The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-discrimination Disciplinary Rule

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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," for charging an illegal fee, for concealing or failing to disclose "that which the lawyer is required by law to reveal," for counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent, or for suppressing evidence that the lawyer has a legal obligation to reveal. The American Bar Association's Model Rules of Professional Conduct have similar law-based ethical provisions.

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 PROFESSIONAL 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, 1990. 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 NYCCt 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 2-102(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 PROFESSIONAL CONDUCT R. 8.4(b), (d), 3.3(a)(2), 4.1(b), 1.2(d), 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? 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. 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. This standard of absolute discretion, which finds support in lawyers' ethics codes and in respected legal treatises, has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma."

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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 EIC 2:36 ("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. Driener, LEGAL ETHICS 159 (1953) ("The 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 declines 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 and federal anti-discrimination statutes and New York's anti-discrimination disciplinary rule, 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. These arguments include:

12 N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992).
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 Stonefeld, 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 183, 195 (Utah 1969)). 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); Lee S. VanderVelden, 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, 171-178, 182 (1989) (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., Dept 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


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.  

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


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. 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. It is also noteworthy that the disciplinary rule is unique in that it applies to both lawyers and law firms.

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 and then also be subject to a variety of

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, circulated, 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 marital 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").

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 E. 2-400(C) (1996).

21 See N.Y. 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 impose discipline to law firms and speculating that New York is "likely to remain the only state" with such rules).

other sanctions as a lawyer in a separate proceeding under the disciplinary rule. 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.

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. 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.

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.

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 cease use, 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.

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").

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, Stropnick v. Nathanson: Choozy 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).

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. \(^{39}\) 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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\(^{39}\) 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, Паруэлл Основы Эмпор, 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.  

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.  

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. 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. The Human Rights Law and the Civil Rights Law are central to the Legislature’s efforts to eliminate improper discrimination in a wide spectrum of activities or places affecting society. 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.

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. The offices of lawyers, however, have not historically been viewed as places of public

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35 See N.Y. JUD. LAW § 90(2) (McKinney 1983); 22 NYCRR §§ 603.2, 691.2, 896.2, 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).
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 too late in the day to challenge the constitutionality of civil rights legislation generally . . . .”) [our 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 (1996) 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. 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. 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, and beyond the reach of federal statutes such as 42 U.S.C. § 1981, which are not premised on the commerce clause. 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

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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. Precedents holding offices of other professionals to be places of public accommodation in New York 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.

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. 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. The definitions

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46 Terri R. Day & Scott L. Rogers, When Principled Representation Tests Antidiscrimination Law, 20 W. New Eng. L. Rev. 23, 31 (1996); 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).


48 See EC 2-9 (“The attorney-client relationship is personal and unique . . . .”); Restatement, supra note 27, § 16 comment b, at 116 (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 5-4; 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 (1979) (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 251. 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,\textsuperscript{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,\textsuperscript{52} as was done by Congress with the Americans with Disabilities Act [ADA],\textsuperscript{53} and by the California Legislature when adopting its anti-discrimination statute.\textsuperscript{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,\textsuperscript{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 accommodation to include every person who provides a service to any member of the public."\textit{Id.}

\textsuperscript{51} See \textit{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).

\textsuperscript{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.


\textsuperscript{54} See \textsc{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 \textsc{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").

\textsuperscript{55} See \textsc{N.Y. Educ. Law} § 6509 (McKinney 1985). Ethical standards of most professions specifically prohibit discrimination. \textit{E.g.}, Stonefield, \textit{supra} note 15, at 112 n.28 (citing to specific professional codes).
rule because law offices were not then places of public accommodation. 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. 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. 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." 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." 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."

56 Begg, supra note 7, at 276-77.
58 Id. at 275; N.Y. EXEC. LAW §§ 292(9), 296(2) (McKinney 1993).
60 N.Y. EXEC. LAW § 292(2) (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." The court's analysis comports with the position of the Legislature expressed in section 300 of the Human Rights Law and earlier precedent. 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. The court also noted that the Legislature had repeatedly amended the statute to expand its scope, 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." 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. 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).
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." The court noted that potential patients could have been drawn to the office by advertising, telephone book listings, referrals, or signs.

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. 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. 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." 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."

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" 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

\(^{76}\) 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.

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

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 119-128 (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).


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 communications to a prospective client); 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 5-12 (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 business persons." 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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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, long-term, 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 Peares, supra note 80, at 1266 (noting that commentators reject the "characterization of businesspersons as morally inferior to lawyers").
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 135; 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"); Lotourneau, 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.90 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.91

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

90 Cahill v. Rosa, 674 N.E.2d 274, 279 n.1 (N.Y. 1990) (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.

91 "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.\footnote{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).} 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.\footnote{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 1897). 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).} 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
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, as well as New York’s Human Rights Law?

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. There appears to be no precedent holding law offices to be places of public accommodation under the federal civil rights acts. 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. 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.

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95 N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).
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).
99 See Mass v. McClennen, 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. 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. 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 329-33 (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 Gianino v. Vreeland, 569 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. POLICY 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

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").


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 666, 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 § 8.6.2 (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, to convenience, to control work time, and to impress the boss); James W. McElhaney, The Legal Wasel 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. 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. 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.

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. 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. It

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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. POLICY 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 "petitioners . . . 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 . . . [thus, a lawyer's claim to specialize
is also clear that the specialization itself cannot be tailored to be unlawfully discriminatory by its very nature.\textsuperscript{113}

Specializations that inherently discriminate based on protected criteria and \textit{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?\textsuperscript{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 \textit{Stropnick v. Nathanson}\textsuperscript{115} agency decision in Massachusetts.

Attorney Judith Nathanson informed a potential male client, Joseph Stropnick, 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.\textsuperscript{116} Mr. Stropnick, 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.\textsuperscript{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.\textsuperscript{118}

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{115} 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

\textsuperscript{116} Id. at 40.

\textsuperscript{117} Id. at 39; MASS. ANN. LAWS ch. 272, § 98 (Law. Co-op. 1992).

\textsuperscript{118} Stropnick v. Nathanson, 19 M.D.L.R. at 42.
Stropnick 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 Stropnick 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.\(^ {123}\)


\(^{120}\) See Berenson, supra note 118, 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 Stropnick 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 Stropnick, 19 M.D.L.R. at 40-42.

\(^{122}\) See id. at 40-41.

\(^{123}\) Id. at 41.
While Stropnicki 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. It is likely that, under the precedent of Cahill v. Roso, 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. 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.

It is noteworthy that the hearing commissioner in Stropnicki 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. It seems certain that the constitutional challenge will eventually be confronted in Stropnicki 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.

124 See N.Y. Exec. Law § 297 (McKinney 1993) (detailing the procedure for filing a complaint alleging a human rights violation).
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 23 and accompanying text (listing disciplinary sanctions available to the courts for violation of a disciplinary rule).
128 See Stropnicki, 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. PIEerce, 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.

Strunicky 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 Strunicky, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{132} While the hearing commissioner stated that he could not address Nathanson’s constitutional claims at the agency level, the constitutional ramifications of the Strunicky case are likely to be addressed on appeal.\textsuperscript{133}

\textsuperscript{129} See Strunicky, 19 M.D.L.R. at 40.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} See MASS. GEN. LAWS ch. 272, § 88 (Law. Co-op. 1992) (making full and equal treatment in places of public accommodation a civil right). Otherwise stated: [To 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...]
\textsuperscript{133} See Strunicky, 19 M.D.L.R. at 42 (leaving the constitutional issues for the courts to decide); Berenson, supra note 118, at 9 (referencing the abundance of controversy provoked by Strunicky); Harpas, supra note 119, at 49 (discussing the “firestorm of reaction” set off by the Strunicky 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: that freedom of speech implicates the "fundamental rule...that a speaker has the autonomy to choose the content of his own message." 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. These points merit further examination. The analysis begins with associational rights derived from the First Amendment.

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. He posits that within this framework particular types of associations will fall within three categories of

136 A female attorney may have a legitimate concern that her representation of men in divorce cases or perhaps rape cases may lead "her gender identity to their cause." Identities and Roles, supra note 83, at 1576. Similarly, African-American lawyers may decline to represent certain clients because they do not wish to lend their racial identity to a case. See id. (analogizing gender-based and race-based obligations); see also Miller, supra note 15, at 179-30 (discussing a religious lawyer's concern 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 (1988).
analysis. 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. 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 antidiscrimination statutes. 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. "The 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."

Within the first two categories, any restrictions by a state are reviewed by courts applying a type of "heightened scrutiny." 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 statute, 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 Perrenson, 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 Perrenson, 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).
highly personal, possessive or political kind of commercial or on the category, constitutional protection members who raise question in the context of intimate or personal associations are afforded less protection than are speech. The nature and freedom of association for the other aspect of our society is at stake in a given case when restrictions by a state are subjected to heightened scrutiny. 144

appropriate level of analysis when rejecting a test that would otherwise be necessary to categorize the relationship. The question goes to the very heart of the constitutional law. Is it a business, association with ideals and

analytical framework, 145 which discusses how the law is applied to two distinct sets. The term "community of association" is two

identical questions that choices to enter into a marriage or to engage in a business enterprise is secured against undue interference in safeguarding the freedom of personal liberty. In this respect, freedom of association for the purpose of the two forms of expression—speech, assembly, etc.—is

afforded to the first two forms. A third way in which restrictions applying the test of cases including equal protection that is protected by

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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 Biking: Regulation of Billing and Expense Fraud by Lawyers, 12 GSO, 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); Leourneau, 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 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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{150} See supra notes 86-87 and accompanying text.

\textsuperscript{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").

\textsuperscript{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. ASHEL, AMERICAN LAWYERS 118-181 (1989); John P. Heinz et al., The Changing Character of Lawyers' Work: Chicago in 1973 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).

\textsuperscript{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).

\textsuperscript{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, 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. 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. Nevertheless, both the Model Rules of Professional Conduct 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." 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. 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 Toun 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 157-68.

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 *Stropnick 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

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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).
167 Id.
represent Stropnicki 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., 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. 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... one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" While lawyers may have less First Amendment protection than other citizens, in that a state may

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108 515 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, 486 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.

109 See Hurley, 515 U.S. at 574 ("[T]he 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 lawyer's identification with unpopular clients); Harpaz, supra note 119, at 50-51, 72.


111 Hurley, 515 U.S. at 573 (citation omitted).
regulate attorneys’ commercial advertising and comments concerning certain judicial proceedings, outside these areas it might be said that the state “may not compel affirmation of a belief with which the speaker disagrees.”

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 Stropnicki, others have not been convinced of this because Hurley can be factually and legally distinguished from Nathanson in several significant ways.

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. The Court found the parade to be symbolic speech: “[a] form of expression, not just motion.” 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. Nathanson’s fact pattern is

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172 See id.; see also Harper, supra note 119, at 58-50 (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’ extrajudicial 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 NYCER § 1200.36], Harper, supra note 119, at 50, 57-58 (suggesting that the Counsel standard curtailng 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.
Harper, 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 1530-81 (suggesitng 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 564-69 (explaining how a parade is a form of protected expression).
178 Id. at 568.
179 See id. (noting that “parades are public dramas”).
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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 56, 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 scope of legal representation does not include
endorsement of a client's views, irrespective of popularity).

\(^{183}\) See Harpaz, supra note 119, at 90-91 (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.; 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).


