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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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DURING this Survey period the legislature, the courts and the state bar task forces have given several warnings to the lawyers of the state of Texas to examine their present methods of advertisement, solicitation and representation of clients and to create effective guidelines to preserve the professional responsibility of our profession. The amendments to the Texas Barratry Statute have created dire results for the improper solicitation of clients.[1] The introduction of a senate bill attempting to espouse legislative guidelines on lawyer advertising has sent an implicit message to the lawyers of this State to begin self-policing or to subject themselves to the discretion of the legislature.[2] Recent Texas decisions regarding the improper appearance created by Mary Carter agreements or overlapping representation of clients show the court's focus on policing the potential impropriety of our conduct as lawyers.[3] Finally, an appellate court's decision that a plaintiff's request for the mandatory provision of pro bono legal services was justiciable threatens another area for which our profession must take responsibility or face legislative control.[4]

I. BARRATRY

The Texas Barratry Statute amendment,[5] effective September 1, 1993, gives the public greater protection against the surging number of improper and intrusive solicitations by attorneys and nonlawyers. The statute's teeth have been sharpened by heightening the penalty for improper written solicitations, unauthorized practice of law and other imposing activities by nonlawyers, to a felony for a first offense.[6] The amendments made by Senate Bill 1227[7] were necessitated by the evolvement of barratry into a full scale enterprise, promoted by attorneys working with referral sources such as physicians, ambulance and wrecker operators, and police and municipal employ-

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1. *See* discussion *infra* Section I.
2. *See* discussion *infra* Section II.
3. *See* discussion *infra* Section IV.
4. *See* discussion *infra* Section V.
5. TEX. PENAL CODE ANN. § 38.12 (Vernon 1989 & Supp. 1994).
6. *Id.*
7. Texas Senate Bill 1227 amends both TEX. PENAL CODE ANN. § 38.01 and § 38.12.

ees. The nonlawyer referral sources, who are in a position to take advantage of accident victims, have been targeted as the fastest route to obtain accident information. Lawyers use this information to immediately secure the client's case. This practice has become so rote that some lawyers will even pressure unwary victims to execute contracts for representation at the accident scene.

A. PROHIBITED SOLICITATIONS

The amended Barratry Statute prohibits in-person solicitations by and payments to those who participate in soliciting employment,[8] as well as written communications by certain professionals seeking employment.[9] An attorney who invests funds to further the commission of barratry or indirectly accepts employment from illegal solicitation also commits barratry, as described below. A person commits a felony offense by engaging in any of the following with the intent to obtain an economic benefit:[10]

(1) knowingly institutes a suit or claim that the person has not been authorized to pursue;
(2) solicits employment, either in person or by telephone for himself or herself or another;
(3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain legal representation from the prospective client;
(4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;
(5) pays or gives or offers to pay or give a family member of a prospective client money or anything of value to solicit employment; or
(6) accepts or agrees to accept money or anything of value to solicit employment.

The Barratry Statute has also been amended to prohibit direct mail solicitation by certain professionals.[11] In addition to attorneys, this amendment affects physicians, surgeons, chiropractors, licensed medical providers and private investigators.[12] The following unsolicited written communications by these professionals are prohibited:

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8. TEX. PENAL CODE ANN. § 38.12(a), (b) (Vernon 1989 & Supp. 1994).
9. *Id.*
10. *Id.* Economic benefit is defined to include accepting or agreeing to accept money or anything of value, as well as accepting or offering to accept employment for a fee or entering into a fee contract. TEX. PENAL CODE ANN. § 38.01(4) (Vernon 1989 & Supp. 1994).
11. TEX. PENAL CODE ANN. § 38.12(b) (Vernon 1989 & Supp. 1994). Not every communication with a prospective client is a solicitation of employment. *Id.* A solicitation must concern "a legal matter arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing legal problem of the prospective client . . . ." However, this definition does not include:
1) communications initiated by a family member of the person receiving a communication;
2) communications with prior or existing clients;
3) communications by an attorney for a qualified nonprofit organization with its membership concerning legal problems or selection of legal counsel;
4) advertisements in the public media.
Id.
12. TEX. PENAL CODE ANN. § 38.12(b) (Vernon 1989 & Supp. 1994).

1) actions for personal injury or wrongful death if mailed within 31 days of the accident;
2) a specific legal matter when the person knows or should know that the person receiving the communication is already represented by an attorney concerning that matter;
3) an arrest or the issuance of a summons to a person if mailed within 31 days of the date of arrest or issuance of summons;
4) a lawsuit and the person to whom the communication is addressed is a defendant or a relative of that person unless such suit has been on file for more than 31 days; and
5) a person who has indicated a desire not to be contacted or receive communications concerning employment.[13]

Senate Bill 1227 also directed the state bar to adopt rules governing lawyer advertising and written solicitation to prospective legal clients no later than June 1, 1994. A discussion of the state bar's proposed amendments as of July 21, 1993 maybe found in section II of this Article.

B. CRIMINAL PENALTIES

The punishment for violations of the Barratry Statute has been increased with the passage of Senate Bill 1227. Violations of section 38.12(a) or (b) of the Penal Code now constitute a felony of the third degree, which could result in confinement for up to ten years and/or the payment of a $10,000 fine.[14] Illegal communication with a prospective client in violation of section 38.12(d) is a Class A misdemeanor, but subsequent convictions will be treated as felonies of the third degree.[15]

Falsely holding oneself out to be a lawyer with the intent to obtain economic benefit is a violation of the Barratry Statute.[16] Likewise, a nonlawyer who contracts to provide legal representation, counsel or advice in a personal injury claim with the intent to obtain economic benefit violates the Barratry Statute.[17] The unauthorized practice of law is a Class A misde-

13. *Id.* Effective September 1, 1993, all state accident report forms must include a question as to whether the individual desires to be contacted by those soliciting professional employment. TEX. PENAL CODE ANN. art. 6701d(45). It is a misdemeanor offense to contact an accident victim who has not expressed a desire to be contacted. United States District Judge David Hittner of the Southern District of Texas has rendered this provision unenforceable in a temporary restraining order issued in Mary Moore, et. al. v. Dan Morales, et al.

14. A conviction under these provisions equates into a "serious crime" as interpreted by the Texas Rules of Disciplinary Procedure and will invoke the compulsory disciplinary process under those rules. Barratry by an attorney is punishable by disbarment. TEX. GOV'T CODE ANN. § 82.062 (Vernon 1988 & Supp. 1993).

