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THE LAWYER'S LICENSE TO DISCRIMINATE REVOKED: HOW A DENTIST PUT TEETH IN NEW YORK'S ANTI-DISCRIMINATION DISCIPLINARY RULE

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I. INTRODUCTION

Many of the legal profession's rules of ethics are premised on legal obligations. Thus, for example, a lawyer in New York State may be disciplined for engaging in *illegal* conduct adversely reflecting on the "lawyer's honesty, trustworthiness or fitness as a lawyer,"[1] for charging an *illegal* fee,[2] for concealing or failing to disclose "that which the lawyer is required by *law* to reveal,"[3] for counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent,[4] or for suppressing evidence that the lawyer has a *legal* obligation to reveal.[5] The American Bar Association's Model Rules of Professional Conduct have similar law-based ethical provisions.[6]

Since ethical obligations such as these are premised on the law of the jurisdiction, an attorney's ethical responsibilities are subject to change as the law of the jurisdiction evolves. At times, such changes in legal standards may have an unforeseen, yet significant, effect upon traditional practices and assumptions concerning

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[1] NEW YORK LAWYER'S CODE OF PROF'L RESPONSIBILITY, DR 1-102(a)(3) (2000) (emphasis added); N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.3(a)(3) (2000) [hereinafter NYCRR]. All future references to disciplinary rules (DRs) or ethical considerations (ECs) are to the *New York Lawyer's Code of Professional Responsibility*, adopted by the New York State Bar Association, effective January 1, 1970, as amended effective June 30, 1999. The Disciplinary Rules of the *Code of Professional Responsibility* are also promulgated as joint court rules of the Appellate Divisions of the Supreme Court of New York, effective as of September 1, 1990, and are now codified in NYCCR tit. 22, §§ 1200.1-1200.47 (2000). References to disciplinary rules will, therefore, have a parallel cite to title 22 of the NYCRR.

[2] DR 2-106(a) [22 NYCRR § 1200.11(a)].

[3] DR 7-102(a)(3) [22 NYCRR § 1200.33(a)(3)] (emphasis added).

[4] DR 7-102(a)(7) [22 NYCRR § 1200.33(a)(7)].

[5] DR 7-109(a) [22 NYCRR § 1200.40(a)] (emphasis added).

[6] *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(b), (f), R. 3.3(a)(2), R. 4.1(b), R. 1.2(d), R. 3.4(a) (2000) [hereinafter MR].

appropriate ethical conduct, even though they may have resulted from changes in the law not specifically targeted at the legal profession.

The continuing expansion of anti–discrimination law provides an excellent example of how change in the law affects lawyers' ethical obligations and prerogatives. As the rights of individuals have expanded under federal and state civil rights statutes, what has been the effect on lawyers' traditional prerogative to exercise absolute discretion in the selection of clients?

Historically, a lawyer in New York could discriminate in his or her selection of clients based upon the client's race, creed, gender, or any other suspect criteria without fear of reprisal or sanction.[7] This traditional prerogative of lawyers to use any criteria in selecting or rejecting clients is illustrated in the following quotation by a noted legal ethicist:

> [A] lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.[8]

This standard of absolute discretion, which finds support in lawyers' ethics codes[9] and in respected legal treatises,[10] has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma."[11]

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[7] *See* Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 280-81 (1993) (stating a lawyer may refuse to represent a client simply because the attorney does not want to be inconvenienced or because the attorney considers the client repugnant).

[8] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2, at 573 (1986).

[9] *See* EC 2-26 ("A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client . . . ."); MR 6.2 cmt. 1 ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant."); ABA CANONS OF PROF'L ETHICS Canon 31 (1908); *see also* THOMAS D. MORGAN & RONALD D. ROTUNDA, 1999 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 265-66 (1999) (noting that the lawyer's code of conduct gives "a lawyer . . . complete discretion whether to accept a particular client").

[10] *See* HENRY S. DRINKER, LEGAL ETHICS 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy."); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.2:302, at 37-38 (2d ed. Supp. 1996) (stating "no lawyer is legally required to accept any particular matter"); WOLFRAM, *supra* note 8, § 10.2, at 573 (collectively recognizing how Canon 31, moral autonomy, and professional detachment reflect this traditional prerogative).

[11] Begg, *supra* note 7, at 280; *see also* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 84 (5th ed. 1884) (stating, in one of the earliest works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

Yet, how does a lawyer's right to reject clients for any reason, including an improper discriminatory one, square with New York[12] and federal[13] anti–discrimination statutes and New York's anti–discrimination disciplinary rule,[14] which appear facially to prohibit certain types of discriminatory conduct? Several arguments support the traditional view that lawyers need absolute discretion in client selection and, therefore, lawyers must in this respect be "above the law" when it comes to discrimination in the selection of clients.[15] These arguments include:

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[12] N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992).

[13] 42 U.S.C. §§ 1981(a), 2000a (1994).

[14] DR 1-102(a)(6) [22 NYCRR § 1200.3(a)(6)].

[15] In limiting the scope of this article, I have selected the six strongest arguments and ignored several others. *See* Gabriel J. Chin, *Do You Really Want A Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 20-21 (1998) (suggesting the problem of lawyer discrimination is so insignificant that it does not justify anti–discrimination ethical rules or prohibitions); Samuel Stonefield, *Lawyer Discrimination Against Clients: Outright Rejection—No; Limitations on Issues and Arguments—Yes*, 20 W. NEW ENG. L. REV. 103, 114 (1998) (arguing that there is simply no improper discrimination by lawyers). This article also does not address whether court appointment of counsel is constitutional. *Compare In re* Smiley, 330 N.E.2d 53, 58 (N.Y. 1975) (stating New York courts "have broad discretionary power to assign counsel without compensation in a proper case"), *and* Jerry L. Anderson, *Court–Appointed Counsel: The Constitutionality of Uncompensated Conscription*, 3 GEO. J. LEGAL ETHICS 503, 503 (1990) (reporting that, as of 1990, "the vast majority of jurisdictions [until recently] upheld court appointment of counsel . . . considering such service part of an attorney's traditional duty as an 'officer of the court'"), *with* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?* 11 GEO. J. LEGAL ETHICS 915, 925 (1998) (noting many courts have considered "mandatory uncompensated representation" to be unconstitutional and citing several cases in support: DeLisio v. Alaska Superior Ct., 740 P.2d 437, 442 (Alaska 1987); Sacandy v. Walther, 413 S.E.2d 727, 730 (Ga. 1992); Stephan v. Smith, 747 P.2d. 816, 842 (Kan. 1987); Bedford v. Salt Lake County, 447 P.2d 193, 195 (Utah 1968)). Neither does this article consider whether forcing a lawyer to represent a client against the lawyer's will is a violation of the Thirteenth Amendment. *See* DAVID LUBAN, LAWYERS AND JUSTICE 285 (1988) (repudiating the argument that court appointed counsel is unconstitutional under the Thirteenth Amendment); Susan R. Martyn, *Professionalism: Behind a Veil of Ignorance*, 24 U. TOL. L. REV. 189, 195 (1992) (noting the argument that mandatory pro bono violates the thirteenth amendment has been rejected every state but Utah); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 503 (1989) (arguing the "restrictive interpretation" of the Thirteenth Amendment limits it to "the abolition of mid-nineteenth century southern racial chattel slavery," which would refute the notion that forcing a lawyer to represent a client against the lawyer's will is a violation of the Thirteenth Amendment). I have also not discussed an argument premised on the Free Exercise clause of the First Amendment to the Constitution, whereby lawyers who refuse to represent potential clients because of their religious beliefs should not be subject to a claim of discrimination in client selection. *See* Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 GEO. J. LEGAL ETHICS 161, 171-176, 182 (1999) (asserting the religious lawyer is unlikely to prevail because of the Supreme Court's decision to uphold a denial of unemployment benefits for persons discharged due to religious use of peyote, Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), and because of the Court's decision to invalidate the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), in City of Boerne v. Flores, 117 S. Ct. 2157 (1997)).

1) Even if lawyers, in fact, invidiously discriminate in their selection of clients, such discrimination does not violate existing law;

2) Lawyers are so sophisticated in their knowledge of law and the legal system that their discrimination in the selection of clients is not likely to be detected or, if detected, is not likely to be actionable due to the difficulty of proving motive;

3) Forcing lawyers to represent particular clients against their will may violate the lawyers' First Amendment rights of freedom of speech and association;

4) The personal and professional autonomy of a lawyer is so essential to the effective and fair administration of justice that the need for absolute discretion in the selection of clients offsets the public policies underlying anti–discrimination statutes;

5) It is not in the "client's best interests" to force a lawyer to represent a potential client when the lawyer has strong feelings against doing so;

6) Under the separation of powers doctrine, legislatures may not regulate the practice of law as that authority is reserved to or inherent in the judiciary.

This article tests the validity of these arguments in New York in light of developments over the past decade. The thesis is that the conjunction of a unique anti–discrimination disciplinary rule, a judicial decision by the state's highest court concerning a dentist, and two court rules meant to inform clients of their rights have led to a significant alteration of the ethical landscape in New York concerning invidious discrimination by lawyers in the selection of clients. The effect is that the lawyer's traditional right or license to discriminate invidiously in the selection of clients has now been revoked in New York. An appreciation of the history and significance of New York's anti–discrimination disciplinary rule and statutes is essential to the development of this thesis.

II. NEW YORK'S ANTI-DISCRIMINATION ETHICS RULES

The New York courts and the New York State Bar Association added an anti–discrimination Disciplinary Rule to the New York Lawyer's Code of Professional Responsibility in 1990.[16] The anti–discrimination rule in DR 1-102(a)(6) states:

[16] *See* Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283, 292 (1990-91) (providing a brief history of the adoption of these provisions, which are the result of two separate "long

A lawyer or law firm shall not:

> Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding.[17]

Several other jurisdictions have adopted anti-bias provisions in their ethics codes,[18] but DR 1-102(a)(6) is unique in its terminology, application, and scope.[19] The disciplinary rule is quite broad, prohibiting discrimination based upon the same suspect criteria that are listed in New York's Human Rights Law.[20] The rule is

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and torturous" proposals); Begg, *supra* note 7, at 303-12 (providing a detailed history of the enactment of DR 1-102(a)(6)). Minor changes were made to the rule, effective June 30, 1999, to clarify that a complaint of improper discrimination must be brought before an appropriate tribunal in a timely fashion. THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY: OPINIONS, COMMENTARY AND CASELAW (Mary C. Daly ed., 2000). Booklet II contains "A Short History of Professional Responsibility in New York State," which notes changes to the Code of Professional Responsibility through 1999. *See also* EC 1-7 ("A lawyer should avoid bias and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process.").

[17] DR 1-102(a)(6) [22 NYCRR § 1200.3(a)(6)]. A tribunal includes "all courts, arbitrators and other adjudicatory bodies." 22 NYCRR § 1200.1(f).

[18] *See* CAL. RULES OF PROF'L CONDUCT R. 2-400 (1996); COLO. RULES OF PROF'L CONDUCT R. 1.2(f) (1993); D.C. RULES OF PROF'L CONDUCT R. 9.1 (1991); FLA. RULES REGULATING THE FLA. BAR 4-8.4(d) (1994); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2000); ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(5) (1993); MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (1993); MINN. RULES OF PROF'L CONDUCT R. 8.4(g)–(h) (1993); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (1990); N. MEX. RULES OF PROF'L CONDUCT R. 16-300 (1994); OHIO CODE OF PROF'L RESPONSIBILITY DR 1-102(B) (1995); R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (1988); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.08 (1998); VT. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6) (1992); WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (1993).

[19] *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 431-39 (2000) (listing various state codes of a similar nature including New York); ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 22 (1999) (commenting that DR 1-102(a)(6) is innovative); Begg, *supra* note 7, at 312-318 (providing a comparison and analysis of anti-bias provisions in other states).

