



COLD TEXTING

**THE NEW WAVE
OF BARRATRY**
BY ED MCCLEES
& MARK THIESSEN

Recently, Harris County and other counties around that state have increased Personal Recognizance bonds. This bond paperwork then becomes public record. In this paperwork, people are requested to list their cell phone numbers. Just because you can find the information online doesn't give you the authority to contact them via that information.

Rapidly evolving technology coupled with aggressive marketing tactics have created a new minefield for the uninformed lawyer. It's been well settled that attorneys are not allowed to "cold call" potential new clients, whether it be for personal injury actions, criminal cases, or other legal work. Often referred to as "ambulance chasing," which has been rampant in the personal injury world for years, we are faced with a new similar threat in the criminal world. Welcome to the world of cold calling or cold texting clients on their cell based off public information received from the district clerk or bond documents.

UNSOLICITED TEXT MESSAGES CAN BE ILLEGAL

Texas Penal Code § 38.12(a) makes it a third-degree felony "if, with the intent to obtain an economic benefit the person...solicits employment, either in person or by telephone, for himself or another." It is also a third-degree felony if a person "knowingly finances" or "invests funds the person believes are intended to further the commission" of act of barratry. Tex. Pen. Code § 38.12(b)(1-2). The Penal Code further prohibits a lawyer from knowingly accepting "employment within the scope of the person's license ... that results from the solicitation of employment in violation of [the barratry statute]." Tex. Pen. Code § 38.12(b)(3).¹

A person convicted of barratry faces severe penalties from the State Bar because a "[f]inal 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." Tex. Pen. Code § 38.12(i).

Depending on the facts surrounding the particular situation, a creative and aggressive prosecutor could even try to throw in a Money Laundering charge (Tex. Pen. Code § 34.01) for the amount of fee that the client paid the lawyer who committed barratry.

THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT FROWN UPON UNSOLICITED TEXT MESSAGES

The Texas Disciplinary Rules of Professional Conduct recognize that "[i]n many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients." Tex. Disc. R. of Prof. Cond. 7.03, com. 1. The "principal concerns presented by such contacts are that they can overbear the prospective client's will, lead to hasty and ill-advised decisions concerning choice of counsel, and be very difficult to police." *Id.*

Texas Disciplinary Rule of Professional Conduct 7.03(a) says that a "lawyer shall not by in-person contact, or by regulated telephone contact or other electronic contact ... seek professional employment concerning a matter arising out of a particular occurrence or event ... from a prospective client or non-client who has not sought the lawyer's advice regarding employment..."

This same rule defines “regulated telephone contact” as “any electronic communication initiated by a lawyer or by any person acting on behalf of the lawyer...that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means.” Tex. Disc. R. of Prof. Cond. 7.03(f). Clearly, text messages fall under this definition.

FOLLOW STATE BAR RULES FOR ADVERTISEMENTS

There is a simple way to ensure that you do not run afoul of the barratry statute or the disciplinary rules. From the outset, when in doubt, follow the requirements of the State Bar of Texas Advertising Review Committee. Submit your advertisement or plan of attack to the Bar and ask for permission. Note, the Bar will never give a lawyer clearance over the phone. All advertisements must be submitted in writing and if approved will be approved by letter with a green stamp on it. Failure to have this written approval subjects the lawyer to defending their marketing tactic before the Bar. Rule of thumb if you have a “clever” new marketing idea: get it formally approved. Texas Disciplinary Rule of Professional Conduct 7.07 lays out the requirements for submitting your marketing idea to the State Bar for approval.

The State Bar has set very specific rules regarding unsolicited direct mail outs. See Tex. Disc. R. of Prof. Cond. 7.05. The font, color, and material must all be pre-approved by the State Bar. This is widely known and has been the case for over 20 years. However, with evolving technology, one could hypothetically reach potential clients faster than mail, by text or direct phone call. The same rule that governs mail outs also governs electronic or digital solicitations. *Id.*

We have yet to see a letter from the State Bar approving unsolicited direct text messaging. Remember, lawyers who either directly or through a third party send unsolicited text messages to potential clients may find that they have run afoul of Texas Disciplinary Rules of Professional Conduct.