15. TEX. PENAL CODE ANN. § 38.12(h) and LOCAL GOV'T CODE ANN. § 215.034 (providing that a conviction for barratry disqualifies one to be a law enforcement officer and that individuals licensed by municipalities, such as operators of emergency vehicles and wreckers, are subject to license revocation if convicted of barratry).

16. TEX. PENAL CODE ANN. § 38.12 (Vernon 1989 & Supp. 1994). Such an offense is a third degree felony and likewise applies to attorneys whose licenses have been revoked or suspended or who are not in good standing with the State Bar.

17. TEX. PENAL CODE ANN. § 38.12 (Vernon 1989 & Supp. 1994). A first offense under this section is treated as a Class A Misdemeanor, and a subsequent violation will be a third degree felony. This section is violated by a person who

meanor on the first offense and a third degree felony for repeat offenders.

C. CONSTITUTIONAL VALIDITY

The expanded scope of the Texas Barratry Statute is likely to come under constitutional scrutiny. Texas courts have upheld the constitutionality of the statute's predecessors,[18] including summarily dismissing a challenge that it unlawfully infringed on the right of free speech, but the broader scope of the amended barratry statute may be subject to error.[19] In a recent declaratory judgment action, R.A. Gabrielle challenged Senate Bill 1227 as unconstitutional on the grounds of vagueness due to the lack of a definition for the word "value" in the statute's prohibition of offering prospective clients "anything of value."[20] Gabrielle challenged the statute as violative of Article 1, Section 19 and Article 1, Section 8 of the Texas Constitution and Amendments I, V and XIV of the Constitution of the United States of America. Gabrielle, a lawyer who advertises as being "THE LAWYER WHO SENDS FLOWERS," petitioned for a declaratory judgment and/or injunction on the basis that the word "value" is highly subjective and nebulous. Gabrielle alleged that it was a violation of both the federal and state constitutions to force Gabrielle to speculate whether his conduct in giving flowers to clients or offering to give flowers to prospective clients was in violation of the amended Barratry Statute. By agreement of the parties, a declaratory judgment was entered that Gabrielle would add a disclaimer to all advertisements stating that "[f]lowers are sent following the establishment of the attorney-client relationship and are not intended for the purpose of soliciting employment" and the subsequent act of giving flowers would not violate the

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1) contracts with any person to represent that person with regard to personal causes of action for property damage or personal injury;
2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;
3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damage;
4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or
5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

Id.

18. *See, e.g.*, Quarles v. State, 385 S.W.2d 395, 397 (Tex. Crim. App.), *cert. denied*, 382 U.S. 829 (1965) (citing McCloskey v. Tobin, 252 U.S. 107, 108 (1920)). In *McCloskey* the United States Supreme Court upheld the Barratry Statute as reasonable because its regulation was designed to bring the conduct of legal business into harmony with ethical practice of the legal profession. The appellant had challenged the statute under the Fourteenth Amendment and claimed that it unlawfully prohibited business in violation of liberty and property rights and equal protection of the laws. The Court responded that to prohibit solicitation is to merely regulate the business and not to prohibit it, and the evil against which the statute is directed is one from which the English law has long sought to protect the community. *Id.*

19. Barbee v. State, 432 S.W.2d 78, 85 (Tex. Crim. App. 1968), *cert. denied*, 395 U.S. 924 (1969).

20. R.A. Gabrielle v. Hon. John Vance, No. 93-06821-M (298th Dist. Ct., Dallas County, Tex., Aug. 12, 1993).

amended Barratry Statute.[21]

Nonlawyers will likely attempt to challenge the statute on constitutional grounds. In *Edenfield v. Fane*[22] the United States Supreme Court held that a Florida statute prohibiting solicitation by Certified Public Accountants (CPAs) in the business context violated the free speech guarantees of the First and Fourteenth Amendments.[23] The Court observed that in soliciting potential clients, the accountant sought to "communicate no more than truthful, nondeceptive information proposing a lawful commercial transaction,"[24] and "this type of personal solicitation is commercial expression to which the protections of the First Amendment apply."[25] The Court found that the Florida ban on solicitation "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard."[26] However, laws restricting commercial speech must only be reasonably tailored to a substantial state interest in order to withstand First Amendment scrutiny.[27] The Supreme Court applied a three-prong test to determine the constitutionality of the Florida statute proscribing solicitation by CPAs: 1) "whether the State's interests in proscribing it are substantial;"[28] 2) "whether the challenged regulation advances these interests in a direct and material way;"[29] and 3) "whether the extent of the restriction on protected speech is in reasonable proportion to the interests served."[30]

The Texas Barratry Statute's intent to limit nonlawyers' solicitation of legal claims to foment litigation or take advantage of injury victims will weigh in favor of the statute's validity. In *Ohralik v. Ohio State Bar Association*[31] the Supreme Court held that a state bar "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[32] A preventative rule is justified only in situations "inherently conducive to overreaching and other forms of misconduct."[33]

The *Edenfield* court distinguished *Ohralik* in declaring the ban of solicitation by CPAs unconstitutional.[34] The court reasoned that a CPA, unlike a

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21. *Id.*
22. 113 S. Ct. 1792 (1993).
23. *Id.* at 1796.
24. *Id.* at 1797.
25. *Id.* The Court observed that solicitation may have considerable value in the commercial context, allowing direct and spontaneous communication between buyer and seller. Commercial solicitation is not removed from the ambit of First Amendment protection. *Id.*
26. *Id.* at 1798.
27. *Id.* Commercial speech is so closely linked with the commercial arrangement that it proposes that the state's interest in governing the underlying transaction may give it a corresponding interest in the expression itself. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* (citing test set forth in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980)).
31. 436 U.S. 447 (1978).
32. *Id.* at 449.
33. *Id.* at 464.
34. *Edenfield*, 113 S. Ct. at 1802.

lawyer, is not "a professional trained in the art of persuasion,"[35] and the typical CPA client is far less susceptible to manipulation than an accident victim approached at a moment of high stress and vulnerability.[36] Even though nonlawyers are affected by the Texas Barratry Statute, the state's interest is a compelling one and may well withstand any constitutional challenge.

