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Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative

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The organized bar can be both praised1 and criticized2 for its efforts to

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1. See AM. BAR ASS'N, ACHIEVING JUSTICE IN A DIVERSE AMERICA: REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM 2-4 & app. B (1992) [hereinafter ABA TASK FORCE ON MINORITIES] (including selected ABA policies and reports relating to racial and ethnic bias); AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY AND PROCEDURES HANDBOOK 153-161 (1991-92) [hereinafter ABA POLICY HANDBOOK] (containing a syllabus index of ABA policy positions relating to civil rights and constitutional law, including the 1965 ABA statement of its policy not to discriminate against any person because of race, color, creed, or national origin); WORKING GROUP ON CIVIL JUSTICE SYSTEM PROPOSALS, AM. BAR ASS'N, AMERICAN BAR ASSOCIATION BLUEPRINT FOR IMPROVING THE CIVIL JUSTICE SYSTEM 24-27 (1992) (discussing promoting access for underrepresented special populations); see also N. Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON AIDS AND THE LAW 1 (1992) (encouraging members to provide pro bono services to those infected with HIV); COMM. TO ENHANCE PROFESSIONAL OPPORTUNITIES FOR MINORITIES, ASS'N OF THE BAR OF THE CITY OF NEW YORK, STATEMENT OF GOALS OF NEW YORK LAW FIRMS AND CORPORATE LEGAL DEPARTMENTS FOR INCREASING MINORITY HIRING, RETENTION AND PROMOTION, 46 REC. 720 (1991) (providing a document in which each signatory pledged to pursue full and equal participation of minorities, minority hiring, minority partners, and senior corporate counsel.).

2. One ABA Section noted:

Another significant change in the legal profession during the decades of the 1970s and '80s has been its gradual and belated opening to minority lawyers and multicultural diversity. Symptomatic of the historic plight of minority lawyers in America was the formal exclusion of black lawyers from membership in the American Bar Association until 1943. Despite the formal lifting of the racial barrier in 1943, it was not until 1950 that the first African American lawyer was knowingly admitted to the Association.

eliminate invidious discrimination within the legal profession and in Ameri-
can society generally. Despite the great strides which have been made
toward the profession's goal of "blind justice," it is striking that in one of
the most fundamental aspects of the practice of law, the creation of the
attorney-client relationship, the legal profession still retains and strongly
supports what I term "a license to discriminate." Consider the following
example.

Attorney Blackstone is engaged in the private practice of law in New
York State. Blackstone's practice is limited to domestic relations matters,
and it is his custom to advertise in the local newspaper that he handles
divorces for a set fee. An African-American woman, Gwendolyn Jones,
comes to Attorney Blackstone's office seeking a divorce. Blackstone tells
Gwendolyn that he never accepts black people as clients because they are
difficult to deal with. Gwendolyn is outraged and now seeks to bring a civil
rights action against Blackstone, and also to file a grievance against him with
the appropriate disciplinary committee.

There are two issues in this hypothetical. First, has Blackstone violated
Gwendolyn's civil rights by rejecting her as a client based upon her race?
Second, has Blackstone violated any ethical rule or norm which would
subject him to professional discipline because he rejected a client based
exclusively on that client's race? In both instances, at least at the present
time in New York State, Attorney Blackstone has done nothing illegal based
on current interpretations and applications of federal or state law and is not
subject to disciplinary sanction.

Many in our society may well find this result troubling if not in fact
shocking. What of the protection of the Constitution and civil rights acts?
Could the lawyers' ethical code possibly condone such blatant discrimina-
tion?

The answer is that despite over a century of progress in American society
toward the elimination of invidious discrimination, the right of an attorney
to reject a potential client based on any criterion remains virtually unfet-
tered. The right to discriminate in the selection of clients has been, and
remains, a basic tenet of the legal profession.

With few exceptions, this right to discriminate in the selection of clients
exists despite the adoption, and indeed the proliferation, of state, local,
and federal antidiscrimination legislation. Attorneys have escaped the consequences of this legislation because offices of professionals, including attorneys, have not historically or statutorily been viewed as places of public accommodation. Moreover, lawyers generally are not viewed as acting under color of state law when in private practice. Therefore, lawyers' rendition of legal services, or their refusal to provide those same services, is viewed as distinctly private actions occurring within a consensual relationship and, as such, are outside the scope of the civil rights acts.

While the right to discriminate in the selection of clients is deeply entrenched, there are recent indications of a significant erosion of this principle. Largely ignored by the practicing bar, potential challenges have arisen, albeit in a haphazard pattern, involving uncoordinated federal, state, and local enactments, which in historical context have not been applied to attorneys' activities. Nevertheless, challenges based on a literal reading of several statutory provisions, or on the basis of evolving judicial precedents,


8. See, e.g., National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988) (holding inter alia that the NCAA could not be deemed to be a state actor on theory that it misused power it possessed by virtue of state law); Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2082-2086 (1991) (stating that in most instances the conduct of private parties lies outside the Constitution’s scope); Joseph G. Cook & John Sobieski, Jr., CIVIL RIGHTS ACTIONS § 2.07(F) (1992) (writing that “the weight of authority holds that attorneys, whether privately retained or appointed, do not act under color of law”); but see Stephen Gellers, UNDER COLOR OF LAW: SECOND CIRCUIT EXPANDS § 1983 LIABILITY FOR GOVERNMENT LAWYERS, A.B.A. J., Dec. 1992, at 121 (discussing the Second Circuit decision expanding scope of section 1983 to include acts by government lawyers).


10. See Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) (1988) (enumerating the establishments which serve the public as places of public accommodation for purposes of the act). 42 U.S.C. § 2000a(e) (1988) states that the provisions of the act “shall not apply to a private club or other establishment not in fact open to the public . . . .” See, e.g., Daniel v. Paul, 395 U.S. 298 (1969) (holding that in 1969 the restaurant was not engaged in selling food for consumption on premises, and was therefore not subject to the Civil Rights Act of 1964); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that a private club does not have to be open to the public in order to be subject to the 1964 Act).
are likely to be pressed in the future.\textsuperscript{11} In addition, several states, including New York, have amended their lawyers’ codes of ethics in an effort to eliminate improper bias or discrimination by legal practitioners, and this too may serve to erode the license to discriminate in client selection.\textsuperscript{12}

This article examines the challenges to a lawyer’s right to discriminate in the selection of clients in New York. In so doing, it first explores the traditional support for unfettered discretion in the selection of clients and then critiques that view. Next, it examines the legislative history and potential application of New York’s antidiscrimination disciplinary rule\textsuperscript{13} and compares the New York rule with similar rules and proposed rules in other states. Finally, the article analyzes the various federal and New York antidiscrimination statutes and evolving case law comprising the legal challenge to the lawyer’s license to discriminate in the selection of clients.

While this article focuses on laws and rules affecting New York lawyers, lawyers in other states also have a similar client selection privilege. Though the consequences for lawyers in other states may be dissimilar due to differences in local and state legislation and professional standards, the trends examined here, especially those relating to federal law, will affect the practice of law in all jurisdictions.

I. THE TRADITIONAL VIEW

In presenting the traditional view that a lawyer may reject potential clients for purely personal reasons, noted legal ethicist Charles Wolfram describes the lawyers’ discretion in these terms:

\ldots [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.\textsuperscript{14}

One might also add other suspect criteria to this list, some of which in other contexts would be violations of antidiscrimination statutes.\textsuperscript{15} Thus in New York a lawyer has a license to discriminate in the selection of clients on the basis of sexual orientation, age, political party, hair style, or astrological sign. Any form of discrimination in client selection is acceptable unless it is

\begin{itemize}
\item\textsuperscript{11} The legal challenges to the lawyers’ right to discriminate in the selection of clients are discussed infra beginning note 262 and accompanying text.
\item\textsuperscript{12} See infra notes 204-85, 206, 208, 210, and accompanying text.
\item\textsuperscript{13} N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1990) [hereinafter N.Y. Code].
\item\textsuperscript{14} CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 19.2, at 573 (1986).
\item\textsuperscript{15} The New York Human Rights Law for example prohibits discrimination based on age, race, creed, color, national origin, sex, disability, or marital status. N.Y. Exec. Law § 296(1)(a) (McKinney 1993).
\end{itemize}
prohibited by statute. No reason for discrimination is too base, vile, sordid, or petty for a New York attorney to use as a basis for rejecting a client.

The traditional view is reflected in the profession’s ethical rules. The Model Code of Professional Responsibility (Model Code) in EC 2-26 makes it clear that “[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become a client . . . .” The Model Rules of Professional Responsibility (Model Rules) state that “[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.” The lawyer’s freedom to select clients is qualified only by an unenforceable aspirational responsibility to provide pro bono service and by mandated acceptance of court appointments.

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18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2(c) cmt. (1992) [hereinafter MODEL RULES]. See also THE AMERICAN LAWYERS CODE OF CONDUCT cmt. to ch. III (The Roscoe Pound — Am. Trial Lawyers Found. Rev. Draft, 1982) (“Except when ordered by a court to represent a client, a lawyer has complete discretion whether to accept a particular client”); The Code of Trial Conduct states rules of employment as follows:

1. EMPLOYMENT IN CIVIL CASES
It is the right of a lawyer in his discretion to accept employment in any civil case, but he
should decline to prosecute a cause or assert a defense obviously devoid of merit, or which
is intended merely to inflict harassment or injury, or to procure an unmerited settlement,
or in which he, his firm or associates have conflicting interests. Otherwise it is his right and
duty to take all proper action and steps to preserve and protect the legal merits of his client’s position and claims and he should not decline employment in any case because of the unpopularity of his client’s cause or position.

3. EMPLOYMENT IN CRIMINAL CASES
A lawyer should not decline to undertake the defense of a person accused of crime merely
because of either his personal or the community’s opinion as to the guilt of the accused or
the unpopularity of the accused’s position, because every person accused of a crime has a
right to a fair trial, including persons whose conduct, reputation or alleged violations may
be the subject of public unpopularity or clamor. This places a duty of service on the legal
profession and, even though a lawyer is not bound to accept particular employment, requests for services in criminal cases should not lightly be declined or refused merely on
the basis of the lawyer’s personal desires, his public opinion concerning the guilt of the
accused, or his repugnance to the crime charged or to the accused.

Code of Trial Conduct (Am. Coll. of Trial Lawyers 1987).

19. See MODEL CODE EC 2-25 (1980) (“The rendition of free legal services to those unable to pay
reasonable fees continues to be an obligation of each lawyer . . . .”); MODEL RULES Rule 6.1 (“A
lawyer should render public interest legal service.”).
20. “The court in its order permitting a person to proceed as a poor person may assign
an attorney,” N.Y. CIV. PRAC. L. & R. 1102(a) (McKinney 1976); N.Y. COUNTY LAW § 722(4)
(McKinney 1991) (persons accused of crime or parties before the family court or surrogate shall be
assigned counsel if they are financially unable to obtain representation); N.Y. JUD. LAW § 35
persons in family court proceedings”), N.Y. CRIM. PROC. LAW §§ 170.16(3)(c), 180.10(3)(c),
The Tentative Draft of the Restatement of the Law Governing Lawyers (Restatement), which purportedly reflects the current status of the law, similarly comments that “[e]xcept when appointed by a tribunal with power to do so, a lawyer need not accept representation of a client.”21 A lawyer may decline representation because it is inconvenient or the client is considered repugnant.22 The Restatement, in its comments, refers to the lawyer’s discretion as a “right” and make it clear that there is “no duty to take action for the prospective client.”23

The traditional view has been espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma. In one of the earliest works on legal ethics, George Sharswood stated that an attorney “has an undoubting right to refuse a retainer, and decline to be concerned in any cause, at his discretion.”24 This sentiment was eventually codified in 1908 as Canon 31 of the American Bar Association’s (ABA) Canons of Professional Ethics (Canons),25 the predecessor to Model Code EC 2-26.

While the traditional view finds support in ethical rules and is frequently assumed in legal commentary,26 there is surprisingly little case law which

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22. Id. § 26 cmt. b.
23. Id. § 27 cmt. b.
24. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 84 (5th ed. 1884).
25. See CANONS OF PROFESSIONAL ETHICS CANON 31 (1908) [hereinafter 1908 CANONS]. The Canons of Professional Ethics (Canons) were adopted by the ABA on August 27, 1908. Canon 31 was among the original group of 32 Canons adopted. Am. Bar Ass’n, Report of the Thirty-First Annual Meeting of the American Bar Association 33 A.B.A. ANN. REP. 55-86, 557-86 (1908). Canon 31 states that “[n]o lawyer is obliged to act either as advisor or advocate by every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel . . . .” 1908 CANONS, CANON 31.
26. See generally GLEASON BOLGER, ETHICAL OBLIGATIONS OF THE LAWYER 60 (Rothman Reprint 1981) (1910); JOHN BURKOFF, CRIMINAL DEFENSE LAW AND LIABILITY § 5-1 (1992) (writing that “a criminal defense attorney is free to accept or reject employment from whomsoever the attorney pleases”); ORRIN CARTER, ETHICS OF THE LEGAL PROFESSION 44 (1915) (noting that in Great Britain an advocate must accept a retainer while here an attorney has the right to refuse cases); HENRY S. DRINKER, LEGAL ETHICS 139 (1953); Richard Chused, Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics, 65 CAL. L. REV. 636, 672 (1977) (quoting Model Code EC 2-26); Nathan M. Crystal, Ethical Problems in Marital Practice, 3 S.C. L. REV. 323, 325 (1979) (noting that “[w]ith few exceptions lawyers have the right to refuse to undertake representation regardless of reason”); David Goldberger, The “Right to Counsel” in Political Cases: The Bar’s Failure, 43 LAW & CONTEMP. PROBS. 321, 323 (1979) (quoting Model Code EC 2-26 “a lawyer is under no [legal] obligation to act as advisor or advocate to every person”); Timothy L. Hall, Moral Character, The
comments on a lawyer's right to select clients, except in the relatively well settled area of court appointments. Also, while there are no statutes in New York recognizing or codifying the lawyer's license to discriminate in the selection of clients, neither are there statutes requiring lawyers to represent all comers, although this is subject, once again, to the major exception of court appointments. At the present time in New York, only a court has the power or authority to force an attorney to represent a particular person against the attorney's will. No individual can demand the legal assistance of a particular attorney if that attorney is unwilling.

Practice of Law, and Legal Education, 60 Miss. L.J. 511, 533 (1990) (writing that the lawyer has the "freedom to decline any representation except one to which he has been appointed"); William Heffernan, The Moral Accountability of Advocates, 61 Notre Dame L. Rev. 3, 46 (1986) (writing that "[a]dovocates are not professionally obligated to accept cases offered to them"); Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. Rev. L. & Soc. Change 609, 623 (1989-90) (stating that "[i]n practice, the lawyer has an unfettered discretion to refuse to accept a person with mental disabilities as a client"). There are a few commentators who dispute the right of unfettered choice. See Monroe H. Freedman, Understanding Lawyers' Ethics 67 (1990) (discussing moral accountability in choosing a client); David Luban, Lawyers and Justice: An Ethical Study 7 (1988) [hereinafter Luban, LAWYERS AND JUSTICE] (quoting David Dudley Field: "[T]he lawyer, being intrusted by government with the exclusive function of representing litigants before the courts, is bound to represent any person who has any rights to be asserted or defended . . ."); Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 Geo. J. Legal Ethics 241, 273 (1992) (stating that when a client's interests conflict with an attorney's sense of what is just and right, the attorney need not accept the case); Wolfram, supra note 14, § 10.22, at 571-72 (writing that "[a]t least in this century, it has never been professional orthodoxy that a lawyer is required to represent any particular client").

