IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANDREW WILLEY	§	
	§	
V.	§	**CIVIL ACTION NO.**
	§	**4:20-cv-1736**
HARRIS COUNTY DISTRICT ATTORNEY	§	

HARRIS COUNTY DISTRICT ATTORNEY'S
MOTION TO DISMISS

DEFENDANT HARRIS COUNTY DISTRICT ATTORNEY moves to dismiss the above-captioned action pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Introduction

Plaintiff Andrew Willey ("Willey") brings this suit against Harris County District Attorney Kim Ogg ("Ogg") in her official capacity only, claiming that he "is being threatened with prosecution"[1] under the Texas barratry statute, specifically, Section 38.12(d)(2)(B) of the Texas Penal Code,[2] "for speaking with prospective clients to advise them of their legal rights and to pursue potential civil-rights litigation." *See* Doc. 1 at 11, ¶ 84.

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[1] Although he alludes to implied threats of prosecution made by a state district judge, Willey has not alleged that Ogg threatened Willey with prosecution under Section 38.12(d)(2)(B).

[2] Section 38.12(d)(2)(B) provides:

> A person commits an offense if the person … with the intent to obtain professional employment for the person or for another, provides or knowingly permits to be provided to an individual who has not sought the person's employment, legal representation, advice, or care a written communication or a solicitation, including a solicitation in person or by telephone, that … concerns a specific matter and relates to legal representation and the person knows or reasonably should know that the person to whom the communication or solicitation is directed is represented by a lawyer in the matter.

TEX. PENAL CODE § 38.12(d)(2)(B).

Willey intends to engage in conduct that facially violates Section 38.12(d)(2)(B). *See* Doc. 2 at 8 ("Willey's intended behavior facially violates the Texas barratry statute.") And he has done so in the past. *See* Doc. 1 at 6, ¶ 30 ("In February 2020, Willey's team contacted 22 people Godinich has been appointed to represent *to ask them questions about their representation* and whether they wanted help requesting a different court-appointed attorney.") (emphasis added).

Under Willey's plan, his volunteer interviewers[3] ask represented defendants whether their lawyers have done "basic defense tasks," and ask the defendants to sign a "limited-scope retainer agreement that, if signed, would authorize Willey to file a motion to substitute counsel with different court-appointed counsel and seek mandamus if it is denied." *See* Doc. 1 at 6, ¶ 28. Willey describes the nature of these communications with the represented defendants expansively as "hearing their stories, advising them that their legal rights are being violated, and helping them vindicate those rights." *See* Doc. 2 at 5.

Willey contends that the threat of enforcement of the Texas barratry statute violates his First Amendment right to free speech, and pursuant to 42 U.S.C. § 1983, seeks "an injunction forbidding prosecuting him for speaking with prospective clients when he does so without a purpose of pecuniary gain, and a declaratory judgment that he may do so without fear of sanction." *See id.* at 11, ¶¶ 86 and 87.

Willey's claim is without merit. Although federal jurisprudence is replete with case authority protecting the rights of individual attorneys to recruit unrepresented individuals as parties to vindicate legal rights, Willey has cited no cases holding that restrictions on solicitations of *represented* defendants violate the First Amendment.

As shown below, there are significant governmental interests served by constraining Texas lawyers and their agents from *initiating* contact with represented

[3] It appears that these volunteer interviewers are *not* lawyers. *See* Doc. 1 at 6, ¶ 27.

individuals to discuss the quality of the existing lawyer's representation and offer alternate representation. It also bears noting that there are also reasonable alternative means of expression that would accomplish substantially the same ends without risking impairment of the attorney-client relationship, causing other foreseeable harms to the represented defendant, and potentially violating existing state ethics standards.

II. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), Ogg moves to dismiss Willey's complaint because Willey has not stated a cognizable legal theory in support of his First Amendment claim.

A. Motions to Dismiss – Standards of Review

12(b)(6) Standard of Review. In considering a 12(b)(6) motion to dismiss, the Court must accept as true all well-pleaded facts and view the allegations in a light most favorable to the non-movant. *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Id.* The complaint must plead sufficient facts to state a claim to relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

Dismissal is proper if the plaintiff's complaint:

(1) Does not include a cognizable legal theory. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

or

(2) Includes a cognizable legal theory but fails to plead enough facts to state a claim to relief that is plausible on its face. *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011).

B. Framing the Issue

As a threshold matter, Ogg acknowledges that the solicitation of unrepresented clients for a noncommercial ideological purpose has been recognized as a form of free speech and political association under the First Amendment. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412, 431 (1978).