\(^{188}\) 436 U.S. 412 (1978).
to achieve their objectives.\textsuperscript{189} In these cases the Court held that the States' interests in preventing conflict of interest, improper solicitation, and unauthorized practice of law were insufficient to overcome the associational rights guaranteed by the First Amendment.\textsuperscript{190}

A state's efforts to use its anti-discrimination statutes to force an organization, such as the NAACP or ACLU, to have its staff attorneys represent clients or causes contrary to the objectives of the organization would likely be stricken as violative of the First Amendment. Thus, for example, a state Human Rights Agency could not force the NAACP, in contravention of its policies, to represent a white male who alleged reverse discrimination when he was denied admission to a law school.\textsuperscript{191} Such a forced representation could send a message contrary to the ideological position of the NAACP and would be barred by the First Amendment as compelled expression or association.\textsuperscript{192} However, application of the \textit{Button} line of authority to the Stropnicki fact pattern, or to the situation where an individual attorney is not acting formally as part of, or in support of, an advocacy organization, appears to be inappropriate. It is the associational and expressive rights of the advocacy organizations that are protected by \textit{Button} and its progeny, not the rights of an individual attorney acting independently.\textsuperscript{193} The fact that Nathanson was listed with women's advocacy groups for referrals is too slender a tie to make her a representative of those associations. In her refusal to represent Stropnicki, she was acting alone, not as a representative

\begin{footnotes}
\item[189] See Wolfram, supra note 120, at 24 (noting that \textit{Button} prohibited state interference with the relationship between members of the NAACP and its legal staff as violative of due process).
\item[190] See \textit{In Re Primus}, 436 U.S. at 424 (requiring rules that encroach upon political expression and association to be narrowly tailored); \textit{United Transp. Union v. State Bar of Michigan}, 491 U.S. 576, 586 (1991) (noting that collective activity aimed at obtaining access to the courts is a fundamental right embodied in the First Amendment); \textit{United Mine Workers v. Illinois State Bar Ass'n}, 389 U.S. 217, 222 (1967) (emphasizing that a state legislature cannot undermine associational rights just because a matter is otherwise within its competence); \textit{Bhd. of R. R. Trainmen v. Virginia}, 377 U.S. 1, 8 (1964) (protecting the associational rights of union members and their lawyers); \textit{Button}, 371 U.S. at 428-29 (recognizing a protected relationship between the NAACP and its legal staff for its modes of expression and association).
\item[191] See Wolfram, supra note 120, at 24 (recognizing forced representation would contradict the clear ideological message of the NAACP).
\item[192] See id. (suggested associational claims that are both clear and expressive will receive protection); \textit{Boy Scouts of America v. Dale}, 120 S. Ct. 2446, 2451-53 (2000) (finding that the Boy Scouts could not be forced to condone a viewpoint concerning homosexuality that is contrary to their ideological position).
\item[193] See \textit{Button}, 371 U.S. at 430 (1962) (affirming the protection that the First and Fourteenth Amendments afford orderly group activity advancing beliefs and ideas).
\end{footnotes}
of a formal organization. While "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment... it has never been accorded affirmative constitutional protections."194

6. Roberts v. United States Jaycees Suggests That Most Lawyering is Primarily a Commercial Association

The United States Supreme Court has also addressed the "conflict between a State's efforts to eliminate gender-based discrimination... and the constitutional freedom of association asserted by members of a private organization" in Roberts v. United States Jaycees.195 In Roberts, the Jaycees argued that requiring their organization "to accept women as regular members... would violate the male members' [First Amendment] rights of free speech and association."196 In analyzing the appropriate level of constitutional protection available to the organization, the Court determined that the Jaycees were not an intimate or highly personal association,197 noting the local chapters were "neither small nor selective," and that much of the central activity of the organization involved the participation of strangers.198

On the issue of freedom of expressive association, the Court noted the Jaycees were engaged in a variety of protected, expressive activities.199 The Court stated there could be "no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire... [and that] [f]reedom of association therefore plainly presupposes a freedom not to associate."200

While the Court seemed to be placing the Jaycees in the second category of expressive associations, the opinion then stated that "[t]he right to associate for expressive purposes is not... absolute."201 "Infringements on that right may be justified by

196. Id. at 615.
197. See id. at 618-622 (outlining cases addressing whether highly personal relationships deserve constitutional protection).
198. Id. at 621.
199. See id. at 622, 626-27 (including civic, charitable, lobbying, and fundraising activities).
200. Id. at 623.
201. Id.; see also Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2451 (2000) (recently reaffirming this concept, yet noting that the right to associate for expressive purposes is especially important).
regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. The Court then held the State's interests in eradicating gender discrimination and allowing equal access to places of public accommodation justified the infringement on the Jaycee's male members' associational freedoms, especially since the Jaycees' had failed substantially to demonstrate that the admission of women to memberships would impose "any serious burdens on the male members freedom of expressive association." The Court observed that while there may be "some incidental abridgement of... protected speech... acts of invidious discrimination in the distribution of publicly available goods [and] services... cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit," and therefore such actions are not entitled to constitutional protection.

Roberts is an especially appropriate case for examining constitutional protections for lawyers' associational and expressive rights when rejecting potential clients. While concurring in the judgment and agreeing that the Jaycees were not an intimate personal association, Justice O'Connor was critical of the majority opinion's requirement that the organization make a "substantial showing that the admission of unwelcome members 'will change the message communicated by the group's speech.' This requirement, in the context of the Court's balancing of interests test, "raises the possibility that certain commercial associations, by engaging occasionally in certain types of expressive activities, might improperly gain protection for discrimination."

In her analysis, Justice O'Connor evaluated the constitutional protections associated with expressive associations when compared with the third associational category: commercial associations. She specifically explored the issue whether associations, entered into while practicing law, created either an expressive association

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202 Roberts, 468 U.S. at 623.
203 See id. at 623, 625-26.
204 Id. at 626.
205 Id. at 628.
206 Id. at 632 (O'Connor, J., concurring).
207 Id. (O'Connor, J., concurring).
208 Id. at 634-38 (O'Connor, J., concurring). See generally Berenson, supra note 119, at 36-39 (rejecting an 'attorney subordination of financial self-interest' argument to remove Nathanson's law practice from the commercial association category).
with heightened protection or a commercial association that receives only minimal constitutional protection in its activities.\textsuperscript{209}

Justice O'Connor noted that the distinction between expressive and commercial associations is often not clear cut because "[n]o association is likely ever to be exclusively engaged in expressive activities... [a]nd innumerable commercial associations also engage in some incidental protected speech or advocacy."\textsuperscript{210} In her view, an association should be characterized as commercial if its activities are not deemed predominately expressive in nature.\textsuperscript{211}

When the association becomes commercial to any substantial degree, it is subject to state regulation and loses the absolute right to determine its membership,\textsuperscript{212} including the right to select its employees, suppliers, or customers.\textsuperscript{213}

In determining which category an association will fall, it is necessary to determine the purposes of the association and its members.\textsuperscript{214} The purpose of a shopkeeper, when entering or refusing to enter into a transaction with a customer, is clearly commercial in nature and, therefore, the "shopkeeper has no constitutional right to deal only with persons of one sex."\textsuperscript{215} But a lawyer is not a shopkeeper, and lawyers' purposes may vary depending on the client and the client's needs. Thus, "[I]lawyering to advance social goals may be speech,"\textsuperscript{216} "but ordinary commercial law practice is not."\textsuperscript{217}

How should one characterize Judith Nathanson's refusal to represent men in divorces? Was her refusal to represent Stropnicki essentially the exercise of her First Amendment right to speaker autonomy and, as such, a refusal to enter into a group voice with a male, which would distort her feminist message? This characterization could possibly entitle her to First Amendment protection from the state's anti-discrimination statute if this is ultimately viewed by the courts as lawyering meant to advance a

\textsuperscript{209} See Roberts v. United States Jaycees, 468 U.S. at 635 (O'Connor, J., concurring) (noting the characteristics distinguishing a commercial association from an expressive one cannot be articulated with simple precision).

\textsuperscript{210} Id. (O'Connor, J., concurring).

\textsuperscript{211} See id. (O'Connor, J., concurring).

\textsuperscript{212} See id. at 636 (O'Connor, J., concurring) (explaining that only expressive activities and organizations are beyond state regulation).

\textsuperscript{213} See id. at 634 (O'Connor, J., concurring) (finding the most simple commercial participants, including a shopkeeper, subject to state restraint).

\textsuperscript{214} See id. at 636 (O'Connor, J., concurring) (pointing out the two main criteria for the expressive activity tests).

\textsuperscript{215} Id. at 634.

\textsuperscript{216} Id. at 636 (citation omitted).

\textsuperscript{217} Id. at 636 (O'Connor, J., concurring) (citation omitted).
social goal through an expressive association. Several arguments can, however, be made to the contrary.

First, as was noted previously, Nathanson was acting alone in pursuit of her political and personal agendas rather than as a member or representative of a formal organization. While “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment,” Nathanson’s activity was not collective, but rather individual in nature, therefore the Button line of authority should not support her position.

Second, Nathanson’s blanket rejection of males in divorce proceedings may actually be contrary to the feminist agenda she supposedly so ardently supports. Stropnický’s legal position was, in essence, a role reversal from that of the typical male breadwinner to that of the atypical male homemaker. Nathanson chose to reject Stropnický based upon his sex, not his legal claim, even though his legal claim may have offered an opportunity to advance gender equity in the law.

In seeking to eradicate the inequitable and discriminatory treatment of women in family law, Nathanson relies upon and reinforces the same stereotypical beliefs about sex and gender that she purports to attack. Her justification rests on an essentialist vision of gender which assumes, and reinforces, the legitimacy of gender as a classificatory scheme.

A lawyer who rejects potential clients based purely on the basis of their sex, race, religion, or other suspect criteria, rather than on the basis of their legal claims, should not be sheltered from the reach of the anti-discrimination statutes by the First Amendment.

218 See Berenson, supra note 119, at 53, 60 (arguing that Nathanson’s law practice could be viewed as a political association and therefore entitled to heightened constitutional protection).
219 Roberts v. United States Jaycees, 468 U.S. at 657 (quoting In re Primus, 436 U.S. 412, 436 (1978)).
220 See supra notes 187-93 and accompanying text.
221 See Vojdik, supra note 132, at 141-42 (suggesting that Stropnický’s responsibility for homemaking and childcare provided an opportunity for Nathanson to challenge the very gender essentialist notions she proclaimed to be against).
222 See id. at 139-40; Identities and Roles, supra note 86, at 1576-77. But see Mahoney, supra note 26, at 84-85, 91 (arguing that Nathanson’s selection of clients is only a particular form of specialization similar to those in civil and criminal representation).
223 Vojdik, supra note 132, at 140; see also Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990) (suggesting that gender categorization only serves to protect privileged classes and silence the voices of others).
224 As one author has noted:
Several arguments were advanced in support of Nathanson’s law practice. The practice was acting alone in defending clients rather than as a part of a national or international organization. While Nathanson had meaningful access to the legal system, she received little protection from the courts and was subject to collective, but rather to individual, challenges. The protection of authority should be extended to lawyers who make a living from their practice.

The idea of males in divorce and family law is often associated with the feminist agenda she espoused. Nathanson’s legal position was, in significant part, a male breadwinner to support a woman. Nathanson chose to reject the traditional claim, even though his basic strategy to advance gender equality was based on the theory that discriminatory actions were a result of male domination and gender bias.