27. See Delia Equip. & Constr. Co. v. Royal Indem. Co., 186 So. 2d 454, 458 (La. Ct. App. 1966) (stating that "[t]he duty to defend or represent imposes upon a member of the legal profession grave responsibilities which he may accept or decline at his election and for whatever reasons he chooses"); see also Hilton Hotels Corp. v. Banov, 899 F.2d 40, 45 (D.C. Cir. 1990) (stating that "[i]n an attorney has broad latitude in deciding whether he will initiate representation of a client"); Cecil v. Green, 43 N.E. 1105, 1106 (Ill. 1896) (stating that nothing in a certain provision requires "a lawyer to accept a retainer . . ."); Olympia Roofing Co. v. City of New Orleans, 288 So. 2d 670 (La. Ct. App. 1974) (holding that attorney did not have obligation to prospective client); In re Wendel's Estate, 287 N.Y.S. 893, 900 (Sup. Ct. 1936) (citing Canon 31). See also, Uneasy Accommodation, Mass. Law. Wkly., Jan. 25, 1993, at 25 (discussing Massachusetts sex discrimination case against lawyer).

28. See, e.g., Argeresinger v. Hamlin, 407 U.S. 25 (1972) (holding that absent knowing waiver no person may be imprisoned unless represented by counsel at trial); Mempa v. Rhay, 389 U.S. 128 (1967) (holding that appointment of counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him); In re Smiley, 330 N.E.2d 53, 55, (N.Y. 1975) (stating that "[i]nherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the disciplinary power of the courts to assign counsel in a proper case to represent private indigent litigants"); People v. Witeski, 207 N.E.2d 358 (N.Y. 1965) (holding that defendants under twenty-one years of age were entitled to counsel at every stage despite negative responses to questions whether they desired representation); but see Mallard v. United States Dist. Court for S. Dist. of Iowa, 490 U.S. 296 (1989) (holding that 28 U.S.C. § 1915(d) did not authorize the District Court to require unwilling counsel to represent indigent in civil cases).

29. See supra note 20 for the statutory authority for mandatory court appointments.
II. RATIONALE FOR THE TRADITIONAL VIEW

A strong case can be made to justify an attorney’s need for unfettered discretion in the selection of clients. Historically, the practice of law has been viewed as a private, one-on-one activity. Lawyers have never been viewed as being open to or available to all comers, as common carriers have been. Neither have they had the duty to serve all, as do public utilities.

Most lawyers were traditionally sole practitioners representing individuals within their communities. Clients selected lawyers based upon community reputation, and the lawyer’s decision to accept a client was often determined by personal criteria, including that individual’s standing in the community. Some ABA Section noted,

Historically the lawyer in America was an independent professional who was neither employed by another nor dependent on others to help the lawyer provide legal services. The lawyer was also a generalist, personally ready to render whatever legal service a private client might require. The vast majority of lawyers were sole practitioners, either as a full-time or a part-time occupation. Many supplemented their income and filled out their time in other activities — real estate, banking or political office — but employment of lawyers by public agencies and private organizations was virtually non-existent until the late 19th century.

NARROWING THE GAP, supra note 2, at 29.


32. MORITZ D. SCHWARTZ, PROBLEMS IN LEGAL ETHICS 59 (3d ed. 1992) (“General Rule: Lawyers Are Not Public Utilities. . . . Absent special circumstances, you are free to decide whom you will represent (assuming they want you) and whom you will not represent. You only have to answer to your conscience and your stomach.”); but see Charles W. Wolfram, A Lawyer’s Duty to Represent Clients, Repugnant and Otherwise, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 214, 223 (David Luban ed., 1983) [hereinafter Wolfram, Clients, Repugnant and Otherwise] (writing that “[i]n other areas of legal right, the American system has placed lawyers in a position like that of a public-utility monopoly. No one but a certified lawyer may render legal services. And, because of the legal system’s complexity and inaccessibility, legal services are virtually indispensable in many contexts if persons are to be assured of their legal rights.”).

33. The ABA Section of Legal Education and Admission to the Bar has commented:

The most numerous segment of the legal profession continues to be the sole and small firm practitioners for whom the traditional community-based, general practitioner was the prototype. Such lawyers generally served a large number of individual clients for whom they handled a variety of discrete matters. The work of the community-oriented lawyer commonly included real estate transactions, intergenerational transfers of property (wills and trusts), personal injuries, matrimonial and family matters, some corporate and commercial law for small businesses, as well as occasional criminal cases. They have been traditionally the true general practitioners representing both plaintiffs and defendants, borrowers and lenders, buyers and sellers, public agencies and private parties.

NARROWING THE GAP, supra note 2, at 35-6 (citations omitted). See generally DONALD D. LANDON, COUNTRY LAWYERS — THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE (1990) (providing extensive statistics and observations regarding law practice in rural settings); Abel, supra note 2, at 178-81 (providing statistics).
community, or more objective criteria, such as the potential client's ability to pay a fee. Regulation of the profession, especially during the first seventy-five years of the nineteenth century, was minimal. Organized bar associations and lawyers' codes of ethics did not evolve until after the Civil War, and New York, like other states, had no formal code of ethics for attorneys until its adoption of the ABA's \textit{Canons} in 1909. The legal profession has followed the pattern of other professions, such as medicine, which supported the concept that a doctor should not normally be forced to accept patients against the doctor's will. Traditionally, then, professionals have had the autonomy to serve only those whom they wished to serve.

This assumption of autonomy is inherent in the attorney-client relationship, which must be consensual in nature. The lawyer and client enter into a contract for the rendition of the lawyer's services, usually for a fee. The freedom to contract, a basic tenet of American society, normally prevents persons from being forced into nonconsensual contractual relationships.

34. \textit{See Model Code EC 2-24, EC 2-25 (relating to obligations to persons unable to pay a fee): but see Model Code DR 2-110(C)(1)(f) (allowing permissive withdrawal if the client "(d)eliberately disregards an agreement or obligation to the lawyer as to expenses or fees").}


36. \textit{See supra note 25. The Canons were adopted by the New York State Bar Association at its thirty-second annual meeting on January 28-29, 1909. 32 REPORT OF N. Y. STATE BAR ASSN 167 (1909).}

37. "Traditionally physicians have been free to accept or reject patients as they see fit, even though no other physician is available." Donald H. Herrmann, \textit{AIDS and the Law in Aids & Ethics} 289 (Frederic G. Reamer ed., 1991); \textit{see generally PRINCIPLES OF MEDICAL ETHICS AND CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS Rule VI pmbl. (A.M. Medical Ass'n 1989) [hereinafter AMA PRINCIPLES OF MEDICAL ETHICS]. See also discussion infra note 110.}

38. Professor Monroe Freedman notes:

Until the lawyer-client relationship is contracted, however — until, that is, the lawyer chooses to induce another to rely upon her professional knowledge and skills — the lawyer ordinarily acts entirely within the scope of her own autonomy. Barring extraordinary circumstances, therefore the attorney is free to exercise her personal judgement as to whether to represent a particular client.

FREEDMAN, \textit{UNDERSTANDING LAWYERS' ETHICS, supra note 26, at 57; see also RESTATEMENT OF THE LAW GOVERNING LAWYERS \S 26 cmt. b (Am. Law Inst. Tent. Draft No. 5, 1992) (citing Restatement (Second) of Agency \S 15 (1958)); Lon L. Fuller, \textit{Consideration and Form}, 41 COLUM. L. REV. 799, 806-808 (1941) (discussing the principle of private autonomy).}

39. \textit{See, e.g., N.Y. Jud. Law \S 474 (McKinney 1983) (discussing compensation of attorney or counsel); Martin v. Camp, 114 N.E. 46 (N.Y. 1916) (holding that a client may, with or without reason, discharge his attorney); WOLFRAM, supra note 14, at \S 9-1.9-6 (discussing client-lawyer contracts).}

This rationale would seem to carry added weight in personal service contracts, since in American society the control of one's labor is viewed as a fundamental right. 41

In addition, the need for freedom to contract in creating the attorney-client relationship is deemed essential because this relationship demands special duties of the lawyer, above and beyond those of a normal contracting party. 42 Once the relationship is formed, agency principles become involved, 43 and the attorney has fiduciary responsibilities which may not be evident in other contractual relationships. 44 Among these obligations are confidentiality of client confidences 45 as well as undivided loyalty to the client. 46

Many lawyers view the attorney-client arrangement as more than a business transaction or sale of services. The relationship is personal in nature, requiring the client to trust the lawyer's abilities and decision-
personal service

A personal rapport may also develop based upon a

making capabilities.47 A personal rapport may also develop based upon a sharing of the client’s confidences and secrets or on the fact that the client’s wealth or freedom may lie in the hands of his advocate or advisor. 48 One

The need for discretion in selecting clients also is tied to the ability zealously to advocate a client’s cause. 50 As an advocate, can an attorney put

47. "Basic trust between counsel and defendant is the cornerstone of the adversarial system and effective assistance of counsel." Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981); "Now, it is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that the lawyer’s tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, . . . is guilty of the grossest breach of trust." United States v. Costen, 38 F.2d 24, 24 (C.C.D. Cal. 1889); STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-3.1 (a) (Am. Bar Ass’n 3d ed. 1992), states that "Defense counsel should seek to establish a relationship of trust and confidence with the accused." See also the Commentary to Standard 4-3.1, stating that "[t]rusting is more fundamental in the lawyer-client relationship than the establishment of trust and confidence." Id. See also Daniel J. Kornstein, Declining Professionalism and Its Causes, in COMMITTEE ON THE PROFESSION OF THE ASS’n OF THE BAR OF THE CITY OF NEW YORK, IS PROFESSIONALISM DECLINING?, 47 Rec. 129, 132 (1992) (‘thereinafter Kornstein, Declining Professionalism’), (writing that a profession requires "lay clients to trust the expertise and ethics of practitioners”).

48. As one court noted,

The relation between attorney and client is a close personal relationship which is far more complex than simply whether the attorney is performing his professional responsibilities and obligations in the proper manner. During the course of handling the client’s case the attorney must maintain communications with the client, must be available to the client so as to furnish and to secure information, and must endeavor to maintain the trust and confidence of the client during the handling of the case. The client is frequently impatient with the progress and anxious about the outcome of the case and is often plagued by economic anxieties, especially in the typical personal injury tort claim. The personalities of the attorney and client, especially as they are revealed to each other, frequently play a much greater part in the relationship between the parties than the professional activities of the attorney in the handling of the case.


49. Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060, 1067 (1976) (arguing that clients have special claim on attorney like family and friends). See also luban, Lawyers and Justice, supra note 26, at 166-69 (comparing the lawyer-client relationship to that of a marriage).

50. Of course, the Model Code places limits on the lawyer’s zeal, see MODEL CODE EC 7-1; MODEL CODE EC 7-19; MODEL CODE DR. 7-101-102, which all place limits on the lawyer’s zeal; see also wolfram, Clients, Repugnant and Otherwise, supra note 32, at 224, where he states:
his whole heart and soul into arguing a position or representing a cause to which the attorney is fundamentally opposed? Would this lack of zeal be fair to the client? The lawyer's need for personal and professional autonomy is diminished when forced to represent a client or a cause which the lawyer finds repugnant or perhaps even immoral, or even if the lawyer believes he cannot work well with a particular person. The lawyer must

Much of this follows from the American style — perhaps found nowhere else in such vigor — of intense lawyer loyalty to the client in adversarial representations. Now, as a century ago, a client typically is represented by a lawyer who is expected to, and most often does, throw himself or herself into the representation with little emotional or personal reserve. The "exertions" of an American lawyer in behalf of a client are not merely physical — time spent, energy expended — although these may be substantial. More than this, American lawyers and their models (F. Lee Bailey, Percy Foreman, Melvin Belli) often perform with great investments of emotional resources.

Id. For an extreme and classic example of a lawyer's zeal, see Lord Brougham's defense of the Queen in Queen Caroline's Case.

[A'n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821).

51. Wolfram, Clients, Repugnant and Otherwise, supra note 32, at 214, 224:

Personal repugnance, then, may create a situation in which some lawyers cannot make the customary emotional commitment. As a result, those lawyers' representations might be defective in the normal emotional commitment that those lawyers would make in other representations and that other lawyers — including the lawyer on the other side — would make in the present case.

Id.; see also Freedman, supra note 26, at 67:

If one begins with the false notion that lawyers cannot exercise choice regarding clients, however, there is considerable compulsion to conclude that lawyers must have discretion regarding what rights are to be asserted. Otherwise, the lawyer's working life could be devoted to using means that the lawyer regards as repugnant in order to achieve ends that the lawyer regards as repugnant on behalf of clients with whom the lawyer does not want to be associated.

Id.

52. "Lawyers who fail to derive personal satisfaction from representing a certain client may terminate the relationship. The lawyer has no need to live with frustration. If a case or client offends his feelings, he may refuse." Marshall J. Brenner, Legal Aid for the Poor: A Conceptual Analysis, 60 N.C. L. Rev. 281, 322 (1982). "A lawyer is not required to represent a client whose claim or defense is morally offensive to the lawyer. In fact, if the lawyer's feelings are sufficiently strong, she should decline the case on conflict of interest grounds." Freedman, supra note 26, at 237. See also Model Code EC 2-30 ("Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of prospective client.").
have the fundamental freedom to associate only with those with whom he wishes to associate. 53

When assessing the traditional view, it is appropriate to weigh the need for such discretion by the lawyer against the harm to the client of not being represented by that lawyer. 54 Initially it may be pragmatic to ask whether there is really a problem. If one attorney refuses to represent a potential client for a particular reason, let her find another lawyer; after all, there are nearly a million of them! But what if all the attorneys in town refuse to represent a particularly reprehensible character? The ethical considerations suggest an exception to the general rule, 55 whereby a lawyer may have an obligation to represent a particular person in the "last lawyer in town" scenario. 56 Also, in a particularly egregious situation, the court may have the inherent power to appoint an attorney if necessary, or a bar association or organizations such as the American Civil Liberties Union or National Association for the Advancement of Colored People may offer to defend an unpopular person as they have done so often in the past. 57

III. VALIDITY OF THE TRADITIONAL VIEW

As the above discussion demonstrates, lawyers' unfettered license to discriminate in the selection of clients has solid underpinnings. Freedom to contract and freedom of association are essential rights, and the need for personal and professional autonomy may also be a persuasive argument to

53. "The lawyer's liberty — moral liberty — to take up what kind of practice he chooses and to take up or decline what clients he will is in aspect of the moral liberty of self to enter into personal relations freely." Fried, supra note 49, at 1078; but see Freedman, supra note 26, at 49-50 (discussing a lawyer's autonomy and moral responsibility). See also Robert L. Nelson, Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 Stan. L. Rev. 503, 504 (1985) (discussing autonomy vis-a-vis clients in a large law firm setting).

54. See Wolfram, Clients, Repugnant and Otherwise, supra note 32, at 229-31 (questioning "[w]ho is a 'necessitous' client?").