II. PROPOSED AMENDMENTS TO PARTS VII, VIII AND IX OF THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

In an attempt to avoid legislative regulation of lawyer advertising, a Texas State Bar task force was formed to draft and propose rules governing lawyer advertising.[37] The proposed amendments to Parts VII, VIII and IX of the Texas Disciplinary Rules were adopted by the state bar Board of Directors on June 17, 1993 and have been submitted to the sections of the state bar for critique.[38] It is expected that the final draft will be submitted to the Texas Supreme Court for referendum by the end of 1993.[39] The majority of the proposed rules affect section VII of the Disciplinary Rules regarding the dissemination of information about legal services, although two proposals regarding the jurisdiction for disciplinary enforcement and the severability of rules found to be invalid are also suggested. The following summary highlights only the changes or expansions made by the proposed rules.

Proposed Texas Disciplinary Rule (DR) 7.01 reiterates the requirements set forth in present DR 7.01 with regard to manner of the use of firm names and letterheads. The proposed DR 7.01, in sections (a), (e), and (f), adds a restriction against any advertisement in the public media or written solicitation under a trade or fictitious name, unless such name is not false or misleading as to the identity of the lawyer or lawyers practicing under the trade name and such trade name appears on the lawyer's letterhead, business cards, office sign, fee contracts, pleadings and other legal documents.[40]

Proposed DR 7.02 continues several of the existing requirements of DR 7.02, regarding communications concerning a lawyer's services. However, proposed DR 7.02 consolidates the guidelines for advertisements or solicitations that designate specific practice areas and the specific requirements relating to specialization are covered by proposed DR 7.04. Under the proposed DR 7.02(a)(5), any lawyer designating one or more specific areas of practice in an advertisement or solicitation must have either special edu-

35. *Id.*
36. *Id.*
37. Defeated House Bill 2506 would have provided comprehensive rules and regulations for lawyer advertisements and written communications, however, the state bar was able to assure the legislature that it would police itself by creating the necessary rules, therefore maintaining the bar's history of autonomy. Richard Hile, *Changes in the Barratry Statute*, 56 TEX. B.J. 914, 916 (1993).
38. *Id.*
39. *Id.*
40. *Proposed Amendments*, 56 TEX. B.J. 1039 (1993).

cation, training or experience in the practice area(s) and must be competent to practice in such area(s).[41] Proposed DR 7.02(b) does not require that a lawyer be certified by the Texas Board of Legal Specialization to designate a practice area, but such certification will conclusively establish that the guidelines of the rule have been met.[42] Finally, proposed DR 7.02 mandates that any statement or disclaimer required by the DR's must be made in each language used in the advertisement or writing.[43]

Proposed DR 7.03 outlines prohibited solicitations and payments. Proposed DR 7.03 incorporates the present DR 7.02, which restricts in-person or telephone contact with prospective clients, but the proposed DR clarifies that the restriction in solicitation applies only to seeking employment "concerning a matter arising out of a particular occurrence or event, or series of occurrences or events . . . ." Therefore, the general solicitation of clients, in-person or by telephone, without regard to a specific matter is not prohibited by proposed DR 7.03(a).[44]

Proposed DR 7.03(a)(1)-(5) does, however, place the present restrictions required by DR 7.01(f) for written communications on the allowed in-person or telephone contact and makes such restrictions more strict.[45] First, the proposed DR does not require that a prospective client actually make known a desire not to receive communications.[46] Rather, the proposed DR requires only that the lawyer "knows or reasonably should know" of the desire not to receive communications from the specific lawyer or, in general, regarding the professional employment of a lawyer.[47] Second, the present DR 7.01(f)(3) restricts written solicitations that involve coercion, duress or harassment.[48] Proposed DR 7.03(a)(3) adopts these same restrictions for in-person or telephone solicitations and adds further restrictions against communications involving fraud, overreaching, intimidation and undue influence.[49] Finally, the proposed DR 7.03(a)(5) also restricts any communication that contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.[50] Additionally, DR 7.03(a) does provide a new exception to the above communications restrictions, for lawyers of qualified nonprofit organizations, who may communicate with the organization's members for the purpose of educating them on the law, on recognizing legal problems and on how to select and use counsel or legal services.[51]

Subsections (b) and (e) of proposed DR 7.03 and subsections (a)(2) and (p) of proposed DR 7.04 expand the restrictions on the use of lawyer referral

41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*; *see also* TEX. DISCIPLINARY R. PROF. CONDUCT 7.01(f).
46. *Proposed Amendments*, 56 TEX. B.J. 1939 (1993).
47. *Id.*
48. TEX. DISCIPLINARY R. PROF. CONDUCT 7.01(f)(3) (1988), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1993) (STATE BAR RULES art. X, § 9).
49. *Proposed Amendments*, 56 TEX. B.J. 1039 (1993).
50. *Id.*
51. *Id.*

services to only those meeting the requirements of Article 320d of the Texas Revised Statutes.[52] Subsection (c) of proposed DR 7.03 restricts a lawyer from paying, giving, advancing or offering to pay, give or advance a prospective client anything of value, other than actual litigation expenses, court costs, and reasonably necessary medical and living expenses.[53]

Proposed DR 7.04(a)(3) expands the present DR 7.01(b)(3)'s acceptance of announcements of lawyer availability in legal directories by recognizing the right to publish in legal newspapers as well.[54] Although, the proposed DR deletes the requirement that the announcement be dignified, the proposed rule does prohibit false or misleading representations of special competence.[55] Subsection (b) of proposed DR 7.04 continues the requirements of legal advertising contained in present DR 7.01(c)(1) with regard to the identification of the responsible attorney, but the proposed DR also requires that a lawyer advertising in the public media publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement.[56]

Proposed DR 7.04(b)(2) and (3) maintain the present DR 7.01(c)'s requirements for the identification of areas of specialization, but the proposed DR also restricts a lawyer from making any statements that he or she has been certified, designated, or is a member of any other organization which by such statement implies that the lawyer possesses special competence.[57] The proposed DR would allow a factually accurate statement of membership or an identification similar to those made for areas of certification, if the organization has been accredited by the Texas Board of Legal Specialization.[58]

Due to the influx of lawyers advertising in the public media, proposed DR 7.04(g)-(o) contain several restrictions for such advertisement. Generally,

52. TEX. REV. CIV. STAT. ANN. art. 320d (Vernon Supp. 1993) (providing that for a lawyer referral service to be lawful it must: 1) be offered primarily for the benefit of the public; 2) be operated by a governmental entity or nonprofit organization or entity exempt from federal taxation; 3) not charge a potential client in combination with the referred attorney an amount in excess of $20.00 for the first thirty minutes of the initial office visit with the participating attorney; 4) be the type of service that a lawyer may cooperate with under the Code of Professional Responsibility (Section 9, Article X, rules Governing the State Bar of Texas); and 5) provide for the eligibility of all licensed attorneys in the referral service who office within the geographical area of the referral service's clients to participate in the referral service upon compliance with reasonable requirements).