This is consistent with the long history of lawyers recruiting unrepresented clients to pursue claims in the public interest, whether as plaintiffs or defendants, as a means of political expression. *See, e.g.*, *Button*, 371 U.S. at 431 ("The NAACP is not a conventional political party; but the litigation it assists ... makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association."); *Primus*, 436 U.S. at 431 (concluding that the appellant's activities come within the generous zone of First Amendment protection reserved for associational freedoms, in part, because "[t]he ACLU engages in litigation as a vehicle for effective political expression")

District Attorney Ogg supports such modes of expression. Willey's complaint does not allege any history in Harris County of her or any past district attorneys prosecuting a nonprofit organization's solicitation of an unrepresented defendant as barratry, and Ogg represents to the Court that she has no intention of starting now.

Nor could she if she wanted to. Subsection (a) of the Texas barratry statute (and Subsection (b), which incorporates Subsection (a)) implicitly protects the right of nonprofit lawyers to solicit unrepresented clients by requiring the State to prove, *inter*

alia, that the lawyer or her agent acted "with intent to obtain an economic benefit."[4] Under Subsections (a) and (b), it would not violate the Texas barratry statute for Willey or his agents to offer free criminal representation to unrepresented indigent defendants *precisely* because Willey has no apparent intent to obtain an economic benefit in doing so.[5]

This is not an unqualified right for nonprofit lawyers, however. The Texas barratry statute identifies six circumstances in which the intent of the solicitor to obtain an economic benefit is not an element of the offense. For example, it forbids *any* attorney from soliciting a client by means involving "coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence" or by using "a false, fraudulent, misleading, deceptive, or unfair statement or claim." *See* TEX. PENAL CODE § 38.12(d)(2)(E) & (F). This makes sense: there should be no free speech protection

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[4] *See* TEX. PENAL CODE § 38.12(a), with emphasis added:

> A person commits an offense if, *with intent to obtain an economic benefit* the person:
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> (1) knowingly institutes a suit or claim that the person has not been authorized to pursue;
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> (2) solicits employment, either in person or by telephone, for himself or for another;
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> (3) pays, gives, or advances or offers to pay, give, or advance to a prospective client money or anything of value to obtain employment as a professional from the prospective client;
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> (4) pays or gives or offers to pay or give a person money or anything of value to solicit employment;
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> (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
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> (6) accepts or agrees to accept money or anything of value to solicit employment.

[5] For purposes of this motion, Ogg assumes that Restoring Justice, Willey's nonprofit corporation, provides no economic benefit to Willey. If, however, Willey was personally drawing a salary from Restoring Justice and he had a personal financial incentive to recruit clients and show potential donors that the nonprofit was sustainable and effective, the analysis could be different.

for a lawyer to coerce or mislead a potential client into agreeing to retain the lawyer's services, no matter if the lawyer seeks an economic benefit in the representation. *See, e.g.*, *Primus*, 436 U.S. at 438 ("The State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence.")

Another circumstance in which the solicitor's intent (or lack of intent) to obtain an economic benefit is not relevant is when the solicitor makes an uninvited solicitation to a person who is already "represented by a lawyer in the matter." *See* TEX. PENAL CODE § 38.12(d)(2)(B). Subsection (d)(2)(B) was first added to Texas law in 1993[6] and has not been substantively changed in the 27 years since. It is this provision of the Texas barratry statute that is at issue before this Court.

C. Section 38.12(d)(2)(B)'s Restriction on Contact with Represented Defendants Serves a Compelling Governmental Interest

For purposes of this motion, Ogg assumes that Willey's attempts to communicate with indigent defendants to assess the quality of their representation and offer free substitute counsel is noncommercial speech similar to the speech constrained in *Button*, and that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *Button*, 371 U.S. at 438.

Button provides a useful framework for assessing the constitutionality of Section 38.12(d)(2)(B) as it relates to Willey's proposed conduct. In *Button*, Virginia tried to apply to the NAACP a recently enacted law prohibiting solicitation of legal business. The legislation, which had been adopted in 1956 as part of Virginia's

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[6] *See* Act of May 27, 1993, 73rd Leg., R.S., ch. 723, 1993 Tex. Gen. Law 2829.

"massive resistance" to school desegregation,[7] expanded the definition of "runner" or "capper" to include an agent for an individual or organization that retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. *Button*, 371 U.S. at 423. Given how the NAACP represented its clients, the law threatened to put an end to NAACP litigation.

The Supreme Court declared this law to be an unconstitutional restraint of free speech, noting its potential effect on the civil rights of African-American citizens:

> There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and … (advise) them to assert their rights by commencing or further prosecuting a suit …."
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> ….
>
> In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

Id. at 434.