55. See MODEL CODE EC 2-26 to 2-29 ("Acceptance and Retention of Employment").


57. As Professor Freedman notes:

Nevertheless, the concern that people and causes will go unrepresented because lawyers fear criticism has proved to be unrealistic. Despite the harshest public denunciation, lawyers have come forward to defend 'the meanest man in New York' and even to support the right of Nazis to march in Skokie. Moreover, in the unlikely event that no lawyer is available to represent someone because of 'the repugnance of the subject matter of the proceeding' or a similar reason, an available solution is the appointment of an attorney by the court.

FREEDMAN, supra note 26, at 69-70 (citing MODEL CODE EC 2-29; MODEL RULES Rule 6.2). See also Rubin v. State, 490 So. 2d 1001 (Fla. Cir. Ct. 1986) (affirming order holding attorney in contempt for refusing to represent appointed client); Sanborn v. State, 474 So. 2d 309, 315 (Fla. Cir. Ct. 1985) (denying counsel's motion to withdraw).
some. Nevertheless, the validity of the traditional view of a near-absolute freedom of discretion in the selection of clients is subject to criticism and open to scrutiny.

Perhaps the greatest misperception relating to the traditional view is that a lawyer always has complete discretion in choosing his clients. That right is not now and probably never has been absolute. There are major exceptions to an attorney’s discretion in accepting or rejecting clients. The most obvious exception is the power of the courts to appoint lawyers to represent indigents in criminal cases and even in some civil matters. Government attorneys may have statutory mandates to represent certain persons whether they wish to do so or not. In addition, there are ethical duties to represent unpopular clients in the situation of the “last lawyer in town” and even more generally “not lightly to decline proffered employment.” There is also an ethical duty to see that high-quality legal services are available to all even if a potential client’s “financial ability is not sufficient to permit payment of any fee.” While the rendition of pro bono legal services to those in need is currently an aspirational goal in most jurisdictions, it may become mandatory in New York and other locations in the future. Such a mandate by definition means attorneys being forced to represent clients

58. N.Y. CRIM. PROC. LAW §§ 170.10(3)(c), 180.20(c)(3), 210.15(2)(c) (McKinney 1982) (giving defendant right to counsel in local criminal court for traffic violations, in proceedings upon felony complaint, and in arraignment upon indictment in Superior Court).
60. See N.Y. EXEC. LAW § 63 (McKinney 1982) (stating the general duties of the attorney general).
62. MODEL CODE EC 2-33.
63. MODEL CODE EC 2-24; see also MODEL RULES Rule 6.1 (stating that a lawyer should render public interest service for no fee or reduced fee); MODEL RULES Rule 6.2 cmt. (stating that a lawyer should provide pro bono publico service).
64. Model Code EC 2-25 states that “[a] lawyer has an obligation to render public interest and pro bono legal service.” Model Code EC 2-25. Since the ethical considerations in the Model Code are aspirational in nature, there is nothing in this rule or the code which mandates rendering pro bono services. The Chief Judge of the New York Court of Appeals has given the bar in New York a two-year period in which to increase pro bono services in the state. If the result is unsatisfactory, a mandatory pro bono court rule may be adopted. The issue of mandatory pro bono was brought to a head as a result of COMM. TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1989) (The Committee was chaired by Victor Marrero and it is generally known as the “Marrero Report”). The Committee concluded at pages 65 and 66 of the report that “a significant unmet need for legal services to the poor exists,” and that practicing lawyers should be required to provide pro bono legal services in response to that need. Id. at 65–66. This recommendation was delayed for two years in 1990 and then again in 1992. See generally Edward A. Adams, Wachtier Defers Mandatory Pro Bono: Seeks to Encourage, Monitor Voluntary Efforts; Pushes Back Requirement 2 Years, N.Y. L.J., May 2, 1990, at 1; Gary Spencer, Decision Delayed a Year on Mandatory Pro Bono Rule, N.Y. L.J., May 22, 1992, at 1.
of a near-absolute right to criticize and to represent." 75

A more reasonable view is that attorneys have rights. That right is subject to certain major exceptions which are designed to protect clients. The most important exception is that lawyers to represent both one and two clients. 59 Government should not allow attorneys to represent clients who are "merely for the purpose of harassing or maliciously injuring any person." 60 Neither may a lawyer represent a client who wishes to "[p]resent a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law." 61 Conflict-of-interest rules also require a lawyer to refuse employment in some situations, 62 and it is also clear that a lawyer should not accept employment from a potential client to handle a legal matter that the lawyer knows he or she is not competent to handle. 63 In addition, a lawyer may not accept employment from a stranger to whom the lawyer has given unsolicited legal advice 64 or from a client who has previously obtained counsel. Finally, it should be noted that if a lawyer learns during the initial interview with a potential client "that circumstances exist that would bring one of the mandatory withdrawal rules into play, the lawyer may not, sensibly enough, even begin the representation." 65 Thus, the mandatory withdrawal requirements of DR 2-110(B) also function to require rejection of clients under delineated circumstances. Obviously, as these rules illustrate, an attorney's professional autonomy, concerning those whom the attorney will represent, is far from absolute.

Not only is the license to discriminate subject to important exceptions, but also it may be argued that this historic right to discriminate is premised on the needs of a legal profession which have changed dramatically. The

whom they may not wish to represent because of the client's inability to pay the requisite fee. The adoption of mandatory pro bono would clearly be a significant and controversial erosion of the lawyers' prerogative in selecting clients. 65

Conversely, a lawyer's discretion is also limited by rules prohibiting the representation of potential clients under certain circumstances, even if the client is otherwise acceptable to the lawyer. These include situations where the lawyer knows, or it is obvious, that the potential client desires to bring a legal action, assert a position, or have steps taken "merely for the purpose of harassing or maliciously injuring any person." 66 Neither may a lawyer represent a client who wishes to "[p]resent a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law." 67 Conflict of interest rules also require a lawyer to refuse employment in some situations, 68 and it is also clear that a lawyer should not accept employment from a potential client to handle a legal matter that the lawyer knows he or she is not competent to handle. 69 In addition, a lawyer may not accept employment from a stranger to whom the lawyer has given unsolicited legal advice 70 or from a client who has previously obtained counsel. 71 Finally, it should be noted that if a lawyer learns during the initial interview with a potential client "that circumstances exist that would bring one of the mandatory withdrawal rules into play, the lawyer may not, sensibly enough, even begin the representation." 72 Thus, the mandatory withdrawal requirements of DR 2-110(B) also function to require rejection of clients under delineated circumstances. 73 Obviously, as these rules illustrate, an attorney's professional autonomy, concerning those whom the attorney will represent, is far from absolute.
privilege for a lawyer arbitrarily to choose whom to serve is a remnant of the pre-Fourteenth Amendment period, when regulation of the practice of law was weak or virtually non-existent, and when attitudes toward human rights were significantly different from those today. Professional organization of lawyers was then mainly at the local level, and discipline was informal, maintained to a large extent through peer pressure.

Significant state regulation of the profession did not begin until the latter part of the nineteenth century in conjunction with the development of statewide and nationwide bar associations. Not only did direct regulation of legal practitioners by the states continue to expand during the twentieth century, but also the impact on the profession of such regulation was compounded by federal court opinions which transformed many aspects of


Professional standards in 1860 had been largely nonexistent. In that year, a specific period of law study, as a necessary qualification for admission to the bar, was required in only nine out of thirty-nine jurisdictions and even law study had come to be thought of as less an apprenticeship and more a clerkship. The bar examination, although required in all states but Indiana and New Hampshire, was everywhere oral and normally casual. In only nine states was there anything approaching a bar examining committee. The leaders of the legal profession, surveying the situation, came to the conclusion that the status quo could not and should not be maintained.

Id.; NARROWING THE GAP, supra note 2, at 103-5.

76. This was a time when slavery was still acceptable in a large portion of the country and when women did not yet have the right to vote. The Thirteenth Amendment was adopted in 1865 and women's suffrage was guaranteed by the Nineteenth Amendment of the United States Constitution in 1920. See CONGRESSIONAL RESEARCH SERV. OF THE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1453, 1897-8 (John H. Kilian ed., 1987).

77. See Bowman, supra note 35, at 274 (noting that the local bar could bring peer pressure and there was no need for a formal code of conduct for lawyers). Peer pressure is still viewed as an appropriate manner of control over attorneys' actions. See MODEL RULES PUBL. ("a lawyer is also guided by personal conscience and the approbation of professional peers").

78. "In the 1870s an identity for the American legal profession began to be framed in the organization of bar associations, first in a few major cities, then in a few states, and in 1878 nationally with the establishment of the American Bar Association." NARROWING THE GAP, supra note 2, at 105-106. Thirteen state bar associations were established between 1873 and 1880. Id. at 205 n. 13; see also GERALD C. CARSON, A GOOD DAY AT SARATOGA (1978) (providing a history of the founding of the ABA in 1878); CHARLES C. GOETSCH, ESSAYS ON SHEON E. BALDWIN 24-30 (1981) (discussing the founding of the American Bar Association in 1878); ABEL, supra note 2, at 44-6 (chronicling the rise in professionalism during the late nineteenth and early twentieth centuries); STEVENS, supra note 75, at 34 (providing additional statistics on state bar associations).

79. New York, for example, is its Judiciary Law regulates: admissions (N.Y. JUD. LAW §§ 90(1), 460 (McKinney 1983)); professional conduct (id. § 90(2), 487); conflict of interest (id. §§ 471, 472, 493); compensation and fees (id. §§ 474, 474-a, & 491); advertising and solicitation (id. §§ 479, 481, 483); forms of practice (id. § 495); attorney bank accounts (id. § 497). See generally ABEL, supra note 2, at 51-3, 62-7.
the practice of law and recognized that law was indeed a business. What was once a prerogative exercised by attorneys in a different time, in a society with different values, and in a non-regulated environment, may now be an archaism in dire need of modification. The underlying justifications for the traditional view may simply not be valid today, given the nature of the modern legal profession.

IV. THE CHANGING LEGAL PROFESSION

Today's legal profession is a service industry costing over ninety billion dollars per year to support. Given the profession's huge size and varied nature, generalizations may be inexact; but clearly, most law practices bear little resemblance to the nostalgic remembrance of the small town, nineteenth century, “one-on-one” practice. Arguably, today, relations be-

80. The ABA Section of Legal Education and Admissions to the Bar reported:

As for the protection of the consumers of legal services, the Supreme Court in recent years, invoking the First Amendment and the antitrust laws, struck down bar-promoted prohibitions on group legal services; prohibitions on advertising; and the promulgation of minimum fee schedules. At the same time, state courts have largely withdrawn from their own aggressive role of protecting the profession from any and all competitive pressures. The ABA's Commission on Professionalism summed up the case law of the 1970s and 1980s in this way:

What these cases and more recent decisions involving attempted state regulation of lawyer practices suggest is a consistent prohibition of rules which operate to limit the extent to which members of the Bar must compete both in the acquisition of business and the charging of fees. Rhetoric about the 'Special' character of the profession remains, but the reality is that, as a matter of law, lawyers must now face tough economic competition with respect to almost everything they do.


81.

The phenomenal growth in the number of lawyers since World War II has been accompanied by an unprecedented increase in demand for legal work, both from business clients and on behalf of previously unrepresented individuals. One result has been that by 1990 the profession had become a $91 billion-a-year service industry, employing more than 940,000 people and surpassing the medical profession in the number of licensed professionals, with one lawyer for every 320 persons in the United States.

NARROWING THE GAP, supra note 2, at 13; see also Abel, supra note 2, at 281 (providing statistics on number of law schools, enrollments, and bar admissions, 1840-1986).

82.

Many adhere to the modern day version of the general practitioner, particularly in rural settings, deeply involved in their local communities and serving as friendly counselors and advisers to a variety of persons and organizations in their locales. However, the opportunities for traditional community-oriented sole and small-firm practitioners have dwindled
tween attorney and client more closely approximate a business relationship than a personal relationship. A personal rapport often does not develop; rather, the relationship is a contractual one in which services are rendered for a fee at arms-length.

In many law firms there is a division of functions between the highly valued rainmakers, who bring the clients to the firm, and the associates who perform the actual work without, in some instances, ever personally meeting the client on whose case they have toiled. In other instances, the attorney-client relationship may exist between an impersonal corporation and an equally impersonal professional corporation or association. Also, a significant minority of legal practitioners find themselves in forms of employment where they may not discriminate in the selection of their clients due to the

with the evolution of the social context in which lawyers function. The increasing anonymity of urbanization and the enormous sprawl in recent decades of suburbanization mean that legal transactions and services 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. (citations omitted).

NARROWING THE GAP, supra note 2, at 38; ABEL, supra note 2, at 184 (offering evidence of decreased loyalty); LANDON, supra note 33, at 35-39 (analyzing the impact of community size on professional stratification).

83. See generally: Morris v. Slappy, 461 U.S. 14, 15 (1983), where the Court noted that:

No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney — privately retained or provided by the public — that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.

Id. See also Marc Galanter & Thomas M. Palay, Why The Big Get Bigger, Promotion-To-Partner Tournament and the Growth of Large Law Firms, 76 VA. L. REV. 747, 752 (1990) (arguing that the new aggressiveness of in-house counsel, the breakdown of retainer relationships, and the shift to discrete transaction has made the practice of law more competitive, "more like a business"); Kornstein, Declining Professionalism, supra note 47, at 132 (writing that "when people complain of declining professionalism, they seem to be referring to lawyers elevating their own economic self-interest and lowering the profession of law to that of a business").

84. As one commentator noted:

Lawyering that is done directly for individuals often can be done efficiently only on a high volume basis that provides little opportunity for developing a personal relation with clients. Moreover, the personal perspective ignores the commercial dimension of most practice. In substantial part, lawyers are in it for the money, and the bar explicitly authorizes them to betray their clients in many situations in which their financial interests are at stake.

Simon, supra note 41, at 1137-8.


86. ABEL, supra note 2, at 200-01; Kornstein, Declining Professionalism, supra note 47, at 142; Simon, supra note 41, at 1137.
A business relationship, when does not develop; services are rendered
between the highly skilled the associates who personally meeting professional personalities, the attorney corporation and an experienced." Also, a significant to their clients due to the

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...ng the Human Capitalists: An...profits, 37 STAN. L. REV. 313,
...factors: The Law and Ethics of...y, supra note 83, at 750, 752.
...ism, supra note 47, at 142;

... nature of their employment; in those situations a right to discriminate is nonexistent.

Another justification for the traditional view, also premised on the unique nature of the attorney-client relationship, is the concept of loyalty. In today's world loyalty seems somewhat illusory. Attorneys frequently jump from firm to firm and take "their clients" with them to the detriment of the parent firm, and possibly to the detriment of the client. Loyalty of clients to firms is also eroding with businesses and major corporations shopping for the best deal they can get in the realm of legal services or even going in-house to address legal needs. The bottom line is usually money, not rapport, friendship, or interpersonal relationships. Loyalty seems only to be an issue that arises when someone raises a conflict of interest charge against an attorney or in those instances where an attorney must turn against his client to collect a fee, defend against a malpractice action, or attempt to have his client adjudged incompetent. One need only examine the statistics relating to any state's
client security fund and disciplinary statistics to see that many lawyers are not loyal to their clients and take their fiduciary duties lightly. If the perception that most attorneys are only businessmen, concerned merely with profit, becomes the standard view of society, the lawyers’ claim to a unique status and its corresponding privilege to discriminate will be seriously undermined.