Nathanson’s law practice could be characterized as a form of disguised feminist battering. See Regehr, supra note 86, at 1576-77. But see Mahone, supra note 87 (suggesting Nathanson’s law practice on the basis of clients is only a particular form of practice). Rath, Race and Essentialism in Law and Society, 64 GEO. Wash. L. REV. 1030, 1039 n.51 (1995) (hereinafter Race, Ethics, and the First Amendment) (noting a sincere and moral justification for refusing to represent a black person to avoid disbarment); Vojdick, supra note 132, at 142 (suggesting that feminist litigators avoid refusing to serve clients on the basis of whether or not they are women). Harpas, supra note 77, at 71 (distinguishing client selections based on gender and those based on the legitimacy of claims).

Such conduct violates the overarching moral injunction against treating people differently on the basis of morally irrelevant characteristics such as gender or skin color. Identities and Roles, supra note 86, at 1577 (footnotes omitted; see also David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 63 GEO. Wash. L. Rev. 1030, 1039 n.51 (1995) (hereinafter Race, Ethics, and the First Amendment) (noting a sincere and moral justification for refusing to represent a black person might still merit disbarment); Vojdick, supra note 132, at 142 (suggesting that feminist litigators avoid refusing to serve clients on the basis of gender).

Third, courts have repeatedly held that the practice of law is a business, and that the commercial elements of the practice can be regulated by the state. Even if some of Nathanson’s actions can be viewed as expressive in nature, they were merely incidental to her overall law practice, which was predominantly commercial in nature. This goes to Justice O’Connor’s concern in Roberts that commercial associations, which may occasionally engage in expressive activities, “might improperly gain protection for discrimination.” A law firm, as a commercial enterprise, therefore cannot claim First Amendment protection for anti-discrimination laws merely by showing that the firm has engaged in a substantial amount of expressive activity.

Although, as one commentator has suggested, “it is often impossible to separate those lawyers who are ‘shopkeepers’ from those who aim to create, with their clients, an associational voice,” it is conceivable that a court may in the future, find the freedom of expressive association argument to be persuasive in protecting a lawyer from sanction under an anti-discrimination statute for refusing clients based on racial grounds, given an appropriate fact pattern. In the most typical scenario, however, contacts between

[Respect for a lawyer’s personal integrity requires that he not be forced to advocate causes that he finds morally reprehensible. It is quite another matter, however, to assert that an attorney may decline to represent individuals on the basis of their status. Such conduct violates the overarching moral injunction against treating people differently on the basis of morally irrelevant characteristics such as gender or skin color. Identities and Roles, supra note 86, at 1577 (footnotes omitted; see also David B. Wilkins, Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?, 63 GEO. Wash. L. Rev. 1030, 1039 n.51 (1995) (hereinafter Race, Ethics, and the First Amendment) (noting a sincere and moral justification for refusing to represent a black person might still merit disbarment); Vojdick, supra note 132, at 142 (suggesting that feminist litigators avoid refusing to serve clients on the basis of gender). Harpas, supra note 119, at 71 (distinguishing client selections based on gender and those based on the legitimacy of claims).]


See Stropnick v. Nathanson, 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997) (finding that Nathanson practices law for a profit in the form of a partnership, solicits business by advertising in various media and with a sign, and is listed with a number of referral services); see also Borenson, supra note 119, at 38; Lawyers’ Identities, supra note 112, at 99.

Roberts, 468 U.S. at 632.

See id. at 637 (finding no special First Amendment protections in commercial law practice); Hishon, 467 U.S. at 78 (1983) (holding that law firms are granted no First Amendment immunity from employment discrimination claims).

Lawyers’ Identities, supra note 112, at 99.
lawyers and potential clients will likely be viewed as commercial encounters, and, therefore, First Amendment protections will be available only in rather unusual circumstances. A more broad-based argument, however, can be advanced in support of the lawyers’ unfettered right to select clients, which is applicable to a considerably wider spectrum of potential attorney-client relationships.

D. 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.

This argument is an “example of interest balancing in the regulatory context.” It requires a weighing of the public policies underlying the anti-discrimination statutes, the principles of equality and equal access, against the public policies supporting the need for an efficient and fair system of justice that are expressed in the constitutional assurances of the right to effective assistance of counsel and in lawyers’ ethics codes. Some argue that the lawyers’ absolute discretion in client selection is necessary for the integrity of our adversarial system of justice and thus should prevail against the contravening public policies expressed in the equality principle. Others view this attempt by lawyers to hold themselves out as “above the law”, as unnecessary to the effective practice of law and detrimental to a profession which, in the past,

230 Stonefield, supra note 15, at 196. “[A] lawyer must retain ethical discretion when selecting clients that allows a balancing of interests when discriminatory considerations are pitted against the lawyer’s personal and professional integrity.” Day & Rogers, supra note 46, at 38.

231 See Day & Rogers, supra note 46, at 34 (suggesting there is no inconsistency in anti-discrimination advocacy and the concept of lawyer autonomy); Iijima, supra note 48, at 74 (arguing that a lawyer’s interest in being able to discriminate is outweighed by society’s interest in securing equal treatment for clients). The Supreme Court has stated that “lawyers are essential to the primary governmental function of administering justice . . . .” Goldfarb v. Virginia State Bar, 421 U.S. 773, 782 (1975).

232 See Chiu, supra note 15, at 13-14, 16-21 (suggesting that a lawyer who is compelled to represent a client will not meet standards of zealous advocacy); Day & Rogers, supra note 46, at 36 (suggesting “legitimate, lawful interests” may exist even when discriminatory issues are before an attorney who refuses to provide legal representation); Quick, supra note 101, at 10 (recognizing the attorney’s need to refuse representation for legitimate reasons); Stonefield, supra note 15, at 106-07 n.13 (noting there are a number of exemptions in anti-discrimination statutes because of the realization that there is a balance between unequivocally prohibiting all discrimination and maintaining personal autonomy); Miller, supra note 15, at 166 (noting the potential discrepancy in providing zealous advocacy when client representation is compelled and maintaining personal integrity and autonomy).
has held itself out as a champion of the cause of equal rights. Since the focus of this article is on New York, it is appropriate to begin the analysis of this issue by examining the nature and source of public policies on both sides of the issue which would affect a lawyer practicing in New York State.

1. Competing Public Policies

Public policy in New York clearly supports equal protection under the law and equal opportunity for the State's inhabitants to participate fully in the economic, cultural and intellectual life of the state. To this end the state has enacted legislation to eliminate and prevent discrimination in employment, places of public accommodation, educational institutions, public services, housing accommodations and other important areas of concern. This equality principle is viewed as essential not only for protecting the rights and proper privileges of individuals, but also for protecting "the institutions and foundation of a free democratic state." Public policy also supports the fundamental right of equal access to the judicial system, including the right to assistance of counsel. Similarly, at the federal level, the principle of equality has been a defining element of government policy reflected in the Declaration of Independence, the Constitution and the current plethora of federal anti-discrimination statutes. Government policy has moved inexorably toward the elimination of improper discrimination in our society and toward the right of equal access to our system of justice. Therefore, the privilege demanded by lawyers that they be free from the strictures of the anti-discrimination statutes is arguably a vestige of the past, and no

234 See N.Y. CONST. art. I § 11 (guaranteeing equal protection of the laws to all persons); N.Y. EXEC. LAW § 290(3) (McKinney 1993) (creating a division in the executive branch to promote these goals).
235 See N.Y. EXEC. LAW § 290(3) (McKinney 1993).
236 Id.
237 See N.Y. CONST. art. I § 6.
238 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
239 See U.S. CONST. amend. XIV, § 1.
241 Begg, supra note 7, at 300-01 (noting changes in public policy have made discrimination in employment, education and private property transactions completely unacceptable and illegal).
longer in keeping with current social norms, expectations, or government policy.\(^{242}\)

Yet public policies in New York also support the need for an effective and fair system for the administration of justice. Since our system of justice is adversarial in nature, it is recognized that, if the system is to work properly, those exposed to the system as civil litigants and criminal defendants need effective advocates to represent their sides in the controversies.\(^{243}\) This need for an advocate is recognized in the United States and New York State Constitutions,\(^{244}\) Federal\(^{245}\) and New York State\(^{246}\) statutes, and in case law.\(^{247}\) The demand that a lawyer be an effective, zealous, loyal, and competent advocate infuses the Lawyer’s Code of Professional Responsibility,\(^{348}\) and also underlies state legislation setting forth standards for admission,\(^{249}\) mechanisms for disciplining lawyers,\(^{250}\) and case law creating causes of action for malpractice.\(^{251}\)

\(^{242}\) See RESTATEMENT, supra note 27, § 14 cmt. b (stating that anti-discrimination statutes are generally applicable to lawyers in client selection); Iijima, supra note 48, at 73 (noting the irony in suggesting lawyers have a “somehow more special and sacred” position in society, and can therefore “give[ ] free rein” to personal racial and gender prejudices in deciding whom to represent).


\(^{244}\) See U.S. CONST. amend. VI (guaranteeing assistance of counsel in criminal proceedings); N.Y. CONST. art. I, § 6 (guaranteeing the criminally accused the right to counsel); see also Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing the importance of guaranteed representation for criminal defendants); Johnson v. Zerlet, 304 U.S. 456, 462-63 (1938) (identifying the right to counsel for defense to a criminal charge as a “fundamental human right”).


\(^{247}\) See Gideon, 372 U.S. at 344 (stating that right to counsel as a means for securing fair trial is an “obvious truth”); Smith v. O’Grady, 31 U.S. 329, 334 (1941) (reversing conviction in part because of court’s failure to provide counsel); Avery v. Alabama, 307 U.S. 444, 446 (1940) (stating that guarantee of counsel requires an opportunity for counsel to confer with the client and prepare the defense and cannot be satisfied by mere formal appointment);

\(^{248}\) Johnson, 304 U.S. at 462 (suggesting the right to counsel is “essential” in preventing the deprivation of rights); Powell v. Alabama, 287 U.S. 45, 72 (1933) (stating “a logical corollary” of the right to be heard is the appointment of counsel).

\(^{249}\) See DR 5-101 to DR 5-110; DR 6-101 to DR 6-102; DR 7-101 to DR 7-110 (setting forth standards for attorney representation which discuss conflicts of interest, competency, and advocacy).

\(^{250}\) See N.Y. JUD. LAW §§ 90(1), 460 (McKinney 1953) (providing appellate divisions with authority to regulate admission to the bar).

\(^{251}\) See id. § 90(2) (providing appellate divisions with the authority to censure, suspend, and remove attorneys from the bar).
Public policy also recognizes that lawyers play an essential role in our system of justice as gatekeepers and, as such, lawyers have the professional responsibility to filter out meritorious or frivolous claims that potential clients may seek to bring merely out of avarice or spite. Thus, New York’s Code of Professional Responsibility requires lawyers to reject certain clients, or withdraw from representation when actions are brought to simply harass another or when a claim is meritorious, frivolous, or illegal. If a lawyer should proceed in such actions the lawyer may be subject to sanction under court rules or statute. Not only do these public policies recognize the need for an effective advocate as essential to the integrity of our system of justice, but they mandate that lawyers exercise discretion in the selection of their clients. Finally, it must be noted that, for many purposes, the attorney-client relationship is contractual in nature, and that public policy has long supported

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[Notes and references omitted for brevity.]
the freedom of individuals to enter into or refuse to enter into contracts, especially those for personal employment.\textsuperscript{258}

2. The Case for Lawyer Autonomy

In order to be an effective advocate and to play the role of a meaningfully independent gatekeeper in our system of justice, lawyers argue that they must have the personal and professional autonomy to reject certain clients and causes even when this might conflict with the principle of equality expressed in anti-discrimination statutes.\textsuperscript{259} But should lawyers have more personal autonomy in selecting clients than is allocated to other professionals, and many others, in our society? Is the practice of law truly unique in this respect? Many would answer these questions in the affirmative.