The *Button* court also observed that the traditional policies underlying barratry and solicitation prohibitions – malicious intent and "stirring up private litigation where it promotes the use of legal machinery to oppress" – did not justify applying the Virginia statute to the NAACP:

> There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or

[7] Lucas Powe, THE WARREN COURT AND AMERICAN POLITICS, at 170 (2000)

> subvert the paramount interests of his client to enrich himself or an outside sponsor.
>
> . . . .
>
> Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.

Id. at 442-443.

Underrepresentation of indigent defendants is not the problem Willey is attempting to address in the instant case, however. The indigent criminal defendants he wishes to contact are already represented by counsel. Unlike the prospective clients in *Button*, indigent defendants in Harris County are not at risk of having their Sixth Amendment right to effective assistance of counsel frozen out of existence by the operation of Section 38.12(d)(2)(B), and there is not a "dearth of lawyers who are willing to undertake such litigation."

Instead, Willey's apparent concern is subtler – he is engaged in conduct apparently intended to expose and remedy what he believes to be the poor quality of appointed private counsel in Harris County. In doing so, however, there is a substantial risk that his efforts will actually *damage* the interests of the represented defendants he wishes to interview.

For example, Willey's proposed conduct risks planting seeds of doubt in the defendant's relationship with his or her existing counsel. The relationship between a client and his or her attorney is predicated in large part on the client's trust that the attorney is acting in the client's best interests and on the client's faith in the skills of the attorney to navigate the myriad strategic decisions arising in the course of a representation.

Willey's procedures damage that relationship. Willey's proposed questionnaire for interviewing represented defendants appears to be a push poll, as suggestive as it is investigative,[8] implying to the represented defendant that his or her existing lawyer's failure to do one or more of the "basic defense tasks" is deficient conduct, an implication reinforced by the subsequent proffer of the "limited-scope retainer" to authorize Willey to pursue the removal of the attorney. It is the rare person whose faith in his or her lawyer would not be shaken by these communications.[9] *Compare Primus*, 436 U.S. at 436 (finding that statute constraining ACLU solicitations not merited because, *inter alia*, "the record [does not] permit a finding of a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship").

There is also a state interest in deterring conduct that interferes with court proceedings. Because of Willey's unsolicited communications, the state district court was compelled to reassure the defendant of his attorney's qualifications, and conduct evidentiary hearings to determine what the client had told Willey outside the presence of his existing lawyer. *See* Doc. 1 at 7-11, ¶¶ 36-72. Section 38.12(d)(2)(B) protects the integrity of the court proceeding, and alternative remedies exist for addressing poor representation, including bringing such complaints to the attention of the trial court. As Judge Amy Martin stated, "If those were valid allegations, they would be brought to me and I would take action. They are not, so they have not been." *Id*. at 7, ¶ 39.

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[8] This communication also essentially asks the represented defendant to make an uncounseled waiver of the attorney work-product doctrine.

[9] As Willey admits in his complaint, after his interviewers communicated with one lawyer's clients, they called the lawyer to "see if he was still representing them." Doc. 1 at 7, ¶ 35.

Section 38.12(d)(2)(B) also protects the State's substantial interest in regulating the legal profession.[10] The issue of unauthorized contact with represented clients is addressed in Texas Disciplinary Rule of Professional Conduct 4.02(d), which parallels the Texas barratry statute, explicitly authorizing a second lawyer to give "advice regarding [the] matter" to a represented client without notice to or consent from the client's current lawyer if the advice *is sought by the represented person*, while *not* extending similar permission for the second lawyer to *initiate* contact with the represented person. This is an implicit rebuke to the conduct Willey intends to pursue.

And while Rule 4.02(a)'s ethical prohibitions against contact with represented persons do not directly apply to the conduct at issue here,[11] the interests served by that rule (and the ABA Model Rule from which it was derived) are much like the interests served by Section 38.12(d)(2)(B)'s prohibitions against solicitation of represented persons:

> Courts and commentators have elaborated on the ways in which Rule 4.2 serves its three functions of protecting the client, the lawyer, and the client-lawyer relationship. They have explained that the Rule guards a party against rhetorical attack by opposing counsel, which could undermine the party's confidence in her lawyer's competence and assessment of a case. The Rule prevents opposing counsel from causing

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[10] The State's promotion of ethical standards is a relevant consideration in evaluating the constitutionality of the barratry statute. *See McCloskey v. Tobin*, 252 U.S. 107, 108 (1920) (upholding Texas barratry statute, finding "Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related is obviously reasonable.")

[11] Rule 4.02(a) only applies when the lawyer communicates with a represented person "in representing a client." *See* TEX. DISCIPLINARY R. PROF. COND. 4.02(a).