The notion that law is a profession with special obligations and privileges thus may be succumbing to the reality that the practice of law is a very competitive business in which advertising and slick public relations campaigns are used in the ever-intensifying competition to attract desirable clients. Since there are so many attorneys and the competition for clients

(1987) (analyzing the notion of the attorney-client relationship of informed consent and difficulties when the client’s competence is in question); MODEL CODE EC 7-12; MODEL RULES Rule 1.13

96. See, e.g., THE LAWYERS’ FUND FOR CLIENT PROTECTION OF THE STATE OF N.Y., ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR THE CALENDAR YEAR 1991 14-16 (Submitted April 1, 1992) (containing statistics on claims received and processed from 1982-1991). “Reported losses have increased five-fold since 1987: from $5.7 million in 1987, to $28.3 million in 1991.” Id. at 15. See also Gary Spencer, Clients’ Security Fund Runs Out of Money, N.Y. L.J., Dec. 5, 1989, at 1 (reporting that the State Clients’ Security Fund totaled over $1.2 million and still it could not afford to pay more than half the reimbursement claims from clients of dishonest lawyers); Gary Spencer, Thefts by Lawyers Triple Since 1987, Fund Reports; Largest Number of Claims Involve L.H. Attorneys, N.Y. L.J., April 16, 1990, at 1 (writing that “[r]eported thefts by lawyers of their clients’ money have nearly tripled since 1987.”).

97. See e.g., N.Y. STATE BAR ASS‘N COMM. ON PROFESSIONAL DISCIPLINE, THE STATE OF DISCIPLINE IN NEW YORK STATE: ANNUAL REPORT FOR THE YEAR 1991 10 (1991) (including detailed statistics on the number of complaints filed against attorneys, as well as on the disciplinary actions taken by disciplinary committees and the courts). This Annual Report provides a table with statewide figures for the 1982 through 1991 period, indicates a low figure in 1982 of 7,057 matters and a high in 1989 of 12,355 matters. In 1991, 9,454 complaints were received. See also Kornstein, Declining Professionalism, supra note 47, at 136-37.

98. See Simon, supra note 41, at 1130 (arguing that the observance of ethical norms above the legal requirements confers prestige on the attorney and the profession while violations degrade both the attorney and the profession). Professor Gillers, in discussing the legal profession’s need to provide more support for legal services programs, notes that lawyers may possibly be forced to forfeit their right of self-regulation.

Unlike other licensed workers, lawyers have won this right precisely because they claim to put the public’s interest ahead of their own, including — but not only — in their ethical precepts. I don’t say that the bar’s heightened status and its right of self-regulation have an exact price tag, but they do come with a certain expectancy that, if unrealized, may force reformation of the original understanding.

Stephen Gillers, Words Into Deeds: Counselor, Can You Spare a Buck?, A.B.A. J., Nov. 1990, at 80, 81; see also NARROWING THE GAP, supra note 2, at 119-20 (noting that “[n]eglect of professional responsibilities compromises the independence of the profession and the public interest which it is to serve”).

99. Even the early opinion in People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919), states that “to practice as an attorney-at-law means to do the work, as a business, which is commonly and usually done by lawyers here in this country.” See NARROWING THE GAP, supra note 2, at 80 (discussing the “newly competitive, profit-oriented environment” in which firms are hiring marketing directors); Kornstein, Declining Professionalism, supra note 47, at 134-35.
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A.B.A. J., Nov. 1990, at 80,

“[n]eglect of professional the public interest which it is
(L.Y. 1919), states that “to which is commonly and usually note 2, at 80 (discussing the
drinking marketing directors); later in

is so stiff, perhaps legal practitioners will discover that they cannot afford financially to discriminate based on meaningless or arbitrary criteria. Will concern for the sacred bottom line by individual practitioners or law firms solve the problem? Unfortunately economic incentives alone will not rem-
edy the current situation. There will always be those who will discriminate with or without a threat of sanction, even if they lose money in the process. While an individual attorney who loses a fee because he chooses to discriminate certainly does not deserve pity, there must be concern for the individual who is discriminated against, as well as for the damage done by such discrimination to the organized bar and to society as a whole. The overall costs to individuals and society of invidious discrimination may simply be too great to bear when balanced against an attorney’s interest in

V. THE COSTS OF DISCRIMINATION

In weighing the costs of discrimination one must initially consider the damage done to the person who is rejected as a client. Not only may the person’s legal rights potentially be affected or delayed, but also the individual can suffer significant emotional and psychological damage as well. Rejection by an attorney may result in a lowering of personal

100. Two commentators have suggested that some rejections may reflect unconscious discrimination:

Philosophically, a lawyer may feel that he is a champion of justice and that in the abstract everyone has a right to be represented. Yet, in any given situation, the lawyer may also have conflicting negative value-judgments about the particular case or the race, ethnicity, gender, or other characteristics of the particular client. A lawyer who is unaware of this philosophical/emotional conflict may reject a potential client because the lawyer “is too busy,” “isn’t the right person for the job,” or “doesn’t have the resources to handle the case properly.” When in fact, the rejection results from the hidden emotional tension.


101. REPORT OF THE N.Y. STATE JUDICIAL COMMISSION ON MINORITIES, Vol. 2, THE PUBLIC AND THE COURTS 10-1 (April 1991); Schwartz, supra note 56, at 164 (arguing the existence of a moral obligation to represent the unpopular client); Wolfram, Clients, Repugnant and Otherwise, supra note 32, at 223: “To the extent that lawyers are not available to render needed legal assistance, then, in fact, prospective clients will not obtain what the law otherwise would have allowed.” See AIDS COORDINATING COMM., AM. BAR ASS’N, AIDS: THE LEGAL ISSUES. DISCUSSION DRAFT OF THE AMERICAN BAR ASSOCIATION AIDS COORDINATING COMMITTEE 14 (1988) (discussing the difficulty that persons with HIV-related legal problems have in obtaining legal services outside of large metropolitan areas); see also NAT’L LAWYERS GUILD AIDS NETWORK, AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE § 1.3, at 17 (3d ed. 1992) (noting that “most people with AIDS die within two and one half years of diagnosis. People with AIDS can deteriorate unpredictably and rapidly, both physically and mentally. Given that dockets in most courts are extremely backedlogged, there is a high probability that a litigant with AIDS will die before trial can be held.”).

esteem, stress, outright anger or rage, and a reinforcement of the perception that the system is simply unfair and stacked against minorities. A probable adverse effect of this type of discrimination is a diminution in the effectiveness of our system of justice. Whether the utility of the attorney's license to discriminate outweighs the damage done to the rejected individual is dependent on the particular circumstances. The spectrum of harms from the act of being rejected as a potential client may vary from mere inconvenience to a lost business opportunity, or even result in a missed statute of limitations resulting in a significant legal detriment.

Discrimination by individual attorneys also reflects adversely on the legal profession as a whole. The act creates a significant appearance of impropriety in that lawyers seem to be holding themselves out as being above the law which they are duty-bound to uphold. When others in American society are threatened with lawsuits or administrative sanction if they discriminate

the psychological injury of discrimination). See also Robert T. Begg, Legal Ethics and AIDS: An Analysis of Selected Issues, 3 GEO. J. LEGAL ETHICS 1, 26-27 (1989) (discussing emotional and psychological damage caused to a potential client when rejected on the basis of AIDS-phobia); GILBERT, supra note 85, at 51 (discussing psychological and emotional consequences relating to a lawyer's failure to act).


105. See MODEL CODE EC 1-5 (A lawyer "should refrain from all illegal and morally reprehensible conduct."). "Even minor violations of the law by a lawyer may tend to lesser public confidence in the legal profession . . ." LUBAN, LAWYERS AND JUSTICE, supra note 26, at 34-35 (1988) (arguing that holding oneself above the law "may indeed be denying human equality and splitting the eye of social solidarity . . ."). See also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 12:201, at 12-14 (Supp. 1992) ("Lawyers sometimes act or talk as though they had a special immunity exempting them from observing 'other' law, which is to say ordinary legal obligations."); MODEL CODE Canon 9; MODEL CODE EC 9-1 ("A lawyer should promote public confidence in our system and in the legal profession."); MODEL CODE EC 9-2 ("Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of lawyers."). As one commentator noted,

The function of professional ethics in the life of the group is not merely to avoid damaging conflicts between the code of the group and that of society, but actively to further, through
in many aspects of their personal lives, or in their commercial dealings with minorities, why then should lawyers be governed by a different standard? Legal niceties which make invidious discrimination unlawful in one setting, yet excuse discrimination by lawyers, probably escape the ken of a typical layperson.

The legal profession also suffers damage to its image because it is caught in the dilemma of staunchly advocating access to the legal system and pro-human rights positions in policy statements, in support of antidiscrimination legislation, and in filing amicus curiae briefs in appropriate civil rights cases, yet contradictorily and simultaneously adhering to a code of ethics providing a blanket right to discriminate in the selection of clients. This perceived hypocrisy is exacerbated when one considers that some professions, which in theory also have a professed need for professional autonomy, have rejected an absolute right to refuse potential clients or patients based on suspect criteria. These professions have chosen to make invidious discrimination in the practice of their professions unethical, bringing them into conformity with contemporary social norms.

the work of the group, the fulfillment of goals approved by the society to which the professional group belongs, and which it should serve. . . .


106. “An attorney should not refuse to represent or limit or modify representation, because of an individual's known or perceived HIV status.” Coordinating Comm. on AIDS, AM. BAR ASS'n, American Bar Association Policy on AIDS, 21 U. Tol. L. Rev. 9, 9 (1989); ABA Task Force on Minorities, supra note 1, at app. B (listing ABA policies relating to racial and ethnic bias); ABA Policy Handbook, supra note 1, at 153-61.

107. See, e.g., ABA Policy on HIV-Related Discrimination, Summary of Action Taken by the House of Delegates of the American Bar Association 26-27 (Feb. 8-9, 1988) (supporting federal legislation to prohibit certain forms of discrimination based on AIDS). The ABA has supported constitutional amendments and legislation to promote equal opportunity on numerous occasions. See ABA Policy Handbook, supra note 1, at 153-161 (providing policy positions regarding criminal procedure); ABA Task Force on Minorities, supra note 1, at app. B (offering selected ABA policies and reports related to racial and ethnic bias in the justice system).

108. See, e.g., Runyon v. McCrory, 427 U.S. 160 (1976); United States v. Weller, 401 U.S. 254 (1971) (deciding jurisdictional issues regarding the Criminal Appeals Act); Paul Reidinger, ABA Supports Runyon, A.B.A.J., Nov. 1988, at 80 (“The ABA notes that its interest as amicus ‘flows from its opposition to racial discrimination and its concern that the abandonment of such an important and well-considered Supreme Court precedent as Runyon would be harmful to the legal system.’”).


110. MODEL GUIDE FOR PROFESSIONAL CONDUCT, CANONS OF PROFESSIONAL CONDUCT (Am. Ass'n of Engineering Societies 1984): “Engineers engage in professional relationships without bias because of race, religion, sex, age, national origin or handicap.”

The American Dental Association's ethics rules provide:

1. PATIENT SELECTION

While dentists, in serving the public, may exercise reasonable discretion in selecting patients for their practices, dentists shall not refuse to accept patients into their practice or deny dental service to patients because of the patient's race, creed, color, sex, or national origin.
While the legal profession in general has failed to keep pace with other professions in outlawing invidious discrimination in the dissemination of


The National Association of Social Workers have a similar provision:

F.3. The Social worker should not practice, condone, facilitate or collaborate with any form of discrimination on the basis of race, color, sex, sexual orientation, age, religion, national origin, marital status, political belief, mental or physical handicap, or any other preference or personal characteristic, conditions or status.

CODE OF ETHICS (Nat'l Ass'n of Social Workers 1980).

Clinical social workers are given similar guidance:

VI. Clinical social workers show sensible regard for the social codes and ethical expectations in their communities, recognizing that violations of accepted societal, ethical, and legal standards on their part may compromise the fulfillment of their professional responsibilities or reduce public trust in the profession.

a) Clinical social workers do not, in any of their capacities, practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, sex, sexual orientation, age, religion, socioeconomic status, or national origin.


The American Medical Association also provides anti-discrimination rules:

VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical services.

9.12 Physician-Patient Relationship: Respect for Law and Human Rights

The creation of the physician-patient relationship is contractual in nature. Generally, both the physician and the patient are free to enter into or decline the relationship. A physician may decline to undertake the care of a patient whose medical condition is not within the physician's current competence. However, physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, or any other basis that would constitute illegal discrimination. Furthermore, physicians who are obligated under preexisting contractual arrangements may not decline to accept patients as provided by those arrangements.


These ethics codes are reprinted in CODES OF PROFESSIONAL RESPONSIBILITY (Rena A. Golfin ed., 2d ed., 1990). See also CODE OF MEDICAL ETHICS ANNOTATED CURRENT OPINIONS 82, 85 (Council on Ethical and Judicial Affairs of the Am. Medical Ass'n 1992), wherein the comment to 9.12 reads as follows:

Journal 1983 Observes that the view of medicine as a profession committed to the sick conflicts with the apparent position of the AMA, that a physician is free to choose his or her patients (See Principle VI). The notion of the medical profession's commitment to the sick gives rise to two interpretations. The weak interpretation is that the profession as a whole has such a commitment, but not each physician. The stronger interpretation is that each physician must have such a commitment. This position is embodied in the 1987 Report of the Council on Ethical and Judicial Affairs, which addresses ethical issues involved in the AIDS crisis. Concludes that physicians have a duty to treat AIDS patients, and must be ready to assume certain levels of risk in fulfilling the duty. References Opinion 9.12. Emanuel, Do Physicians Have an Obligation to Treat Patients With AIDS? 318 NEW ENG. J. MED. 1686, 1687 (1988).
REVOKING THE LICENSE TO DISCRIMINATE

professional services, \(^{111}\) the New York State Bar Association has adopted a disciplinary rule\(^ {112}\) and an ethical consideration\(^ {113}\) which on their face attempt to eliminate bias and unlawful discrimination in the practice of law. But, as will be seen, the organized bar in New York has apparently accepted the position that the disciplinary rule is not applicable to the selection of clients,\(^ {114}\) which has the effect of emasculating much of the potential of the rule. If this limited interpretation of the scope of the rule prevails, the bar will have simultaneously taken the position that invidious discrimination is wrong, yet it will have carved out a major exception which allows for such discrimination in the selection of clients. Such positions appear contradictory and self-serving. A privilege of unfettered discretion in client selection can be justified only if there is significant public policy or moral support for the exception, or if there are no acceptable alternatives available.

\(^{111}\) Id.

A new rule 9.131 has been adopted:

9.131 HIV Infected Patients and Physicians. A physician may not ethically refuse to treat a patient whose condition is within the physician's current realm of competence solely because the patient is seropositive for HIV. Persons who are seropositive should not be subjected to discrimination based on fear or prejudice.

When physicians are unable to provide the services required by an HIV-infected patient, they should make appropriate referrals to those physicians or facilities equipped to provide such services. A physician who knows that he or she is seropositive should not engage in any activity that creates a risk of transmission of the disease to others. A physician who has HIV disease or who is seropositive should consult colleagues as to which activities the physician can pursue without creating a risk to patients.

\(^{112}\) Id.