53. *Proposed Amendments*, 56 TEX. B.J. 1039, 1040 (1993); TEX. DISCIPLINARY R. PROF. CONDUCT 1.08(d) (1988).

54. *Proposed Amendments*, 56 TEX. B.J. 1039, 1040 (1993).

55. *Id.*

56. *Id.*

57. TEX. DISCIPLINARY R. PROF. CONDUCT 7.01 (c) (1988); *Proposed Amendments*, 56 TEX. B.J. 1039, 1040-41 (1993) (clarifying that the statements of certification must be set forth exactly as suggested by the disciplinary rules, with no abbreviations, changes, or additions).

58. *Id.* at 1040 (requiring that the Texas Board of Legal Specialization find that the organization is bona fide and "admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct and reputation) which are reasonably relevant to the special training or special competence that is implied and which are in excess of the level of training and competence generally required for admission to the Bar"). *Id.* at 1041.

advertisements are not to contain appeals primarily to emotions.[59] Further, any persons portraying a lawyer, on television or radio, must in fact be one or more of the lawyers whose services are being advertised.[60] If such advertisement discloses the possibility that representation will be on a contingent fee basis, the advertisement must state whether the client will be responsible for court or any other costs and if a specific range or percentage is stated, the advertisement must disclose whether the percentage is computed before or after expenses.[61] If a lawyer advertises a specific fee or range of fees for particular services, the lawyer must maintain such prices for at least ninety days, unless the advertisement specifies a shorter period or the advertisement is in a media form that is not published more frequently than annually. In the case of an annually published reference, the published amounts must remain intact for at least one year from publication.[62] Any advertisement must designate the city or town of the lawyer or firm's principle office and no advertisement of any other location may be made, unless the other location is staffed by a lawyer at least three days a week or the advertisement discloses the days and times during which a lawyer will be present.[63] A lawyer may not directly or indirectly pay all or a portion of the cost of an advertisement for a lawyer not in the same firm, unless such advertisement discloses the name and address of the financing lawyer, the relationship between the lawyers and the likelihood of referral of cases to the financing lawyer.[64] Similarly, if an advertising lawyer knows that a case or matter will likely be referred, a statement of that fact must be conspicuously included in the advertisement.[65] The proposed DR also restricts any statements of professional superiority that cannot be factually substantiated or any motto, slogan or jingle that is false, misleading, or appeals primarily to the emotions.[66]

Finally, proposed DR 7.04(q) sets forth the guidelines for cooperative or joint venture advertisements by lawyers not in the same firm.[67] In order for lawyers from separate firms to place one advertisement, the advertisement must state that it is paid for by cooperating lawyers and specifically name such lawyers.[68] Furthermore, DR 7.04(r)(2) provides that each lawyer involved in an advertising cooperative or venture shall be individually responsible for ensuring that the advertisement does not violate proposed DR 7.04 and that a copy of the advertisement is filed with the Lawyer Advertisement and Solicitation Review Committee of the State Bar, in accordance with pro-

59. *Id.* at 1041.
60. *Id.*
61. *Id.*
62. *Id.* (specifically contemplating that advertisement of prices in the classified sections or "yellow pages" of the telephone directories remain constant for at least one year after publication).
63. *Proposed Amendments*, 56 TEX. B.J. 1039, 1041 (1993).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1042.
68. *Id.* (reiterating the special competency and other requirements of the Disciplinary Rules and the restrictions against statements indicating professional superiority or that are not readily subject to verification).

posed DR 7.06, discussed below.[69]

Proposed DR 7.05 defines prohibited written solicitations and expands the existing restrictions in the same manner discussed above with regard to in-person and telephone solicitations.[70] Additionally, proposed DR 7.05(b) sets forth several substantive requirements to be placed on written solicitations.[71] First, the communication must comply with proposed DR 7.04's requirements regarding specialization and certification.[72] Second, the communication must be plainly marked "ADVERTISEMENT" on both the first page and the face of the envelope, in a color that contrasts sharply with the background and in the larger of either 3/8-inch type or three times the vertical height of the body type.[73] Third, no communication may resemble legal pleadings or documents, reveal on the outside the nature of the legal problem of the prospective client or imply that the State Bar of Texas or the Lawyer Advertisement and Solicitation Review Committee has approved or authorized such communication.[74] Fourth, the communication may not be sent in any manner that requires personal delivery.[75] Finally, the communication must disclose how the lawyer obtained the information prompting the communication if the contact was prompted by a specific occurrence involving the recipient or his family member.[76] According to proposed DR 7.05(e), the substantive requirements do not apply to communications to current or past clients or their family members, communications that are not motivated by a particular occurrence or a specific existing legal problem known to the sending lawyer, communications not significantly motivated by a desire of pecuniary gain or communications requested by prospective clients.[77]

Proposed Rule 7.06(e) creates a filing requirement for public advertisements and written solicitations.[78] A copy of any written solicitation and its envelope or any advertisement, production script and a statement of times for publication or broadcast must be filed with the Lawyer Advertisement and Solicitation Review Committee of the State Bar of Texas, along with a fee for review.[79] Advance advisory opinions may be obtained under proposed DR 7.06(c) by submitting the advertisement or communication to the Lawyer Advertisement and Solicitation Review Committee, not less than thirty days prior to the date of the first dissemination.[80] An advisory opin-

