He received his B.A. from Trinity University in 1970, and his J.D. and LL.M. from Southern Methodist University. He is the author of Criminal Offenses and Defenses in Texas and co-author of Texas Criminal Procedure.

1. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, Sec. 9, Rules 3.01, 7.02, 7.03 (Vernon Supp. 1990). Rule 7.02 states:
   A lawyer shall not seek professional employment from a prospective client who has not sought his advice regarding employment or with whom the lawyer has no family or prior attorney-client relationship by in-person or telephone contact, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
2. *See* TEX. PENAL CODE ANN. Sec. 38.12 (Vernon Supp. 1990).
3. *See* Sapino, *Prosecutor Tries to Beat Odds in Barratry Cases,* Texas Lawyer, April 16, 1990, at 20. The author's research has uncovered no reported case in which a Texas lawyer has been convicted of barratry. Recently, however, lawyers have been charged with barratry arising from the Alton school bus disaster. *Id.*
4. Law of Aug. 21, 1876, ch. 135 Sec. 1, 1876 Tex. Gen. Laws 227, 8 H. Gammel, Laws of Texas 1063 (1898).
5. TEX. PENAL CODE ANN. art. 290 (1901) (repealed 1917).
6. *See* TEX. PENAL CODE ANN. art. 290 (1901) (repealed 1917). Attorneys remain subject to disbarment as well as criminal prosecution for barratry. TEX. GOV'T CODE ANN. Sec. 82.062 (Vernon 1988).
7. TEX. PENAL CODE ANN. art. 421 (1917) (repealed 1925).
8. *Compare* TEX. PENAL CODE ANN. art. 430 (1925) *with* TEX. PENAL CODE ANN. Sec. 38.12 (Vernon 1974).
9. Mega-litigation of personal injury claims has given rise to other ethical issues. *See generally* Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions,* 54 BROOKLYN L. REV. 539, 539-45 (1988).
10. *See* TEX. PENAL CODE ANN. Sec. 38.12(a) (Vernon Supp. 1990).
11. TEX. PENAL CODE ANN. Sec. 38.01(4) (Vernon 1989).
12. TEX. PENAL CODE ANN. Sec. 38.12(a)(1) (Vernon Supp. 1990).
13. TEX. PENAL CODE ANN. Sec. 38.12(a)(2) (Vernon Supp. 1990). The requirement that the accused know the suit or claim is false is a second specific intent requirement that must be pled and proved in prosecutions under this subsection.
14. TEX. PENAL CODE ANN. Sec. 38.12(a)(3) (Vernon Supp. 1990).
15. TEX. PENAL CODE ANN. Sec. 38.12(a)(4) (Vernon Supp. 1990).
16. TEX. PENAL CODE ANN. Sec. 38.12(b) (Vernon Supp. 1990).
17. *See* LaFave & Scott, CRIMINAL LAW Sec. 2.12(d) (2d ed. 1986).
18. Of course, the counter to this argument is that juries are always free to infer specific intent from objective fact, and that the presumption does no more than focus their attention on clearly relevant facts from which to infer intent.
19. *See* Reamey, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 308-10 (1987).
20. *See In re Winship,* 397 U.S. 358 (1970); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *Sandstrom v. Montana,* 442 U.S. 510 (1979). *See also* Reamey, *supra* note 19 at 308-09.
21. *See* TEX. PENAL CODE ANN. Sec. 2.05 (Vernon 1974); Reamey, *supra* note 19 at 308-310.
22. An argument that the presumption, if given to the jury, constituted a comment on the evidence might succeed where a broader due process argument would fail. *See, e.g., Aguilar v. State,* 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Browning v. State,* 720 S.W.2d 504, 506 (Tex. Crim. App. 1986) (permissive presumption of burglarious intent from unauthorized nighttime entry was comment on evidence by trial court).
23. TEX. PENAL CODE ANN. Sec. 38.01(11) (Vernon Supp. 1990).
24. *Id.*
25. *Id.*
26. *Id.* The definition's exceptions essentially track those contained in Disciplinary Rule 7.02. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X., Sec. 9, Rule 7.02 (Vernon Supp. 1990).
27. "Qualified nonprofit organization" is also statutorily defined. TEX. PENAL CODE ANN. Sec. 38.01(10) Vernon Supp. 1990).
28. For example, an attorney who was charged with barratry only to later have the charge dismissed, was recently quoted as saying: "It bothers me. I knew I hadn't done anything unethical. We went to the [Rio Grande] Valley *by request.*" (emphasis added) Sapino, *Barratry Probe Ends Without New Charges,* Texas Lawyer, May 21, 1990, at 3.
29. For discussions of these cases and the constitutionality of limiting solicitation in various contexts, *see* Johnson, *Solicitation of Law Firm Clients by Departing Partners and Asso-*

ciates: Tort, Fiduciary, and Disciplinary Liability, 50 U. PITT. L. REV. 1, 28-36 (1988); Comment, *Solicitation After an Air Disaster: The Status of Professional Rules and Constitutional Limits,* 54 J. AIR L. & COM. 501 (1988); Comment, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik,* 12 J. L. Reform 144 (1978).