[20] The rule states:

It shall be an unlawful discriminatory practice for any person, being the owner, lessee,

unusual in that, before coming to the disciplinary system, it requires that complaints of discrimination initially be brought in a timely fashion before a tribunal with appropriate jurisdiction.[21] A tribunal's finding of discrimination constitutes *prima facie* evidence of a violation of the disciplinary rule and may lead to imposition of a sanction upon the offending attorney.[22]It is also noteworthy that the disciplinary rule is unique in that it applies to both lawyers and law firms.[23]

The key term in the disciplinary rule is the word "unlawfully." For the disciplinary rule to be applicable, a lawyer must have violated some law prohibiting discrimination based on the criteria listed in the rule, such as race or sex. This creates the interrelationship between the statutory rule and the ethics rule. If the lawyer's actions are unlawful the lawyer may be penalized as a citizen under the statute[24] and then also be subject to a variety of

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> proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sex or martial status, or, having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993). *But see* N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992) (prohibiting discrimination in places of public accommodation on the more limited basis of "race, creed, color or national origin").

[21] *See* Gross, *supra* note 16, at 294 (stating that, where a tribunal has jurisdiction, any complaint must be brought before that tribunal); Daniel Wise, *Top Judges Approve New Discipline Rules*, N.Y.L.J., Jan. 30, 1990, at 1 (mentioning that attorneys may be sanctioned "only after a duly constituted body . . . issues a finding that they have discriminated"). Normally in New York all complaints against lawyers are initially forwarded to a Departmental Disciplinary Committee. 22 NYCRR §§ 605.6 (1st Dep't.), 691.4 (2d Dep't.), 806.4 (3d Dep't.), 1022.19 (4th Dep't.). DR 1-102(a)(6)'s requirement of prior action by a tribunal is an exception to the normal procedures. California has a similar requirement in its anti-discrimination ethics rule. *See* CAL. RULES OF PROF'L CONDUCT R. 2-400(C) (1996).

[22] DR 1-102(a)(6) [22 NYCRR § 1200.3(a)(6)].

[23] *See* THE NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY: OPINIONS COMMENTARY AND CASELAW, *supra* note 16, at 9 ("New York thus became the first jurisdiction in the United States to adopt disciplinary rules for law firms as opposed to individual lawyers."); Edward A. Adams, *New Rule Authorizes Discipline of Firms: Responsibility for Supervision Imposed*, N.Y.L.J., June 4, 1996, at 1 (recognizing expansion of the traditional role of the attorney grievance committee to include the discipline of firms); Mark Hansen, *Taking a Firm Hand in Discipline*, 84 A.B.A. J. 24, 24 (Sept. 1998) (noting that New York is the only state to apply discipline to law firms and speculating that New York is "likely to remain the only state" with such rules).

[24] Procedures for filing a complaint under New York's Human Rights Law are set forth at N.Y. EXEC. LAW § 297 (McKinney 1993 & Supp. 1999-2000) and in 9 NYCRR § 465. Remedies

other sanctions as a lawyer in a separate proceeding under the disciplinary rule.[25] Conversely, if the lawyer is not in violation of a statute, there is no violation of the disciplinary rule no matter how egregious the discriminatory conduct may have been.[26]

Also important to the applicability of DR 1-102(a)(6) is the requirement that the discrimination take place "in the practice of law." While the phrase "in the practice of law" is not defined in the Disciplinary Rule or elsewhere in the Code of Professional Responsibility, it is clear that the client selection process is an essential, heavily regulated, and financially important component of the practice of law.[27] The courts' adoption of such broad language in DR 1-102(a)(6) puts lawyers on notice that they may not "unlawfully" discriminate in any aspect of the practice of law, including client selection.[28]

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for an unlawful discriminatory practice are set forth at N.Y. EXEC. LAW § 297(4)(c) (McKinney Supp. 1999-2000). Among the remedies are: (i) requiring respondents to cease and desist from their unlawful discriminatory practices, (ii) affirmative action including "the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons," and (iii) compensatory damages. As will be seen, the New York State Division of Human Rights could therefore, in an appropriate case, have the authority to order a lawyer to cease and desist from his or her refusal to represent certain classes of potential clients, to order the lawyer to represent a specific person, or to order compensatory damages.

[25] A finding by an appropriate tribunal of unlawful discrimination constitutes *prima facie* evidence of professional misconduct in a disciplinary proceeding. DR 1-102(a)(6) [22 NYCRR § 1200.3(a)(6)]. If the lawyer is found to have violated the disciplinary rule, the lawyer may be sanctioned by the Appellate Division of the Supreme Court under N.Y. JUD. LAW § 90(2) (McKinney 1983), which authorizes the court to censure, suspend from practice, or remove from office any attorney who is guilty of professional misconduct. *See id.* This creates the intriguing situation whereby the Division of Human Rights has the authority to order a lawyer to represent a particular person against the lawyer's will, see *supra* note 24, but the courts do not have the authority, under N.Y. JUD. LAW § 90(2) (McKinney 1983), to issue a similar disciplinary sanction. It may be that the courts have inherent powers to order such representation, but it does not seem to be an appropriate disciplinary response based on the statute. Also intriguing is the nature of discipline that can be applied to a law firm as an entity as compared to sanctioning an individual lawyer.

[26] *See* Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 W. NEW ENG. L. REV. 79, 79-80 (1998) (discussing how various types of discriminatory acts are not legally redressable because there is a permissible basis for discrimination or "because the circumstances are simply not covered by law").

[27] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2000) [hereinafter RESTATEMENT] (setting forth a model for lawyers' duties to prospective clients); Begg, *supra* note 7, at 319-23 (discussing what constitutes the practice of law in New York State); Amy B. Letourneau, Comment, Stropnicky v. Nathanson: *Choosy Massachusetts Lawyers, Choose Your Fights With Care!*, 33 NEW ENG. L. REV. 125, 154 (1998) (discussing how "the 'practice of law' contemplates a circle of activity wider than that which is encompassed by the attorney-client relationship").

[28] *See* Begg, *supra* note 7, at 308, 312 n.204 (noting the uncertainty as to whether client selection was included within the "practice of law" during debates over the adoption of DR 1-102(a)(6)). Some have interpreted DR 1-102 (a)(6) [22 NYCRR § 1200.3(a)(6)], as being applicable only to employment discrimination in the practice of law. *See* Susan D. Gilbert & Michael P. Allen, *Overcoming Discrimination in the Legal Profession: Should the* Model Rules

Significantly, the courts have also set in place mechanisms meant to reinforce this message and to insure that clients are aware that lawyers may not refuse to represent them for invidious reasons. These mechanisms take the form of a Disciplinary Rule adopted in 1993 to deal with problems associated with lawyers in domestic relations matters and two court rules meant to inform clients and potential clients of their rights.[29] DR 2-106(f) requires lawyers in domestic relations matters to provide prospective clients with a "Statement of Client's Rights and Responsibilities."[30] Listed among these rights is the following:

> "An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability."[31]

A second subsequently adopted court rule containing a similar anti–discrimination provision mandates that *every* attorney with a law office in the state post a "Statement of Client's Rights" in his or her office, in a manner visible to clients.[32] The result is that all potential clients visiting a lawyer's office in New York are now theoretically placed on notice that lawyers cannot discriminate in client selection.

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be Changed?, 6 GEO. J. LEGAL ETHICS 933, 936 (1993) (stating "New York's anti–discrimination rule extends only to employment"); Joanne Pitulla, *Fighting Invidious Discrimination in the Legal Profession: Is Justice a White Men's Club?*, 4 PROF. LAW. 11, 15 (Nov. 1992) (noting the uniqueness of New York's anti-discriminatory statutes and disciplinary provisions, stating "[o]nly a handful of states have adopted rules of professional conduct regulating discriminatory practices"); E.J. McMahon, *Rule Adopted by State Bar Aimed at Job Bias by Lawyers*, N.Y.L.J., June 30, 1987, at 3 (noting proponents of the anti–discrimination rule did not intend the rule to apply to client selection).

[29] The rule originally codified as DR 2-105-a is now codified as DR 2-106(f) [22 NYCRR § 1200.11(f)], which is the disciplinary rule dealing with fees for legal services. The rule's placement is appropriate since the Statement of Client's Rights and Responsibilities, 22 NYCRR § 1400.2 and App. A, setting forth detailed provisions concerning retainer agreements and fees in domestic relations matters. *See generally* Frederick Miller, *Farewell Caveat Emptor*, 5 PROF. LAW. 18 (May 1994).

[30] DR 2-106(f) [22 NYCRR § 1200.11(f)]; *see also* 22 NYCRR § 1400.1–1400.7 (providing "Procedure For Attorneys in Domestic Relations Matters" and Appendices for Statement of Client's Rights and Responsibilities). The Statement shall be provided to prospective clients at the initial conference prior to signing a retainer agreement. *See id.*

[31] Statement of Client's Rights and Responsibilities, 22 NYCRR § 1400.2.

[32] 22 NYCRR § 1210.1. The Statement of Client's Rights is a more generalized and more concise list of client's rights than is found in the domestic relations attorneys' Statement of Client's Rights and Responsibilities. *See* 22 NYCRR § 1400.2. The Statement of Client's Rights is meant to be posted, while the Statement of Client's Rights and Responsibilities is a document to be signed by both the lawyer and client, with a copy given to the client for the client's later reference. The anti-bias provision of the Statement of Client's Rights states: "You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability." 22 NYCRR § 1210.1.

These two statements and DR 1-102(a)(6) clearly show that the judiciary in New York views certain types of discrimination as inappropriate when a lawyer is selecting clients, yet the interplay of these statements and DR 1-102(a)(6) is not completely consistent, since they were not adopted simultaneously or in a coherent package. Significantly, the word "unlawful" does not appear in either statement but is a key element in DR 1-102(a)(6). Another important distinction is that while the court rules are the most forceful and clear statements yet made by the judiciary that lawyers in New York should not discriminate by refusing to represent potential clients based on certain criteria, they are not phrased like the Disciplinary Rule as a prohibition imposed on lawyers, but rather as a right accorded clients. Also, the listed criteria under DR 1-102(a)(6) do not precisely match those in the statements, nor are the statements entirely consistent with each other.[33]

Interestingly, these statements, which dramatically challenge lawyers' traditional rights, have been universally circulated to law offices throughout the state, but their bold pronouncement that lawyers cannot invidiously discriminate in selecting clients has so far generated little more than a yawn from the legal profession. Why this is so is open to speculation. It may be that lawyers generally accept the fact that they can no longer exercise absolute discretion in selecting clients, or it may be that many attorneys have not bothered to read the statements. Another possibility is that violation of a potential client's rights as reflected in the two statements, carries with it no meaningful sanction, and therefore lawyers are not concerned or threatened. This lack of meaningful sanction is due to the fact that, while a lawyer may be sanctioned for violating the court rules or DR 2-106(f) by not posting the Statement of Client's Rights or not providing a client with the Statement of Clients Right's and Responsibilities in a domestic relations matter, in order to be sanctioned for *discrimination* the lawyer must be shown to have violated DR 1-102(a)(6). The two statements of Client's Rights, therefore, seem to operate in tandem with DR 1-102(a)(6). The Statements are meant to put clients on notice of their rights while the Disciplinary Rule is meant to enforce those rights if violated through the disciplinary process.[34] This is

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[33] *Compare* DR 1-102(a)(6) (listing "marital status" as a criterion), *with* 22 NYCRR § 1210.1 (listing "religion" as a criterion), *and* 22 NYCRR § 1400.2 (listing neither "marital status" nor "religion" as a criterion). But all three list "creed" as a criterion.

[34] Discipline is handled by the Appellate Divisions at the Departmental level in New York State. *See* N.Y. JUD. LAW § 90(2) (McKinney 1983).

significant because DR 1-102(a)(6) requires "unlawful" discriminatory conduct by the lawyer in order for the Appellate Divisions to sanction the lawyer.[35] Therefore, it is necessary to determine what types of discriminatory conduct by lawyers are "unlawful" for purposes of the Disciplinary Rule.

III. NEW YORK'S ANTI-DISCRIMINATION STATUTORY SCHEME

New York has adopted a comprehensive body of anti–discrimination legislation making discrimination based on a number of listed criteria unlawful conduct.[36] The Human Rights Law[37] and the Civil Rights Law[38] are central to the Legislature's efforts to eliminate improper discrimination in a wide spectrum of activities or places affecting society.[39] For purposes of client selection by lawyers, the concern is primarily with those provisions which statutorily prohibit discrimination in the rendition of services in places of public accommodation.[40]

While the Human Rights and Civil Rights statutes differ in origin and scope, they each have similarly long and detailed definitions of place of public accommodation.[41] The offices of lawyers, however, have not historically been viewed as places of public

[35] *See* N.Y. JUD. LAW § 90(2) (McKinney 1983); 22 NYCRR §§ 603.2, 691.2, 806.2, 1022.17.