69. *Id.*
70. *See supra* text accompanying notes 44-50.
71. *Proposed Amendments*, 56 TEX. B.J. 1039, 1042 (1993).
72. *Id.*
73. *Id.* at 1043. This subsection also requires the same indication on the address panel of a brochure or pamphlet that is a self-mailer.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Proposed Amendments*, 56 TEX. B.J. 1039, 1043 (1993).
79. The Board of Directors of the State Bar of Texas are to set such fee, which must be paid by check or money order. *Id.*
80. *Id.* (providing that it is not necessary to submit a videotape of an advertisement, if one has not been prepared, as long as the submitted production script reflects, in accurate detail,

ion of noncompliance with the proposed DR is not binding in a disciplinary proceeding or action, but a finding of compliance is binding if the representations, statements, materials, facts and written assurances are true and not misleading.[81]

There are several exceptions to the filing requirements espoused by proposed DR 7.06.[82] First, advertisements that contain only some or all of the following: name, address and telephone numbers of the lawyer or firm; field(s) of law, in compliance with the specialization and certification designation requirements set forth in the rules; dates of admission to the State Bar, federal courts and other jurisdiction's bars; technical and professional licenses; foreign language ability; identification of participation in prepaid or group legal service plans; acceptance of credit cards; sponsorship of charitable, civic or community programs or events or public service announcements; and disclosures now required by the disciplinary rules or later promulgated by the Supreme Court of Texas are exempt from the filing requirement, provided none of the above information is presented in a false or misleading way.[83] Second, public media advertisements that identify lawyers or firms as contributors to charities or charitable, community, or public interest programs, activities or events are excluded from the filing requirement, if such advertisement contains no information other than names and office locations.[84] Third, listings in regularly published law lists, business cards or announcement cards showing new or changed associations, offices or similar changes need not be filed.[85] Fourth, newsletters mailed only to existing or former clients, other lawyers or professionals and certain members of nonprofit organizations are not subject to the filing requirement.[86] Finally, written solicitations not motivated by particular occurrences, events or specific existing legal problems known by the sending lawyer, requested by a prospective client or not significantly motivated by a desire for or possibility of pecuniary gain are not required to be filed.[87] Despite the numerous exceptions, proposed DR 7.06(e) provides for the submission of information to substantiate statements or representations made or implied in any advertisement or written solicitation upon the request of the Lawyer Advertisement and Solicitation Review Committee.[88]

Proposed DR 7.07 prohibits a lawyer from accepting or continuing em-

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the actions, events, scenes and background sounds which will be depicted and provides a narrative of the verbal and printed transcript).

81. *Id.* (recognizing that an opinion issued under these rules is admissible evidence if offered by a party to disciplinary actions or proceedings).

82. *Id.*

83. *Id.* at 1043-44.

84. *Id.* at 1044.

85. *Id.*

86. *Id.* Unless the primary purpose of a nonprofit organization is to provide legal services, or the recommending, furnishing, paying for, or educating persons about legal services is incidental to and reasonably related to the primary purpose of the organization, or the organization derives a financial benefit from the rendition of legal services, a newsletter sent to such nonprofit organization need not be filed. *Id.*

87. *Id.*

88. *Proposed Amendments*, 56 TEX. B.J. 1039, 1044 (1993).

ployment when the lawyer knows or reasonably should know that the person seeks the lawyer's services as a result of conduct prohibited by the Disciplinary Rules.[89] Proposed DR 8.05 would supplement section VII of the Texas Disciplinary Rules regarding maintaining the integrity of the profession. The proposed DR 8.05(b)(1) ensures that a lawyer admitted to practice in Texas is subject to disciplinary authority for public media advertisements that do not comply with the Texas Disciplinary Rules and that are broadcast or disseminated in another jurisdiction. Even if the advertisement complies with the rules of the other jurisdiction, if the advertisement is intended to be received by prospective Texas clients and is intended to secure employment to be performed in Texas, the attorney could be subject to discipline.[90] Proposed DR 8.05(b)(2) governs written solicitation communications mailed from another jurisdiction to a Texas addressee or intended to secure employment to be performed in Texas.[91] Proposed DR 9.01 would sever any Disciplinary Rule that is held to be invalid, so as not to affect any other provision or application of the Disciplinary Rules.[92]

III. MARY CARTER AGREEMENTS

Mary Carter agreements, or agreements in which a settling defendant retains a financial stake in the plaintiff's recovery and remains a party at trial, have been declared void by the Texas Supreme Court in *Elbaor v. Smith*.[93] Mary Carter agreements have allowed plaintiffs to buy support for their case while at the same time motivating more culpable defendants "to make a 'good deal' " and then appear at trial to aid the plaintiff's efforts to obtain a large judgment against a nonsettling defendant, out of which the settling defendant may be reimbursed.[94] The supreme court stated that the public policy favoring fair trials outweighs the public policy favoring partial settlements, and such settlements fostered by Mary Carter agreements promote

89. *Id.*
90. *Id.*
91. *Id.*
92. *Proposed Amendments*, 56 TEX. B.J. 1039, 1044 (1993).
93. 845 S.W.2d 240, 250 (Tex. 1992). The supreme court declared this holding to apply to the instant case, to those cases in the judicial pipeline where error has been preserved, and to those actions tried on or after December 2, 1992, the date of decision. Mary Carter agreements acquired their name from the Florida case of Booth v. Mary Carter Paint Co., 202 So. 2d 8, 10-11 (Fla. App. 1967), and have since been defined in various ways. *See Elbaor*, 845 S.W.2d at 247, reviewing prior interpretations and clarifying the Texas Supreme Court's definition:

> A Mary Carter agreement exists, under our definition, when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial. This creates a tremendous incentive for the settling defendant to ensure that the plaintiff succeeds in obtaining a sizable recovery, and thus motivates the defendant to assist greatly in the plaintiff's presentation of the case (as occurred here). Indeed, Mary Carter agreements generally, but not always, contain a clause requiring the settling defendant to participate in the trial on the plaintiff's behalf.

Id. (citations omitted).
94. 845 S.W.2d at 249.

rather than discourage further litigation.[95]

The facts of the *Elbaor* case aptly demonstrate the supreme court's concern with the effect of Mary Carter agreements.[96] Plaintiff filed suit against two hospitals and four doctors for medical malpractice associated with the treatment of severe ankle injuries suffered in an automobile accident. Prior to trial, the plaintiff entered into Mary Carter settlement agreements with two doctors and one hospital for respective payments of $350,000; $10; and $75,000. The agreements provided that the settling defendants were required to participate in the trial of the case and contained pay-back provisions where certain settling defendants would be reimbursed all or part of the settlement funds paid to the plaintiff out of any recovery against one of the nonsettling doctors. Thereafter, the plaintiff nonsuited her claim against one of the nonsettling doctors and settled and dismissed her claim against one of the hospitals. The remaining nonsettling doctor, whom the plaintiff was targeting for a large damage award at trial, filed a cross claim for contribution against the other doctors and the hospital that had executed a Mary Carter agreement.

