# BARRATRY – CHAMPERTY - MAINTENANCE

## Barratry

The ordinary meaning of barratry is vexatious incitement to litigation, especially by soliciting potential legal clients. *See Barratry*, Black's Law Dictionary (10th ed. 2014). It has long been a crime in Texas. *See Ackerman v. State*, 124 Tex.Crim. 125, 61 S.W.2d 116 (1933) (affirming barratry conviction). The criminal prohibition of barratry is now found in Chapter 38 of the Texas Penal Code. *See* Tex. Penal Code Ann. § 38.12 (West Supp. 2014) (entitled "Barratry and Solicitation of Professional Employment"). The rules of professional conduct also address barratry. *See* Tex. Disciplinary Rules Prof'l Conduct R. 7.03 (entitled "Prohibited Solicitations and Payments"), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013).

In 1989, the legislature enacted a new statute, § 82.065 of the Texas Government Code, addressing contingent-fee contracts and barratry:

(a) A contingent fee contract for legal services must be in writing and signed by the attorney and client.

(b) A contingent fee contract for legal services is voidable by the client if it is procured as a result of conduct violating the laws of this state or the Disciplinary Rules of the State Bar of Texas regarding barratry by attorneys or other persons.

Act of May 27, 1989, 71st Leg., R.S., ch. 866, § 3, 1989 Tex. Gen. Laws 3855, 3857 (amended 2011 and 2013) (current version at Tex. Gov't Code Ann. § 82.065 (West Supp. 2014)).

In 2011, the legislature amended § 82.065 and enacted § 82.0651. The 2011 amendments to § 82.065 are not relevant to this appeal. New § 82.0651 contained the following provisions:

(a) A client may bring an action to void a contract for legal services that was procured as a result of conduct violating the laws of this state or the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas regarding barratry by attorneys or other persons.

(b) A client who prevails in an action under Subsection (a) shall recover from any person who committed barratry:

(1) all fees and expenses paid to that person under the contract;

(2) 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 as provided by Section 82.065(c);

(3) actual damages caused by the prohibited conduct; and

(4) reasonable and necessary attorney's fees.

....

(e) This section shall be liberally construed and applied to promote its underlying purposes, which are to protect those in need of legal services against unethical, unlawful solicitation and to provide efficient and economical procedures to secure that protection.

(f) The provisions of this subchapter are not exclusive. The remedies provided in this subchapter are in addition to any other procedures or remedies provided by any other law, except that a person may not recover damages and penalties under both this subchapter and another law for the same act or practice.

Act of May 5, 2011, 82d Leg., R.S., ch. 94, § 2, 2011 Tex. Sess. Law Serv. 535, 535–36 (amended 2013) (current version at Tex. Gov't Code Ann. § 82.0651 (West Supp. 2014)).

> *Barratry involves stirring up or exciting litigation, some of which may be frivolous. At common law, a cause of action could not lie without three such instances. See, e.g. 9 FL Jur. 2d § 4 (1997); 2 Witkin Epstein, Cal. Criminal Law (2d ed. 1988) § 1131, p. 1310. Statutes, however, may make individual acts of solicitation an offense of barratry. See Tex. Penal Code Ann. art. 290 (1901) (repealed 1917); 9 FL Jur. 2d § 4; see also Susan Lorde Martin, Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?, 30 Am. Bus. L.J. 485, 488-89 (1992).*
>
> *The offense of barratry has an ancient lineage. In some form, the doctrine of barratry existed in Greek and Roman times, as well as in the Middle Ages in England. See Martin, supra at 487. Moreover, the legal profession's resistance to solicitation derives from the Magna Carta-era traditions of the English system of legal education. Beginning in the thirteenth century, the Inns of Court trained wealthy young men, who, needing no income, "viewed law practice as a public service instead of a trade." Katherine A. Laroe, Comment, Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation, 25 St. Mary's L.J. 1513, 1519-20 (1994). This view even gave rise to an eighteenth century law forbidding barristers from accepting fees,id. at 1520, much less soliciting them.*
>
> *The State of Texas also has a long history with laws against barratry: it enacted its first criminal barratry statute in 1876.Id. at 1524. The barratry law has undergone periodic updates, of which H.B. 1327 is*

*the latest. And in the years following 1876, the United States Supreme Court explicitly acknowledged that the first amendment protects commercial speech. Since solicitation of business by chiropractors (even barratrous solicitations) is commercial speech, this court must measure the prohibition imposed by H.B. 1327 against the proscriptions of the first amendment.*

*Courts scrutinize commercial speech under the intermediate standard set forth in Central Hudson Gas Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980). This standard grants states free rein to regulate false, deceptive or misleading speech. See id. at 563-64. If the state wishes to regulate truthful and non-deceptive speech that merely proposes a commercial transaction, however, the state bears the burden of proving the following: (1) the state has a substantial interest, (2) the regulation directly and materially advances, and (3) the regulation is "narrowly drawn." See id. at 564-65.*

*The State has asserted three interests in this case: (1) forbidding solicitation where the sellers are likely to engage in, and the prospective buyers are vulnerable to, undue influence, intimidation, overreaching, or other vexatious conduct; (2) protecting the privacy and tranquility of injured people; and (3) upholding the reputations and public images of the professionals licensed by the state. We accept this showing as one that satisfies the Central Hudson standard, since the Supreme Court has recognized each of these interests as being substantial. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 624-25 (1995) (maintaining ethical standards in state-licensed professions, privacy); Edenfield v. Fane, 507 U.S. 761, 770 (1993) (preventing fraud, maintaining ethical standards, privacy); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) (maintaining ethical standards, preventing vexatious conduct). Bailey v. Morales, 190 F.3d 320, 322-23 (5th Cir. 1999)*

**Champerty**

*Martin v. Morgan Drive Away, Inc., 665 F.2d 598, 603 (5th Cir. 1982) ("A champertous agreement is one in which a person without interest in another's litigation undertakes to carry on the litigation at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation. 14 C.J.S. Champerty and Maintenance § 1 (1939). See Restatement of*

*Contracts § 540(2), § 542(1) (1932). Champerty is a special form of maintenance, which is essentially officious intermeddling in a suit in which one has no interest by assisting a party in its prosecution. Champerty is maintenance with compensation derived from the proceeds of the suit. 14 C.J.S. Champerty and Maintenance §§ 2 and 3 (1939).")*

**Maintenance**

*Maintenance, whose ancient common law roots are closely tied to claims of champerty and barratry, "is essentially officious intermeddling in a suit in which one has no interest by assisting a party in its prosecution." U.S. for Use and Benefit of Balboa Ins. Co. v. Algernon Blair, Inc., 795 F.2d 404, 409 (5th Cir. 1986) (citing 14 C.J.S. CHAMPERTY AND MAINTENANCE § 2-3 (1939) and RESTATEMENT OF CONTRACTS §§ 540(2), 542(1) (1932)). Abuse of process, which is discussed further below as it applies to Plaintiff, occurs when a party causes the employment of process in an unwarranted, illegal, improper, or perverted manner to serve an ulterior purpose resulting in damages to the party upon which the process was served. Preston Gate, L.P. v. Bukaty, 248 S.W.3d 892, 897 (Tex.App.-Dallas 2008, no pet.). Briones v. Smith Dairy Queens, Ltd., CIVIL ACTION No. V-08-48, at *4-5 (S.D. Tex. Sep. 9, 2008)*