BE CAREFUL WITH LAWYER REFERRAL SERVICES

Both the Texas Penal Code and the Texas Disciplinary Rules of Professional Conduct make it clear that a lawyer can get in trouble if that lawyer knowingly uses a lawyer referral service that breaks the rules. These services are

regulated by the Texas Occupations Code, which defines a “lawyer referral service” as “a person or the service provided by the person that refers potential clients to lawyers regardless of whether the person uses the term ‘referral service’ to describe the service provided.” Tex. Occ. Code. § 952.003(1).

Many of the people operating lawyer referral services do not realize that a “person may not operate a lawyer referral service in this state unless the person holds a certificate issued” under the Occupations Code. Tex. Occ. Code § 952.101. Also, applicants for these certificates must be operated by a governmental entity, or a nonprofit entity. Tex. Occ. Code § 952.102.

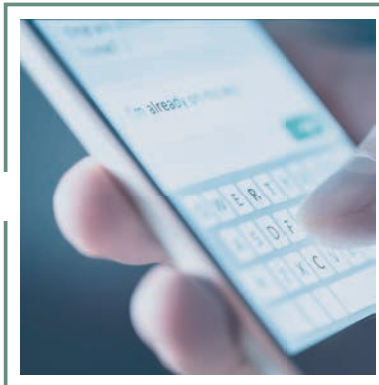
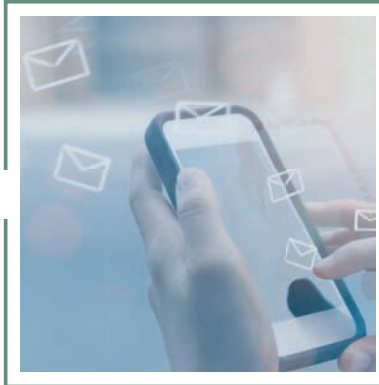
So, be weary when your email box gets flooded with various lawyer referral services trying to get you to pay them for client referrals. Many of these businesses are not operating legally.

UNSOLICITED TEXT MESSAGES SEEKING CLIENTS IS ILLEGAL AND SUBJECTS THE SENDER TO CIVIL LIABILITY

There are several civil penalties that exist for directly soliciting clients via text message. Tex. Gov’t Code § 82.0651, for example, creates an aggressive civil penalty for barratry where the offending party must forfeit their attorney’s fees,

pay a \$10,000 fine, and the attorney’s fees of the party bringing an action.

Additionally, the Telephone Consumer protection Agency (TCPA) and Federal Communications Commission (FCC) regulations make it illegal for a company to send a text message unless the person receiving the text message gave consent to receive it, or if the message was sent for emergency purposes. While we all agree that getting new business is important, it falls well short of being an “emergency” under these regulations.



The bottom line is that any lawyer who directly, or through a third party, sends unsolicited text messages to people charged with a crime in order to solicit that person's business risks significant criminal and civil liability. Lawyers MUST NOT cold call any number that has not contacted you first or asked you through some sort of submission, to contact you.

DUTY TO REPORT

As attorneys we have an affirmative ethical duty to report barratry. Tex. Disc. R. of Prof. Cond. 8.03.

However, if a text was to mimic the requirements established in the Rules, would it be ethical? As of the date of this writing, we have found no ethics opinion or court opinion that authorizes such conduct.

Any lawyer who wishes to engage in this unscrupulous tactic should first seek State Bar approval.

While no lawyer wishes to "snitch" on a fellow lawyer, this affects us all and cheapens our profession. If we do not take action against this conduct, then we risk having a criminal bar that goes the way

of the personal injury bar – where significant numbers of cases are illegally "run" by the criminal law version of the ambulance chaser in a cheap suit.

This illegal conduct makes all of us look bad in a world where people already have a hard time trusting lawyers.

Some might suggest that an unsolicited text message is no different from mailouts, which have been approved and have been happening for years. Unsolicited texts messages are distinguished from mailouts for several reasons:

1 Direct Mail Outs don't cost the client anything. The United States Postal Service is a free service for receivers unlike cell phone or even land lines. Many subscribers must pay for call minutes or data used for texting. Many calls or texts are not free to a potential new client. Some clients work extremely hard just to pay to keep their phone on; imagine if that client was then inundated with hundreds of unsolicited calls or texts from lawyers. The fees would become an extreme hardship, and they should not have to pay them just because their information was placed on a bond or cross referenced via public data.