If one assumes that the public policies requiring a fair and efficient system for the administration of justice are equivalent to, or of greater importance than, the public policies underlying the equality principle, then the professional rules and duties that have historically made the system function properly should be accorded great deference.\textsuperscript{260} More specifically, the professional requirements


\textsuperscript{258} Freedom of contract is derived from the Fourteenth Amendment to the United States Constitution as a liberty guaranteed by the due process clause, and has been frequently applied as a restraint on federal and state power. While freedom of contract is not absolute, any "legislative authority to abridge it could be justified only by exceptional circumstances." S. Doc. No. 103-6, reprinted in \textit{Congressional Research Service of the Library of Congress, The Constitution of the United States of America: Analysis and Interpretation} 1981-82 (Johnny H. Killian & George A. Costello eds., 1996). In \textit{Coppage v. Kansas}, 236 U.S. 1 (1915), the Supreme Court stated:

[Included in the right of personal liberty and the right of private property--partaking of the nature of each--is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.

Id. at 14; see also Simon, \textit{ supra} note 252, at 1128 (considering the right to control one's labor to be fundamental); \textit{Race, Ethics, and the First Amendment}, supra note 224, at 1039 (recognizing the argument supporting a lawyer's "moral right to control his or her own labor").

\textsuperscript{259} See Quick, \textit{ supra} note 101, at 12 (discussing how a lawyer's compliance with anti-discrimination rules can result in violation of other ethics rules, particularly those requiring competent and zealous representation); see also Day & Rogers, \textit{ supra} note 46, at 34-35 (arguing that a lawyer does not violate anti-discrimination statutes by refusing to represent a client who is a member of a protected class, as long as her refusal is based on autonomous, ideological principles and not naked prejudice).

\textsuperscript{260} See Day & Rogers, \textit{ supra} note 46, at 25 (claiming a lawyer's political and ideological aversion may undermine the ability to provide effective advocacy); Stonefield, \textit{ supra} note 15,
that mandate that lawyers be zealous, loyal, effective, and professionally independent in their gatekeeper role should be viewed as fundamentally important to the integrity of the system. A lawyer's personal autonomy, since it infuses each of these professional responsibilities, also deserves similar deference and respect.

The importance of zealous advocacy by a lawyer "both to his client and to the legal system" is strongly emphasized in the Code of Professional Responsibility. While the Code places some limits on a lawyer's zeal, a client has a right to expect that his or her lawyer will put forth his or her best efforts to achieve the client's legitimate objectives. Professional services are usually provided in exchange for a fee, but the ethical provisions require zealous representation even if the services are provided pro bono or for the reduced fees that often accompany court appointments. Thus, the Code requires a lawyer to make a professional commitment to advocating for the client even in the absence of financial incentives. This is one of the characteristics that makes law a profession rather than merely a business.

It has been noted that many lawyers shape their professional identities through their role as advocates in our adversarial system of justice, and that this role is often intensely personal.
Lawyers, as advocates and advisors, often personally identify quite strongly with the interests and causes of the clients they represent despite the concept of professional detachment. As one commentator has stated relative to the personal commitment and zeal brought to lawyering by many attorneys:

We are indeed persons when we provide legal services, and our very personhood is crucial to both the appearance and reality of legal work. Our beliefs, our words, our genders, races and reputations infuse, enable and limit what we can offer those in need of legal help. We sometimes do and always should be able to marshal our very selves as lawyers on behalf of causes.

Understandably, lawyers with such an intense commitment can, in many instances, have a difficult time separating their personal and professional reaction to a particular client or cause, and it is because of this integration of the lawyer's persona with his or her

Recognition of the lawyer's right to reject prospective clients is also necessary to protect the lawyer's ability to fashion his or her professional identity. In choosing the clients one represents, the lawyer engages in an act expressing the lawyer's conception of self, and contributing to the further formation of that self.

Collett, supra note 155, at 159-60; see also Timothy W. Floyd, The Practice of Law as a Vocation or Calling, 66 FORDHAM L. REV. 1405, 1416 (1998) (suggesting lawyering will ultimately shape one's entire character); Lawyers' Identities, supra note 112, at 93 (noting that many lawyers construct and reveal their true identity through the adversarial process).

See Joseph Allegritti, Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship, 27 CREIGHTON L. REV. 1, 8 (1993) (citing that "lawyers often deal with their clients in a face-to-face, long-term, and intensely personal relationship"); Day & Rogers, supra note 46, at 31 (suggesting effective persuasion is the result of personal sincerity); Miller, supra note 112, at 93 (identifying a connection between "professional identity and personal belief"); see also supra note 48 and accompanying discussion (noting how lawyers identify personally with their clients' claims and concerns).

See Allegritti, supra note 266, at 10-12 (discussing how lawyers continue to represent their clients' interests despite doubts concerning the validity of the client's cause and the means necessary to achieve the client's ends); Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L REV. 669, 673 (1978) (arguing that lawyers are not "legally, professionally, or morally accountable for the means used or the ends achieved" for their clients); Identities and Roles, supra note 86, at 1505 (1998) (suggesting that objectivity and neutrality have an important place in the legal arena); John J. Werley, Foreword: Neutralism, Perfectionism, and the Lawyer's Duty to Promote the Common Good, 40 S. TEX. L. REV. 1, 4 (1999) (noting criticism of the view that an attorney simply acts as a "mouthpiece" for client).

Martha Minow, Foreword: Of Legal Ethics, Tucis, and Doing the Right Thing, 20 W. NEW ENG. L. REV. 5, 8 (1998); see also Collett, supra note 155, at 161. Collett noted that the lawyers discretion to select clients, is supported by a belief in the primacy of liberty over license, the importance of the moral autonomy of lawyers, the systemic benefits derived from the exercise of that autonomy, and a recognition in the limited desirability of legal regulation of all immoral conduct. It is grounded in the lawyer's moral right to craft a professional identity consistent with his or her deeply held beliefs.

Id.
As one legal commitment and commitment can, protecting their personal character or cause, and it is mandatory with his or her own professional identity.

In choosing the clients, lawyer's conception of self, the practice of law as a profession (s)uggesting lawyerly will suprana note 112, at 93 (noting the adversarial process). An Essay on George Orwell 1983 (noting that "lawyers are hardly personal relationship"); rejection is the result of personal consideration between "professional duty and any discussion (noting other concerns).

Lawyers continue to represent the client's cause and the lawyer, The Professionalism and suggesting that lawyers are not or the ends achieved" for example as a "mouthpiece for the change of the Right Thing, 20 W. 161. Collett noted that the importance of the from the exercise of that regulation of all immoral things. A professional identity legal work that a lawyer arguably must have absolute discretion relative to those clients and causes they will represent.271

From a practical standpoint there is an underlying concern that a lawyer compelled to represent a client or cause the lawyer finds repugnant may not be able to provide the personal commitment that is essential to truly zealous and effective advocacy.272 Qualified or impaired advocacy can result when a lawyer has such an "inner conflict" resulting from a forced relationship, that it threatens the lawyer's personal belief system.273 Since "[n]ot every lawyer will be able to meet the requirements of zealous advocacy under conditions of personal, political or ideological aversion,"274 it is feared that the client will not receive the zealous and effective advocacy to which he or she is entitled, and that the integrity of the system of justice will be called into question in the process. In criminal cases, and "[e]ven in routine civil matters, a lackadaisical lawyer can do a great deal of harm," and the errors or nonfeasance may be difficult or impossible to repair after the fact.275

271 This has been described as a "confluence of professional identity and personal belief..." Lawyers' Identities, supra note 112, at 93. One author has stated: "few would question that, when an individual or entity seeks to retain a lawyer, the lawyer acts consistently with the professional norms in refusing to render legal services if the prospective client or the prospective cause is repugnant, or even mildly offensive, in light of the lawyer's personal values." Green, supra note 107, at 53; see also Day & Rogers, supra note 46, at 35, 37 (arguing that lawyers should be given the discretion to reject a repugnant client or cause based on professional considerations).

272 See EC 2-30 (stating that a lawyer should refuse employment when "unable to render competent service"); WOLFRA, supra note 8, at 157-59 (discussing the importance of communication between lawyer and client regarding both legal and non-legal matters); Chin, supra note 15, at 17-19 (describing the ineffective counsel clients' receive when their attorney feels little commitment toward them because of their particular race or gender); Day & Rogers, supra note 46, at 26 (discussing the implications of Strobnick v. Nathanson, 19 M.L.R. 39 (M.C.A.D. Feb. 25, 1997)); Stonefield, supra note 15, at 113 (noting that the alleged found the rationale for the traditional rule... wholly unconvincing"; Quick, supra note 101, at 10 (noting that "the courts have found that a lawyer's personal prejudice against a prospective client is a legitimate reason for declining representation").

273 See Allegretti, supra note 268, at 14-15 (discussing why a lawyer should listen to his client's position even though the lawyer may believe it to be morally dubious); Day & Rogers, supra note 46, at 36 (claiming that forced representation will result in diminished advocacy); Quick, supra note 101, at 14-16 (arguing that it is the clients who suffer when a lawyer is forced to represent them).

274 Day & Rogers, supra note 46, at 26; see also Chin, supra note 15, at 13 (stating that the legal system has an interest in preventing clients from going into cases where from the beginning it is clear that they are likely to be shafted").

275 Chin, supra note 15, at 14. The author also states "[t]here are powerful reasons that both legal culture and legal rules impose a special duty of loyalty on attorneys towards their clients." Id. If lawyers cannot discriminate in selecting clients and are enjoined to take clients who they do not want, they would likely perform adequately, like conscripts in the army, rather than being highly motivated. See id. at 14, 17. Recalcitrant counsel may therefore only practice at a level sufficient to avoid malpractice liability or discipline, thus...
Similarly, the Code of Professional Responsibility deems loyalty by a lawyer to his client to be a fundamental component of the attorney-client relationship, and hence essential to the integrity of our system of justice. A lawyer, as a fiduciary, must be absolutely loyal to his client. This, in turn, implicates a lawyer's responsibilities to avoid conflicts of interest, to maintain a client's confidences and secrets, and not to "[p]rejudice or damage the client during the course of the professional relationship.

These professional responsibilities are meant to encourage clients to trust their legal advocate and advisor with their confidences, financial well being, or even their freedom. Trust and confidence require a personal relationship or rapport in which strong bonds may develop between attorney and client. Many lawyers believe this close attachment or bonding is essential to the effective practice of law. Some commentators have argued that this personal

potentially resulting in injustice or loss to the client. See id. at 17-18; see also EC 6-5 (stating that a lawyer should be motivated by more than civil liability when representing a client).

276 See Polk County v. Dodson, 454 U.S. 312, 318-319 (1951) (stating that "a defense lawyer best serves the public... by advocacy the unaffiliated interests of his client") (citation omitted); EC 5-1 (stating that the lawyer's interests in and loyalty to the client are paramount). "[T]he stakes go beyond those of the client's interests; the justice system has an interest in ensuring that parties to actions are represented by committed counsel. By way of analogy, some conflicts of interest between lawyer and client are not waivable, even if the client consents." Chin, supra note 15, at 16; see also Wendel, supra note 243, at 47 (noting that "the judiciary has supported the organized bar's position that loyalty to one's client is the polestar value for lawyers").