30. 433 U.S. 350 (1977).
31. *Bates v. State Bar of Arizona,* 433 U.S. 350, 385 (1977).
32. The *Bates* court considered the state's preferred justifications and rejected each in turn. 433 U.S. at 369-80.
33. 433 U.S. at 366.
34. *Id.*
35. 436 U.S. 447 (1978).
36. 436 U.S. at 450. The attorney was casually acquainted with the young woman solicited and spoke with her parents before visiting her. She was in the hospital at the time of his initial contact, a fact that would enhance the offense to a felony in Texas if the attorney had previously been convicted of barratry by solicitation. *See* TEX. PENAL CODE ANN. Sec. 38.12(d) (Vernon Supp. 1990).
37. 436 U.S. at 460-62. The "abuses" of solicitation include "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." 436 U.S. at 462. The *Ohralik* court characterized the state interests as "legitimate and indeed compelling." *Id.* These interests justify prohibition of personal solicitation, and no actual harm need be shown. 436 U.S. at 467.
38. 436 U.S. at 456. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* the Supreme Court articulated an analysis for commercial speech which is now relevant in lawyer advertising and solicitation cases. 447 U.S. 557, 566 (1980). The analysis considers first whether the speech concerns lawful activity and is not misleading. If so, attention turns to whether the government's interest is substantial. Where these questions are answered affirmatively, the regulation at issue must be found to directly advance the governmental interest asserted and not be more extensive than necessary to advance that interest. *Id.*; *see* Ewald, *Content Regulation of Lawyer Advertising: An Era of Change,* 3 GEO. J. LEGAL ETHICS 429, 448-55 (1990).
39. 436 U.S. 412 (1978).
40. *Id.* at 431.
41. *Id.*; Comment, *Solicitation After an Air Disaster: The Status of Professional Rules and Constitutional Limits,* 54 J. AIR L. & COM. 501, 512-513 (1988). The Texas barratry statute applies only to solicitations made "with intent to obtain an economic benefit," a different motivation than that of the lawyer in *Primus. See* TEX. PENAL CODE ANN. See 38.12(a) (Vernon Supp. 1990).
42. _____ U.S. _____, 108 S.Ct. 1916 (1988); *see generally* Whitman, Direct Mail Advertising by Attorneys, 20 N.M.L. REV. 87 (1990).
43. 108 S.Ct. 1916, 1919 (1988).
44. *Id.*
45. 108 S.Ct. at 1920; *see* Comment, *supra* note 40 at 514-16.
46. 108 S.Ct. at 1922.
47. *Id.*; see *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 642 (1985).
48. 108 S.Ct. at 1922-23.
49. 108 S.Ct. at 1923.
50. Another commentator has noted this possibility:

    It remains unclear whether attorneys may use the telephone, telegraph, or FAX machine to convey truthful advertising. It is possible that the Supreme Court may come to view these means of personal promotion as more intrusive on the recipients' privacy and therefore permit states to outlaw the use of these means of communication. With its ruling in *Shapero,* however, the Court has clearly moved the bar in the direction of permitting virtually all legal advertising that is neither false, deceptive, or misleading.

    Whitman, *Direct Mail Advertising by Attorneys,* 20 N.M.L. REV. 87, 112 (1990).
51. *See Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462 (1978).
52. *See Shapero v. Kentucky Bar Association,* 108 S.Ct. 1916, 1923 (1988). The Supreme Court noted in *Shapero:*

    But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. See *In re R.M.J.,* 455 U.S., at 203, 102 S.Ct., at 937. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, *id.* at 206, 102 S.Ct., at 939, giving the State ample opportunity to supervise mailings and penalize actual abuses.