[36] *See* N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992) (making it illegal to deny access to public accommodations based on "race, creed, color or national origin"); *supra* note 20 for text of the statute.

[37] N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

[38] N.Y. CIV. RIGHTS LAW §§ 40-45 (McKinney 1992).

[39] N.Y. EXEC. LAW §§ 290(3), 296, 296-a (McKinney 1993). New York's public accommodations provisions have withstood constitutional challenge. *See* United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1205-06 (N.Y. 1983) ("It is much too late in the day to challenge the constitutionality of civil rights legislation generally . . . . [O]ur statute is a proper exercise of the State's power . . . ."). The United States Supreme Court has also held "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995) (citing New York State Club Ass'n v. City of New York, 487 U.S. 1, 11-16 (1988)); Roberts v. United States Jaycees, 468 U.S. 609, 624-626 (1984); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-262 (1964).

[40] Statutory provisions specifically prohibit discrimination by employers, labor organizations, real estate brokers, and others, and in education, housing, and health care, among others. *See* N.Y. EXEC. LAW § 296 (McKinney 1993). Provisions prohibiting discrimination in places of public accommodation, because of their broad definitions of place of public accommodation, greatly expand the scope and reach of the statutes to include a variety of unnamed business and service providers. *See* N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992); N.Y. EXEC. LAW § 296(2) (McKinney 1993).

[41] *See* N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992); N.Y. EXEC. LAW § 292(9) (McKinney Supp. 1999-2000) (listing a category as broad as "establishments dealing with goods or services of any kind").

accommodation, but rather as private places beyond the reach of the Civil Rights and Human Rights laws in New York.[42] Thus, one could rightly conclude that lawyers' discrimination in the selection of clients is a non-issue since lawyers are in this respect "above the law," or beyond the reach of the law. This is so despite the tremendous degree of change in our general society resulting from the civil rights revolution and expansion of civil rights law. Yet, one might ask whether it remains fair, necessary, legal, or ethical for lawyers to be viewed as "above the law" in this respect.[43] In response to this question, the arguments that are propounded in support of a lawyer's right to exercise absolute discretion in the selection of clients will now be presented and their validity tested under state and federal law and ethics rules currently in force in New York.

IV. SIX ARGUMENTS FOR AND AGAINST A LAWYER'S RIGHT TO DISCRIMINATE IN SELECTING POTENTIAL CLIENTS

A. Even If Lawyers In Fact Invidiously Discriminate In Their Selection Of Clients, Such Discrimination Does Not Violate Existing Law.

Since law practice and lawyers' offices are "distinctly private" by their very nature, they fall outside the definition of place of public accommodation for purposes of the New York statutes,[44] and beyond the reach of federal statutes such as 42 U.S.C. § 1981, which are not premised on the commerce clause.[45] No New York precedent has found a lawyer's office to be a place of public accommodation, and "there has been no universal application of antidiscrimination principles to the client selection decision" in most other

[42] *See* Marla B. Rubin, *Undesirable Clients: Is a Law Office a Public Accommodation?*, 17 N.Y. ENVTL. LAW. 49 (Summer 1997) (noting that as of 1997, no New York court had included professional offices within CIVIL RIGHTS LAW § 40).

[43] *See* RESTATEMENT, *supra* note 27, § 14 cmt. b, at 126 (stating while lawyers are generally free to decide with whom they will deal, they are nevertheless "subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"). The Restatement thus takes the position that lawyers are not "above the law" if they fall within the reach of an applicable anti-discrimination statute. *See id.*

[44] N.Y. EXEC. LAW § 292(9) (McKinney Supp. 1999-2000). *But see United States Power Squadrons*, 452 N.E.2d at 1204 (noting "place of public accommodation" is a term of convenience, not limitation, therefore persons may be subject to the law even though they do not operate from a fixed place, but supply their services at a variety of locations).

[45] 42 U.S.C. § 1981 (1994) is derived from act May 31, 1870, ch.114, § 16, 16 Stat. 144, which was enacted by virtue of the U.S. CONST. amend. XIII.

jurisdictions.[46] Precedents holding offices of other professionals to be places of public accommodation in New York[47] are distinguishable from law practice because, unlike other professionals, lawyers have unique fiduciary, confidentiality, and loyalty duties, and often develop a close, personal, distinctly-private relationship with their clients.[48]

Any effort to apply the statutory definitions of place of public accommodation in the Human Rights or Civil Rights Laws to the practice of law requires a tortured reading of New York's anti–discrimination statutes.[49] These statutes attempt to enumerate, through an exhaustive listing, those places which are public in nature and exempt distinctly private activities and places. The statutory definitions neither specifically mention lawyers' offices nor indicate any legislative intent to include them.[50] The definitions

[46] Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 31 (1998); *see also* Cecil v. Green, 43 N.E. 1105, 1106 (Ill. 1896) (concluding lawyers are free to retain clients as they see fit, for any reason); *supra* note 42 (listing several New York rules that seemingly grant lawyers a degree of discretion in client selection). *But see infra* note 54 (discussing the California statute and court rule prohibiting discrimination in client selection).

[47] *See* Cahill v. Rosa, 674 N.E.2d 274, 277 (N.Y. 1996) (finding a private dental practice is a "place of public accommodation" for purposes of Executive Law § 292(9)); D'Amico v. Commodities Exch. Inc., 652 N.Y.S.2d 294, 296 (App. Div. 1997) (finding a commodities trading floor is a "place of public accommodation" for purposes of the Human Rights Law and Executive Law § 292(9)).

[48] *See* EC 2-9 ("The attorney-client relationship is personal and unique . . . ."); RESTATEMENT, *supra* note 27, § 16 cmt. b, at 146 (noting that "[l]awyers often deal with matters [more] confidential and vital to the client" than those handled by other fiduciaries). Professor Samuel Stonefield terms this "lawyer exceptionalism," which claims that "the practice of law is so 'special' that the standards that apply to other occupations and professions should not apply to lawyers." Stonefield, *supra* note 15, at 111. One commentator has suggested that the attorney-client relationship is, "in a real sense, intimate; even parents, priests, and physicians are not required to devote such single-minded dedication to those they are close to." Chin, *supra* note 15, at 13. This notion is also inherent in other arguments that will be made later in this article concerning the need for personal and professional autonomy by lawyers and the First Amendment rights of lawyers. *See* arguments *infra* Parts 3-4; *infra* note 146 and accompanying text (noting the attorney-client relationship is considered intimate); *see also* Chris K. Iijima, *When Fiction Intrudes Upon Reality: A Brief Reply to Professor Chin*, 20 W. NEW ENG. L. REV. 73, 74 (1998) ("[A]n attorney's relationship with her client is uniquely different from that of a doctor, or clergyperson, because property, liberty and often life hangs in the balance of an attorney's zeal."); Letourneau, *supra* note 27, at 152-153 (arguing that any analogy between the practice of law and practice of medicine or dentistry is "fundamentally misleading"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 13-14 (1975) (distinguishing lawyers' behavior from that of other professionals).

[49] *See Cahill*, 674 N.E.2d at 278-279 (Levine, J., dissenting) (suggesting such a broad interpretation empties the phrase 'public accommodation' of any content and expands the jurisdiction of the State Division of Human Rights beyond that contemplated by the legislature).

[50] *See id.* at 281. The dissent argued that there was "no support in the language or legislative history . . . for the majority's all-encompassing interpretation of a place of public

were meant to include only quasi-public places,[51] while excluding the practice of law due to its distinctly private nature.

It is also noteworthy that these statutes have been amended on numerous occasions and it would have been a simple task to include lawyers' offices within the definition of place of public accommodation if the Legislature had wished to do so,[52] as was done by Congress with the Americans with Disabilities Act [ADA],[53] and by the California Legislature when adopting its anti–discrimination statute.[54] Both the ADA and the California statute clearly show a legislative intent to prohibit certain types of discrimination by lawyers in the selection of clients. Yet, while New York has chosen by statute to define the refusal to provide professional services because of a person's race, creed, color, or national origin as professional misconduct by other professionals,[55] it has not done so with respect to lawyers. Law practice is recognized as different.

Since law offices have not been held to be places of public accommodation, a lawyer's decision to reject a client, even based on criteria that would, in other contexts, be a violation of the Human Rights and Civil Rights Laws, is not unlawful. The traditional prerogative of a lawyer to reject potential clients for any reason has therefore been both lawful and ethical in New York.

1. But the Law Has Changed

In the past, the above stated argument was persuasive and legally correct. In fact, six years ago I stated with confidence in another article that a lawyer in New York could reject a potential client based on any criteria and not be in violation of New York's anti-discrimination statutes or its anti-discrimination disciplinary

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accommodation to include every person who provides a service to any member of the public." *Id.*

[51] *See id.* at 279 (stating that the "essential character" of quasi-public places is that they "hold themselves out as 'facilities ostensibly open to the general public'") (citation omitted).

[52] The statute was originally enacted by 1951 N.Y. Laws ch. 800, and has been amended twenty-three times since then, most recently by 1997 N.Y. Laws ch. 269.

[53] *See* 42 U.S.C. § 12181(7)(f) (1994) (including law offices as places of public accommodation within the statutory definition); 28 C.F.R. pt. 36, at 502 (1999) (providing Department of Justice regulations and obligations this definition imposes).

[54] *See* CAL. CIV. CODE § 51 (West 1982 & Supp. 2000) (providing for "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever"); *see also* CAL. RULES OF PROF'L CONDUCT R. 2-400(B)(2) (1992) (prohibiting a lawyer from unlawfully discriminating in "accepting or terminating representation of any client").

[55] *See* N.Y. EDUC. LAW § 6509 (McKinney 1985). Ethical standards of most professions specifically prohibit discrimination. *E.g.*, Stonefield, *supra* note 15, at 112 n.28 (citing to specific professional codes).

rule because law offices were not then places of public accommodation.[56] As was suggested in the introduction, however, sometimes a change in the law that was not directly targeted at lawyers can have an unforeseen but significant effect on traditional practices and assumptions concerning appropriate ethical conduct in the practice of law.

Just such a change in the law occurred in 1996 when the New York Court of Appeals rendered its decision in *Cahill v. Rosa*.[57] This case involved a dentist in private practice who refused to treat patients whom he suspected or knew to be HIV positive. The issue on appeal was whether private dentists' offices were "places of public accommodation" within the definition of New York's Human Rights Law and therefore subject to its anti–discrimination provisions.[58] In holding that health care providers' offices, which provide services to the public, are places of public accommodation within the meaning of the Human Rights Law, the Court of Appeals greatly expanded the scope and reach of that statute. In the opinion of Judge Levine, dissenting in *Cahill*, the decision is so expansive that it will make "all of the practitioners of all of the professions places of public accommodation."[59] While the dissent may state the majority holding rather broadly, a careful reading of the majority opinion does support the conclusion that most professionals who provide services to the public may now be viewed as places of public accommodation, including legal practitioners.

The outcome in *Cahill* hinged on the statutory construction and interpretation of the definition of place of public accommodation. The pertinent part of the Human Rights Law's statutory definition states that "[t]he term 'place of public accommodation, resort or amusement' shall include . . . wholesale and retail stores and establishments dealing with goods or services of any kind."[60] This clause is then followed by a list of specific examples of places of public accommodation. There is also a list of specific places *not* included within the definition, as well as a statement excluding from the definition "any institution, club or place of accommodation which is in its nature distinctly private."[61]

[56] Begg, *supra* note 7, at 276-77.
[57] 674 N.E.2d 274 (N.Y. 1996).
[58] *Id.* at 275; N.Y. EXEC. LAW §§ 292(9), 296(2) (McKinney 1993).
[59] Cahill v. Rosa 674 N.E.2d 274, 279 n.1 (Levine, J., dissenting).
[60] N.Y. EXEC. LAW § 292(9) (McKinney 1993).
[61] *Id.*

The court began its analysis by "recognizing that the provisions of the Human Rights Law must be liberally construed to accomplish the purposes of the statute."[62] The court's analysis comports with the position of the Legislature expressed in section 300 of the Human Rights Law[63] and earlier precedent.[64] The language of the statute was viewed by the court to be broad, and the statutory listing of specific places of public accommodation in the definition was held to be merely illustrative and not all-inclusive.[65] The court also noted that the Legislature had repeatedly amended the statute to expand its scope,[66] ignoring the fact that the Legislature could have specifically included professional offices during the amendment process if it had so wished.