111. Several states and the District of Columbia have adopted anti-bias provisions in their ethics codes; however, some of their provisions are limited in their scope and application. See infra notes 203, 205, 207, 209, 212-13. “The ABA Standing Committee on Ethics and Professional Responsibility also has begun work on a model rule against intentional discrimination, spurred on by a recommendation last year by the Association’s Task Force on Minorities and the Justice System,” Don J. DeBenedictis, More States Ban Bias by Lawyers, A.B.A. J., Jan. 1993, at 24; see ABA TASK FORCE ON MINORITIES, supra note 1, at 27, stating:

No lawyer should intentionally engage in racially or ethnically discriminatory acts in the practice of his or her profession. The Task Force recommends that the ABA consider amending its Model Rules of Professional Conduct to make acts of racial and ethnic discrimination while acting in one's professional capacity sanctionable and unprofessional conduct.


\(^{114}\) N.Y. CODE DR 1-102(A)(6).

113. N.Y. CODE EC 1-7.

114. See infra note 179 and accompanying text.
VI. PUBLIC POLICY CONCERNS

The need for lawyer autonomy in the creation of the attorney-client relationship is premised on the lawyers' gatekeeping function — his or her ability to screen out meritless, unjust, or immoral claims by prospective clients, thus aiding the effective administration of justice. 115 While this justification for the rule may seem legitimate, it is counterbalanced by a significant public policy against invidious discrimination.

Beginning with the Bill of Rights 116 and the Civil Rights Amendments, 117 and later with the New York Constitution, 118 and evidenced by numerous federal, 119 local, 120 and New York state civil rights acts, 121 public policy both in New York state, and in the United States as a whole, has moved inexorably toward the elimination of improper discrimination in our society. Initially the effort was to eliminate discrimination by governments and those acting under the color of state law, 122 but even discrimination by private individuals became subject to scrutiny. 123 At common law, common carriers

115. See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Controversial and Luigiess Society, 31 UCLA L. REV. 4, 19 (1983) (discussing screening function); Stewart Macaulay, Lawyers and Consumer Protection Laws, 14 LAW & SOC'Y REV. 115, 116-17 (1979) (discussing lawyers as mediators); Nelson, supra note 53, at 505-07 (discussing lawyers as mediators who must restrain clients and impose their own sense of justice in representing clients); Simon, supra note 41, at 1082 (writing that a lawyer has a "professional duty of reflective judgment"); Wolfram, supra note 14, §§ 102.2, 11.2.1, 11.2.2., at 571-78, 594-97 (addressing attorneys' responsibilities as advocates and advocates). Rule 11 of the Federal Rules of Civil Procedure would seem to provide public policy support for the lawyers' gatekeeper function. Fed. R. Civ. P. 11 (requiring an attorney to make a good faith investigation of client's claim).

116. U.S. Const. amend. I-X.

117. U.S. Const. amend. XIII, XIV, XV.

118. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. Const. art. 1, § 11 (1993).

119. See supra notes 6-7.

120. See supra note 5.

121. See supra note 4.

122. See NOWAK & ROTUNDA, supra note 46, § 10.4 at 336.

Almost all of the constitutional protections of individual rights and liberties restrict only the actions of governmental entities. For example, the Bill of Rights acts as a check only on the actions of the federal government. Moreover, the provisions of the body of the Constitution that protect individual rights are limited expressly in their application to actions of either the federal or state governments. Finally, the amendments to the Constitution which protect individual liberties only have been applied to the actions of the state or federal governments. The Civil War amendments — thirteen, fourteen, and fifteen — contain the most important applications and the only significant exception to this principle.

Id.

123. Section 1981 played a key role here:

Section 1981 of Title 42 of the United States Code provides that all persons within the
had a duty to serve all, and this policy was reasserted in statutes prohibiting discrimination based on suspect criteria in places of public accommodation. As public policy evolved, invidious discrimination in education and employment, and even in such traditionally private activities as the sale or rental of property, has become unacceptable and illegal. At the same time that coverage of the antidiscrimination laws has expanded, there has been a corresponding expansion of the list of suspect or questionable classification criteria, thus greatly enlarging the pool of those protected.

The crux of the issue is, therefore, whether invidious discrimination by attorneys in the selection of clients must be rejected as being contrary to the public policy of eliminating such discrimination, or whether the interests underlying the attorneys' license to discriminate are sufficiently strong to justify an exception to that public policy. Put more concisely, is it more important to our society that a lawyer have the un fettered right to choose,

jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as it enjoyed by white citizens, and are subject to like punishment, pains, penalties, taxes, licenses and executions of every kind, and to no other.

This section had its origin in the Civil Rights Act of April 1, 1866 and was reenacted after the adoption of the Fourteenth Amendment, in an act of May 31, 1870.


125. See supra notes 7, 10.


or is it more important to eliminate one of the last vestiges of official discrimination? One need only measure the harm caused by invidious discrimination to the potential client, to the reputation of the legal profession, and to society in general, to conclude that the attorneys' unfettered license to discriminate is destined for revocation, or more likely, modification.

The lawyers' license to discriminate is a classic example of the exercise of a legally defensible privilege which "can properly be subjected to the moral scrutiny and criticism of others."130 The rule in its absolute form allows invidious discrimination by those who have a monopoly on the provision of legal services,131 and who are characterized as officers of the court.132 Yet, in other contexts, the fundamental rights of freedom of contact and association have been abridged by the public policy of eliminating invidious discrimination.133 Not only may the license to discriminate in selecting clients in its absolute form be viewed as a morally indefensible, but also there are alternatives which may better accommodate the lawyers' needs to those of society. Perhaps the best of these alternatives is a modified version of the rule, one which could still allow some discretion but which would prohibit invidious discrimination against protected groups. Even a version of the

130. Monroe Freedman, Lawyer and Client: Personal Responsibility in a Professional System, in ETHICS AND ADVOCACY: FINAL REPORT, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY 45, 51 (1978) (writing that "[i]n short, a lawyer should indeed have the freedom to choose clients on any standard . . . .") Freedman has also argued:

The lawyer's decision to take or to reject a client is a moral decision for which the lawyer can properly be held morally accountable. Indeed, there are few decisions that a lawyer makes that are more significantly moral than whether she will dedicate her intellect, training, and skills to a particular client or cause. Thus, even the "purely financial" decision to accept only clients who can afford a $300-an-hour fee and to turn away all others so matter how just their causes might be, is inescapably a moral decision.

FREEDMAN, supra note 26, at 68 (citations omitted).

131. See infra notes 239-46 for unauthorized practice of law statutes. The New York courts have not been sympathetic to claims for absolute privileges, see People v. Belge, 376 N.Y.S.2d 771, 772 (App. Div. 1975), aff'd., 359 N.E.2d 377 (N.Y. 1976), where the Appellate Division emphasized its "serious concern regarding the consequences which emanate from a claim of an absolute attorney-client privilege."


133. See supra note 6; see also Patterson v. McLean Credit Union 491 U.S. 164, 187 (1989), where the Court stated that: "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decision should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private as well as the public sphere." See 42 U.S.C. §§ 1981, 1982 (1988) (federal antidiscrimination statutes).
English "Cab Rank Rule," although it may be too extreme in the American setting, could be the model for an alternative to the existing rule.134

One need not, however, look too far for an acceptable alternative to the absolute rule. An acceptable version is already in place in New York in the form of DR 1-102(A)(6),135 but this rule does raise two problems. The first problem is that the disciplinary rule is only applicable to unlawful discrimination, which limits its effectiveness in light of current definitions of place of public accommodation and restrictive application of other legislation. The second problem is that the position taken by some, that DR 1-102(A)(6) does not apply to the selection of clients,136 The next portion of this article will examine the origin and potential scope of DR 1-102(A)(6), with special attention to the meaning of "the practice of law" in New York.

VII. LEGISLATIVE HISTORY OF DR 1-102(A)(6)

The process leading to New York’s adoption of the anti-discrimination amendment to DR 1-102(A) and the corresponding new ethical consideration, EC 1-7,137 has been described as "long and tortuous."138 It began with the rejection of the ABA’s Model Rules by the New York State Bar Association’s House of Delegates on November 2, 1983.139 The process

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134. In England, a practicing barrister’s discretion in refusing to act for a particular party is limited. This principle is the "cab rank rule." See SIR WILLIAM W. BOULTON, CONDUCT AND ETIQUETTE AT THE BAR 4 (3d ed. 1961). Boulton states:

Counsel is bound to accept any brief in the courts in which he professes to practice at a proper professional fee dependent on the length and difficulty of the case but special circumstances may justify his refusal, at his discretion, to accept a particular brief.

Id.

The rule is meant:

to ensure that when the services of a barrister are required, he should be selected for his capacity to handle the case without regard to any other considerations and should accept a case without regard to his personal views, whether about the client, the nature of the case or, in the case of crime, the offense charged."

135. The Royal Commission on Legal Services, Final Report 31 [Chairman: Sir Henry Benson] (October 1979); The Professional Conduct of Solicitors 8 (Council of the Law Soc’y 1974) (“A solicitor should not refuse to act solely on account of race, colour, ethnic or national origins, sex or creed of prospective client.”). See also RONALD J. WALKER, THE ENGLISH LEGAL SYSTEM 271 (6th ed. 1985); Simeon E. Baldwin, The New American Code of Legal Ethics, 8 Colum. L. Rev. 541, 544-45 (1908); CARTER, supra note 26, at 44-45; DRINKER, supra note 26, at 139 (all distinguishing rules here from rule in Great Britain where an advocate must accept a retainer).

136. See infra note 179 and accompanying text.


139. Model Rules Jointed, A.B.A. J., Jan. 1986, at 18; Model Rules Resolution Loses in House, 73-59,
culminated with a significant number of amendments to the New York Code of Professional Responsibility (New York Code), and the adoption of the newly amended disciplinary rules of the Code by the Appellate Divisions of the New York Supreme Court as a joint court rule, effective September 1, 1990.\footnote{140}

The ABA's Model Rules were rejected by the New York State Bar Association after serious study and debate.\footnote{141} Despite the defeat of the Model Rules, the debates in the House of Delegates confirmed that there were serious problems with the New York Code adopted in 1970, and that some of the changes in the proposed Model Rules draft would be beneficial.\footnote{142} In addition, strong support was evident among some constituencies for retention of the existing format of the New York Code.\footnote{143} Therefore, a Special Committee to Review the Code was established by the New York State Bar Association. Chaired by Hugh R. Jones, the committee was charged with considering amendments to the existing code.\footnote{144}

While the Jones Committee was deliberating, the New York Task Force on Women in the Courts (appointed by the State's Chief Judge) issued a report on March 31, 1986.\footnote{145} This report ultimately had a significant effect on the New York Code amendment process. The Task Force Report concluded "that gender bias against women litigants, attorneys, and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity."\footnote{146} The report also detailed the types of conduct and forms of discrimination suffered by women in and out of the courtroom and the negative effect this

\footnote{N.Y. St. Bar News, Dec. 1985, at 1 (describing the defeated resolution which had recommended replacing present N.Y. Code with the Model Rules).}

\footnote{140. "The Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Divisions of the Supreme Court effective September 1, 1990, are now Part 1200 of Title 22 of New York Codes, Rules and Regulations. . . ." N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (1993). The order was signed by the four Presiding Justices on April 5, 1990. See infra note 196 for the text of the court order.}

\footnote{141. See supra note 129.}

\footnote{142. See N.Y. State Bar Ass'n, Summary Report of Special Committee to Consider Adoption of ABA Model Rules of Professional Conduct (as Amended by the House of Delegates June 21, 1985) (August 7, 1985) (Chaired by Ralph L. Halpern) (summarizing the Committee's fourteen month study of the ABA's Model Rules of Professional Conduct).}

\footnote{143. Gross, The Long Process of Change, supra note 138, at 286 (noting the New York State Bar Association House of Delegates' rejection of a prior committee's report on grounds that a wholesale abandonment of the New York Code was unnecessary).}

\footnote{144. Model Rules Resolution Loses in House, 73-59, supra note 139, at 1.}


\footnote{146. Task Force Report, supra note 145, at 5.}
had on individuals and on the administration of justice.\textsuperscript{147} The report noted that gender bias was "often compounded by racism and classism."\textsuperscript{148} While recognizing that existing ethical rules admonish lawyers to "assist in maintaining the integrity and competence of the legal profession,"\textsuperscript{149} and that "much of the gender-biased conduct identified in [the] Report clearly falls within the ambit of prohibited conduct"\textsuperscript{150} under the New York Code and New York Code of Judicial Conduct, the Task Force nevertheless concluded that a specific rule defining and recognizing this type of unethical conduct would be beneficial.\textsuperscript{151} It was the report's position that development of such an ethical rule would be "most appropriately undertaken by bar associations,"\textsuperscript{152} which must ultimately be willing "to engage in intense self-examination."\textsuperscript{153} This Task Force Report provided a major impetus for the antidiscrimination disciplinary rule which was to eventually evolve from the Bar Association's amendment process.

Two Bar Association committees played prominent roles in advocating an antidiscrimination provision for the New York Code. The Committee on Minorities in the Profession sought a disciplinary rule relating only to employment discrimination by lawyers in hiring, promotions, and conditions of employment.\textsuperscript{154} Its recommended provision read as follows:

A lawyer shall not: Discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, place of birth, age or handicap in hiring, promoting or otherwise determining the conditions of employment of that individual.\textsuperscript{155}

A Special Committee on Women in the Courts was appointed in July 1986 "to report on the Task Force Report, with particular emphasis on its recommendations for actions by bar associations."\textsuperscript{156} This Committee

\textsuperscript{147} Id. at 192.
\textsuperscript{148} Id. at 195.
\textsuperscript{149} Id. at 270 (citing N.Y. Code Canon 1).
\textsuperscript{150} TASK FORCE REPORT, supra note 145, at 271.
\textsuperscript{151} Id. at 271.
\textsuperscript{152} Id. at 271.
\textsuperscript{153} Id. at 274.
\textsuperscript{154} REPORT OF THE COMMITTEE ON MINORITIES IN THE PROFESSION TO THE N.Y. STATE BAR ASSOCIATION HOUSE OF DELEGATES (April 2, 1987). (Gail J. Wright, chair) [hereinafter REPORT OF THE COMMITTEE ON MINORITIES]. The two page report urged the Jones Committee to add an antidiscrimination provision to DR 1-102(A). See Gross, The Long Process of Change, supra note 138, at 292 (discussing the antidiscrimination proposals of the two Committees).
\textsuperscript{155} REPORT OF THE COMMITTEE ON MINORITIES, supra note 154, at 3.
\textsuperscript{156} N.Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON WOMEN IN THE COURTS 3 (portions of which were endorsed at the June 27, 1987 N.Y. State Bar Assn. House of Delegates meeting) (Ruth G. Schaeplo, Chair) (Oct. 1987) [hereinafter REPORT OF SPECIAL COMMITTEE ON WOMEN]. An earlier version, N.Y. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON WOMEN IN THE COURTS (March 24, 1987), was distributed to the delegates prior to the Bar Association meeting.
suggested a new provision targeted differently from that of the Committee on Minorities. Its proposed amendment to DR 1-102(A) corresponded with the terms of New York Executive Law Section 296 and was meant to prohibit discrimination or bias in legal proceedings. This provision stated that:

A lawyer shall not: "Engage in any conduct concerning his or her handling of any legal proceeding that would directly or indirectly discriminate against any participant in the proceeding, or would manifest bias, on the basis of sex, color, race, religion, national origin, disability, age, marital status, or sexual preference."