2 As of the date of this writing, the use of unsolicited text messages to solicit new clients has not been approved by the State Bar. As stated above, lawyer marketing must be submitted to the State Bar for approval. If the marketing is approved, the State Bar will then send you a letter with its verification.

3 A person's cell phone is a greater invasion of privacy than a land line. In the past, municipalities provided phone books which gave specific addresses or names for landline numbers. Cell phone numbers are not freely given for a good reason. Cell phones are also no longer publicly attached to an address. Spam calling and telemarketing are all allowed to be blocked for the protection of privacy. Attorneys should not be allowed to circumvent this privacy in the hopes of gaining a new client.

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4 There is a delay with mailouts that provides a “cooling off” period for the potential client to avoid making a “hasty and ill-advised decision.” See Tex. Disc. R. of Prof. Cond. 7.03, comm. 1. An unsolicited text message can reach a prospective client literally the minute after they get out of jail, when that client is particularly vulnerable.

5 Citizens are used to junk mail. While it is not unusual to get many pieces of junk mail in your mailbox, it is not as common to get direct calls or text messages. These texts or calls are personal and come with more physical, psychological, and legal pressure than direct mail outs. Calling or texting prospective clients the moment they are released from jail on potentially the most life-changing day of their lives creates alarmism that could cause that person to make rash decisions. Indeed, the Texas Penal Code creates a 30 day “no solicitation” period for personal injury or wrongful death cases. See Tex. Penal Code § 38.12(d)(2)(A). Shouldn’t people accused of crimes, with all of the safeguards afforded by the Constitution, be entitled to the same grace period?

No one likes to snitch on friends. However, the practice of unsolicited text messaging is unethical and illegal unless specifically allowed by the State Bar. This article is not intended to encourage grievances, prosecution, or civil lawsuits; rather, it is intended to educate those attorneys who think they or the company they hired found a cutting edge way to market for new clients. Technology may be evolving, but the basics of law remain the same. Remember, pigs get fed, hogs get slaughtered. If you have a new way to market, get it approved. The State Bar will not tell your competitors, but this approval will vindicate you when your competitors take offense.

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- 1 Lawyers should be weary of lawyer referral services, which is discussed in more detail in another section.
 - 2 So far, none of the attorneys we have approached regarding their text message solicitation have provided this verification, which is likely because none exists.



Ed McClees is the managing partner of McClees Law Firm, PLLC. He is the former Chief of the Organized Crime Section of the Harris County District Attorney's Office, where he routinely provided advice to federal and state law enforcement agencies, including the FBI, IRS, Joint Counterterrorism Task Force, United States Secret Service, Houston Police Department, Harris County Sheriff's Office, and many others. He currently represents individuals charged with various DWI and Intoxication-related crimes, Murder, Sexual Assault, White Collar Crimes, and others.



Mark Thiessen is a criminal trial lawyer and the Chairman/CEO of the Thiessen Law Firm in Houston, Texas. Mark is Board Certified in (1) Criminal Law by the Texas Board of Legal Specialization; (2) DUI Law by the DUI Defense Lawyers Association; and (3) DUI Defense Law by the National College for DUI Defense through the American Bar Association. Mark earned the American Chemical Society-Chemistry and the Law (ACS-CHAL) Forensic Lawyer-Scientist designation, which is the highest form of scientific recognition available for lawyers. Mark is a frequent legal seminar lecturer, author of numerous published legal articles, and a faculty member for various organizations. Mark is the current DWI Committee co-chair and on the Board of Directors for Texas Criminal Defense Lawyers Association (TCDLA), President and on the Board of Directors for Harris County Criminal Lawyers Association (HCCCLA) and a Charter Member and Director for DUI Defense Lawyers Association (DUIDLA). Mark is a 7 time Texas Super Lawyer and in the Top 100 Super Lawyers in Houston (2017-19). In 2019, Mark was the only DWI lawyer to be named to the Top 100 Super Lawyers in all of Texas. Mark has won trials from class B misdemeanors up to first degree felonies.



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