In analyzing the language of the statutory definition, the court expressly chose to adopt an interpretation whereby the words "'wholesale and retail'" do *not* modify the clause "'establishments dealing with goods or services of any kind.'"[67] This is unquestionably the broadest possible interpretation of the statutory language, meaning that establishments dealing with goods or services of any kind are now places of public accommodation.[68] Once the court interpreted the statute in this fashion it could readily hold that a

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[62] *Cahill*, 674 N.E.2d at 276.

[63] "The provisions of this article shall be construed liberally for the accomplishment of the purposes thereof." N.Y. EXEC. LAW § 300 (McKinney 1993).

[64] *See* United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1204 (N.Y. 1983) (noting that the division's interpretation furthered the mandate of the legislature); City of Schenectady v. State Div. of Human Rights, 335 N.E.2d 290, 295 (N.Y. 1975) (concluding that a liberal interpretation of the Human Rights Law would support finding the city responsible for discrimination).

[65] *See* Cahill v. Rosa, 674 N.E.2d 274, 276 (rejecting, in theory, an application of the doctrine of *expressio unius est exclusio alterius*). This maxim of statutory interpretation states "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

[66] *See Cahill*, 674 N.E.2d at 276 (noting the legislature's steps to delete a "limiting phrase" within the statute).

[67] *Id.* at 276-77.

[68] Chief Judge Judith S. Kaye of the New York Court of Appeals, in discussing *Cahill*, has noted that, since "the statute's terms were ambiguous and the legislative history unhelpful, the Court examined the broader role in society of both the statute and dental offices and concluded that the offices were places of public accommodation." Hon. Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 610 (1997). "Had we gone the other way in *Cahill*, for example, we would have decided that persons with disabilities could not be discriminated against at skating rinks and ice cream parlors . . . but that health care providers were free to deny medical care solely on the basis of disability." *Id.* at 611 (footnote omitted). "I think it is clear that common-law courts interpreting statutes and filling gaps have no choice but to 'make law' where neither the statutory text nor the 'legislative will' provides a single clear answer." *Id.*; *cf. Cahill*, 674 N.E.2d at 280-81 (Levine, J., dissenting) (concluding that the majority had "fashioned its own statute" and worked an "extreme substantive change in the meaning of a place of public accommodation").

professional's office, including a dentist's office that provided services to the public, was a place of public accommodation. This was so, even though the services were provided "on private premises and by appointment," since the office was "generally open to all comers."[69] The court noted that potential patients could have been drawn to the office by advertising, telephone book listings, referrals, or signs.[70]

The court rejected the dentist's contention that his office was among the places exempt from the statute as "distinctly private," concluding that the Legislature had intended the inclusive list of public accommodations to be broadly construed, while the exemptions for "distinctly private" places were to be narrowly construed.[71] Noting that "[t]he hallmark of a 'private' place within the meaning of the Human Rights Law is its selectivity or exclusivity," the court then stated that the burden of establishing that a particular place of public accommodation is "distinctly private" falls on the person seeking the benefit of the exemption.[72] A showing that the premises in which the office was located was privately owned, and that patients generally were required to make appointments, was viewed as inadequate to make the office "distinctly private."[73] The dentist had offered no proof that his list of patients was "selective or exclusive," or that the "practice was not generally held open to the public."[74]

The holding in *Cahill* has profoundly expanded the scope of the definition of place of public accommodation in New York. After *Cahill*, "establishments dealing with goods or services of any kind"[75] are places of public accommodation for purposes of the Human Rights Law. Obviously, lawyers and law offices provide services and may now arguably come within this expansive definition, even though not specifically included in the list of places

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69 *Cahill*, 674 N.E.2d at 277.

70 *See id.*

71 *See id.*

72 *Id.* (citations omitted).

73 *See id.*

74 *Id.* The court discussed discrimination by health care providers in the context of the fear of contracting AIDS or HIV and noted there was no case law "in which a private health care provider claimed that its practice was not a place of public accommodation . . . until the advent of HIV and AIDS." *Id.* at 278. Refusal to treat persons because they may be HIV positive is selective discrimination based on disability, which violates "the very essence of the Human Rights Law." *Id.* The court found it "inconceivable" that a dentist would challenge the application of the statute if a patient complained of being denied treatment due to gender, race, or a form of disability that did not threaten the dentist. *See id.*

75 N.Y. EXEC. LAW § 292(9) (McKinney 1993).

within the definition or within the list of places excluded as being private places.[76]

2. Does the Holding in *Cahill v. Rosa* apply to Lawyers; Or Are Legal Practitioners Distinguishable From Other Service Providers?

Since no court in New York has yet held a law practice to be a place of public accommodation, the effect that the holding in *Cahill* will have on the legal profession remains uncertain. Will its impact be as broad as that expressed by the dissent in *Cahill*—that all practitioners of all the professions including lawyers are now places of public accommodation—or will it have little or no impact at all upon the legal profession?

Any argument that *Cahill* will have no impact on the legal profession must be premised on the traditional viewpoint, discussed previously, that the practice of law is unique when compared generally to other professions, and that *Cahill* is thus distinguishable.[77] Fundamental elements of the attorney-client relationship, such as the lawyer's fiduciary, confidentiality, and loyalty duties, and the close personal relationship that can develop between attorney and client, simply make a law practice different from other professions.[78] The practice of law, therefore, meets the *Cahill* test of being "distinctly private" because lawyers must be "selective" in choosing their clients in order to develop an appropriate attorney-client relationship.[79]

Although judges, as lawyers, may have some sympathy for the argument stated above, it appears unlikely that a broad-based "law is unique" argument will be successful in thwarting the application of the public accommodation statute to *all* lawyers given the expansive language in *Cahill*. A large portion of the profession does indeed hold itself out as providing legal services to the public. Modern law practice is a business in which lawyers aggressively

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[76] N.Y. EXEC. LAW § 292(9) (McKinney 1993). Of course, when speculating whether the Court of Appeals would apply the *Cahill* precedent to lawyers, one is reminded of the quote from Karl Llewellyn that "[t]here is no precedent the judge may not at his need either file down to razor thinness or expand into a bludgeon." K. N. LLEWELLYN, THE BRAMBLE BUSH, ON OUR LAW AND ITS STUDY 180 (1960); *see also* Leo T. Crowley, *Dentists' Offices as Public Accommodations*, N.Y.L.J., Oct. 30, 1996, at 3 ("There does not seem to be any principled basis on which the *Cahill* holding could be limited to health care professionals. Accountants, attorneys, architects, social workers and other professionals (whether operating in firms or as solo practitioners) may now find their offices deemed public accommodations.").

[77] *See* discussion *supra* Part IV. 1.

[78] *See supra* note 48 and accompanying text.

[79] Cahill v. Rosa, 674 N.E.2d 274, 277 (N.Y. 1996).

seek out new clients, rainmakers are viewed as valued firm assets, and virtually all firms and most solo practitioners accept referrals, have signs for their offices, and are listed in the yellow pages.[80] Many lawyers advertise in the various public media and have home pages on the Internet.[81] Public relations is considered to be important even for firms that would never dream of advertising. The financial pressures to obtain and keep clients are so great that lawyers' ethics codes are, in fact, geared toward restraining excessive solicitation of clients.[82] It will be difficult to distinguish these business elements of the practice of law from the business elements of dentistry noted in *Cahill*.[83]

It is also worth noting that the uniqueness argument has not prevented Congress from determining that law offices are places of public accommodation for purposes of the Americans with

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[80] *See* DR 2-101 [22 NYCRR § 1200.6] (regulating publicity and advertising); DR 2-102 [22 NYCRR § 1200.7] (regulating professional notices, letterheads, and signs); DR 2-103 [22 NYCRR § 1200.8] (regulating solicitations and referrals). *See generally* RICHARD L. ABEL, AMERICAN LAWYERS 119-122 (1989) (listing famous rainmakers such as Senate majority leader Howard Baker who was paid $700,000 to $800,000 a year as a part-time partner); PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 99-103 (1998) ("the aggressive pursuit of business . . . is now routine for lawyers at all levels of practice."); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1251 (1995) (noting not only is law a business, but it is a 'big business', even compared to the steel and textile industries); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 9-12 (1999) (suggesting productivity in a law firm also means being a marketer of legal services); Hon. Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 BUS. LAW. 463, 467 (1975) (suggesting "the ethics of the business lawyer are indeed, and perhaps should be, no more than the morals of the market place"). Justice Brennan once wrote "that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living." Evans v. Jeff D., 475 U.S. 717, 758 (1986) (Brennan, J., dissenting).

[81] *See* DR 2-101 [22 NYCRR § 1200.6]; N.Y.S. Bar Ass'n Formal Op. 709 (1998) (providing rules governing internet usage).

[82] *See* DR 2-101 [22 NYCRR § 1200.6] (prohibiting false, deceptive, or misleading communications to a prospective client); DR 2-103 [22 NYCRR § 1200.8] (prohibiting certain methods of solicitation); MR 7.1 (addressing communications regarding a lawyer's services); MR 7.3 (addressing direct contact with prospective clients). *See generally* Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 630-31 (1994) (discussing competition among firms for attracting clients); Pearce, *supra* note 80, at 1265 (noting that the "perception that law practice is a business . . . pervades discussions of professional responsibility"); Regan, *supra* note 80, at 9-12 (discussing increasing competition in lawyering).

[83] *See Cahill*, 674 N.E.2d at 277 (analyzing several factors that support finding a dentist's office as a place of public accommodation); *see also* Pearce, *supra* note 80, at 1265, (noting that lawyers behave like other business persons). "[Lawyers] structure their practices and sell their services using the same techniques as other businesspersons." *Id.* It should also be noted, of course, that the status of attorneys as "self-employed businessmen" does not necessarily negate their duties "as trusted agents of their clients, and as assistants to the court . . . ." Cohen v. Hurley, 366 U.S. 117, 124 (1961).

Disabilities Act.[84] Neither has the State of California, home to the nation's largest population of lawyers, had a problem with making law offices places of public accommodation for purposes of its anti–discrimination statute.[85] These statutes, which have been in force for a number of years, and affect very large numbers of lawyers, have had no discernable negative impact on lawyering.

Also, in response to the argument that lawyers have unique duties *vis-à-vis* clients, it must be noted that other professionals have fiduciary responsibilities as agents, confidentiality requirements, and loyalty duties relative to those they serve.[86] Certainly a close personal relationship can develop between doctor and patient, clergyman and parishioner, or other professionals and their clientele.

In reality, law is a business as well as a profession, and routine legal services are often provided in which there is no significant personal interaction between attorney and client.[87] To argue that the entire legal profession is unique due to the personal element of law practice and therefore "above the law" would in all likelihood be futile after *Cahill*, and perhaps in the end damaging to the profession.[88]

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[84] *See* 42 U.S.C. § 12181(7)(F) (1994) (including law offices within its definition of a place of public accommodation).

[85] *See* CAL. CIV. CODE § 51 (West 1982) (ordering full and equal accommodations in *all business* establishments).

[86] *See* RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 13 (defining an agent as a fiduciary); *id.* at §§ 387, 389, 394 (defining an agent's loyalty duties); *id.* at §§ 395, 396 (defining an agent's confidentiality duties). "I'm sure the medical profession would argue that the patient/doctor relationship is as privileged, fiduciary, longterm, and devoted (albeit differently and arguably more so) as any relationship between a lawyer and her client." Iijima, *supra* note 48, at 74-75 n.4; *see also* Pearce, *supra* note 80, at 1266 (noting that commentators reject the "characterization of businesspersons as morally inferior to lawyers"); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1526 (1998) [hereinafter *Identities and Roles*] (noting that academics from other disciplines "have always been skeptical of the legal profession's claim that lawyers inhabit a strongly differentiated social and ethical universe").

[87] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (noting that "solicitation by a lawyer of remunerative employment is a business transaction"); Bates v. State Bar of Arizona, 433 U.S. 350, 368-69 (1977) (discussing the commercial nature of the practice of law); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 (1975) (noting that legal services are commerce and that law has a business aspect).