277 See RESTATEMENT, supra note 27, at § 16; JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 829-30 (6th ed. 1941) (emphasizing the highly fiduciary relationship between an attorney and his client); Letourneau, supra note 27, at 147-49 (listing intimacy, confidence, and loyalty as characteristics of the lawyer-client relationship).

278 JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES Canon 6, at 498 (explaining that a lawyer's "obligation to represent [their] client with undivided fidelity" forbids the lawyer from taking on adverse interests); RESTATEMENT, supra note 27, at § 16(3) (stating the importance of fidelity and good faith in the attorney-client relationship).

279 See DR 4-101 [22 N.Y.C.R.R. § 1200.19]; N.Y. C.P.L.R. § 4503 (McKinney 1992) (stating the importance of confidential communication between attorneys and their clients).

280 DR 7-101 [22 N.Y.C.R.R. § 1200.32(a)(3)].

281 See David B. Wilkins, Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars, 11 GEO. J. LEGAL ETHICS 855, 878 (1998) (noting that trust is so important in the attorney-client relationship that a client has "an unqualified right to fire their lawyers 'at any time, and with or without cause'); see also Linton v. Perin, 656 F.2d 207, 212 (6th Cir. 1981) (holding Sixth Amendment was violated when an individual was deprived of the right to choose his own retained counsel).

282 See Smith v. Westside Transit Lines, Inc., 312 So.2d 371, 376 (La. Ct. App. 1975) (finding that a "breakdown of communications" was good cause to discharge an attorney); EC 3-4 (suggesting that it is because of the significant responsibilities involved that only those regulated by the legal profession may be permitted to act in the capacity of a lawyer); Stonefield, supra note 15, at 121 (arguing that a "close attachment with a client is necessary for the effective practice of law").

283 As one author has stated.
relationship can become so intense as to be similar to that of a marriage, or that clients may have a claim on their lawyer similar to that of family members or friends. Clearly, forcing a lawyer to enter into a personal relationship with a client or cause that the lawyer finds abhorrent or repugnant would have a negative impact on the lawyer’s professional commitment and loyalty to the client, and on the effectiveness of the lawyer as an advocate or counselor.

Public policies derived from constitutional sources also buttress lawyers’ claims to autonomy in client selection. Historically, American lawyers have not been viewed as being open to or available to all comers, as are common carriers or public utilities, neither has the English “Cab Rank” rule, which requires lawyers to represent any client seeking legal services, been adopted in this country. Therefore, forcing lawyers into contractual relationships against their will not only strikes at the lawyers’ traditional professional prerogative of autonomy in client selection, but is also contrary to the fundamental tenet of American society that citizens have the freedom to enter into contracts or to refuse to enter into contracts. Of course, central to any contractual relationship is the mutual assent or agreement of the parties.

Attorneys such as Judith Nathanson . . . believe that a strong personal relationship—a bonding and a feeling of attachment and solidarity—between the lawyer and client is essential to their practice of law, and assert that the strong personal relationship is possible only with clients of a particular race or sex. Stonefield, supra note 15, at 120.

284 See Luban, supra note 146, at 167-68.
285 See Fried, supra note 146, at 1067 (suggesting the “efforts [one will] expend for [their] friend or relative are more likely to be effective” due to the strong social tie between them).
286 See Mortimer D. Schwartz et al., Problems in Legal Ethics 59 (3d ed. 1992) (stating the general rule that “a lawyer is not a public utility . . . . [absent special circumstances, you are free to decide whom you will represent (assuming they don’t want) and whom you will not represent. You only have to answer to your conscience and your stomach.”), Richard H. Underwood, Taking and Pursuing A Case: Some Observations Regarding “Legal Ethics” and Attorney Accountability, 74 KY. J. 173, 174 (1985-86) (cautioning against relying on clichés when taking or rejecting cases despite the fact that “it is regularly observed that the American lawyer is not a common carrier”).
287 See Hazard, supra note 169, at 89 (describing the lawyer as merely an agent to his client, much like a cab driver who must accept anyone who beckons); WOLFRAM, supra note 8, at §10.2.2 (describing the “cab rank” rule which, in theory, requires English barristers to accept every client).
288 “[O]ne of the basic sources of the lawyer’s power—the ability to refuse assistance—is grounded in what most people would consider a fundamental right to control one’s labor.” Simon, supra note 252, at 1128. In People v. Marcus, the New York Court of Appeals stated, “[t]he free and untrammeled right to contract is a part of the liberty guaranteed [sic] to every citizen by the federal and state Constitutions.” 77 N.E. 1073, 1073 (N.Y. 1906).
289 “Indeed it is and always has been central to the very concept of a ‘contract’ that there be ‘assent by the parties who form the contract to the terms thereof.’” Runyon v. McCrary, 427 U.S. 160, 194 (1976) (White, J., dissenting) (citation omitted); see also 1 Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 1:3 (4th ed. 1998) (defining the
While it is recognized that lawyers, as officers of the court, and as bearing an obligation associated with the privilege of practicing law, have a duty to represent clients when appointed to do so by a court, this is a major exception to the general rule of freedom to contract. This exception, which usually arises in the criminal justice setting, implicates significant constitutional rights of criminal defendants, as well as the integrity of the criminal justice system. While conceding the need for this exception, lawyers should, nevertheless, not be forced into nonconsensual contractual relationships with potential clients in routine civil litigation or transactional matters where the public policies underlying representation of criminal defendants are implicated to a far lesser extent. The lawyer's freedom to contract should not be abridged except for the most essential of public concerns, such as the protection of the constitutional rights of defendants, especially when alternative sources of legal assistance are readily available to the potential client.

290 See generally N.Y. C.P.R.R. § 1102(e) (McKinney 1997) (mandating that the court appoint an attorney to the indigent); In re Smiley, 330 N.E.2d 53, 55 (N.Y. 1975) (stating that it is in the court's discretion whether or not counsel should be assigned); RESTATEMENT, supra note 27, at § 14(2) (stating that "a tribunal with power to so appoints the lawyer to provide the services").

291 See U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 2.3 (2d ed. 1996) (hereinafter HALL) (noting that the Sixth Amendment is applicable whenever incarceration can be imposed, including juvenile and contempt proceedings).

292 There is no constitutional right to a lawyer in private litigation. See Mallard v. U.S. District Court, 490 U.S. 296, 298 (1989) (holding that 28 U.S.C. § 1915d does not authorize the appointment of an unwilling attorney to represent an indigent in a civil matter). LEGAL REPRESENTATION OF MINORITIES: BACKGROUND BRIEFING PAPER #3, in 5 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES at 3-13 (1984) (noting that "no clear constitutional mandate" exists for free civil legal service to the poor); see also Race, Ethics, and the First Amendment, supra note 224, at 1034 (stating that "in civil cases... the 'right to counsel' is not a guarantee that a litigant will actually be represented by counsel."). But see In re Smiley, 330 N.E.2d at 58 (stating that "[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case") (citations omitted).

293 See In re Smiley, 330 N.E.2d at 58 (discussing alternative ways to secure legal counsel including voluntary organizations, federally-funded programs, and the possibility of pro bono representation from lawyers fulfilling their obligations to indigents under legal canons).
3. Public Policies Supporting the Principle of Equality Outweigh the Lawyer Autonomy Argument

In a dialogue between competing public policies and interests, a convincing case can be made that lawyers’ personal and professional autonomy is important to the practice of law, necessary to the fair and efficient administration of justice, and an essential element in the level of a lawyers’ job satisfaction. But the claim that lawyers should have an unfettered or absolute right to reject potential clients on any basis whatsoever, be it pure whimsy or outright invidious discrimination based on race, religion, gender, or other suspect criteria, is arguably not supportable based on public policy, lawyers’ professional responsibilities, or the personal needs or rights of individual attorneys.

The public policies underlying the principle of equality are reflected in a constitutional and statutory structure that attempts to prevent discrimination targeted at certain groups or status categories by those offering goods or services to the public294 or by those who would refuse to enter into contracts with certain members of our society.295 Clearly, there is sufficient flexibility within this structure to allow lawyers legitimate personal and professional autonomy in client selection without granting absolute discretion.296 An unfettered right invidiously to discriminate is simply not essential to the effective and ethical practice of law.297

Take, for example, the lawyer’s gatekeeping function, which is clearly an essential, legitimate role required of lawyers. The role of a gatekeeper in our system of justice, whether the lawyer is using objective or subjective criteria in determining whether to accept a case, will, on occasion, require the lawyer to deal with issues that relate to a potential clients’ sex, race, religion, or other status listed in the anti-discrimination statutes. A lawyer is required by disciplinary rules and statute to reject potential clients when they wish to bring an action simply to harass another or to bring a claim

296 See RESTATEMENT, supra note 27, at § 14 cmt. b (noting that statutes prohibiting certain types of discrimination are a legitimate limitation on lawyers’ freedom to select clients).
297 See Stonefield, supra note 15, at 120 (“None of several common views of the lawyer—as a ‘hired gun,’ as counselor, as fiduciary and as an officer of the court—support the claim that ‘affirmative’ discrimination is necessary to the practice of law.”).
that is frivolous or illegal. The lawyer has a responsibility to bring his professional skill and knowledge to bear in objectively making such a determination. Therefore, if anyone in a protected status sought out a lawyer for assistance in bringing a frivolous, meritless or illegal case, the lawyer must reject him or her, despite his or her membership in a protected class. This is not discrimination, but rather the mandated exercise of the gatekeeper’s professional discretion. In exercising this function it must be emphasized that, traditionally, the character of the client’s case, not the character of the client, is the prime determining factor.

Subjective factors can also legitimately influence a lawyer as gatekeeper in rejecting potential clients or causes. A potential client may have a nonfrivolous claim that the lawyer believes is immoral, or perhaps harmful to the environment, or one that will cause great harm to the adverse party at little gain to the client. Alternatively, the client may wish the lawyer to help him in forwarding a cause to which the lawyer is personally opposed. In his gatekeeper role, a lawyer normally has the personal autonomy to reject such clients for these reasons so long as they are not a subterfuge for rejecting a client based on unlawful motives.

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298 See DR 7-102(a)(2)(b) [22 NYCRR § 1200.33] (stating that lawyers must represent their clients within the boundaries of the law); DR 2-109 [22 NYCRR § 1200.14] (stating that lawyers have an obligation to decline employment if the client wishes to proceed on non-legal grounds).

299 See Simon, supra note 252, at 1983 (adding reflective judgment as a dimension of the lawyer’s professional duties); Stonefield, supra note 15, at 123 (stating that a lawyer has the right to make a personal interpretation of the law). HAZARD & HOPES, supra note 10, at § 1.2:104 (claiming that the provision of high quality service is “[a] pact between lawyers and clients”).

300 See supra note 296 and accompanying text (indicating DR 2-109 [22 NYCRR § 1200.14] requires a lawyer to decline representation initially, while DR 2-110 [22 NYCRR § 1200.15] requires withdrawal after the representation began).

301 See Hon. William Howard Taft, Ethics of the law, in ADDRESSES AND LECTURES 15 (Earle C. Hathaway ed., 1914) (opining that every member of the legal profession must do some “free” work; it is a matter of personal preference how much and what work to accept).