The effects of the Mary Carter agreements were obvious at the ensuing trial. Counsel for the settling defendants vigorously assisted the plaintiff in casting blame upon the nonsettling doctor. Plaintiff's counsel stated during voir dire and opening statement that the conduct of one of the settling doctors was "heroic" and that the nonsettling doctor's negligence caused the plaintiff's damages.[97] In closing argument, the plaintiff's counsel asked the jury to find that the settling doctor had not caused any damages despite the plaintiff's expert testimony that he committed malpractice. Counsel for the settling doctors even stressed during voir dire that plaintiff's damages were extremely high and later elicited testimony from plaintiff favorable to her. In attempting to have the nonsettling doctor held totally liable, the settling defendants abandoned their contributory negligence defense against the plaintiff and argued that she should be awarded all of her damages, including damages for pain and mental anguish.[98]

The trial court denied the nonsettling doctor's request to hold the Mary Carter agreements void as against public policy or to alternatively dismiss the settling defendants. In view of the agreements, the trial court attempted to mitigate their injurious effects by reapportioning the preemptory chal-

95. 845 S.W.2d at 250. The court disputed that such agreements promote settlement and observed that they almost always guarantee a trial against the nonsettling defendant. *Id.* at 248. The court then noted the real potential for a Mary Carter agreement to prevent a fair trial, "[W]e do not favor settlement arrangements that skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment." *Id.* at 250. The Court further quoted with approval Justice Spears' concurring opinion in Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986), in which he stated Mary Carter agreements do not promote settlement but rather "present to the jury a sham of adversity between the plaintiff and one co-defendant, while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff and, in some cases, exoneration for the settling defendant." *Id.*

96. *Elbaor*, 845 S.W.2d at 241-42.

97. *Id.* at 246.

98. *Id.* at 246-47.

lenges, changing the order of proceedings to benefit the nonsettling doctor, allowing counsel to explain the agreements and instructing the jury on their existence.[99] Notwithstanding those instructions, the jury found damages for the plaintiff in the amount of $2,253,237.07, of which the nonsettling doctor was responsible for eighty-eight percent and another settling doctor was found liable for the remaining twelve percent. The total judgment against the nonsettling doctor after credits was $1,872,848.62.[100] However, this judgment, affirmed by the court of appeals, was properly reversed and remanded by the supreme court after it reviewed the distortions created by the Mary Carter agreements and declared them void due to their violation of public policy.[101]

In declaring Mary Carter agreements violative of sound public policy, the Texas Supreme Court also saw their potential to adversely affect attorney ethics.[102] In its review, the court looked to Comment 2 of Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct which states: "[A] lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decisionmaker."[103] The collusive effects of the settling defendant's participation on behalf of the plaintiff at trial created an atmosphere the court found to be confusing and improper.[104] Further, the court reflected that such distortive effects could reasonably be construed as unfairly influencing the decisionmaker, and thus were in violation of the Texas Disciplinary Rules.[105]

IV. CONFLICT OF INTEREST

A. MOTIONS TO DISQUALIFY

Although an attorney is subject to disqualification if his present representation of a client bears a substantial relationship to the representation of a former client, a party who fails to timely file a motion to disqualify counsel waives such complaint.[106] In *HECI Exploration Co. v. Clajon Gas Co.*[107] HECI Exploration Co. ("HECI") filed a motion to disqualify the law firm for Clajon Gas Co. ("Clajon"), contending that an attorney in the firm had represented HECI in the same litigation before joining the firm representing Clajon. The trial court denied the motion to disqualify and on appeal HECI argued that the ruling denied it due process under the federal and state constitutions because Clajon's law firm was disqualified as a matter of law. Clajon responded that its attorney did not have a "substantial relationship"

99. *Id.* at 246.
100. *Id.* at 242-43.
101. *Id.* at 241.
102. TEX. DISCIPLINARY R. PROF. CONDUCT 3.05 (1988); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC-720 (1979).
103. *Elbaor*, 845 S.W.2d at 250 (quoting TEX. DISCIPLINARY R. PROF. CONDUCT 3.05 cmt. 2 (1988)).
104. *Id.*
105. *Id.*
106. HECI Exploration Co. v. Clajon Gas Co., 843 S.W.2d 622, 628 (Tex. App.—Austin 1992, writ denied).
107. *Id.*

with HECI and that HECI waived its right to disqualify the firm by waiting eleven months after learning of the attorney's association with the firm before filing the motion to disqualify.[108] The Austin Court of Appeals held that the facts demonstrated a substantial relationship between the attorney's former and subsequent representations, but found that HECI waived such complaint by waiting too long to bring the matter to the court's attention.[109]

The Austin Court of Appeals cited *NCNB Texas National Bank v. Coker*[110] in which the Supreme Court of Texas outlined the factors for determining what constitutes a substantial relationship between an attorney's multiple representations.[111] Proof of a substantial relationship between the former and present representations gives rise to an appearance of impropriety as a matter of law and results in disqualification. In coming to this conclusion, the court in *HECI Exploration Co.* concluded there was a substantial relationship between the attorney's former and subsequent representations.[112] The court cited Texas Disciplinary Rule of Professional Conduct 1.09(a), which provides that "[w]ithout prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client: (1) if it is the same or a substantially related matter. . . ."[113]

The attorney had discussed case issues with other HECI counsel while he

108. The attorney involved had represented a group who later succeeded the ownership of HECI prior to his commencement of representation of HECI in 1985. While counsel for this ownership group, the attorney attended at least one meeting in which a HECI attorney discussed the merits of the 1985 contract with Clajon which led to the underlying litigation. It was not until October, 1988 that the attorney spoke with HECI's president and another HECI attorney about the Clajon litigation. In November 1988, the head of Clajon's outside law firm approached the attorney about joining the firm. When the firm head learned that the attorney represented HECI, he informed the attorney that his firm represented Clajon and that the attorney would need to discuss the possible conflict of interest with HECI, whose president responded by requesting that the firm withdraw from representing Clajon. The firm refused and when the attorney relayed this response to HECI's president, he said nothing. The attorney assumed acquiescence to be silence on the part of HECI.