[88] "[A]n institution and profession that would enforce society's decision to ban invidious discrimination, but consciously exempt itself from that ban neither fosters nor deserves the public trust." Iijima, *supra* note 48, at 78. The message "that lawyers can discriminate, even though virtually no one else can . . . [is] harmful to the moral authority and image of the legal profession and undermined the societal commitment to eradicating discrimination." Stonefield, *supra* note 15, at 133; *see also* Day & Rogers, *supra* note 46, at 33 (noting that "unfettered discretion permits invidious discrimination by the very persons who have taken an oath to uphold the Constitution"); Letourneau, *supra* note 27, at 126 (suggesting the

At the opposite extreme from the position that "law is unique" and thus not subject at all to the Human Rights Law, is the view expressed by the dissent in *Cahill* that all licensed lawyers are now places of public accommodation and thus subject to the anti-discrimination law.[89] This view recognizes neither the complexity and variety of legal practice nor the flexibility suggested in the majority opinion. There are some lawyers who do not hold themselves out to the public, whose practices may be distinctly private because of the "selectivity or exclusivity" of the clients they serve, and hence should not fall within the definition of place of public accommodation.

Therefore, it is likely that the expansive *Cahill* reading of the definition of place of public accommodation will extend to some lawyers, but not to all lawyers. It appears that licensed lawyers will be divided into three groups for purposes of applying the Human Rights Law. The largest group will be those who clearly are viewed as places of public accommodation. A second, smaller group includes those who clearly are not included as places of public accommodation. The third group will be those who are in a gray area, where if a claim of improper discrimination is filed with the Division of Human Rights, the lawyers will have the burden of proving that their activities as a lawyer are "distinctly private" in nature and thus not subject to the Human Rights Law.[90]

What types of lawyers will fit into each of these groups? The largest grouping will be those lawyers who clearly hold themselves out as open to the public. Such indicia as signs, advertising, acceptance of referrals, yellow pages listings, association with a law firm holding itself out as serving the public, listing with lawyer referral or court appointment programs, or a full-time commitment to a standard private practice would suggest inclusion as a place of public accommodation.[91]

In contrast, a second group of attorneys should not be viewed as a place of public accommodation. The primary characteristic of this group of lawyers is that, due to the nature of their employment or

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profession's public perception will suffer by proclaiming an exemption from anti-discrimination laws).

[89] Cahill v. Rosa, 674 N.E.2d 274, 279 n.1 (N.Y. 1986)(Levine, J., dissenting) (concluding that the majority's opinion expanded the jurisdiction of the Division of Human Rights by 570,000 State Education Department professionals and 164,000 registered attorneys).

[90] "The hallmark of a 'private' place within the meaning of the Human Rights Law is its selectivity or exclusivity, and persons seeking the benefit of the exemption have the burden of establishing that their place of accommodation is 'distinctly' private." *Id.* at 277.

[91] *See id.* (listing factors that bring a dentist's office within the definition of a place of public accommodation).

the limited nature of their client base, they do not hold themselves out as open to the public.[92] No individual could demand their services. Consequently, these attorneys could refuse to represent any external client without being in violation of the Human Rights Law. This group would be diverse, including those who are licensed to practice but are not practicing law, such as law professors or retired lawyers who have retained their licenses, and also judges, prosecutors and certain other public officials.[93] Single-client lawyers, such as government lawyers, in-house counsel, and possibly lawyers in firms with only one major client, such as an insurance company, may also be in this group.

The third group occupies a gray area in which the determination whether a particular lawyer when offering legal services, is a place of public accommodation is open to question. This group presents the hard questions. It is fact specific as to whether the activities of the lawyer are "distinctly private," with the burden of proof on the lawyer.

What types of attorneys are likely to fall within this gray area group? Some of the lawyers in the third group could be included if they practice "on the side" in addition to their regular positions. Thus if a law professor is "of counsel" to a law firm and represents law firm clients, the professor and the firm will be viewed as places of public accommodation even though the professor may have no office at the firm. But what of the law professor who merely drafts an occasional will, periodically represents a student with a DWI charge, or handles a case on appeal every year or so? These legal activities do not suggest that the professor is holding himself out to the public as willing to accept all comers. The professor's activities may be viewed as "distinctly private" and his choice of clients is certainly "selective and exclusive." None of the indicia of a place of public accommodation is apparent. But could the professor refuse to represent an African-American or gay student, that is, a person within the group he sometimes does represent?

In a similar vein, a staff attorney for a bank may reject anyone who approaches him or her for representation without fear of violating the Human Rights Law. But if that same lawyer has a

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[92] In *Cahill*, the court noted that "[n]either dentist offered evidence that his patient roster was selective or exclusive, or that his practice was *not generally held open to the public*." *Id.* (emphasis added).

[93] For example, full-time judges in New York are prohibited by the New York State Constitution from practicing law. N.Y. CONST. art 6. § 20(b)(4) (McKinney 1987). Similarly, most district attorneys in full-time positions are prohibited from engaging in the practice of law. N.Y. COUNTY LAW § 700(8) (McKinney 1991).

home office in which he does tax work on the weekends during the income tax filing season, is his home office a place of public accommodation? It then becomes a question of fact. How does he solicit clients? How many clients does he service? Is his list of clients selective or exclusive? Does he only help relatives and friends? If an African-American living on the next block asks the lawyer to prepare his income taxes and the lawyer refuses, is that a violation of the Human Rights Law? If the same lawyer refuses to represent a neighbor with a disability, has he violated the Americans With Disabilities Act,[94] as well as New York's Human Rights Law?[95]

3. Federal Laws Also Prohibit Certain Types of Discrimination in Client Selection

The last question highlights the fact that lawyers are subject to both state and federal antidiscrimination statutes. The Civil Rights Act, a federal act stemming from the Commerce Clause, prohibits discrimination in places of public accommodation.[96] There appears to be no precedent holding law offices to be places of public accommodation under the federal civil rights acts.[97] In 1990, however, Congress adopted the Americans with Disabilities Act, which expressly includes lawyers' offices within the definition of place of public accommodation for purposes of the Act.[98] The result is that improper discrimination based on disability by a lawyer in New York would violate both the Americans with Disabilities Act and the New York Human Rights Law, and a finding of such discrimination by an appropriate tribunal would constitute *prima facie* evidence of a violation of DR 1-102(a)(6), possibly leading to discipline. Similarly, a lawyer who refused to enter into a contract with a potential client because of that person's race, sex, religion, or place of national origin may be in violation of 42 U.S.C. § 1981, which, since it is not premised on the Commerce Clause, would not require a finding that a law office is a place of public accommodation.[99]

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[94] 42 U.S.C. §§ 12101-213 (1994).

[95] N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

[96] *See* Civil Rights Act, 42 U.S.C. §§ 2000(a)-(a)(6) (1994).

[97] *See* Chin, *supra* note 15, at 20 n.43 (suggesting the lack of cases brought against lawyers under 42 U.S.C. § 1981 can be attributed to most lawyers' willingness to take any client who can pay the retainer, regardless of race or gender).

[98] *See* 42 U.S.C. § 12181(7)(f) (1994).

[99] *See* Mass v. McClenahan, 893 F. Supp. 225, 229-30 (S.D.N.Y. 1995) (allowing a lawyer to recover damages under § 1981 when a client's reason for firing the lawyer was that the lawyer

As the previous discussion has shown, lawyers may no longer be "above the law" when it comes to the selection of potential clients. Now, many are very likely subject to the Human Rights Law and to certain federal antidiscrimination statutes. But, being subject to these laws and actually being found to be in violation of them are two distinct matters. The next argument suggests that, even if the laws are applicable to lawyers, as a practical matter the laws may be irrelevant or unenforceable.

B. Lawyers Are So Sophisticated in Their Knowledge of Law and the Legal System That Their Discrimination in the Selection of Clients Is Not Likely To Be Detected Or, If Detected, To Be Actionable Due To The Difficulty of Proof of Motive.

This argument is premised on the notion that, due to their education, training, and knowledge of the legal system, lawyers are too smart to be caught violating the antidiscrimination statutes.[100] Lawyers have a degree of sophistication that allows them to discriminate in ways that are not readily detectable or actionable. No lawyer would ever be stupid enough to discriminate so blatantly in rejecting a client that they would be caught violating these statutes. A lawyer can always provide a reason for not accepting a particular client that appears nondiscriminatory.[101] Therefore, why attempt to enforce a statute or disciplinary rule prohibiting conduct that would, at best, be difficult, if not impossible, to prove? The lack

was a "'New York Jew'" and holding that § 1981 "undoubtedly reaches the attorney-client relationship"); Begg, *supra* note 7, at 329-35 (noting the caselaw interpreting § 1981 suggests that a lawyer's refusal to contract with a client based strictly on race would be prohibited); Stonefield, *supra* note 15, at 113 n.31 (noting that § 1981 would almost certainly "give a black prospective client the same right to make and enforce a lawyer-client contract as a white person"). *But see* Giaimo v. Vreeburg, 599 N.Y.S.2d 841, 842-43 (App. Div. 1993) (refusing to recognize a § 1981 claim brought by white attorneys fired by a black client).

[100] *See* Chin, *supra* note 15, at 10-11 ("Only those lawyers stupid . . . enough to be candid are likely to be targets."). *But see Identities and Roles*, *supra* note 86, at 1581 (noting that while enforcement would be difficult, "[e]nforcement . . . has never been thought to define the entire ambit of ethics or morality."); Miller, *supra* note 15, at 168 (noting "it is critically difficult to enforce the rule against lawyer dishonesty" in cases of client rejection).

[101] *See* Chin, *supra* note 15, at 10 (recognizing attorneys can usually find a reason within the lawyer's code of ethics to reject a client); Iijima, *supra* note 48, at 74 n.4 ("The availability of potential pretexts for discrimination cannot be a reason for prohibiting attorney discrimination. Indeed, if that were the case, all civil rights law would be unenforceable."); Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 15 (1993) (noting that some lawyers will lie to avoid facing ethical sanctions); Miller, *supra* note 15, at 167-68 (suggesting attorneys may not be able to "meet the requirements of zealous advocacy under the pressures of religious and moral antipathy").

of caselaw or disciplinary proceedings against lawyers for unlawful discrimination in the selection of clients proves this point.[102]

1. Improper Discrimination by Lawyers in Client Selection is Detectable and Actionable in a Variety of Scenarios

One is reluctant to give credence to the preceding argument for several reasons, although there may be a certain core of truth to it. The argument certainly does not flatter the profession. It admits that lawyers improperly discriminate, but, because they are such crafty liars and manipulators, they will not be caught. Also, while proof of motivation or intent may be difficult to prove, our system of justice is called upon to do so continuously. Finally, the lack of precedent proving the point is self-serving. There was a time when there was little precedent concerning legal malpractice since lawyers were rarely ever sued by clients, but that has certainly changed.[103]

The "too-crafty-to-be-caught" argument assumes improper intentional discrimination, but it ignores the fact that there may be intentional discrimination by lawyers based on what certain lawyers may view as "pure" motives, but which nevertheless violate the anti-discrimination statutes. Lawyers may also unconsciously discriminate in rejecting certain clients. Even conscientious lawyers, ones who would never view themselves as discriminating for invidious reasons, may nevertheless violate the statutes from a technical standpoint. Each of these forms of discrimination deserves further review.

It would seem that lawyers who would intentionally discriminate against certain groups of people based on simple prejudice are the most likely to hide their true motivation. Techniques for driving off undesirable clients leap readily to mind:[104] you have no case or a weak case; you cannot afford my fees; I am not qualified to handle your case; due to the pressure of business, I am not accepting new clients at this time; I am going on vacation; I have a conflict of interest. But pitfalls can abound for liars. If an attorney tells

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[102] *See* Chin, *supra* note 15, at 20 n.43 (suggesting that "discrimination by lawyers in selection of clients is not a frequent problem, or, if it is, ethical rules enforced through litigation have not proved to be the remedy").

[103] *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1678 (1994) (noting the number of legal malpractice suits doubled between 1979 and 1986).