302 See EC 7-9 (“[W]hen an action in the best interest of the client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action.”); HAZARD & HOPES, supra note 10, § 1.2:303 at 38 (recognizing that an attorney is not obliged to accept a case he or she considers repugnant and that, if representation has already been undertaken, an attorney may withdraw from representation on this ground); Green, supra note 107, at 25-26 (addressing the role of the lawyer’s religious and moral understandings in the client selection process). But see Lloyd N. Cutler, Book Review, 83 Harvard L. Rev. 1746, 1750 (1970) (suggesting that, for the adversary system to work, even unsavory defendants need vigorous representation).

303 See Stonefield, supra note 15, at 122 (expressing that a lawyer can choose to work on behalf of any client or cause he or she wishes to support as long as the selection criteria used are lawful); Wendel, supra note 243, at 57 (stating a lawyer cannot be “compelled to
Beyond the gatekeeper analogy several other responses to the lawyers’ need for personal and professional autonomy arguments merit consideration.

First, as previously mentioned, most relationships between lawyer and client do not require bonding or a close, intimate, personal relationship. For example, routine transactional lawyering, and even criminal defense work, always require the best efforts of the lawyer, but rarely require personal bonding.

Second, lawyers can and do effectively represent clients for whom they have no personal regard, and for causes in which they may not believe, and, in fact, some lawyers even provide effective service to clients despite actual animosity or resentment toward their clients. The concept of professional detachment allows a lawyer to provide professional and effective representation, even without the lawyer’s personal commitment to the client or the cause. This is true of court appointed lawyers, government lawyers, in-house counsel, associates in law firms, and possibly in the scenario of the “last lawyer in town.” The feature common to these examples is that the lawyers do not always have a say over which clients or represent a particular client in a case where the client would be able to secure alternate representation.

304 See supra notes 267-75 and accompanying text.

305 See HALL, supra note 291, § 10.13 at 340-41 (citing U.S. Supreme Court’s refusal to require an attorney to develop a “meaningful relationship” with the client); Day & Rogers, supra note 46, at 30 (noting that “[m]uch of the time, a client’s cause and the legal argument that supports it lack partisan interests to an attorney”); Wendel, supra note 243, at 50 (suggesting that the lawyer and client enter a relationship as “contracting parties, not friends”).

306 See HALL, supra note 291, § 10.13, at 341 (“Lawyers represent people all the time that they do not like and cannot stand to talk to, yet they still provide excellent representation.”). WILIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 35 (1996) (enumerating reasons, particularly moral ones, for a lawyer’s strong negative feeling about their clients); Allegretti, supra note 268, at 5-13 (advancing the idea that George Orwell’s 1986 essay Shooting the Elephant helps us better achieve an understanding of the dynamics between attorney and client); Wendel, supra note 243, at 55-57 (claiming that one way lawyers distance themselves from unsavory clients is by claiming to advocate for the abstract rights of their clients, not the “evil” clients themselves).

307 See JERRY GIESLER & PETE MARTIN, THE JERRY GIESLER STORY 326 (1969) (emphasizing the importance of keeping a distance from one’s clients). HAZARD & HODGES supra note 10, § 1.2:301 at 35-36 (explaining lawyers “administer justice in the broadest sense” when they remove the “moral filter” and just provide citizens with what the law allows); Stonefield, supra note 15, at 121 (arguing that professional standards should override conflicting personal concerns in the attorney-client relationship); see also HALL, supra note 291, § 4.11 at 93 (stating that a lawyer’s representation of a client does not indicate the lawyer supports the client’s views); Wendel, supra note 243, at 53-53 (acknowledging the “lawyer’s role . . . is instrumental—to provide expertise that clients lack and assisting clients in pursuing their interests”).

308 See Begg, supra note 7, at 288 (referring to situations where a lawyer’s discretion in selecting clients is limited).
matters they handle, yet they have the professional duty to represent their clients competently, zealously, and in compliance with the Code of Professional Responsibility. Those who would argue that absolute discretion in client selection is essential to the practice of law must admit that there are already major segments of the lawyering population, including all the lawyers in California, who do not have absolute discretion in client selection, and yet still perform competently and ethically as advocates and advisors. 309

Third, though lawyers clearly owe a duty of loyalty to their clients as fiduciaries and agents, this is professional loyalty, not personal loyalty. 310 Loyalty requires a lawyer to maintain the client's confidence and secrets, avoid conflicting interests, avoid the appearance of impropriety, and not prejudice or damage the client during the representation. 311 It does not mean that the lawyer will share the client's cell in prison if convicted, or help pay the damages in a personal injury case that the client has lost. Loyalty is a professional, rather than personal duty; it is owed by all fiduciaries and agents to their clients. 312 The loyalty duty is not unique to law and does not support a demand for absolute discretion in client selection. 313

Fourth, requiring lawyers to comply with anti-discrimination statutes results in some marginal infringement on the lawyer's freedom to refuse to enter into contracts. Yet, the freedom of contract is not absolute. 314 "It is now well established that [federal

309 See Begg, supra note 7, at 288-289 (discussing how the possible enactment of a mandatory pro bono law in New York "would clearly be a significant and controversial erosion of the lawyers' prerogative in selecting clients"); supra note 54 and accompanying text (citing CAL. CIV. CODE § 51 (West 1982) and CAL. RULES OF PROF'L CONDUCT Rule 2-400(c) (West Supp. 2000)).

310 See EC 7-17 (limiting duty of loyalty to professional obligations); Wendel, supra note 243, at 92-94 (cautioning that caring too much for one's client may in fact "be an impediment to providing effective legal services").

311 See DR 4-101 [22 NYCRR § 1200.19]; DR 5-101 [22 NYCRR § 1200.20]; DR 7-101(a)(3) [22 NYCRR § 1200.32]; DR 9-101 [22 NYCRR § 1200.45] (collectively addressing the lawyer's duty of loyalty).

312 RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (clarifying that an agent has fiduciary duties only with respect to matters within the scope of the agency); see also HAROLD GILL BRUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 67 at 125-27 (2d ed. 1990) (concluding that a fiduciary's duty only extends to matters connected to his or her agency).

313 See Bruschlein & Gregory, supra note 312, at 125 (applying a broad definition of fiduciary); see also GEORGE T. BOGERT, TRUSTS § 31 at 105 (6th ed. 1987) (requiring fiduciaries to account for their own actions, even where they are seeking to withdraw as trustees).

The Lawyer's License to Discriminate

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law ... prohibits racial discrimination in the making and enforcement of private contracts. New York State statutes prohibiting discrimination in places of public accommodation, and federal statutes, such as the Americans With Disabilities Act and § 1981, are a constitutionally valid exercise of the government's power even though they may infringe on the lawyer's right to refuse to enter into a contractual relationship with certain potential clients.

Fifth, it can be argued that the public policies underlying the equality principle are simply too important to allow them to be overcome by the personal whims, biases, or inner conflicts of individual attorneys. Improper discrimination harms not only the individuals who are discriminated against, but also society in general and the integrity of our system of justice. The legal profession cannot ignore history or the trend toward equal rights.

circumstances have to be made out in order for the legislature to abridge the freedom of contract.

The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified.

Nebbia, 291 U.S. at 527-28 (footnotes omitted).


320 See Lijuma, supra note 48, at 74-75 (deciding that the ultimate choice of representation should rest with the client); Race, Ethics, and the First Amendment, supra note 224, at 1069 ("Lawyers have a special responsibility to ensure that the promise of 'Equal Justice Under Law' implicit in our Constitution amounts to more than just empty rhetoric.").

321 See Begg, supra note 7, at 295 (balancing the attorney's desire to have discretion in selecting clients against the costs of invidious discrimination, and concluding that the "overall costs to individuals and society of invidious discrimination may simply be too great to bear"); Quick, supra note 101, at 13 (reporting that the purpose of a Michigan anti-discrimination rule "was to protect the public's confidence in the legal system" and that "[a]ny manifestation of invidious discrimination by lawyers or judges damages public confidence in the fairness and impartiality of the administration of justice") (alteration in original).

In claiming a license to discriminate in client selection, the legal profession is attempting to hold itself out as above the laws that apply to all other professions.\textsuperscript{323} Publicly espousing this position will harm a profession that has held itself out as being in the forefront of the equal rights movement.\textsuperscript{324} The irony and hypocrisy of such a position are clearly evident.\textsuperscript{325} In any balancing of interests, the benefits of a rule of absolute discretion in client selection are overwhelmingly outweighed by its costs. While all would agree that lawyers need a level of discretion in client selection, absolute discretion that violates the principle of equality is too extreme a position and must be regarded as an unwarranted anachronism.

Finally, whether lawyers are happy in their work or not, or whether the lawyers do or do not find personal and professional rewards in their law practice, is not sufficient to defeat the public policies that underlie the equality principle. The connection between the need for friendship, bonding, or personal rapport with clients, and the fair and effective administration of justice, is tenuous at best,\textsuperscript{326} and even if given credence, should not be

\textsuperscript{323} See David B. Wilkins, \textit{In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law}, 38 WM. & MARY L. REV. 269, 289 (1996) (arguing that the prima facie obligation to obey the law should have a special significance for lawyers . . . [and] lawyers have always presented themselves as having a special responsibility to support legally sanctioned schemes of social cooperation and to ensure that the law remains an instrument of justice'). \textit{But see William H. Simon, Should Lawyers Obey the Law?}, 28 WM. & MARY L. REV. 217, at 216-36 (1996) (arguing that lawyers have no categorical duty to obey the law and ‘[p]opular respect for law may require lawyers to violate the positive law’).

\textsuperscript{324} See Stonefield, supra note 15, at 133 (‘The prior message that lawyers can discriminate, even though virtually no one else can . . . was harmful to the moral authority and image of the legal profession and undermined the societal commitment to eradicating discrimination.’); \textit{identities and roles}, supra note 86, at 1581.

\textsuperscript{325} Lawyers have been granted a monopoly by the state to perform an essential service . . . [T]he profession’s commitment to ‘equal access under law’ is undermined if individual lawyers are allowed systematically to refuse to represent individuals on the basis of considerations that have nothing to do with either their moral worth as human beings or the legitimate interests of attorneys.

\textit{Id.}

\textsuperscript{326} See Lijina, supra note 48, at 73 (noting the irony in lawyers championing equal protection while reserving the right to represent clients based on their own gender and racial biases).

adequate to defeat the public policies underlying the anti-discrimination statutes.

In discussing the lawyers’ need for personal and professional autonomy, it was argued that as a practical matter, a lawyer who could not develop a personal commitment to the client or the client’s cause, would not provide the zealous and effective advocacy which a client deserves—thus potentially injuring the client. The lawyer, in such instances, therefore, has a professional responsibility to avoid such representations. As presented, this is a “lawyer centered” argument premised on a lawyer’s professional duties. Yet, a “client centered” argument can also be presented as follows.

E. 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.

This argument in favor of exempting lawyers from the reach of the anti-discrimination statutes when selecting clients is premised on the notion, touched on previously, that a potential client may be harmed by having an advocate or counselor who is dragged into representing the client against the lawyer’s will, especially when the lawyer has a personal animosity or prejudice against the client or his or her cause. Not only may it be difficult to determine if or when such harm has occurred, but it may also be difficult or impossible to repair the harm after the fact. It is, therefore, in a potential client’s “best interest” not to force a lawyer into a position where the lawyer’s responsibilities to the client may be compromised. It is precisely for this reason that the Code of Professional Responsibility requires lawyers not to take particular
clients or to withdraw from representation when there are certain conflicts of interest. Common sense dictates that no sensible client should want a particular lawyer when the lawyer believes himself or herself unable zealously to represent the client’s interests. Therefore, it is necessary to protect such potential clients from their own folly in dealing with a particular lawyer, as is done when the rules prevent clients from waiving certain types of conflicts of interest. A second point supporting this argument premised on the integrity of the legal system, is that the state has an interest “in preventing clients from going into cases where from the beginning it is clear they are likely to be shafted.”