Despite the concerns of the Committee on Minorities and the Special Committee on Women in the Courts, the Jones Committee was not persuaded that a provision concerning discrimination was appropriate for an ethics code, or even necessary in light of existing federal and state antidiscrimination legislation. Therefore, the June 10, 1986, and February 28, 1987, drafts of an amended New York Code prepared by the Jones Committee contained no reference to discrimination or bias, and commentary in the legal press concerning the amendment process at this time made no reference to any antidiscrimination provision.

When the New York State Bar Association House of Delegates met on April 11, 1987, its agenda included a "presentation of a report on measures recommended for the State Bar to implement the report of the Task Force on Women in the Courts." The agenda also included delegate action on

157. The Report of the Committee on Minorities urged a disciplinary rule which only targeted discrimination in employment while the Report of the Special Committee on Women targeted conduct concerning the handling of a legal proceeding. Compare Report of the Committee on Minorities, supra note 154, at 1 to Report of the Special Committee on Women, supra note 156, at 49.

158. Report of the Special Committee on Women, supra note 156, at 49.

159. Id.

160. Gross, The Long Process of Change, supra note 138, at 292 (noting Jones Committee's decision that the subject of discrimination was adequately covered by state and federal laws).


the amendments to the New York Code recommended by the Jones Committee. The two agenda items were intertwined in that the Special Committee on Women in the Courts Report recommended the adoption of the new DR 1-102 provision prohibiting bias, while the Jones Committee had not included this amendment in its report. During discussion at the meeting, it was apparent that the delegates were receptive to some form of antidiscrimination provision, indicating a desire for a “statement prohibiting at least certain kinds of discrimination.” Rather than voting on such a provision at the April meeting, the House of Delegates instructed the Jones Committee to prepare an antidiscrimination provision for future discussion. This new rule was to combine into a single provision the proposals of the Committee on Minorities and the Special Committee on Women in the Courts and also to reflect the concerns expressed during the meeting by the delegates.

The Jones Committee, true to its mandate, and after consultation with the Committees on Minorities and Women in the Courts, prepared an ethical consideration which encouraged lawyers to avoid unlawful discrimination and condescension and to treat with dignity and respect all those involved in the legal process. As an ethical consideration, violation of this provision would not subject an attorney to discipline. The Jones Committee still was not convinced of the necessity of a binding rule and, in fact, also recommended that the ethical consideration not be adopted by the House of Delegates, based on two concerns. The Committee felt that such a provision was inconsistent with other provisions of the New York Code which prohibit lawyers from engaging in “illegal conduct involving moral turpitude.” It seemed inappropriate to pick one particular illegal act to highlight and to eliminate the moral turpitude requirement. A second major concern, which was strongly expressed later at the Appellate Division level, related to the ability of the departmental disciplinary and other grievance committees to cope with a large number of discrimination claims.
"committees are ill-equipped to act as quasi-human rights commissions . . ."\textsuperscript{171} The Report of the Special Committee on Women in the Courts took the position that the new rule should be enforced using mechanisms currently in place, but that enforcement should be closely monitored. If necessary, in fact, a special committee could be created to receive complaints and to assist in the prosecution of grievances under the new rule.\textsuperscript{172} The House of Delegates met again on June 26-27, 1987, to complete its work on the amendments to the New York Code.\textsuperscript{173} The debate over the antidiscrimination provision was extensive and wide ranging. One group questioned whether there should be such a provision in the New York Code at all, since it does not "go to the merits [or] the substance of the practice of law."\textsuperscript{174} The Jones Committee position, that existing federal and state legislation was adequate protection, was also discussed.\textsuperscript{175} Others voiced concern about the coverage of the proposed rule. The only issue which required a formal vote, rather than a show of hands, was whether the rule should include language prohibiting discrimination against homosexuals.\textsuperscript{176} By a close vote, the phrase "sexual orientation" was removed from the provision.\textsuperscript{177} Still other delegates were concerned that the provision would restrict their right to select or reject clients at their discretion.\textsuperscript{178} Proponents argued that the provision "was not meant to apply to the selection of a lawyer's clients"\textsuperscript{179} although no such exemption language was expressly included in the Report of the Special Committee on Women in the Courts. In the end, proponents of the rule were able to defuse the major concerns of most delegates and to convince a majority of the delegates that a self-policing mechanism for the legal profession to deal with discrimination was a necessity.\textsuperscript{180}

As a result of the debate, the antidiscrimination concepts were codified into two separate provisions, an ethical consideration and a disciplinary rule.\textsuperscript{181} Ethical Consideration 1-7 states that "[A] lawyer should avoid bias

\textsuperscript{171. Id.}
\textsuperscript{172. Report of Special Committee on Women, supra note 156, at 49-50.}
\textsuperscript{173. The House of Delegates had acted on about 80 percent of the Jones Committee recommendations at its April meeting. Daniel Wise, State Bar Delegates Split Over Subpoenas to Lawyers, N.Y. L.J., June 25, 1987, at 1.}
\textsuperscript{174. McMahon, supra note 169, at 3.}
\textsuperscript{175. Id.}
\textsuperscript{176. Id.}
\textsuperscript{177. Id.}
\textsuperscript{178. Id.; Marjorie E. Gross, Amendments to New York's Code of Professional Responsibility — Part I, N.Y. L.J., March 8, 1990, at 1 [hereinafter Gross, Amendments] (noting that the House did not want to prohibit all discrimination, for example an attorney's affirmative action program).}
\textsuperscript{179. McMahon, supra note 169, at 3.}
\textsuperscript{180. Id.}
\textsuperscript{181. Gross, The Long Process of Change, supra note 138, at 293.}
and condescension toward, and treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process." Though similar to EC 7-10 in tone, EC 1-7 does not contain the "infliction of needless harm" standard of EC 7-10, which "presumably allows a lawyer certain latitude in examining witnesses." It is also noteworthy that since the language describes persons already involved in the legal process, the ethical consideration is apparently not applicable to the selection of clients.

The new disciplinary rule which was adopted has far greater significance than the ethical consideration, because, unlike an aspirational ethical consideration, a disciplinary rule is mandatory, and its violation can subject an attorney to discipline. The version of DR 1-102(A)(6) approved by the House of Delegates provided that a lawyer shall not "[u]nlawfully discriminate in the practice of law, including discrimination in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status." Approval of the amendments to the New York Code by the New York State Bar Association was not, however, the final step in the process. It was still necessary for the amendments to be approved by the Appellate Divisions before they would be binding on attorneys' conduct. On October 5, 1987 the amendments approved at the June Bar Association meeting, along with a recommendation for their adoption, were sent to the Appellate Divisions for their approval.

The Appellate Divisions were painstakingly methodical in their study of the Bar Association's proposals. A committee was established, comprised of two representatives from each of the four Judicial Departments, in an effort

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182. N.Y. CODE EC 1-7.
183. N.Y. CODE EC 7-10. "The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." Gross, The Long Process of Change, supra note 138, at 293 n. 46.
185. In New York, the legislature has delegated power and control over attorneys to the Supreme Court. The Appellate Division in each Supreme Court department is authorized to discipline attorneys who are "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice," N.Y. JUD. LAW § 90(2) (McKinney 1983). A joint court order adopted the disciplinary rules of the N.Y. CODE as minimum standards of conduct for attorneys subjecting them to discipline under section 90(2). See infra note 196 for text of joint court order. In the past the disciplinary rules were used as a definition of professional misconduct for purposes of discipline under section 90(2), but they were not actually adopted as court rules. See N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (1989) (including former section 806.2, "Professional Misconduct Defined").
to promote uniformity of the rules statewide. Justice T. Paul Kane of the Third Judicial Department chaired the committee during its eighteen month study of the proposed amendments to the New York Code. While the Kane Committee approved of the majority of the Bar Association’s proposals, it rejected the antidiscrimination provision of DR 1-102(A)(6) along with four other provisions.

The Kane Committee recommendations were sent to the Presiding Justices of the Appellate Divisions in May 1989. During the seven months of study of the draft rules by the Presiding Justices, the antidiscrimination provision was again resurrected. As in the case of the Jones Committee, there was major concern about the ability of the Departmental Disciplinary Committees to cope with a potential overload of discrimination charges, which would in effect convert them into “quasi-human rights commissions.” To remedy this concern, a second paragraph was added to the Bar Association-approved DR 1-102(A)(6), which required that a complaint of professional misconduct, based on unlawful discrimination, must initially be brought in a tribunal of competent jurisdiction rather than before the Departmental Disciplinary Committee. A finding by such a tribunal that a lawyer has in fact engaged in an unlawful discriminatory practice involving race, sex, or the other six named criteria, would then constitute prima facie evidence of professional misconduct.

By January 1990 the Presiding Justices had ironed out the last of the remaining difficulties, and at the Administrative Board of the Courts Meeting that month “agreed in principle to adopt the rule in its present form,” subject to separate approval by each Department (by then basically just a technical formality). On April 5, 1990, the Appellate Divisions promulgated a joint court order which adopted the disciplinary rules of the New York Code as minimum standards of conduct, the violation of which would subject the attorney to disciplinary action. The disciplinary rules

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188. Id. at 2.
189. Id.; Gross, Amendments, supra note 178, at 1.
191. Id. at 2.
196. The Order provided:

In the Matter of the Adoption of the Disciplinary Rules of the Lawyer's Code of Professional Responsibility.
became effective as minimum standards as of September 1, 1990. The concluding chapter of the rule's legislative history occurred when the New York State Bar Association at its June 1990 meeting amended the New York Code to bring it into conformity with the disciplinary rules as adopted by the Appellate Divisions.

It is important to note that the court order only adopted the disciplinary rules of the New York Code and not the ethical considerations, canons, or preamble. Therefore, EC 1-7 is purely an aspirational objective promulgated by the Bar Association, not a binding court rule.

DR 1-102(A)(6), as finally adopted, states that a lawyer 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 or marital status.

Where there is available a tribunal of competent jurisdiction, other than a Departmental Disciplinary Committee, a complaint of professional misconduct based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the

Pursuant to the provisions of section 90 (subd. 2) of the Judicary Law and section 80.3(c) of Administrative Delegation Number 1 of the Chief Judge of the State of New York (22 NYCRR 80.3[3]), it is

ORDERED, that the Disciplinary Rules of the Lawyer's Code of Professional Responsibility, annexed hereto and made a part hereof, are hereby adopted by the Appellate Divisions of the Supreme Court as minimum standards of conduct for attorneys in the State of New York the violation of which shall subject the attorney to disciplinary action, and it is further

ORDERED, that the Disciplinary Rules adopted by this order are hereby enacted as a joint rule of the Appellate Divisions of the Supreme Court and shall be effective as minimum standards of conduct for attorneys in the State of New York as of September 1, 1990.

Francis T. Murphy
Guy J. Mangano
A. Franklin Mahoney
Michael F. Dillon

DATED AND ENTERED: April 5, 1990

197. _Id._


199. See text of Court Order supra note 196. One should note, however, that the definitions section has been included in the court rules at N.Y. Comp. Codes R. & Regs. tit. 22 § 1201.1 (1992). It should also be noted that the disciplinary rules, as adopted by the Appellate Divisions, are codified as N.Y. Comp. Codes R. & Regs. tit. 22 § 1200 (1992).

200. N.Y. CODE DR 1-102(A)(6); N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.3(a)(6) (1992) (The bar association draft separates the disciplinary rule into two distinct segments, while the NYCRR combines the rule into one paragraph).
lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding. 201

VIII. COMPARISON, ANALYSIS, AND APPLICATION OF N.Y. DR 1-102(A)(6)

Only seven jurisdictions have adopted anti-bias provisions relating to lawyers’ conduct. 202 Of these seven, New York's is unique in its terminology as well as its scope. 203 The New York disciplinary rule is quite expansive in that it specifically includes employment practices, yet also goes well beyond this to include discrimination in “the practice of law.” 204

By comparison, the District of Columbia and Vermont have provisions which only prohibit employment discrimination. 205 A Colorado rule deals only with conduct engendering bias in connection with a lawyer’s activities in the legal process and thus appears to fall more along the lines of New York’s EC 1-7, rather than within the broader scope of the New York disciplinary rule. 207 Rhode Island has couched its rule in terms of conduct

201. N.Y. CODE DR 1-102(A)(6).
202. See DeBenedictis, supra note 111 (noting that while six jurisdictions already have anti-bias rules (the author excluded Colorado), the states of Michigan, Florida, and California have proposed rules pending approval by their Supreme Courts); Gilbert & Allen, supra note 111, at 941 (noting that the state of Washington also has a proposed antidiscrimination rule pending before its Supreme Court).
203. GILERS, supra note 85, at 682.
204. N.Y. CODE DR 1-102(A)(6). Some readers of the New York disciplinary rule interpret it to apply only to employment discrimination. See E.J. McMahon, Rule Adopted by State Bar Aimed at Job Bias by Lawyers, N.Y. L.J., June 30, 1987, at 1; Pitufo, supra note 111, at 15; Gilbert & Allen, supra note 111, at 936. Clearly, however, the general provision of the disciplinary rule prohibits unlawful discrimination in the practice of law, and it is then modified by a clause indicating that employment discrimination is to be included within the scope of the practice of law. Had the House of Delegates or the Appellate Divisions wished a provision applying only to employment discrimination, they could have adopted the disciplinary rule suggested by the Report of the Committee on Minorities. See supra text accompanying note 155. The legislative history of DR 1-102(A)(6) clearly indicates that the rule was a consolidation of the provisions proposed by the Committee on Minorities and the Special Committee on Women in the Courts. See supra note 166 and accompanying text.
205. D.C. RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1991) [henceforth D.C. RULES] (“A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.”); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1992) [henceforth VT. CODE] (“A lawyer shall not . . . discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual.”).
206. COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.2(f) (1993) [henceforth COLO. RULES] (“In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person . . . whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.”).
207. Compare N.Y. CODE EC 1-7 (“A lawyer should avoid bias and condescension toward, and
which is "prejudicial to the administration of justice," including discriminatory treatment of those involved in the judicial system and others but only based on the suspect criteria of race, nationality, or sex.

The New Jersey provision is in some respects more encompassing than the New York rule and in some respects less so. In New Jersey, it is professional misconduct for a lawyer in a professional capacity to engage in discriminatory conduct against an individual with one of the ten listed traits, where the lawyer's conduct is intended or likely to cause harm. However, the rule specifically excludes employment discrimination, unless an agency or tribunal has made a final determination of discriminatory conduct. In this respect, it is analogous to the general provision of paragraph two of New York Code DR 1-102(A)(6), which also requires a final determination of a tribunal before discipline can be applied for discriminatory conduct. The

treat with dignity and respect, all parties, witnesses, lawyers, court employees, and other persons involved in the legal process."

208. R.I. RULES OF PROFESSIONAL CONDUCT Rule 8.4(d) (1988) [hereinafter R.I. RULES] ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex.").

209. Id.

210. N.J. RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (1990) [hereinafter N.J. RULES] ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex."").

The Comment to the New Jersey rule adds:

This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule.

N.J. RULES Rule 8.4 cmt.

