

Analysis and Application of Fs. 877.01 & Fs. 877.02

Citizens Legal Department provided an analysis of these two statutes

The copy attached to Mr. Johnson's email highlighted subsection 2 of F.S. § 877.01. He then sent the current version in which the provisions of F.S. § 877.01 were moved to F.S. § 877.02. The language of the statute remains the same. Like much statutory language, the statute does not read particularly easily.

F.S. § 877.02 generally criminalizes the solicitation of legal services. *Subsection 1* makes it a first-degree misdemeanor for a person to solicit legal business directly or indirectly but allows for certain entities to forward legal business provided it is done within the bounds of legal ethics. Simply referring someone to a lawyer or recommending a lawyer is not a criminal act. It would become a criminal act if fee sharing or compensation was involved.

Subsection 2, which is what was highlighted by Mr. Johnson, is a criminal statute that makes it unlawful (a first-degree misdemeanor) for certain persons or certain persons employed by certain types of businesses to communicate with an attorney for the purpose of soliciting legal business. This subsection specifically addresses certain people in a position to routinely encounter people potentially in need to legal services. Pertinent to the property insurance business, this includes public adjusters and contractors. It is unlawful under this subsection for contractors or PAs to communicate with an attorney *for the purpose* soliciting legal business. The statute is written to include direct or indirect communication and written to include people acting on behalf of an attorney. In other words, using intermediaries between the person soliciting the business and the attorney does not insulate the participants from the criminal statute.

Here are some practical observations about subsection 2.

- This is a criminal statute not an insurance claim statute. A violation of this statute does not invalidate an insured's claim. A violation creates criminal exposure for the participants (the PA and the attorney). If an insurer has evidence of a violation it would be appropriate for its SIU to send a referral to DFS, but it would still be necessary to adjust the claim. This does not mean that a fraudulent claim should be paid. The insurer can still apply the misrepresentation provisions of the policy to deny payment if sufficient facts exist.
- If there is sufficient evidence that the statute has been violated and that the violation led to the insured retaining the attorney, an argument can possibly be made that the representation agreement would have been obtained illegally and is therefore void. However, under the representation agreement it is the insured that would owe the attorney a fee. Under the one-way fee statute, in the event of payment after suit, the insurer owes the fee to the insured, not the attorney. The insured would have an argument that they do not owe the attorney a fee because the representation agreement was procured illegally. Under the one-way fee statute (F.S. § 627.428) when there is a payment by the insurer after suit is filed, the insurer owes the insured (not the attorney) a reasonable sum as attorney's fees. Although it is clear that an insured/client

would not be legally obligated to pay the attorney fees pursuant to an illegally procured representation agreement, it is not clear whether the insurer could take advantage of the violation to refuse payment of a fee to the insured. If we have clear evidence of a violation our legal team can certainly further assess and advise on the possibility of contesting payment of attorney's fees.

- As a practical matter it is often difficult to gather the evidence to establish a violation of the statute. How and why an insured selects a particular attorney is not information needed to adjust or assess the claim. Likewise during litigation questions about the circumstances of retaining the attorney would normally raise objections that the court would be likely to uphold since the information being sought would not be considered "reasonably calculated to lead to the discovery of admissible evidence". In other words, the court would likely say that witnesses could not be questioned about these matters because it does not impact the validity of the claim, whether there is coverage or the amount potentially owed.

Insurer SIU units should certainly be aware of and well-versed in the provisions of the statute so that they can recognize potential violations and report them accordingly. Also, the insurer could further consider whether it might wish to contest payment of attorney's fees on the basis that the insured is not legally obligated to pay fees to the attorney and payment of fees to the insured would in essence be a windfall.

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