In short, the need to protect the client and the integrity of the legal system are sufficiently important that they should be given precedence, even in cases of invidious discrimination, over the application of the anti-discrimination statutes and disciplinary rules. The protection of clients’ interests from harm must be viewed as paramount, even though this may limit potential clients’ choice of counsel.

1. Potential Clients May Have Sound Reasons for Wanting a Particular Lawyer to Represent Them Despite a Conflict of Interest

The paternalistic “client’s best interest” argument may deserve credence in some cases, but it is not valid in all instances. There are times when clients may rationally want to retain a lawyer who does not wish to represent them. Several examples come to mind where a potential client would, rather than being foolish, have valid reasons for wanting a particular lawyer to represent them, despite

329 DR 2-109 [22 N.Y.C.R.R. § 1200.14].
330 See DR 2-110(b)(2) [22 N.Y.C.R.R. § 1200.15] (mandating withdrawal if it is obvious that continued employment would result in violation of a disciplinary rule).
331 See Chin, supra note 15, at 18 (noting that injustice was caused by attorneys who did not zealously represent their clients’ interest).
332 DR 5-101(b) [22 N.Y.C.R.R. § 1200.20]; DR 5-104(b) [22 N.Y.C.R.R. § 1200.23]; see also Chin, supra note 15, at 16 (stating that “the justices system has an interest in ensuring that parties to actions are represented by competent counsel”); Fred C. Zacharias, Waiving Conflicts of Interests, 108 Yale L.J. 407, 420-423 (1998) [hereinafter Waiving Conflicts] (arguing that overriding client consent is justified by the need to protect the client, to protect independent interests of the legal system, and to prevent improper influence by lawyers).
334 See id.
335 See H. Montgomery Hyde, Carson 151 (1974) (providing an example in the practice of Sir Edward Carson). Identities and Roles, supra note 86, at 1581 (noting that these clients have the added protection of a malpractice suit and other doctrines prohibiting incompetence or deceit).
the lawyer's personal reservations, prejudices, or downright hostility.336

Perhaps most obvious is the situation where the lawyer has an excellent reputation for expertise or success in the community in an area of law involving the potential client's legal concerns. A sophisticated client would not necessarily be foolish in wanting the best legal services available, even if the lawyer potentially harbored reservations.337 The risks of not developing a personal rapport with the lawyer, or of having mildly impaired representation at a certain level, may be offset by the value of having "the best lawyer in town" in your corner. It is also conceivable that the potential client may wish to keep the "best lawyer in town" from representing the adverse party.338

Another example would be where a male client might view it as being in his "best interest" to be represented by the best female lawyer available, or possibly in certain circumstances by an African-American lawyer, because mere representation by a woman or an African-American would be to the client's tactical advantage.339 It is well recognized that, at times, a lawyer's personal attributes can be attributed to the client or the cause either positively or negatively, therefore a potential client's selection or rejection of a particular lawyer may be dictated by such attributes as race, religion, or gender.340 Similar strategies are commonly employed by lawyers in

336 See Race, Ethics, and the First Amendment, supra note 224, at 1042 (referring to the Klu Klux Klan's decision to retain a black lawyer in a case challenging a disclosure order by the state of Texas).

337 See Restatement, supra note 27, at § 122 (noting that decisions upholding a waiver of attorney conflict generally look at the client's sophistication and experience in legal matters); Richard L. Abel, American Lawyers 201 (1989) (recognizing that many clients, including corporate executives, wealthy individuals, and the in-house counsel of many corporations are the social equals, if not social superiors, to many lawyers).

338 From a strategic standpoint, a client with adequate resources may wish to tie up all the best legal resources in the community by retaining several lawyers or large firms, or consulting with them, thus creating a conflict of interest and preventing them from representing the adverse party. Whether these lawyers are hostile, unfriendly, or unmotivated is irrelevant from a strategic viewpoint, since they can no longer assist the other party. See Thomas D. Morgan, Suing a Current Client, 9 GEO. J. LEGAL ETHICS 1157, 1162 (1996). But see SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392, 1402 (N.D. Ill. 1992) (noting that there is the potential for clients with significant resources to parcel out their legal business among many firms for the sole purpose of creating conflicts of interest that would prevent potential adversaries from using these firms).

339 See Race, Ethics, and the First Amendment, supra note 224, at 1038, 1042 (pointing out that race is often an integral part of the moral and legal significance of a case); Letourneau, supra note 27, at 189-90 (noting how important it is for a client's lawyer to understand her background in order to then make her background understood by both judge and jury).

340 Perhaps the best recent example of race being used as a trial tactic is the O. J. Simpson case, which has been discussed in a torrent of books and articles. See, e.g., Marcia Clark, Without a Doubt 114, 126-127, 211, 288-90 (1997).
jury selection in order to enhance the chances of a favorable verdict.\textsuperscript{341}

A final example is where the potential client is acting on principle. A potential client may be a member of a minority group that has demanded that its members be treated equally, or an AIDS activist, or a gay rights activist, and is willing to force a recalcitrant lawyer to represent him or her just to make a point.\textsuperscript{342} Or perhaps, ironically, a white male may be rejected by a female lawyer for representation in a divorce case, merely on the basis of his gender, and the male takes offense.\textsuperscript{343} Such people may have had a good reason for going to a particular lawyer in the first instance, but perhaps they feel even more strongly about it after being rejected for apparently discriminatory motives. It can become a matter of principle to the rejected client, even if, in the lawyer’s view, it may be in the “best interests” of the potential client to find another lawyer.

2. The Client Has a Right to Choose

If one accepts that any or all of these examples might have some validity, and that, based on previous arguments, lawyers are subject to the anti-discrimination statutes,\textsuperscript{344} an argument can be made that lawyers should not be granted an exemption from such statutes because of a lawyer’s personal conflict of interest premised on invidious motives if the client wishes to proceed.\textsuperscript{345} As one commentator has noted, “[l]awyers often justify their misdeeds as necessary to protect the interests of their clients.”\textsuperscript{346}


\textsuperscript{342} The use of “test cases” to advance civil rights is a common practice. See, e.g., NAACP v. Button, 371 U.S. 415 (1963).

\textsuperscript{343} This is obviously the scenario in Stropnick v. Nathanson, 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

\textsuperscript{344} See supra parts IV.4–1a to 4–1c.

\textsuperscript{345} See John Leubsdorf, Using Legal Ethics to Screw Your Enemies and Clients, 11 GEO. J. LEGAL ETHICS 831, 842 (1998) (observing that ethical rules are often used by attorneys to justify unethical conduct).

\textsuperscript{346} Id. at 836.
Given a scenario in which a potential client rationally desires to retain a lawyer, even though the lawyer may, for statutorily improper reasons, not wish to represent that person, an argument can be made in favor of mandating representation, or alternatively, subjecting the lawyer to some other sanction under an anti-discrimination statute and DR 1-102(a)(6).

The principle issue underlying such an argument is that of client autonomy. Clients have the right to make certain decisions relative to their legal matters, even over the objections of their lawyers, and even if there is a potential that the client may be harmed in some fashion. Thus, a client may normally waive most conflicts of interest. While certain conflicts may not be waived due to the effect on third parties or the difficulty of the waiver being truly informed, a client should normally be able to waive a conflict concerning a personal prejudice, or even the hostility of their lawyer. A client who is aware of a conflict has the right to assume the risk, or to ignore the risk, depending on the client’s personal situation.

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424 See Iijima, supra note 48, at 15; Wendel, supra note 243, at 51-52 (stating that client autonomy includes “the power to compel the lawyer to accept the client’s resolution of a contested moral issue, and the duty on the part of the lawyer to . . . adopt the client’s [moral] commitment as her own”).

425 See EC 7-7; EC 7-8 (stating that it is the lawyers’ responsibility to predict harsh consequences but it is the client who makes the ultimate decision); MR 1.2(a); see also RESTATMENT, supra note 27, at Ch. II Topy 4, Introductory Note; CRYSTAL, supra note 289, at 64-65 (1998) (noting that the traditional view of the lawyer as an expert entrusted to handle client matters as the lawyer sees fit has been rejected by the Model Rules and the Restatement (Third) of the Law Governing Lawyers as being “paternalistic” and “suffer[ing] from fundamental defects,” and including “[t]he expert model subordinates the actual client to the lawyer’s view of the client’s interests”); Josephine Ross, Autonomy Versus A Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek to Control Their Defense, 28 AM. CRIM. L. REV. 1343, 1344-48 (1998) (discussing the availability of a nonresponsibility defense when a lawyer chooses to place a client’s autonomy before his or her legal interests), Zacharias, supra note 15, at 918 (discussing how clients may be willing in a contractual sense to enter into an attorney-client relationship in which they receive “less than perfect representation”).

426 See DR 5-101(a) [22 NYCRR § 1200.20]; DR 5-104(a)(2)(3) [22 NYCRR § 1200.23]; see also Waiting Conflicts, supra note 332, at 412-16 (listing a number of reasons why a client may want to waive the conflict-of-interest protection including strategy, familiarity, and qualifications).

427 See supra note 15, at 16 (noting that, in the interest of the justice system, some conflicts of interest between client and lawyer cannot be waived).

428 See supra note 15, at § 122 ents. a, b, and c (discussing the client’s level of sophistication relative to forgiving some of the protections against conflicts of interest); Race, Ethics, and the First Amendment, supra note 224, at 1044, 1054 (believing current ethics rules fail to consider situations where a lawyer publicly opposes the ideology of his or her client).

429 See supra note 27, at § 122 cmts. a, b, and c (discussing the client’s level of sophistication relative to forgiving some of the protections against conflicts of interest); Race, Ethics, and the First Amendment, supra note 254, at 1038 (discussing the Ku Klux Klan’s retention of a black lawyer who was openly critical of the organization’s ideology).
In weighing the risk of a lawyer’s personal prejudices resulting in a lack of zeal or impaired advocacy, a potential client may be comforted by the fact that, once lawyers enter into attorney-client relationships, even if against their will, they have ethical responsibilities to serve competently§ and not to injure their clients’ interests. These duties are bolstered by the threat of malpractice and discipline. It is also important to note that, in New York, law firms as entities may also be subject to discipline for allowing firm members to violate the disciplinary rules, thus providing an even greater incentive for competent representation.

Therefore, a lawyer who wishes to reject a potential client based strictly on race, gender, religion, or other invidious criteria cannot hide behind the ethics rules by claiming that he or she is acting in the “best interest” of the client if the client is willing to enter into the attorney-client relationship and to waive the conflict. The choice lies with the client. If the lawyer still refuses to enter into the relationship, despite the waiver, the lawyer will be subject to liability under the Human Rights Law, and to sanction under DR 1-102 (a)(6).

The very idea that a legislative enactment can dictate how a lawyer practices law or can sanction a lawyer for actions taken in the practice of law, as is suggested in the last paragraph, would be viewed as an improper usurpation of judicial authority by the legislature in many jurisdictions. This leads to the sixth and last argument supporting a lawyer’s right to exercise absolute discretion in the selection of clients.