[104] *See* Chin, *supra* note 15, at 10 (enumerating various excuses attorneys use to reject clients); Quick, *supra* note 101, at 15 (noting lawyer's can often fabricate a reason for not accepting a client that appears legitimate on the surface).

potential clients they have no case without researching it, there may be malpractice liability.[105] Would any lawyer be so foolish as to advertise their fees and then quote higher fees in an effort to drive off a minority group member? Clearly, lying can catch up with an individual and if an attorney lies to a client and the deception is discovered, the consequences can be more than embarrassing: they can lead to a possible human rights complaint as well as disciplinary action.[106]

A second group of lawyers who would discriminate against certain groups might do so for what they believe are "pure" or acceptable reasons. Such a lawyer may, for moral or religious reasons, refuse to represent gays or lesbians because of their sexual orientation, since it may be contrary to the lawyer's religious beliefs.[107] Another lawyer may have no religious scruples, but rather may be afraid of contracting AIDS from a potential client. Discrimination based on a perceived health risk could nevertheless be a violation of an antidiscrimination statute just as it was for the dentist in *Cahill v.*

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[105] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (requiring "an attorney . . . to undertake reasonable research in an effort to ascertain relevant legal principles and to make . . . an intelligent assessment of the problem."); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693-94 (Minn. 1980) (recognizing a claim for legal malpractice where the attorney failed to perform the minimal research that an ordinarily prudent attorney would perform before rendering legal advice). *See generally* WOLFRAM, *supra* note 8, at § 5.6.2 (discussing the standard of liability for malpractice).

[106] *See* Lisa G. Lerman, *Lying To Clients*, 138 U. PA. L. REV. 659, 705 (1990) (noting that "lawyers most frequently deceive their clients for economic reasons," but also to cover mistakes, to impress clients, for convenience, to control work time, and to impress the boss); James W. McElhaney, *The Legal Weasel Trap: Some Lawyers Think Mendacity Goes With the Territory*, 86 A.B.A. J. 68, 69 (Jan. 2000) (suggesting that lawyers usually get caught lying as a result of plain stupidity, and the result of getting caught can be devastating).

[107] *See* Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 25 (1997) ("Ultimately, it seems clear that a lawyer's religious and moral understandings may be brought to bear on at least *some* decisions that the lawyer makes. For example, a lawyer generally may rely on these understandings in deciding whom not to represent . . . ."); Azizah al-Hibri, *On Being a Muslim Corporate Lawyer*, 27 TEX. TECH L. REV. 947, 961 (1996) (concluding "that religion subconsciously informs our individual professional practice"); *see also* Tenn. Eth. Op. 96-F-140, 1996 WL 340719 (Tenn. Bd. Prof. Resp. 1996) (addressing "the ethical obligations of court-appointed counsel for minors who obtain abortions via judicial bypass of the parental consent"); Debra Baker, *Acting on One's Beliefs: Clash Between Gay Rights and Religious Freedom Spills Over Into Workforce*, 86 A.B.A. J. 18 (Jan. 2000) (noting that using religious belief as a shield against civil rights law is the "defense du-jour"); Steven H. Resnicoff, *A Jewish Look at Lawyering Ethics*, 15 TOURO L. REV. 73, 74, 85-87 (1998) (recognizing that Jewish law clashes with secular law in numerous practical ways, including precluding a Jewish lawyer from taking any action that would "eat away at the intrinsic holiness of the Jewish actor"); Stonefield, *supra* note 15, at 134 (noting that a lawyer who refuses to represent an inter-racial couple because he rejects inter-racial marriages would be liable for discrimination under a conventional discrimination analysis); Miller, *supra* note 15, at 163-67, 170 (noting that the Supreme Court would probably uphold a religious lawyer's free exercise claim if the lawyer chose not to represent a client based on the lawyer's religious belief).

Rosa.[108] Such lawyers may be forthright in expressing their reasons for refusing to represent a potential client because they truly believe in the propriety of their position. Some potential clients may accept this and find another lawyer, while others might instead file a human rights complaint.

As with the population at large, and with other professions, some lawyers may unconsciously discriminate in the rejection of certain people as clients.[109] If this is true, then self-delusion would underlie the excuses used for turning potential clients away. If this type of discrimination is truly unconscious, then the "too-crafty-to-be-caught" argument is not applicable since there is no guile associated with it. Whether unconscious or not, the fact of refusing, withholding, or denying legal services to those protected by the statute places the burden of proving nondiscriminatory intent upon the lawyer.[110]

A final group of lawyers who may unlawfully discriminate are those in technical violation of the statute, even though they may believe their rejection of certain clients is legally and ethically appropriate. This situation may arise when lawyers specialize or limit their practices to certain areas of the law.

Clearly, it is not unlawful or unethical to reject potential clients based upon a limitation of area of practice or specialization even if the lawyer or law firm is viewed as a place of public accommodation.[111] Thus, a law firm that limits its practice to taxation can reject any potential client that requests representation for any legal services not relating to taxation. But that law firm cannot reject a potential client seeking legal services related to taxation for reasons such as race, religion, gender, or disability.[112] It

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[108] 674 N.E.2d 274 (N.Y. 1996).

[109] *See* Chin, *supra* note 15, at 19 (recognizing "invidious prejudice" may result from cultural beliefs that are not "self-created"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) (acknowledging the presence of unconscious racism in all individuals); Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL'Y 605, 613 (1999) (discussing how individuals may not believe they are lying because *they* believe the truth of their claims).

[110] *See Cahill*, 674 N.E.2d at 277 (determining "[p]etitioners . . . failed to sustain the burden of proving they are exempt").

[111] *See* DR 2-105 [22 NYCRR § 1200.10] (permitting attorneys to limit their practice areas).

[112] One author has noted:

> The notion that specialization in the provision of services to the public can by itself amount to wrongful discrimination derives its power from a simple proposition: the traits that distinguish members of protected groups are irrelevant to their ability to enjoy the offered services . . . specialization in the needs of whites, men, or heterosexuals can only be a pretext for naked discrimination, since this kind of specialization in the provision of food, housing or dentistry is not meaningfully possible. In general, legal services are justifiably treated in a similar way . . . [t]hus, a lawyer's claim to specialize

is also clear that the specialization itself cannot be tailored to be unlawfully discriminatory by its very nature.[113]

Specializations that inherently discriminate based on protected criteria and *de facto* limitations of practices to certain groups have been relatively common. In the past, no one was startled or concerned, to hear about Jewish law firms, Hispanic law firms, Black law firms, or firms specializing in women's issues. Are such firms, which in essence limit their clientele based upon criteria that the anti-discrimination statutes list as suspect, now violating the law?[114] Could a lawyer be subject to sanctions for maintaining this type of practice? While it has not yet happened in New York, an excellent example of a practice limitation that resulted in a claim being filed under an anti-discrimination statute against a lawyer is the *Stropnicky v. Nathanson*[115] agency decision in Massachusetts.

Attorney Judith Nathanson informed a potential male client, Joseph Stropnicky, that she would not represent him. She told him she only represented women in divorce proceedings, although she did represent men in other legal matters.[116] Mr. Stropnicky, upset at the lawyer's refusal to represent him because of his sex, filed a complaint against her with the Massachusetts Commission Against Discrimination, and the agency's hearing commissioner found that Attorney Nathanson's behavior violated the Massachusetts statute that prohibited discrimination in places of public accommodation.[117] Nathanson was ordered to pay $5,000 in damages for emotional distress and to cease her practice of refusing to represent potential clients due to their sex.[118]

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in the representation of whites or males in real estate transactions ought to provoke serious skepticism.

James A. Gardner, *Section 98 and the Specialized Practice of Civil Rights Law*, 20 W. NEW ENG. L. REV. 39, 43 (1998); *see also* Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93, 100 n.24 (1998) [hereinafter *Lawyers' Identities*] (noting a lawyer can only use the First Amendment as a shield against the application of the anti-discrimination principle if the practiced discrimination also enhances the quality of representation provided).

[113] *See* Gardner, *supra* note 112, at 41-42.

> The idea that services offered to the public can be so narrow or specialized as to amount to prohibited discrimination is one that makes a good deal of sense from the point of view of civil rights law, for it prevents bigots from escaping liability merely by narrowly defining the services they choose to offer to the public.

Id.

[114] *See Identities and Roles*, *supra* note 86, at 1582 (recognizing that "male-only firms both deny women substantial opportunity and reinforce stereotypes," while a women–only firm might actually undermine gender stereotypes).

[115] 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

[116] *Id.* at 40.

[117] *Id.* at 39; MASS. ANN. LAWS ch. 272, § 98 (Law. Co-op. 1992).

[118] *Stropnicky*, 19 M.D.L.R. at 42.

Stropnicky v. Nathanson created quite a furor in the Massachusetts legal community since it challenged a lawyer's traditional right to reject potential clients for any reason.[119] The commissioner's position that law offices were places of public accommodation and that a lawyer could not reject clients based on suspect criteria, was widely criticized.[120] Several arguments in favor of Attorney Nathanson's right to specialize her practice in a way that clearly discriminated against males were presented, but the arguments were unpersuasive to the hearing officer.[121] Nathanson's practice was held to be within the statutory definition of place of public accommodation and her refusal to represent Stropnicky solely on the basis of his sex was a violation of the antidiscrimination statute.[122] In essence, her specialization was viewed as inherently discriminatory and thus in violation of the statute. The language of the commissioner's decision attempts to draw a distinction between proper and illegal specialization:

> This ruling does not impinge upon Nathanson's right to devote her practice to furthering the cause of women as she defines that cause. Had Nathanson concluded that the issues raised by Complainant's divorce action were not consistent with her specialty and area of interest and rejected Complainant on that basis, rather than solely because he is a man, the focus of this inquiry would be different. However, Nathanson never inquired into the nature or circumstances of Complainant's divorce case and stated only that she did not represent men in divorce cases. Had this case involved the rejection of a female or African-American on similar grounds, it would appear more starkly to be a violation of the spirit and intent of G.L. c. 272.[123]

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[119] *See* Steve Berenson, *Politics and Plurality in a Lawyer's Choice of Clients: The Case of* Stropnicky v. Nathanson, 35 SAN DIEGO L. REV. 1, 9-10 (1998) (noting the decision may "contribute to the current backlash against affirmative action"); Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 49 (1998) (characterizing the *Stropnicky* ruling as setting off "a firestorm of reaction").

[120] *See* Berenson, *supra* note 119, at 9 (observing that "[s]ome lawyers have expressed outrage at the Commission's intrusion into what has traditionally been considered a lawyer's unfettered discretion to choose who to accept as a client") (citation omitted); Charles W. Wolfram, *Selecting Clients: Are You Free to Choose?*, 34 Trial 21, 22, 24 (Jan. 1998) (arguing *Stropnicky* should be reversed because there was no violation of the Massachusetts code of ethics, the commission failed to address the right of "freedom of assembly," and government agencies should not be responsible for client selection).

[121] *See Stropnicky*, 19 M.D.L.R. at 40-42.

[122] *See id.* at 40-41.

[123] *Id.* at 41.

While *Stropnicky* has no precedential value in New York and is yet to be tested by the courts in Massachusetts, it appears likely that, given this same fact pattern, a lawyer in New York could also be found to be illegally specializing or limiting his or her practice by rejecting potential clients strictly on the basis of sex. Assume that an aggrieved party filed a complaint with the New York Division of Human Rights alleging sex discrimination by a lawyer.[124] It is likely that, under the precedent of *Cahill v. Rosa*,[125] the lawyer's office would be viewed as a place of public accommodation since the lawyer advertised and held herself out as open for business to the general public. The refusal to represent a potential client merely because of his or her sex would violate section 296 of the Human Rights Law.[126] In addition to sanction under the statute, in New York the lawyer could also be subject to professional discipline because the Division of Human Rights' ruling would constitute *prima facie* evidence at the lawyer's disciplinary hearing for a violation of DR 1-102(a)(6)'s prohibition against unlawful discrimination in the practice of law.[127]

It is noteworthy that the hearing commissioner in *Stropnicky* refused to address the lawyer's assertion that the Massachusetts statute was unconstitutional in that it interfered with certain of her First Amendment rights. The commissioner felt it was inappropriate to raise a constitutional challenge in the agency forum when the issue is more properly left to the courts.[128] It seems certain that the constitutional challenge will eventually be confronted in *Stropnicky* or in some future case, so it is worthwhile to examine a third argument supporting a lawyer's right to exercise absolute discretion in the selection of clients.