211. N.J. RULES Rule 8.4. The Comment to Rule 8.4 specifically states that "employment discrimination in hiring, firing, promotion, or partnership status is not intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct." Id. at cmt. The reasons behind this limitation were that the Supreme Court felt that:

existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionately to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

Id.
New Jersey rule also prohibits discrimination based on sexual orientation and socioeconomic status, which are not covered in the New York rule.\textsuperscript{212}

Minnesota has adopted two anti-bias provisions which are very comprehensive. Harassing a person on the basis of a listed trait in connection with a lawyer's professional activities\textsuperscript{213} or committing an unlawful discriminatory act "that reflects adversely on the lawyer's fitness as a lawyer"\textsuperscript{214} constitute professional misconduct. These rules are similar in scope to the New York and New Jersey rules in that they provide protection against harmful or illegal discrimination to a wide variety of groups. Minnesota's rule against unlawful discrimination is so broad that it is viewed as being applicable even to acts "not committed in connection with the lawyer's professional activities."\textsuperscript{215}

Antidiscrimination rules have also been proposed in four other states where final enactment awaits approval by their supreme courts. In California a proposed Rule 2-400 would prohibit unlawful discriminatory conduct in a California State Bar member's law practice including employment issues and "accepting or terminating representation of any client."\textsuperscript{216} The California rule is similar to New York's DR 1-102(A)(6), in that it only

\textsuperscript{212} See supra notes 208-201, 210 and accompanying text.

\textsuperscript{213} MINN. RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (1992) [hereinafter MINN. RULES] ("It is professional misconduct for a lawyer to ... harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities.").

\textsuperscript{214} MINN. RULES Rule 8.4(h). The rule reads:

It is professional misconduct for a lawyer to ... commit a discriminatory act, prohibited by federal state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.

\textsuperscript{215} MINN. RULES Rule 8.4 cmt. In addressing the scope of the rule, the Comment adds:

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

\textsuperscript{216} Michael J. Hall, Bias Conduct Rule Shelved, L.A. DAILY J., Aug. 17, 1992, at 3. As drafted, the proposed rule states: "In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, age or disability in: (1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client." Id. See also Pittila, supra note 111, at 15-16.
addresses unlawful discrimination and that it requires that "a tribunal of competent jurisdiction, other than a disciplinary tribunal" initially find the lawyer guilty of a discriminatory act before discipline is imposed. The proposed California rule is unique in its unambiguous and unequivocal application to an attorney's selection of clients. The adoption of such a rule by California, the home of more lawyers than any other state, would establish a powerful precedent for rejection of the traditional view of a lawyer's unfettered right to discriminate in selecting clients. It could provide an impetus for other states with more ambiguous rules like New York, Minnesota, and New Jersey to interpret them broadly to include client selection.

The Florida Supreme Court is also considering the adoption of two rules relating to discriminatory acts. One rule would prohibit a lawyer from engaging in conduct that prejudices the administration of justice by disparaging, humiliating, or discriminating against persons involved in the judicial process based on the listed traits. The other rule would subject a lawyer to discipline if during the practice of law he/she has been adjudicated or held to have committed a prohibited discriminatory practice by an agency or tribunal. This second Florida provision is very similar to the New York disciplinary rule in that it targets illegal discriminatory acts, occurring in the practice of law, and it requires an outside agency or tribunal to make the initial determination of impermissible conduct before discipline is imposed.

The Michigan Supreme Court is also considering two changes in the

217. Hall, supra note 216, at 3.
219. RULES REGULATING THE FLORIDA BAR Rule 4-8.4 (Proposed Official Draft 1992) [hereinafter FLA. RULES]. The proposed rule reads:

A lawyer shall not engage in conduct that is prejudicial to the administration of justice, including to knowingly or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel or other lawyers on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age.

Id.
220. FLA. RULES Rule 4-8.7 (Proposed Official Draft 1992). The proposed rule reads:

If a lawyer has been adjudicated or held to have committed, in the course of the practice of law, a prohibited discriminatory practice in a final order of an agency or court of competent jurisdiction, after all appellate rights have been exhausted, such conduct shall be subject to discipline under these Rules Regulating The Florida Bar.

Id.
Michigan Rules of Professional Conduct (Michigan Rules) proposed by the State Bar. The first provision would require a lawyer who has knowledge that another lawyer or judge "has committed a significant violation of the Rules of Professional Conduct involving invidious discrimination" to report the matter to the appropriate authorities.\textsuperscript{222} The second provision prohibits an attorney or his staff and agents from engaging in invidious discrimination and also prohibits a lawyer from holding a membership "in any organization that the lawyer knows invidiously discriminates" on the basis of enumerated suspect traits.\textsuperscript{223} These proposals, especially those relating to organizational memberships, are quite controversial.\textsuperscript{224}

A proposed rule in the State of Washington prohibits lawyers from committing unlawful discriminatory acts if found to be connected with the lawyer's professional activities.\textsuperscript{225} This rule is comparable to the New York disciplinary rule and the proposed Florida rule in that it focuses on "illegal" discriminatory acts relating to activities in the practice of law.\textsuperscript{226} The

\begin{itemize}
\item[(a)] A lawyer shall not engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin, and shall prohibit staff and agents subject to the lawyer's discretion and control from doing so.
\item[(b)] A lawyer shall not hold membership in any organization that the lawyer knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin.
\item[(c)] A lawyer serving as an adjudicative officer shall prohibit invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin against parties, witnesses, counsel, or others on the part of lawyers in proceedings before the adjudicative officer.
\end{itemize}


\textsuperscript{223} MICH. RULES Rule 5.7(b) (Proposed Official Draft 1991), cited in 437 Mich. 1228 (1992). The entire proposed rule reads:

\begin{itemize}
\item[(a)] A lawyer shall not engage in invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin, and shall prohibit staff and agents subject to the lawyer's discretion and control from doing so.
\item[(b)] A lawyer shall not hold membership in any organization that the lawyer knows invidiously discriminates on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin.
\item[(c)] A lawyer serving as an adjudicative officer shall prohibit invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin against parties, witnesses, counsel, or others on the part of lawyers in proceedings before the adjudicative officer.
\end{itemize}

\textsuperscript{224} See id. at cmt., for the rationale behind prohibiting memberships by attorneys in organizations that invidiously discriminate. Compare Ingrid Farquharson & Elsa Shartsis, Can Rules Eliminate "Invidious Discrimination"?: Against the Proposals, 69 MICH. B. J. 1285 (1990) (objecting to the proposed rules) with Victoria A. Roberts, Can Rules Eliminate "Invidious Discrimination"?: For the Proposals, 69 MICH. B. J. 1280 (1990) (supporting the proposed rules). See also Barry P. Waldman, Race/Gender Bias Rules Draw MLA Opposition, 5 MICH. L. WKLY. 764 (1991) (arguing that the rules are overly broad, vague, and violate the rights of privacy, speech, and association).

\textsuperscript{225} WASH. RULES OF PROFESSIONAL CONDUCT Rule 8.4(g) (Proposed Official Draft 1993) [hereinafter WASH. RULES]. The proposed rule reads:

It is professional misconduct for a lawyer to . . . commit a discriminatory act prohibited by law or harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination or harassment is committed in connection with the lawyer's professional activities.

\textsuperscript{Id.}

\textsuperscript{226} Id.
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Washington rule does not have the requirement that an agency or court
outside the disciplinary process reach an initial finding of illegal discrimi-

As evidenced by the preceding discussion of enacted and proposed
ethical rules relating to bias and discrimination, the legal profession has
recognized that there is a problem of discrimination and that it must be

Yet, most state ethics codes as well as the ABA’s Model Rules
continue to ignore the problem.

Of those jurisdictions which have adopted anti-bias provisions, there is a lack of uniformity, each using
different terminology and each having varying scope and listings of suspect

The New York rule limits its scope to “unlawful discrimination,” but it
is expansive enough to include any act of unlawful discrimination “in the
practice of law.”

The provisions of the New Jersey and proposed Florida
rules parallel paragraph two of the New York disciplinary rule, requiring

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228. See NARROWING THE GAP, supra note 2, at 213, which lists among the fundamental values of the
profession, the striving to promote justice, fairness, and respect in an attorney’s daily practice, which
includes “treatment of other people... with dignity and respect.” Id. This commentary notes that
this includes “refraining from sexual harassment and from any form of discrimination on the basis of
gender, race, religion, ethnic origin, sexual orientation, age or disability, in one’s professional
interactions with clients, witnesses, support staff, and other individuals.” Id. at 214 (citing N.Y.
CODE EC 1-7 (as amended Sept. 1, 1990) and MINN. RULES Rule 8.4 (as amended Dec. 27, 1989)).
Another commentary noted fundamental value of being a lawyer is to strive to improve the
profession. “As a member of a ‘self-governing’ profession a lawyer should be committed to the values of... [including]
tracing the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, Age, or Disability, and to Rectify the Effects of Those Biases.”

NARROWING THE GAP, supra note 2, at 216 (citation omitted). This commentary expands on this
concept:

Finally, it is incumbent upon all members of the bar to strive to rid the profession of the
existence and effects of bias based on race, religion, ethnic origin, gender, sexual
orientation, age, or disability. Despite the substantial efforts of the organized bar
to eliminate bias within the profession, its effects continue to be felt in numerous ways. See, e.g.,
COMM. ON WOMEN IN THE PROFESSION, A.M. BAR ASS’N, REPORT TO THE HOUSE OF
DELEGATES 17 (Approved by ABA House of Delegates, Aug. 10, 1988) (concluding that “a
variety of discriminatory barriers remain a part of the professional culture” and “make it
difficult for women to participate fully in the work, responsibilities and rewards of the
profession”); TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, A.M. BAR ASS’N,
REPORT WITH RECOMMENDATIONS 7 (1986) (finding that “lack of equal opportunity for the
minorities in the legal profession persists”).

NARROWING THE GAP, supra, at 217.

229. While the ABA Model Rule and the ABA Model Code of Professional Responsibility currently
have no provisions relating to bias or discrimination, a proposed Model Rule dealing with this subject
is being developed. See DeBenedictis, supra note 111, at 24; see also ABA TASK FORCE ON
MINORITIES, supra note 1, at 27 (recommending that the ABA amend the Model Rules “to make acts of
racial and ethnic discrimination while acting in one’s professional capacity actionable and
unprofessional conduct”); Pitulka, supra note 111; Gilbert & Allen, supra note 111, at 934 (arguing
that the time has arrived for the ABA to include in the Model Rules a rule against discrimination).

230. N.Y. CODE DR 1-102(A)(6). For the text of DR 1-102(A)(6), see supra text accompanying
note 201.
that actions initially be commenced by a tribunal or human rights agency, prior to action by the disciplinary committee,\textsuperscript{231} but no two rules are alike in all respects.

IX. APPLICATION OF THE ETHICAL RULES TO THE SELECTION OF CLIENTS

Can any of the anti-bias provisions in state disciplinary rules be construed as being applicable to discrimination in the selection of clients? Clearly, the District of Columbia and Vermont rules do not apply, since they are strictly limited to employment discrimination.\textsuperscript{232} Colorado limits its rule to bias "in representing a client," which obviously excludes client selection, while California unambiguously includes client selection in its rule.\textsuperscript{233} The Rhode Island, New Jersey, and Minnesota rules are drafted in language which is arguably broad enough to include bias in client selection.\textsuperscript{234} The New York rule prohibits unlawful discrimination "in the practice of law." It is therefore crucial to determine the boundaries of "the practice of law" in New York to be able properly to apply this disciplinary rule in a specific instance.

As was described earlier, the New York antidiscrimination disciplinary rule was very controversial. The Jones Committee refused to include the rule in its drafts until ordered to do so by the House of Delegates.\textsuperscript{235} The Appellate Divisions' Kane Committee also deleted the rule, only to see it resurrected at the last moment at the Administrative Board of the Courts meeting in January 1990.\textsuperscript{236} The original proposal of the Special Committee on Women in the Courts led a phoenix-like existence, during which the rule was transformed from a fairly innocuous provision,\textsuperscript{237} which sought only to prevent discrimination or bias on the part of attorneys in their handling of legal proceedings, to a rule which prohibited unlawful discrimination in any aspect of "the practice of law."

It seems clear that the only reason the disciplinary rule ultimately made its way into the New York Code was because its proponents, and those in positions of authority to block it, were willing to compromise, amend, and

\textsuperscript{231} See supra notes 211 and 220.
\textsuperscript{232} See supra note 205.
\textsuperscript{233} See supra notes 206 and 216.
\textsuperscript{234} See supra notes 208, 210 and 213.
\textsuperscript{235} See supra note 166 and accompanying text.
\textsuperscript{236} See supra note 159 and accompanying text.
\textsuperscript{237} In her transmittal letter accompanying the Report of the Committee on Minorities in the Profession to John A. Williamson, Jr., Associate Executive Director of the New York State Bar Association, Gail J. Wright, Chair for the Committee on Minorities, in reference to the Committee's proposed DR 1-102(A)(6) states: "It is our strong and sincere belief that such language, prohibiting discrimination, is innocuous and yet of paramount importance." Letter from Gail J. Wright, Chair for the Committee on Minorities, New York State Bar Association, to John A. Williamson, Jr., Associate Executive Director, New York State Bar Association 1 (April 2, 1987) (emphasis added).
create a legislative history interpreting key elements of the rule in a manner not likely to frighten legal practitioners. Examples of such actions were the deletion of sexual preference from the list of discriminatory criteria, the inclusion of paragraph two of the rule to prevent Departmental Disciplinary Committees from becoming “quasi-human rights commissions,” and the use of the word “unlawfully” in the rule, at a time when attorneys’ offices were not viewed as places of public accommodation. Another example of a balm to the practicing bar’s fears was the argument of the rule’s proponents, found in the legislative history, that the disciplinary rule was not applicable to the selection of clients. “The joint proposal of the Special Committees on Minorities and on Women in the Courts indicated that the term ‘practice’ was intended to commence at a point after legal representation has commenced.”

Articulating such a narrow definition of “the practice of law” was probably a political necessity for the ultimate enactment of the rule, given the traditional view that attorneys must have the ability to select clients based on any criteria. Ultimately the issue will be resolved by the courts when they are required to interpret “the practice of law” in a case where a human rights commission or other tribunal finds that an attorney has rejected a client based on one of the enumerated criteria in the rule. Will the definition or scope of “the practice of law” in New York be deemed broad enough to include client selection, which would bring such conduct within the purview of the rule? Statements of legislative intent by proponents of the rule clearly have no binding effect on the courts; it will be necessary for a court to seek a legislative or judicial definition of “the practice of law” in New York which does have authority or precedential value. Statements of the position of the organized bar in the New York Code or in ethics opinions concerning the scope of “the practice of law” may, at best, have potential non-binding influence on a court in making this determination.

X. Is Selection of Clients the Practice of Law?

The legislature in New York has defined “the practice of law” primarily in the context of statutes prohibiting the unauthorized practice of law, which specify activities that are and are not the practice of law. Under these statutes, the practice of law includes the following: appearing before a

238. See Gross, Amendments, supra note 178, at 6; see also Gross, The Long Process of Change, supra note 138, at 294.

239. Examples of activities which are not the unauthorized practice of law include the appearance of non-lawyers before certain administrative agencies, see N.Y. WORK. COMP. LAW § 24-a-1 (McKinley 1993); N.Y. A.P.A. § 501 (McKinley 1984), and also appearances before tribunals by some law students, law school graduates, and officers for societies for prevention of cruelty. See N.Y.
tribunal representing one other than oneself;\textsuperscript{240} rendering legal services;\textsuperscript{241} giving an opinion as to the law or its application and advice relating thereto;\textsuperscript{242} preparing legal documents or instruments;\textsuperscript{243} holding oneself out to the public as being entitled to practice law;\textsuperscript{244} assuming, using, or advertising the title of attorney in a way that conveys the impression that one owns, conducts, or maintains a law office or is a legal practitioner;\textsuperscript{245} or in any other manner assuming to be an attorney.\textsuperscript{246} Some statutory exceptions relate to officers of societies for the prevention of cruelty, law students, and certain law school graduates.\textsuperscript{247} Since it is unlawful for a non-lawyer to commit any of these acts because they are the practice of law, it is certainly obvious that a lawyer committing these acts is also practicing law.