§ See DR 6-101 [22 NYCRR § 1200.30]; EC 6-5 (stating that “the obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty”); RESTATEMENT, supra note 27, at § 16 cmt. f (discussing a lawyer’s intentional failure to fulfill a valid contract); Wondel, supra note 242, at 60 (stating that a client’s interest must prevail over the lawyer’s, even if they significantly diverge); Zacharias, supra note 15, at 949-50 (discussing different levels of lawyer competency).

§§ See DR 7-101(a)(3) [22 NYCRR § 1200.32]; Chia, supra note 16, at 17 (noting lawyer’s are “subject to contractual, fiduciary, and ethical duties to act in the interest of their clients”).

Paragraph 395 See RESTATEMENT, supra note 27, at §16, cmt. d ("the law seeks to elicit competent and diligent representation through civil liability [and] disciplinary sanctions . . . .").

§ See DR 1-102(a)(1) [22 NYCRR § 1200.3]; supra notes 23, 25.

§§ See DR 5-101 [22 NYCRR § 1200.20].

§§§ See William L. F. Felstiner and Austin Sarat, Enactments of Power: Negotiating Reality and Responsibility in Lawyer–Client Interactions, 77 CORNELL L. REV. 1447, 1451-54 (1992) (examining conventional views of power between lawyer and client, noting that power varies by status, economic resources, or the vagaries of particular clients); Iijima, supra note 48, at 75 (arguing that a client has a choice to go elsewhere when faced with an attorney who is forced to take their case).

§§§§ See N.Y. EXEC. LAW § 296 (McKinney 1993).

§§§§§ See DR 1-102(a)(6) [22 NYCRR § 1200.3].
ejudges resulting in potential client may be into attorney-client attorney-client they have ethical not to injure their ed by the threat of tant to note that, in object to discipline for plenary rules, thus interpretation. Potential client based dious criteria cannot sce or she is acting in willing to enter into the conflict. The refuses to enter into will be subject to o sanction under DR 2.25.

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that "the obligation to act from fear of civil liability or m. f (discussing a lawyer's te 242, at 60 (stating that a significantly diverges); Zacharias, incompetency).

Note 15, at 17 (noting lawyer's the interest of their clients"), seeks to elicit competent and sanctions . . . ").

5.

F. Under the Separation of Powers Doctrine, Legislatures May Not Regulate the Practice of Law. That Authority is Reserved to or Inherent in the Judiciary.

In the United States, under the separation of powers doctrine, regulation of lawyers' conduct and the practice of law has been viewed primarily, and at times exclusively, as a function of the judiciary. In some jurisdictions this power is bestowed by the state's constitution upon the judiciary, yet even when state constitutions do not expressly grant such authority, courts have claimed the authority to regulate the practice of law as an "inherent power" of the courts. In instances where other coordinate branches of government have attempted to infringe on the judiciary's authority over the practice of law, most courts have ruled such actions unconstitutional under the "negative inherent powers" doctrine, thus preserving their control over the legal profession.

These doctrines may come into play when a state statute or a state administrative agency created by the legislature attempts to compel lawyers to represent certain classes of clients under threat of sanction or civil liability. The Stropnick v. Nathanson decision in Massachusetts is an example where the separation of powers issue was raised. There, the Massachusetts Commission Against Discrimination sanctioned a lawyer for violating the state's antidiscrimination statute by refusing to represent a potential client strictly on the basis of his gender. Some have argued that the Commission had no authority to sanction any lawyer since the Massachusetts Constitution has separated various powers among the Executive, Judicial, and Legislative Departments, with the Judicial Department being granted ultimate authority over the practice of law. Since the judiciary has not adopted an anti-discrimination ethics rule, and since the ethics code in

351 See Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 2-3 (5th ed 1986) (discussing legislative attempts to usurp the authority of the judiciary to regulate the practice of the law); Wolfram, supra note 8, §§ 2.2.1, 2.2.2, at 22, 24.


353 See Wolfram, supra note 8, § 2.2.3, at 27 (1986).


355 M. CONST. pt. 2, chs. I-III; pt. 1, ch. 1 art. XXX.

356 See, e.g., Marino v. Tagara, 480 N.E.2d 286, 289 (Mass. 1985) (stating the "court is the 'ultimate authority' over the conduct of members of the bar"); In re Keenan, 37 N.E.2d 516, 520 (Mass. 1941) (finding the judiciary has power over admission to and removal from the bar and over practice of the law).
Massachusetts grants lawyers great discretion in client selection, Nathanson has arguably done nothing to warrant sanction by the courts, and the Commission arguably has no authority to sanction a lawyer for activities undertaken in the practice of law due to the separation of powers doctrine.\(^{367}\)

1. Separation of Powers Relating to the Practice of Law is Not an Issue in New York

While this argument can be made in Massachusetts and in some other jurisdictions,\(^{368}\) it is not valid in New York State. Under the New York State Constitution, "the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature."\(^{369}\) While the Legislature has, in turn, broadly delegated authority to the courts, "any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute."\(^{370}\) Thus, the separation of powers doctrine is not an issue in New York concerning the legislative regulation of the practice of law.

It is also worthy of note that, unlike Massachusetts, the judiciary in New York has adopted both an anti-discrimination disciplinary rule that tracks the state Human Rights Law,\(^{371}\) and a Statement of Client's Rights and Responsibilities and Statement of Client's Rights, which state that a lawyer may not discriminate in client selection.\(^{372}\) In New York there is no conflict between the legislature and judiciary over who controls the practice of law. On the issue of client selection, it appears that the judiciary has gone to greater lengths than even the legislature in clearly stating that improper discrimination based on certain suspect criteria or status should

\(^{367}\) See Wolfram, supra note 120, at 22, 24. It must be noted that constitutionally based prohibitions against discrimination would control over a state court's efforts to regulate the practice of law. See, e.g., In re Griffiths, 413 U.S. 717 (1973); see also Kristen L. Christophe, Recent Developments in the Law Affecting Professionals, Officers, and Directors, 33 TORT & INS. L.J. 629, 637 (1997) (noting the failure of the Stroopsky decision to cite Mass. DR 5-105, which barred attorneys from accepting employment where their independent professional judgment may be adversely affected).

\(^{368}\) See Ochialino and Browne, supra note 362, at 474-83.

\(^{369}\) A. G. Ship Maint. Corp. v. Lezak, 503 N.E.2d 681, 683 (N.Y. 1986) (citing N.Y. Const. art. VI, § 30); see also WOLFRAM, supra note 8, § 2.2.2, n.31, at 24.

\(^{370}\) Lezak, 503 N.E.2d at 683 (citing Cohn v. Borchard Affiliations, 250 N.E.2d 690 (N.Y. 1969); see also N.Y. Jud. Law § 211(1)(b) (McKinney 1983) (providing legislative authority for the Chief Judge, after consultation with the Administrative Board, to adopt court rules regulating practice and procedures in the courts).

\(^{371}\) Compare DR 1-102 (a)(6) [22 NYCRR § 1200.3], with N.Y. Exec. Law § 296(2) (McKinney 1993).

\(^{372}\) See 22 NYCRR § 1210.1 and Part 1406 App. A.
have no part in the practice of law from either a legal or ethical perspective.

V. CONCLUSION

The ethical landscape in New York has changed because the law has changed. The ruling in Cahill v. Rosa, interpreting the definition of place of public accommodation to include "establishments dealing with goods or services of any kind," is so expansive that most law practices will now fall within this definition. A generalized argument that law is different from other professions, and, therefore, that law offices are not places of public accommodation, is not likely to be successful given the broad language in Cahill. Should a specific lawyer wish to argue that his or her practice is not a place of public accommodation, the burden of proof would be on the individual lawyer to show that his or her specific practice was "distinctly private," and therefore not covered by the Human Rights Law. The overall effect is that the Human Rights Law as interpreted by Cahill and earlier federal statutes, such as the Americans With Disabilities Act, and 42 U.S.C. § 1981, now constitute a body of legal authority prohibiting various forms of improper discrimination by lawyers.

This expansion of anti-discrimination law puts teeth into New York's anti-discrimination disciplinary rule, which sanctions unlawful discrimination in the practice of law. In turn the Statement of Client's Rights and the Statement of Client's Rights and Responsibilities are the mechanisms created by the judiciary for alerting potential clients that discrimination in client selection by lawyers is inappropriate. Thus, a judicial decision concerning a dentist, a unique disciplinary rule, and the two court rules delineating clients' rights, when taken together, appear to have revoked the lawyers' traditional right to exercise absolute discretion in the selection of clients in New York. This new ethical regime should prevail over the arguments presented concerning lawyers' constitutional rights and personal and professional autonomy, as

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774. Id. at 278; see also N.Y. EXEC. LAW § 292(9) (McKinney Supp. 2000).
775. Cahill, 674 N.E.2d at 277.
776. N.Y. EXEC. LAW § 296(2) (McKinney 1993).
780. DR 1-102(a)(6) [22 NYCRR § 1200.3].
781. See 22 NYCRR 1210.1, and Part 1400 App. A.
well as the need to protect clients’ interests, except in unusual circumstances.

It is important to emphasize the nature of the limitations being placed on lawyers’ traditional rights. Since it is generally accepted that lawyers must have a significant degree of discretion in client selection if they are to be effective advocates, advisors, and gatekeepers, lawyers may continue to exercise their discretion based on any legitimate, non-discriminatory ground, but they may not reject a client strictly on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. If, in exercising discretion, a lawyer’s motives are viewed as suspect, then, as stated in Cahill, “they may be tested under the usual rules.”

The traditional view, which allowed absolute discretion in client selection, was rooted in the history and lore of the legal profession. It has remained unchallenged for years, but laws and our society have changed. While some may continue to argue on principle, or based on a specific sympathetic fact pattern, that lawyers need absolute discretion in client selection, there is a fundamental discomfort inherent in arguing that lawyers, and lawyers alone of all the professions, have a right to invidiously discriminate.

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382 See Cahill, 674 N.E.2d at 278 (N.Y. 1996); DR 1-102 (a)(6) [22 NYCRR 1200.3]; N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993).
383 Cahill, 674 N.E.2d at 278.
384 Even as staunch a defender of the lawyer’s right to exercise discretion in client selection as Charles W. Wolfram, whose quotation at note 6 supra, reflecting the traditional view helped introduce this article, has concluded that a lawyer may not unlawfully discriminate in client selection. Nevertheless, he argues that “a lawyer providing advocacy services that directly involve ideology, is entitled to distinguish among her prospective clients based on their gender . . . ideology has a direct link to decisions about which clients to represent.” Wolfram, supra note 120, at 26; see also Lawyers’ Identities, supra note 112, at 101 (citing the First amendment and professional discretion in favor of allowing lawyers to choose who their clients will be); Minow, supra note 270, at 7 (stating that “lawyers should have the ability to select and reject clients based on political visions and personal commitments”); Deborah L. Rhode, Can A Lawyer Insist on Clients of One Gender? NATL. L. J., Dec. 1, 1997, at A21 (noting the discomfort of bar leaders (who normally are supportive of anti-discrimination legislation) over the Commissioner’s decision in Srotnicky v. Nathanson). From this point of view, the interaction of anti-discrimination statutes and court rules in New York is a negative manifestation of the “law of unintended consequences.” Frank B. Cross, Paradoxical Perils of the Precautionary Principle, 63 WASH. & LEE L. REV. 851, 862 (1996).
385 See supra note 88 and accompany text (suggesting that enabling lawyers to discriminate invidiously in client selection is contrary to the oath lawyers swear to uphold and would undermine the integrity of the profession).