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[124] *See* N.Y. EXEC. LAW § 297 (McKinney 1993) (detailing the procedure for filing a complaint alleging a human rights violation).

[125] 674 N.E.2d 274 (N.Y. 1996).

[126] *See* N.Y. EXEC. LAW § 296 (McKinney 1993) (making the refusal of services in a place of public accommodation, when based upon sex, unlawful discrimination); *supra* note 24 and accompanying text (listing remedies available for a violation of § 296).

[127] *See* DR 1-102(a)(6) [22 NYCRR § 1200.3]; *supra* note 25 and accompanying text (listing disciplinary sanctions available to the courts for violation of a disciplinary rule).

[128] *See Stropnicky*, 19 M.D.L.R. at 42 ("Such a claim is beyond the scope of my authority, because any power I have to rule on such matters is derived from the very statute which Respondent now challenges as unconstitutional."); Califano v. Sanders, 430 U.S. 99, 109 (1977) (acknowledging administrative agencies are unsuitable forums for deciding constitutional questions); Weinberger v. Salfi, 422 U.S. 749, 767 (1975) (recognizing constitutional issues are "concededly beyond" the competence of an administrative agency); *see also* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.5, at 331 (3d ed. 1994) (referencing the agencies' inability to decide constitutional questions); Wolfram, *supra* note 120, at 24 (noting that this position is standard administrative practice, citing Mathews v. Eldridge, 424 U.S. 319, 329-30 (1976)).

C. Forcing lawyers to represent particular clients against their will may violate the lawyers' First Amendment rights of freedom of speech and association.

Stropnicky v. Nathanson serves as an interesting springboard for a discussion of potential constitutional challenges that might be made to an application of antidiscrimination statutes to the client selection process. The attorney in *Stropnicky*, Judith Nathanson, neither hated men nor rejected all men as clients, but rather only refused to represent men in divorce proceedings because of her personal commitment to the elimination of sex bias favoring males in divorce proceedings.[129] It was her belief "that the issues that arise in representing wives in divorce proceedings differ from those involved in representing husbands;" for example, "wives' attorneys emphasize the value of homemaker services and the limited future earning potential" of the wife.[130] Nathanson needed "to feel a personal commitment to her client's cause in order to function effectively as an advocate" and in family law matters, she only experienced this commitment when representing women.[131] Thus Nathanson can be said to have had both a personal agenda and a feminist political agenda when selecting clients, but unfortunately these agendas collided with the Massachusetts anti-discrimination statute.[132] While the hearing commissioner stated that he could not address Nathanson's constitutional claims at the agency level, the constitutional ramifications of the *Stropnicky* case are likely to be addressed on appeal.[133]

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[129] *See Stropnicky*, 19 M.D.L.R. at 40.

[130] *Id.*

[131] *Id.*

[132] *See* MASS. GEN. LAWS ch. 272, § 98 (Law. Co-op. 1992) (making full and equal treatment in places of public accommodation a civil right). Otherwise stated:

> [t]o require an attorney to represent a client whose cause she finds repugnant is to forcibly intrude into one's private belief system. Most of the time, an attorney's decision to decline to represent an undesirable client or cause is a permissible exercise of professional autonomy under the rules. There are times, however, when because of a convergence of cause and client, such refusal resembles class-based discrimination which society, through its laws and collective conscience, finds intolerable . . . ;

Day & Rogers, *supra* note 46, at 31; *see also* Valorie Vojdik, *Afterword: A Thought About Feminist Litigation Strategies*, 20 W. NEW ENG. L. REV. 139, 139 (1998) (expressing the author's struggle with the *Stropnicky* decision); Wolfram, *supra* note 120, at 25 (suggesting Nathanson and her secretary gave the "wrong" reason for rejecting the male client, thereby violating the Massachusetts anti-discrimination statute).

[133] *See Stropnicky*, 19 M.D.L.R. at 42 (leaving the constitutional issues for the courts to decide); Berenson, *supra* note 119, at 9 (referencing the abundance of controversy provoked by *Stropnicky*); Harpaz, *supra* note 119, at 49 (discussing the "firestorm of reaction" set off by the *Stropnicky* decision).

There are two distinct but overlapping First Amendment arguments that can be made to support the position that an attorney cannot be compelled to represent certain clients. The first argument is that the public accommodation laws cannot be used to compel expression by a lawyer:[134] that freedom of speech implicates the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message."[135] The second argument is that a lawyer cannot be compelled to associate with clients whose views the lawyer may find unacceptable or repugnant and which may potentially be attributed to the lawyer.[136] These points merit further examination. The analysis begins with associational rights derived from the First Amendment.[137]

1. Classifying Freedom of Association Rights

Professor Steve Berenson has examined the analytical framework that has been established by the United States Supreme Court for balancing freedom of association claims against competing equal access claims under public accommodation and other anti-discrimination legislation.[138] He posits that within this framework particular types of associations will fall within three categories of

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[134] *See* Harpaz, *supra* note 119, at 50-52, 64 (comparing *Stropnicky* to Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)); Stonefield, *supra* note 15, at 128-131 (suggesting the First Amendment rights of free speech and freedom of assembly as possible defenses to a charge of discriminatory client selection).

[135] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

[136] A female attorney may have a legitimate concern that her representation of men in divorce cases or perhaps rape cases may lend "her gender identity to their cause." *Identities and Roles*, *supra* note 86, at 1576. Similarly, African-American lawyers may decline to represent certain clients because they do not wish to lend their racial identity to a cause. *See id.* (analogizing gender-based and race-based obligations); *see also* Miller, *supra* note 15, at 179-80 (discussing a religious lawyer's concerns about compelled speech).

[137] Since our concern in this article is with discrimination in the selection of clients by lawyers, the constitutional challenge will arise in the context of forced association with a potential client's message rather than in the context of pure free speech by the lawyer. It is clear that the states may not regulate the content of speech or a speaker's viewpoint even if discriminatory, but that discriminatory conduct may be regulated. *See* R.A.V. v. City of St. Paul, 505 U. S. 377, 396 (1992) (refusing to abridge the First Amendment where politicians are hostile toward a view being expressed); *Lawyers' Identities*, *supra* note 112, at 100 n.24 (stating the First Amendment protects the political commitments of even bigoted attorneys); Andrew E. Taslitz and Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 803-807 (1996) (discussing the holding in the *R.A.V.* case). For attempts to regulate attorneys' racist speech by means of ethical rules, see Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 PROF. LAW. 1 (1995).

[138] *See* Berenson, *supra* note 119, at 2.

analysis.[139] The first category includes intimate or highly personal associations, the second category includes expressive or political associations, while the third category is comprised of commercial or purely social associations.[140] Depending on the category, associations are granted different levels of constitutional protection under the First Amendment relative to non-members who raise equal access claims against the association under anti-discrimination statutes.[141] Within this framework, intimate or personal associations and expressive or political associations are provided with a higher level of constitutional protection than are commercial or purely social associations.[142] "[T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."[143]

Within the first two categories, any restrictions by a state are reviewed by courts applying a type of "heightened scrutiny."[144] Therefore, in order to determine the appropriate level of constitutional protection that a lawyer would receive when rejecting a potential client based on a suspect criteria that would otherwise violate an anti-discrimination statue, it is first necessary to determine into which of the three associational categories the lawyer-client relationship falls. This determination goes to the very heart of the debate over whether the practice of law is a business, engaged in primarily for profit, or a profession with ideals and

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[139] *See id.* (introducing the three categories). For a slightly different analytical framework, see *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), which discusses how the Court's decisions concerning freedom of association have fallen into two distinct sets.

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.

Roberts, 468 U.S. at. 617-18.

[140] *See* Berenson, *supra* note 119, at 2, 11-12, 14-15.

[141] *See id.* at 2 (finding "heightened" constitutional protection afforded to the first two categories while denying it to the third category).

[142] *See id.* at 14-15.

[143] *Roberts*, 468 U.S. at 618.

[144] Berenson, *supra* note 119, at 14 ("[T]he Court reviews such restrictions applying the type of 'heightened scrutiny' that is familiar from a variety of types of cases including equal protection challenges to racial classifications, and restrictions on speech that is protected by the First Amendment.") (footnote omitted).

objectives that go beyond the financial well-being of individual attorneys.

2. Is the Attorney-Client Relationship an Intimate or Personal Association?

As will be seen, the typical lawyer-client relationship that is entered into for most routine legal services is normally viewed as commercial in nature and will usually fall within the third associational category, which is not examined under such a strict scrutiny standard.[145] Some have argued, however, that the lawyer-client relationship is so intensely personal, almost akin to that of a friendship, that it should fall into the category of intimate or personal associations.[146] This is so because clients may share their innermost secrets with the lawyer and rely heavily on the lawyer's skill, integrity, and personal loyalty in protecting their resources, families, or, at times, their personal freedom. Essentially, this is the "law is unique" argument discussed previously.[147] This view holds that the legal profession, by its very nature, is just different from other professions, and that lawyers, unlike doctors, dentists, or accountants, develop a type of personal relationship with their clients that deserves greater constitutional protection.[148]

While, admittedly, many lawyers do develop a close personal relationship with some of their clients, this is still not "the familial and related types of relationships that the Court has previously considered to fall within its intimate category."[149] It is also clear

[145] *See Roberts*, 468 U.S. at 637 (O'Connor J., concurring) (stating "ordinary law practice for commercial ends has never been given special First Amendment protection"); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 219 (1999) (emphasizing the business aspect of the legal profession).

[146] *See* LUBAN, *supra* note 15, at 167-168 (1988) (asserting that the lawyer-client relationship is comparable to that of a marriage); Berenson, *supra* note 119, at 35-36 (discussing the classification of the attorney-client relationship); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951) (stating the attorney-client relationship has an intimate character); Letourneau, *supra* note 27, at 147-49 (suggesting that the lawyer-client relationship is more than a mere business relationship); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1067 (1976) (contending clients have a special relationship with their lawyer akin to that of a family member or friend).

[147] *See supra* note 48 and accompanying text.

[148] Wolfram, *supra* note 120, at 26 (expressing the notion that, in the practice of law, ideology is directly linked to the decision whether or not to accept a client).

[149] Berenson, *supra* note 119, at 35; Roberts v. United States Jaycees, 468 U.S. 609, 619-620 (1984) (noting family relations fall into the intimate category and listing characteristics of an intimate relationship); Stonefield, *supra* note 15, at 129 ("An attorney has a constitutional right freely to choose her friends, but no constitutional right to choose her clients (or her law associates or even her law partners).").

that in many, if not most, instances no meaningful personal rapport beyond that experienced with other professionals develops between lawyers and clients.[150] The practice of law today often entails a business relationship where the lawyer renders services for a fee at arms-length based on a written retainer agreement.[151] The processes of urbanization and suburban sprawl have led to increased anonymity and depersonalization in recent decades generally within our society, and this in turn has led to lawyers' involvement in "legal transactions and services [that] are mainly with strangers, in marked contrast with the social context of the small town where so many transactions and services are between persons known to each other."[152] Today in many large firms there is a clear division of functions between rainmakers, who entice clients to the firm, and associates, who, while providing the actual legal services, may in some instances, never even meet the client.[153] Due to this depersonalization in the everyday practice of law, it appears very unlikely that the courts will grant the typical lawyer First Amendment protections premised on the lawyer-client relationship being an intimate or close personal association, but rather would regard the association as having elements that were commercial in nature.[154]

3. Is the Attorney-Client Relationship an Expressive or Political Association?

The next issue is whether the lawyer-client relationship falls into the second category, that of an expressive or political association.

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150 *See supra* notes 86-87 and accompanying text.

151 *See* Begg, *supra* note 7, at 292; Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 92-100 (1998) (explaining that the legal profession "increasingly sees itself as profit-centered rather than client-centered").

152 SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASSN., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM 38 (1992); *see also* EC 2-7 (noting how "[c]hanged conditions . . . have seriously restricted the effectiveness of the traditional selection process"); RICHARD L. ABEL, AMERICAN LAWYERS 178-181 (1989); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 768-69 (1998) (noting a growth in the size of corporate practice accompanied by a decline in the percentage of personal and small business legal work, and the percentage of solo practitioners).