    Id. Regulation of commercial speech must, of course, be reasonable. For example, the Pennsylvania Supreme Court has held a statute prohibiting solicitation of clients by public adjusters within 24/hours of a fire or catastrophe unconstitutional. *Insurance Adjustment Bureau v. Insurance Commissioner for Commonwealth Pennsylvania,* 542 A.2d 1317 (Pa. 1988).
53. 108 S.Ct. 1916 (1988).
54. The ABA's Model Rules permit the use of prerecorded telephone solicitations. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1989); Ewald, *Content Regulation of Lawyer Advertising: An Era of Change,* 3 GEO. J. LEGAL ETHICS 429, 439 (1990).
55. *See* note 50 *supra.* In *Zauderer,* the Supreme Court placed the burden of such regulation on the states:

    Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

    Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985).
56. The United States Supreme Court has held that the overbreadth doctrine is inapplicable in commercial speech cases. *Bates v. State Bar of Arizona,* 433 U.S. 350, 381 (1978); *see Woll v. Kelley,* 297 N.W.2d 578, 597-99. (Mich. 1980) (limiting construction necessary for overbroad statute prohibiting solicitation by lawyers).
57. None of the reported criminal prosecutions involved an attorney as defendant.
58. 763 S.W.2d 397 (Tex. 1988).
59. *See* 763 S.W.2d at 398-99.
60. 763 S.W.2d at 399.
61. 763 S.W.2d at 400.
62. 763 S.W.2d at 401.
63. 763 S.W.2d at 402.

64. The court expressly refused to decide whether free speech in Texas is broader than the guarantee of the United States Constitution. 763 S.W.2d at 402.
65. 763 S.W.2d at 403.
66. *Id.* The open courts claim was rejected because the court found that the ban on solicitation did not inhibit access to the courts by potential claimants. 763 S.W.2d at 404; *see* J. AUERBACH, UNEQUAL JUSTICE 43 (1977). Justice Kilgarlin suggested in dicta that a successful constitutional argument might be grounded on evidence that only plaintiff's personal injury lawyers are targeted for discipline. *Id.* Justice Gonzales, concurring, disagreed with this suggestion. 763 S.W.2d at 406.
67. 432 S.W.2d 78 (Tex. Crim. App. 1968), *cert. denied,* 395 U.S. 924 (1969). Interestingly, while still in private practice, Justice Kilgarlin argued the case on appeal for the appellant.
68. *Barbee v. State,* 432 S.W.2d 78, 85 (Tex. Crim. App. 1968), *cert. denied,* 395 U.S. 924 (1969).
69. The entire opinion relating to constitutionality consists of the following:

    Appellant's remaining ground of error, contending that the barratry statute, Art. 430 P.C., is unconstitutional because it imposes a limitation on the right of free speech, is overruled. *Id.*
70. Despite its age and infirmity, *Barbee* was cited as authority in *O'Quinn. See O'Quinn v. State Bar of Texas,* 763 S.W.2d 397, 403 (Tex. Crim. App. 1988).
71. TEX. PENAL CODE ANN. Secs. 38.12(c) (Vernon Supp. 1990, 12.21 (Vernon 1974).
72. TEX. PENAL CODE ANN. Secs. 38.12(c), (d) (Vernon Supp. 1990).
73. *Id.; see* TEX. PENAL CODE ANN. Sec. 12.34 (Vernon 1974).
74. *See* TEX. PENAL CODE ANN. Sec. 38.12(d)(1) (Vernon Supp. 1990).
75. *See* TEX. PENAL CODE ANN. Sec. 38.01(7) (Vernon Supp. 1990) (definition of "hospital").
76. *See* TEX. PENAL CODE ANN. Sec. 38.01(5) (Vernon Supp. 1990) (definition of "funeral establishment").
77. TEX. PENAL CODE ANN. Sec. 38.12(d)(2)(A) (Vernon Supp. 1990).
78. TEX. PENAL CODE ANN. Sec. 38.12(d)(2)(B)(i) (Vernon Supp. 1990).
79. TEX. PENAL CODE ANN. Sec. 38.12(d)(2)(B)(ii) (Vernon Supp. 1990).
80. TEX. PENAL CODE ANN. Sec. 38.12(d)(2)(B)(iii) (Vernon Supp. 1990).
81. TEX. PENAL CODE ANN. Sec 38.12(d)(2)(C) (Vernon Supp. 1990).
82. TEX. PENAL CODE ANN. Sec. 38.12(e) (Vernon Supp. 1990).
83. *See* SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, Sec. 7(8) (Vernon 1988).
84. SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, Sec. 7(5) (Vernon 1988).
85. TEX. GOV'T CODE ANN. Sec. 82.062 (Vernon 1988).
86. *Id.*
87. *Id.*
88. Apparently, a challenge on Texas constitutional grounds will fare no better, at least in civil proceedings. *See O'Quinn v. State Bar of Texas,* 763 S.W.2d 397, 403 (Tex. 1988).