After the attorney joined the firm representing Clajon in January 1989, HECI's attorney contacted the Clajon firm about the potential conflict of interest. HECI proceeded to file a motion to disqualify in November 1989 after Clajon's motion for summary judgment had been pending for two months. The trial court denied the motion to disqualify after the hearing. *Id.* at 627.

109. *Id.* at 628. The court also denied HECI's due process claim, noting that there is no constitutional right to reasonably effective representation by counsel in a civil case. *Id.* at 629.

110. 765 S.W.2d 398 (Tex. 1989).

111. *Id.* at 399-400.

> The moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary. Sustaining this burden requires evidence of specific similarities capable of being recited in the disqualification order. If this burden can be met, the moving party is entitled to a conclusive presumption that confidences and secrets where imparted to the former attorney.

Id. at 400.

112. *HECI Exploration Co.*, 843 S.W.2d at 628.

113. 843 S.W.2d at 627 n.5 (citing TEX. DISCIPLINARY R. PROF. CONDUCT 1.09(a) (State Bar Rules art. X, § 9)). Under Rule 1.09(b) all members of a lawyer's firm are disqualified if the attorney practicing alone would be disqualified.

was still an attorney for HECI. Also, the attorney represented both parties in the same type of proceeding.[114] The court perceived a danger that the attorney could divulge HECI's confidences to Clajon because his representations of each company included identical facts.[115] Under the Texas Disciplinary Rules, confidential information of a former client generally may not be used to the disadvantage of the former client after the representation is concluded, unless the former client consents after consultation or the confidential information has become generally known.[116]

However, the court found that HECI had waived its right to disqualification for failure to assert the motion to disqualify in a timely manner.[117] The court noted that HECI had learned of the attorney's association with Clajon's law firm by January 1989, yet did not file a motion to disqualify until November 1989, two months after Clajon had filed its motion for summary judgment. HECI delayed and debated whether to file a motion to disqualify, lending support to the trial court's suspicion that the motion to disqualify was "a negotiating tool."[118] The court stated that had HECI seriously feared the disclosure of confidences by the attorney, HECI would have filed the motion to disqualify before Clajon's law firm conducted depositions and had continued its representation for eleven months.[119] The court emphasized that motions to disqualify should not be used as a "dilatory trial tactic" and the apparent use of such a motion as a negotiating tool after a delay in its filing will support its denial despite the impropriety of such professional conduct.[120]

B. USE OF CONFIDENTIAL INFORMATION

In the case *In re Burton Securities, S.A.*[121] the court held that a law firm may lawfully proceed to collect fees owed the firm by a former client through the latter's bankruptcy.[122] In *Burton* the debtor's former law firm joined in a competing creditor's plan of reorganization, for which all the creditors voted, except the class composed of the debtor's interest holders. The debtor objected to confirmation of the creditor plan and alleged that the

114. 843 S.W.2d at 628.

115. *Id.* When an attorney shifts sides during the pendency of a single case, the relationship does not have to rise to the same level of involvement as would be required with two separate cases as was contemplated in *Coker*. 843 S.W.2d at 628 (citing Enstar Petroleum Co. v. Mancias, 773 S.W.2d 662, 664 (Tex. App.—San Antonio 1989, orig. proceeding); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 301 (Tex. App.—Dallas 1988, orig. proceeding)).

116. TEX. DISCIPLINARY R. PROF. CONDUCT 105(b)(3) (1988).

117. 843 S.W.2d at 628 (citing Turner v. Turner, 385 S.W.2d 230, 236 (Tex. 1964); *Enstar Petroleum Co.*, 773 S.W.2d at 662, 664)).

118. *Id.* at 629 (citing Spears v. Fourth Court of Appeals, 797 S.W.2d 654, 658 (Tex. 1990, orig. proceeding) (motion to disqualify appeared to be a tactical weapon)).

119. 843 S.W.2d at 629 (citing Conoco, Inc. v. Baskin, 803 S.W.2d 416, 420 (Tex. App.—El Paso 1991, orig. proceeding) (finding of waiver was supported by four-month period of inactivity)).

120. 843 S.W.2d at 629 (citing *Spears*, 797 S.W.2d at 656 n.1). There was also evidence that HECI offered to withdraw its motion to disqualify if Clajon would agree to forego all defenses and claims concerning the 1985 contract. 843 S.W.2d at 629 n.6.

121. 148 B.R. 478 (Bankr. S.D. Tex. 1992).

122. *Id.* at 480.

plan was not proposed in good faith as required by the Bankruptcy Code,[123] since the debtor's law firm could not actively participate in the debtor's reorganization.

The *Burton* court addressed the issue of whether a law firm may propose a creditor plan of reorganization in the bankruptcy of its former client to attempt to recover fees owed. The debtor alleged that its former firm violated the Disciplinary Rules prohibiting a law firm from disclosing confidential information as well as those prohibiting a lawyer from representing another party in a matter adverse to the former client.[124] Generally, an attorney cannot use the information learned when representing a former client in a later representation.[125] However, the court noted in *Burton* that the firm was representing itself as a creditor and not another client in the bankruptcy of its former client. Furthermore, although the firm drafted the proposed plan, the firm did not propose the plan itself or represent any other creditor and was only attempting to recover fees owed to it by the debtor. The court further held that the firm did not use client confidences to draft the disclosure statement or plan of reorganization that was submitted for bankruptcy court approval.[126] Moreover, even if it had, the court stated that ethical rules would not necessarily have been violated. As the court noted, the Model Rules of Professional Conduct expand the exception to allow disclosure of confidential information to recover property from the client in addition to recovery of attorneys' fees.[127]

V. PRO BONO SERVICES

The movement for pro bono legal services has reached the Texas courts. In *Gomez v. State Bar of Texas*[128] the Austin Court of Appeals reversed the

123. *See* 11 U.S.C. § 1129(a)(3) (1988) (requiring a plan be proposed in good faith and not forbidden by any law).

124. However, Burton's own representative testified by affidavit that no client confidences were disclosed to the creditor firm, which merely had acted as local counsel for the debtor in two other bankruptcy proceedings. The creditor plan was not prepared from any information subject to the attorney-client privilege, and the creditors' disclosure statement was compiled from information from the debtor's disclosure statement.