One commentator has observed, however, that a lawyer who contacts a represented nonclient to undermine that person's relationship with their lawyer runs the risk of committing, or aiding and abetting, the tort of intentional interference with contractual relations. George M. Cohen, *Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 TULANE L. REV. 1197, 1201 (June 2013). He also observes that such contact would violate ABA Model Rule 7.3, which regulates solicitation of clients. *Id.* at 1239 n.170.

> a party to ignore her lawyer's advice and from "driving a wedge" between a party and her lawyer. And it protects the attorney-client privilege – critical to a strong client-lawyer relationship – by precluding inadvertent or legally imprudent disclosures of privileged information.
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> This last function – protection of the attorney-client privilege – is thought by many to be the core function of Rule 4.2. Our constitutional tradition honors the attorney-client privilege as a rule of privacy and of protection of citizens from the force of government coercion, even while accepting that the privilege can sometimes obstruct access to truth. The merits of this trade-off may be debatable, and the traditional value placed on the privilege has been periodically challenged, but it remains a central feature of legal representation. Rule 4.2's role in reinforcing its protections is therefore critical.

Geoffrey C. Hazard, Jr. and Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 802 (March 2009).[12]

For the foregoing reasons, the Texas barratry statute is narrowly tailored to serve the compelling state interests identified above.

D. Reasonable Alternatives Exist

Sustaining the constitutionality of Section 38.12(d)(2)(B) as it relates to Willey would not leave Willey without recourse to pursue his goals of improving the criminal justice system.

[12] Hazard and Irwin ultimately conclude in their article that Model Rule 4.2 should be amended to "focus clearly and unambiguously on protection of the client-lawyer relationship" and propose a strict prohibition on communications that "seek or obtain information protected by the attorney-client privilege or work-product immunity." *See id.* at 804 & 848.

Willey could advertise the availability of his services to indigent defendants in a manner that does not constitute "solicitation" under the Texas barratry statute.[13] For example, Willey could send generalized written communications describing his program and offering to send a representative to evaluate a defendant's case *upon the defendant's request*. He could also communicate the nature of his program through mass media (*e.g.*, signs, radio commercials, public service announcements).

And Willey could make his volunteer lawyers available for appointment through the court system. This would have the collateral benefit of ensuring that his lawyers meet minimum standards of competency and experience under the Fair Defense Act. *See, e.g.*, Harris County Criminal Court at Law Local Rule 24.5[14] (detailing minimum competency and experience requirements to be eligible for appointment to represent indigent defendants in Harris County Criminal Courts at Law); Harris County District

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[13] Under Texas law:

> "Solicit employment" means to communicate in person or by telephone with a prospective client or a member of the prospective client's family concerning professional employment within the scope of a professional's license, registration, or certification arising out of a particular occurrence or event, or series of occurrences or events, or concerning an existing problem of the prospective client within the scope of the professional's license, registration, or certification, for the purpose of providing professional services to the prospective client, when neither the person receiving the communication nor anyone acting on that person's behalf has requested the communication. The term does not include a communication initiated by a family member of the person receiving a communication, a communication by a professional who has a prior or existing professional-client relationship with the person receiving the communication, or communication by an attorney for a qualified nonprofit organization with the organization's members for the purpose of educating the organization's members to understand the law, to recognize legal problems, to make intelligent selection of legal counsel, or to use available legal services. The term does not include an advertisement by a professional through public media.

TEX. PENAL CODE § 38.01(11).

[14] www.ccl.hctx.net/attorneys/FDA/Rule%2024%20(Alternative%20Plan)%20-%202016.pdf

Courts Fair Defense Act Standards and Procedures Section 4.0[15] (detailing minimum competency and experience requirements to be eligible for appointment to represent indigent defendants in Harris County District Courts).

III. Conclusion

As Willey acknowledges, District Attorney Ogg is "as interested in a fair process in which criminal defendants are provided adequate representation as Willey is." Doc. 2 at 11.

Invalidation of Section 38.12(d)(2)(B), however, would have repercussions far beyond Willey's goals by removing an important protection to the attorney-client relationship and exposing defendants to invasive and potentially prejudicial ex parte questioning and solicitations without the assistance of their existing counsel or the state courts. Section 38.12(d)(2)(B) is a narrowly tailored constraint on speech that serves the compelling state interest of protecting represented persons from the damaging consequences that would inevitably ensue from such ex parte communications.

Accordingly, Plaintiff Andrew Willey's claims against Harris County District Attorney Kim Ogg in her official capacity should be dismissed with prejudice.

Respectfully submitted,

/s/ Scott A. Durfee

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[15] www.justex.net/JustexDocuments/0/FDAMS/2018/standards.PDF

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2020, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF system to counsel for the plaintiff.

/s/ Scott A. Durfee
SCOTT A. DURFEE
Assistant District Attorney