153 *See* Begg, *supra* note 7, at 292; *see also supra* notes 80-81, 83; Heinz, et al. *supra* note 152, at 773 (noting the division of labor between lawyers who only handle corporate work and lawyers who are actually involved with clients' personal matters).

154 *See* Roberts v. United States Jaycees, 468 U.S. 609, 637 (1984) (discussing a case where a law firm was not able to claim a First Amendment defense to charges of employment discrimination); Berenson, *supra* note 119, at 35-36, 39.

In the typical relationship between lawyer and client relating to the vast majority of transactional or routine representations,[155] the association between lawyer and client has no expressive content and is not political in nature. Such associations will not be viewed as falling into the second category and thus will not be entitled to heightened constitutional protection.[156]

But what of the non-routine case where the potential client is encumbered with unwelcome political or moral baggage with which the lawyer would rather not be associated? The legal profession has long recognized that representation of certain unpopular clients or controversial causes can result in adverse community reaction toward the lawyer.[157] Nevertheless, both the Model Rules of Professional Conduct[158] and the New York Lawyers' Code of Professional Responsibility recognize the professional independence of the lawyer by making it clear that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[159] This rule, which stresses the lawyer's autonomy relative to clients and their causes, is meant to ensure legal representation for even the most despicable of clients.[160] The ethics rules thus take the position that mere association with a client is not the equivalent of expression or endorsement of the client's views.

4. Can Lawyers be Compelled to Join in a Common Voice?

The above cited ethics rules, however, admittedly do not trump constitutional rights. Lawyers have First Amendment protections against compelled association and expression. While it is arguable that associations relating to most routine legal services are

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[155] "Transactional lawyering primarily consists of counseling and assisting clients in identifying, complying with, and utilizing relevant provisions of the positive law to the client's advantage." Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137, 147 (1999) (footnotes omitted). The author draws a distinction between transactional lawyers and trial lawyers. *Id.* at 167-68.

[156] *See* Berenson, *supra* note 119, at 41.

[157] *See* EC 2-27 (discussing a lawyer's duty to provide representation even though community reaction is adverse). Assigned defense lawyers as early as 1697 were concerned about having their clients' views imputed to the lawyers. *See* JANE GARRETT, THE TRIUMPHS OF PROVIDENCE: THE ASSASSINATION PLOT, 1696, 238 (1980); *see also* Letourneau, *supra* note 27, at 152 (stating that even "detached" attorney-client relationships incorporate the concept of "social price").

[158] MR 1.2(b) and cmt. (3); *see also* HAZARD & HODES, *supra* note 10, § 1.2:301, at 36 (discussing moral arguments surrounding client representation).

[159] *See* MR 1.2(b) and cmt. (3); EC 2-27.

[160] Both MR 1.2(b) and EC 2-27 apply specifically to court appointments.

commercial associations and do not fall into the second category of "expressive or political" associations, there may be instances where a lawyer's relationship with a particular client, or the lawyer's views concerning certain issues, can be viewed as expressive or political in nature and thus entitled to greater First Amendment protection than purely commercial speech.

Again the *Stropnicky v. Nathanson*[161] case provides an interesting fact pattern for evaluating such arguments. The facts show that Nathanson refused to represent men in divorce cases because of her own personal belief that women were treated unfairly in divorce proceedings when compared with men. Her position can be viewed as both personal and political: personal in that she can only feel a personal commitment as an advocate for her client's cause in a divorce when representing women;[162] and political in that she is advancing a feminist ideological agenda towards a goal of greater equality by eliminating gender bias in the court system.[163] Nathanson's limitation of practice is such that her relationships with female clients may arguably be viewed as a form of expressive or political association, which may fall into the second category of associations, which is provided with greater First Amendment protections.[164]

Since ideology has a direct link to Nathanson's determination of which clients she will represent, forcing her to represent any man in a divorce would, based on her value system, send the wrong message.[165] In essence, an attorney-client relationship of this nature becomes an association of the sort "[which] enjoys First Amendment protection of both the content of its message and the choice of its members."[166] "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[167] Forcing Nathanson to

[161] 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

[162] *See id.*

[163] *See id.*

[164] *See* Berenson, *supra* note 119, at 53 (arguing that a systematic approach of challenging courts to be fair toward women amounted to an act of political association deserving heightened First Amendment protection).

[165] *See* Wolfram, *supra* note 120, at 24, 26 (suggesting a real connection exists between political ideology and client representation). As stated by the Supreme Court, "[w]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 576 (1995).

[166] Roberts v. United States Jaycees, 468 U.S. 609, at 633 (1984) (O'Connor, J., concurring).

[167] *Id.*

represent Stropnicky sends a message that contradicts certain of her fundamental beliefs; therefore, she should not be compelled to associate with, and become part of, a group voice with a potential client whose cause she does not support.

A similar argument was made in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[168] in which the United States Supreme Court held that the State of Massachusetts could not use the public accommodation laws to compel the South Boston Allied War Veterans Council to allow an organization of gays, lesbians, and bisexuals to march in their St. Patrick's Day Parade because of the message it might convey. Nathanson, and a similarly situated lawyer may also be able to argue that they should have similar autonomy to choose the content of their own message through association or non-association with certain clients.[169] The Supreme Court in *Hurley* made this clear, stating: "'[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid[170]. . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'."[171] While lawyers may have less First Amendment protection than other citizens, in that a state may

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[168] 515 U.S. 557 (1995). Recently the United States Supreme Court applied the *Hurley* analysis in *Boys Scouts of America v. Dale*, 120 S. Ct. 2446, 2457 (2000). The Boy Scouts, a private, not-for-profit organization, revoked the membership of James Dale, an adult member and assistant scoutmaster, when the organization learned that Dale was an avowed homosexual and gay rights activist. *Id.* at 2449. The New Jersey Supreme Court had held that the Boy Scouts were a place of public accommodation and that Dale's expulsion violated New Jersey's public accommodation law, N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (West Supp. 2000), in that the Boy Scouts revoked his membership based solely on his sexual orientation. *Id.* at 2449-50. The New Jersey Supreme Court held that Dale should be readmitted despite the Boy Scouts' argument that the application of the public accommodation statute in this context violated their First Amendment rights of association and free speech. *Id.* at 2450. The Supreme Court reversed the New Jersey Supreme Court, applying its earlier precedents in *Hurley*, 515 U.S. 557 (1995), *Roberts*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). The Court in *Boy Scouts* stated that "[t]he forced inclusion of an unwanted person in a group infringes upon the group's freedom of expressive association if the presence of that person affects, in a significant way, the group's ability to advocate public or private viewpoints." *Boy Scouts*, 120 S. Ct at 2451 (citation omitted). The Court held the First Amendment prohibits the state from imposing a requirement that the Boy Scouts retain a homosexual scoutmaster since it "would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' right to freedom of expressive association." *Id.* at 2457.

[169] *See Hurley*, 515 U.S. at 574 ("[T]his principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive."); *see also* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 89-95 (1978) (discussing lawyers' identification with unpopular clients); Harpaz, *supra* note 119, at 50-51, 72.

[170] *Hurley*, 515 U.S. at 573 (citing Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 11 (1986)).

[171] *Hurley*, 515 U.S. at 573 (citation omitted).

regulate attorneys' commercial advertising[172] and comments concerning certain judicial proceedings,[173] outside these areas it might be said that the state "may not compel affirmance of a belief with which the speaker disagrees."[174]

5. But is Hurley Distinguishable?

While it can be argued that Nathanson should be successful with a First Amendment speaker autonomy claim preventing application of the anti-discrimination statute to her actions in rejecting Stropnicky,[175] others have not been convinced of this because *Hurley* can be factually and legally distinguished from *Nathanson* in several significant ways.[176]

In *Hurley,* the Court was dealing with the associational and free speech rights of an organization that was expressing its message in a non-commercial manner in the form of a parade that was taking place in a very public forum.[177] The Court found the parade to be symbolic speech: "[a] form of expression, not just motion."[178] It also discussed the essential public nature of a parade, noting the parade's extreme dependence on those who view or watch the parade and on media coverage.[179] Nathanson's fact pattern is

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[172] *See id.*; *see also* Harpaz, *supra* note 119, at 58-60 (explaining limits on lawyer advertising and compelled commercial expression).

[173] *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1033-36 (1991) (observing that attorneys' extra-judicial speech is limited by professional standards, the extent to which it may "materially prejudice" the proceeding, and the attorney's own discretion in disseminating information that may be critical of, and thus harmful to, public officials); DR 7-107, [22 NYCRR § 1200.38]; Harpaz, *supra* note 119, at 50, 57-58 (suggesting that the *Gentile* standard curtailing attorneys' First Amendment rights to free speech needs refinement to accommodate civil cases, cases not argued before a jury, and other situations where attorney public speech would not be prejudicial).

[174] *Hurley*, 515 U.S. at 573.

[175] Based on the reasoning in *Hurley*, in order for Nathanson to succeed in a compelled expression First Amendment claim based on speaker autonomy, she would be required:

> to demonstrate that her expression receives the full protection of the First Amendment, that her refusal to support the state's compelled message is politically motivated, that the state is forcing her to communicate a message to the public that she disagrees with, that the public would perceive that message as endorsed by the speaker, and that the state lacks a sufficient justification to intrude on the right to speaker autonomy.

Harpaz, *supra* note 119, at 72.

[176] *See* Stonefield, *supra* note 15, at 129-31 (distinguishing the activities of a parade director and the work of an attorney); *Identities and Roles*, *supra* note 86, at 1580-81 (suggesting that attorneys should be prohibited from discriminating based on personal interactions even if the practice would be acceptable for non-lawyers).

[177] *See Hurley*, 515 U.S. at 568-69 (explaining how a parade is a form of protected expression).

[178] *Id.* at 568.

[179] *See id.* (noting that "parades are public dramas").

distinguishable from *Hurley's* in several respects since "unlike the parade, the lawyer's expression, in the typical case, is not engaged in primarily as an act of political speech in order to inform the public."[180] The practice of law is simply not analogous to a parade.[181] Also, as the ethics codes suggest,[182] the lawyer is expressing the client's views and not her own.[183] In addition, with the exception of courtroom advocacy, most of a lawyer's professional activities do not take place in a public forum, and a lawyer's services are usually rendered for a fee.[184]

It is also noteworthy that *Hurley* involved a parade that was a function of an established group attempting to express its message. Nathanson, in contrast, was concerned that representing a man in a divorce would send a message contravening her own personal feminist viewpoint. Yet, while Nathanson was acting in a personal capacity rather than as a lawyer for a feminist advocacy organization, she had been listed with several women's advocacy groups for referrals and was attempting to further a political agenda those organizations would likely support.[185] Would these ties be sufficient to provide Nathanson with the constitutional protections afforded to political associations?[186]

In a series of cases beginning with *NAACP v. Button*[187] and culminating with *In re Primus*,[188] the United States Supreme Court has upheld the right of political/advocacy associations and unions to develop lawyer-client relationships in order to obtain legal services

[180] Harpaz, *supra* note 9, at 50, 56-64 (providing a detailed analysis of the First Amendment status of a lawyer's speech on a client's behalf).

[181] *See* Stonefield, *supra* note 15, at 129-131 (discounting Harpaz's argument, which attempted to form an analogy between the activities of a parade director and an attorney's manner of client selection).

[182] *See* EC 2-27; MR 1.2(b) (stating that the scope of legal representation does not include the endorsement of a client's views, irrespective of popularity).

[183] *See* Harpaz, *supra* note 119, at 50-51 (noting that an attorney cannot legitimately claim First Amendment speech protections when the views being expressed are the client's, not the attorney's).

[184] "There is no suggestion in *Hurley* that the Council's decisions about when, where, or what to communicate were ever offered for sale to members of the public. Most lawyers, even politically committed lawyers like Judith Nathanson, obviously cannot make this claim." *Lawyers' Identities*, *supra* note 112, at 97-98.

[185] *See* Wolfram, *supra* note 120, at 24 (noting that Nathanson was committed to a mission of solely representing women).

[186] *See id.*; *see also* Berenson, *supra* note 119, at 53 (suggesting that an express effort to unequivocally represent women in divorce proceedings should be entitled to First Amendment protection).

[187] 371 U.S. 415 (1963).

[188] 436 U.S. 412 (1978).