125. *In re* American Airlines, Inc., 972 F.2d 605, 614 (5th Cir. 1992); *In re* Dresser Industries, 972 F.2d 540, 544 (5th Cir. 1992). In addition to the state rules, the Fifth Circuit will consider the ethical canons contained in the ABA Model Code in determining whether the use of such information is proper. *In re* American Airlines, 972 F.2d at 610.

126. 148 B.R. at 480. Rule 1.05 of the Texas Rules of Professional Conduct provides in pertinent part:

"(c) A lawyer may reveal confidential information:

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(5) to the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client." TEX. DISCIPLINARY R. PROF. CONDUCT 1.05.

Paragraph 15 of the Comments to Rule 1.05 recognizes that "[a] lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it." The court also cited Paragraph 15 of the Comments, which recognizes that a lawyer should not "exploit the relationship to the detriment of the fiduciary" and "[a]ny disclosure by the lawyer . . . should be as protective of the client's interests as possible." 148 B.R. at 480.

127. *Id.* (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1983)).

128. 856 S.W.2d 804 (Tex. App.—Austin 1993, writ granted).

district court and held that it had jurisdiction to consider declaratory and injunctive relief with respect to plaintiffs' class action seeking to require lawyers to provide free legal services to the indigent.[129] In this suit, plaintiffs alleged that 80% of Texas lawyers fail to participate in organized pro bono services to the indigent and that 90% of indigents' legal needs go unmet. The class members contended that the State Bar of Texas has a legal duty to provide free legal services to the indigent citizens of Texas through directives established by the preamble to the Texas Disciplinary Rules of Professional Conduct, the Texas Lawyer's Creed and by various state constitutional and statutory provisions.[130] Plaintiffs requested that the district court declare their rights under the preceding authorities and that an injunction be issued to prevent the state bar from violating those authorities and denying pro bono services to the indigent. Plaintiffs also requested a mandatory injunction be issued to require defendants to implement an adequate and effective pro bono program to provide free legal services to indigent citizens. The district court dismissed plaintiffs' action for lack of subject matter of jurisdiction.[131]

The Austin Court of Appeals analyzed the Texas constitutional provision defining the district court's jurisdiction and whether the plaintiffs had standing and had shown a justiciable controversy. The court further addressed whether the district court could grant the declaratory and injunctive types of relief requested. In addressing the jurisdictional question, the court observed that the State Bar Act vests the Texas Supreme Court with the power

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129. *Id.* at 814. The case was remanded for further proceedings for the district court to determine its jurisdiction and evaluate whether declaratory and injunctive relief should be granted on each of plaintiffs' claims. *Id.* at 816.

130. *Id.* at 806-07. The court set forth that the alleged legal duty was based on the following "directives:"

> (1) the preamble to the Texas Disciplinary Rules of Professional Conduct which provides in part:
>
> "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees is a moral obligation of each lawyer as well as the profession generally."

TEX. DISCIPLINARY R. PROF. CONDUCT preamble ¶6 (STATE BAR RULES art. X, § 9).

> (2) Comment 3 to Tex. Disciplinary R. Prof. Conduct 6.01 (State Bar Rules art. X, § 9), which provides in part:
>
> "[E]ach lawyer engaged in the practice of law should render public interest legal service."
>
> (3) Article I, sections 2 and 3 of the Texas Lawyer's Creed, which sets forth the following affirmations for all lawyers licensed in Texas:
>
> "2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
>
> 3. I commit myself to an adequate and effective pro bono program."

856 S.W.2d at 806-07. The plaintiffs also alleged that their inability to obtain free legal services deprived them of rights embodied in the Texas Constitution pursuant to "1) the open courts provision, TEX. CONST. art. I, § 13; 2) the equal protection provision, TEX. CONST. art. I, § 3; 3) the equal rights amendment, TEX. CONST. art. I, § 3a; 4) the due course of law provision, TEX. CONST. art. I, § 19; and 5) the general rights provision, TEX. CONST. art. I, § 29." 856 S.W.2d at 807.

131. 856 S.W.2d at 807.

to exercise administrative control over the State Bar.[132] The district court had denied jurisdiction based on Article V, Section 8 of the Texas Constitution which generally provides that district courts shall have exclusive, appellate, and original jurisdiction in all actions except in cases where such jurisdiction may be conferred by law on some other court, tribunal or administrative body.[133] The district court erroneously concluded that exclusive jurisdiction over the subject dispute had been conferred on the Texas Supreme Court. The district court accepted Plaintiffs' argument that the mere grant to the Texas Supreme Court of administrative control over the state bar did not divest the district court of subject matter jurisdiction concerning issues of the practice of law.

The Austin Court of Appeals agreed and held that the jurisdiction granted in the constitution refers to the court's adjudicative function, *i.e.*, their authority to adjudicate legal disputes, as opposed to their administrative functions. Neither the State Bar Act nor any other statute confers the authority to adjudicate disputes concerning the practice of law on any judicial body other than the state district courts.[134] Therefore, the constitution does not limit the ability of the district courts to hear controversies regarding the practice of law. The appellate court also held that plaintiffs had pled a justiciable controversy and had standing to assert their claims.[135] However, the court held that the district court could have no authority to grant such relief as would displace the supreme court's supervisory control over the state bar. Therefore, while a district court could enjoin the state bar from taking actions contrary to Plaintiff's constitutional and statutory right to legal services, the district court could not affirmatively require particular programs to protect such rights and an injunction could not lie to mandate a pro bono program.[136]

* * *

The acts of the legislature, the state bar task forces and the Texas courts during this Survey period have clearly sent a message to the lawyers of this State to examine their conduct. Our profession has been given an opportunity to develop and adhere to our own guidelines to ensure and enhance our professional responsibility. The choice is now ours whether to self-govern or to allow others to intervene in our practice.

132. TEX. GOV'T CODE ANN. § 81.011(c) (Vernon 1988).
133. TEX. CONST. art. V, § 8.
134. *Gomez*, 856 S.W.2d at 810.
135. *Id.* at 812. However, the court noted that because a mandatory pro bono legal services program does not and may never exist, no justiciable controversy would exist with respect to that claim, and the district court would have no jurisdiction to decide whether such a mandatory program is constitutional. *Id.* at 812 n.4.
136. *Id.* at 815-16.