Does the selection of clients fall within the statutory definition of what constitutes “the practice of law” for which a non-lawyer could be prosecuted? To be sure, in order to have potential clients to reject, one must be “holding himself out” as being entitled to practice law, and also, be “assuming to be” an attorney. The selection of clients would therefore seem to fall within the statutory definitions.

The courts of New York have taken an expansive view of what constitutes “the practice of law” for purposes of unauthorized practice. The Court of Appeals has consistently held, over a long period of time, that “[t]he ‘practice’ of law reserved to duly licensed New York attorneys includes the rendering of legal advice as well as appearing in court and holding oneself out to be a lawyer.”\textsuperscript{248}


\textsuperscript{240} \textit{N.Y. Jud. Law} § 478 (McKinney 1983 & Supp. 1993); \textit{id.} § 484 (McKinney 1983 & Supp. 1993); \textit{id.} § 90(2)(a) (McKinney 1983); \textit{id.} § 495(1)(a)(b) (McKinney 1983). This would include appearance before a court or magistrate and, under § 90(2)(a), appearance before a justice, board, commission, or other public authority. Section 495(1)(a) refers to any judicial body. For administrative agencies, see \textit{N.Y. A.P.A.} § 501 (McKinney 1984).


\textsuperscript{242} \textit{id.} § 90(2)(b) (McKinney 1983).

\textsuperscript{243} \textit{id.} § 484 (McKinney 1983 & Supp. 1993).

\textsuperscript{244} \textit{id.} §§ 478, 484 (McKinney 1983 & Supp. 1993); \textit{id.} § 495(1)(b)(c) (McKinney 1983).

\textsuperscript{245} \textit{id.} § 478 (McKinney 1983 & Supp. 1993); \textit{id.} § 4951)(a)(b) (McKinney 1983).

\textsuperscript{246} \textit{id.} § 478 (McKinney 1983 & Supp. 1993); \textit{id.} § 495(1)(b) (McKinney 1983). \textit{See id.} § 753(A)(4) (McKinney 1992), for the courts’ power to punish for civil contempt one who assumes to be an attorney and acts as such without authority.


\textsuperscript{248} El Gemyel v. Seaman, 533 N.E.2d 245, 248 (N.Y. 1988) (emphasis added); \textit{see also} Spivack v. Sachs, 211 N.E.2d 329, 330-31 (N.Y. 1965) (“single, isolated incident” is still considered to be the “practice” of law); People v. Alfani, 125 N.E. 671, 672 (N.Y. 1919) (“To practice or to represent as being entitled to practice law in any manner is prohibited to those not lawyers.”). It should be noted that for purposes of application of the unauthorized practice statutes the courts have held that advice or services must be directed at particular clients, which prevents authors of law review
While both the legislature and courts view merely “holding oneself out” as an attorney to be the practice of law, what is the view of the organized bar as to an appropriate definition? The New York Code takes the position that it is both unnecessary and undesirable to form “a single, specific definition of what constitutes the practice of law.”249 “Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.”250 Obviously this is done in the context of an attorney applying his or her education, ability, and professional judgment to the specific legal problems of clients.251

The practice of law is indeed a client-centered profession and business. Essential to the rendition of legal services to laypersons is the necessity of attracting potential clients to the lawyer’s office, and then the determination of which of these potential clients the lawyer will or will not accept as clients. Client selection is an absolutely fundamental aspect of the practice of law requiring the lawyer to exercise professional knowledge, discretion, and judgment in determining whom to represent. It is surely the “practice of law” to decide that one is unqualified to handle a potential client’s legal problem. To argue, as the proponents of DR 1-102(A)(6) did, that “the practice of law” does not begin until “a point after legal representation has commenced”252 not only ignores the legislative and judicial definitions of the practice of law, but also ignores reality.

While politically it was necessary to argue a limited meaning of “the practice of law” for the adoption of DR 1-102(A)(6), there are unresolved, but very practical, questions relating to that position. One might ask, if solicitation and selection of potential clients is not the practice of law, why then are these activities so heavily regulated as part of the practice of law by the legislature, judiciary, and the Model Code?253 Also, if client selection is

articles and books from committing unauthorized practice, even though they may be transmitting legal advice in a written format. In re Rowe, 604 N.E.2d 728, 731 (N.Y. 1992) (publishing a legal article did not constitute practice of law); New York County Lawyers’ Ass’n v. Dacey, 234 N.E. 2d 459, 459 (N.Y. 1967) (publishing advice on how to fill out legal forms held not to constitute unlawful practice of law).

249. N.Y. Code EC 3-5.

250. Id.

251. Id.

252. See Gross, Amendments, supra note 178, at 6.

not the practice of law, then why do professional duties and responsibilities, such as confidentiality, attach prior to the formal establishment of the contractual attorney-client relationship? Furthermore, if dealing with non-clients, in the context of client selection, is not viewed as the practice of law, what is the nature of a lawyer’s relationship to other non-clients, such as adverse parties, witnesses, judges, and other attorneys?

Ultimately, the courts will have to apply DR 1-102(A)(6) to a situation involving unlawful discrimination in client selection. If a court accepts the New York State Bar Association’s legislative history position of a narrow definition of “practice of law,” there are two major consequences. First, the scope of the rule will be very limited, greatly reducing the number of potential disciplinary charges which might otherwise be brought under the rule. This reduces concerns about overloading an already overtaxed disciplinary structure. Second, the courts would be condoning and reasserting the attorneys’ license to discriminate from a professional and ethical standpoint and eliminating the threat of professional discipline for invidious discrimination in the selection of clients. The public policies supporting freedom of contract and association and professional and personal autonomy will have prevailed.

Alternatively, a court’s determination that the practice of law does include the process of selecting clients has several different ramifications. First, the disciplinary rule would have a much broader scope, providing an additional remedy for those suffering invidious discrimination when attempt-


255. See supra note 40 and text accompanying notes 114-115.
ing to obtain access to the legal system. Second, the lawyers’ license to discriminate in selecting clients would be significantly eroded. The public policy of seeking to eliminate invidious discrimination in American society will have prevailed. Finally, more grievances are likely to be filed under DR 1-102(A)(6) concerning unlawful discrimination in the selection of clients, but as noted earlier the number of such grievances should not be overwhelming.

Paragraph two of the rule, which requires that a complaint based on unlawful discrimination be brought before a tribunal other than a disciplinary committee in the first instance, should significantly mitigate any burdens on the disciplinary system. Since a determination by such a tribunal, that an attorney has engaged in an unlawful discriminatory practice, is prima facie evidence of professional misconduct, there would be no need for a de novo disciplinary proceeding. It would be analogous to the process of disciplining an attorney based on a felony conviction or when a lawyer is sanctioned in another state.

Even if a court should determine that the practice of law includes the selection of clients, the requirement of the rule that the discrimination be unlawful poses a significant obstacle to application of DR 1-102(A)(6). Since attorneys have not traditionally been viewed as acting under color of state law, and since lawyers’ offices have not been viewed as places of public accommodation, the various civil rights acts have not been held applicable to client selection. Therefore, discrimination by attorneys in the selection of clients has not been unlawful, and the disciplinary rule would not be applicable. Such a view of the state of the law relating to discrimination by attorneys fails, however, to recognize the effect of recent legislation and the potential application of long-standing federal and state antidiscrimination provisions which are being reexamined by the courts. These provisions constitute a major challenge to the lawyers’ license to discriminate in selecting clients. If these provisions make discrimination in the selection of clients illegal, then DR 1-102(A)(6) will indeed have a prominent role in helping to end unlawful discrimination in the practice of law in New York. An examination of existing and potential statutory challenges to the lawyers’ license to discriminate in the selection of clients is instructive.

256. See supra text accompanying notes 116-129.
257. N.Y. CODE DR 1-102(A)(6).
258. Id.
260. See supra note 8.
261. See supra note 10.
XI. LEGAL CHALLENGES TO THE LAWYERS’ LICENSE TO DISCRIMINATE

A. THE AMERICANS WITH DISABILITIES ACT

Perhaps the most far-reaching and significant of the potential legal challenges to a lawyers’ ability to discriminate in the selection of clients comes from the enactment in 1990 of the Americans With Disabilities Act.\(^{262}\) This federal legislation is much more than a barrier-removal act; in fact, it is arguably one of the most far-reaching general civil rights statutes ever enacted.\(^{263}\) The Act’s definition of disability is very broad, potentially encompassing forty-three million Americans.\(^{264}\) For purposes of the Act, disability with respect to an individual is defined as “a physical or medical impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such an impairment.”\(^{265}\)

While the Americans With Disabilities Act prohibits discrimination against the disabled in employment\(^{266}\) and public services,\(^{267}\) the major significance of the statute for the attorney who wishes to discriminate in selecting clients is its unique definition of place of public accommodation. For the first time in a federal antidiscrimination statute, lawyers’ offices are specifically enumerated as places of public accommodation.\(^{268}\)

The Act prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who


\(^{263}\) Although it was patterned after earlier discrimination statutes, the Americans with Disabilities Act has greatly expanded federal protection against discrimination based on disability. The Act does not tie its remedies “to the discriminator being a federal agency or being in receipt of federal funds. Instead, the Act is a quite general civil rights law for persons with disabilities, prohibiting disability-based discrimination in employment (Title I), in the provision of public services (Title II), and by privately-owned public accommodations (Title III).” Nat’l Lawyers Guild Aids Network, AIDS Practice Manual: A Legal and Educational Guide § 9.1, at 9-3 (3d ed. 1991, updated 1992); see also Robert L. Burgdorf Jr., The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. C.R.-C.L. L. Rev. 413, 453 (1991) (“The Americans with Disabilities Act has the broadest scope of coverage of any single civil rights measure to date . . . .”).

\(^{264}\) 42 U.S.C. § 12101 (a)(1) (1990) (“The Congress finds that (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . . ”).

\(^{265}\) Id. § 12102(2)(A)(B)(C).

\(^{266}\) Id. §§ 12111-12117.

\(^{267}\) Id. §§ 12131-12165.

owns...or operates a place of public accommodation.”

This provision greatly restricts the scope of the lawyers' license to discriminate in the selection of clients. Any non-government lawyer involved in commerce may not now discriminate in the selection of any of these millions of potential clients on the basis of a covered physical or mental impairment or record of impairment. In addition, a lawyer may not reject a potential client because the lawyer perceives or believes that an individual has or may have an impairment, even if the individual is a member of a group with a high propensity for a particular disease or condition. For example, if an attorney refused to represent an African-American because the attorney fears AIDS and knows that AIDS is more widespread in the African-American population, this would constitute discrimination in violation of the Act due to the individual's disability, not race.

In the future, lawyers must be very careful when rejecting potential clients, because the rejection may appear to the rejected individual to be based on a discriminatory motive. Given the broad scope of the definition of “impairment” under the Act, a lawyer may not even be aware that a potential client has an impairment. “Impairments” include many conditions...
which might not commonly be viewed as disabilities, such as cosmetic disfigurement, emotional illness, learning disabilities, contagious diseases or infections, drug addiction, and alcoholism.\footnote{275}

It would also be improper under the Act to reject a potential client because that individual is related to or associated with another who has a known disability, which may be somehow offensive to the lawyer.\footnote{276} A lawyer could, however, reject as a client, a person with a disability which posed a “direct threat” to the lawyer’s health or safety, unless “reasonable modifications of policies, practices, or procedures will mitigate the risk.”\footnote{277}

These prohibitions against discrimination in providing services to those with disabilities are applicable to all attorneys in private practice, whose activities affect commerce, whether the attorney is in solo practice or a

\footnote{275. 28 C.F.R. § 36.104 (defining physical or mental impairment); see ADA HANDBOOK, supra note 270, at III-17 to III-19 (providing an analysis of the regulation). The text of the regulation reads:

(i) The phrase physical or mental impairment means —
   (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skill; and endocrine;
   (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and special learning disabilities;
   (iii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;
   (iv) The phrase physical or mental impairment does not include homosexuality or bisexuality.


The individuals covered under this section include any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this part for a day care center to refuse admission to a child because his or her brother has HIV disease. This protection is not limited to those who have a familial relationship with the individual who has a disability. If a place of public accommodation refuses admission to a person with cerebral palsy and his or her companion, the companion have an independent right of action under the ADA and this section.

ADA HANDBOOK, supra note 270, at III-53.

277. 28 C.F.R. § 36.208 (1992); see also 42 U.S.C. § 12182(b)(3) (1990); School Board v. Arline, 480 U.S. 273, 287-88 (1987) (holding that it is for the courts to determine whether any “reasonable accommodation” can be made by the employer to satisfy the medical judgments of public health officials when dealing with an individual with a contagious disease); ADA HANDBOOK, supra note 270, at III-58.}
partner in a very large firm. This application should be distinguished from the employment provisions of the Americans With Disabilities Act which apply only to employers, including law firms, having fifteen or more employees.

In a similar vein, lawyers who use their residence, or a part of their residence, as a law office will find that even their home may be viewed as a place of public accommodation for the purposes of the Act. That portion of the residence used exclusively as a law office, or used both as a law office and for residential purposes, as for example a restroom, are covered, while any part of the house used exclusively for residential purposes is not within the purview of the Act. Thus, a lawyer may not utilize suspect criteria relating to a person's disability in rejecting that person as a client, no matter the size of the lawyer's practice or even if legal services are provided in the lawyer's own home.

The mandate of the Americans With Disabilities Act is clear. Discrimination against individuals with disabilities must be eliminated from the practice of law. Undoubtedly the lawyer's historic right to discriminate in the selection of clients based on any criteria is thus greatly diminished relative to the forty-three million Americans covered by the Act. But does the Act eliminate all discretion on the part of the lawyer relative to rejecting a case which a person with a disability may wish to bring or for providing other legal services to such a person?

Obviously, lawyers still retain some discretion and, in certain circumstances, must reject a particular client even if the individual is disabled, as in the case where the client wishes the attorney to engage in an unlawful act or where the attorney would be violating a disciplinary rule. Lawyers may also refuse to accept a person with a disability as a client if the rejection is based on legitimate criteria which the lawyer applies uniformly to all clients

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278. See supra note 270; see also James G. Frierson, Does Your Law Office Meet the Requirements of the Americans With Disabilities Act? 32 LAW OFF. ECON. & MGMT. 397, 402 (1991) ("All law firms and offices open to clients must conform to Title III of the ADA on public accommodations.").

279. 42 U.S.C. § 12111(5) (1990); The text of 29 C.F.R. § 1630.2(e) states that:

The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees . . .

280. 28 C.F.R. § 36.207 (1992); see also Frierson, supra note 278, at 402.

281. 28 C.F.R. § 36.207; see also ADA HANDBOOK, supra note 270, at III-36 to III-57.

282. See 42 U.S.C. § 12101(b)(1) (1990); id. § 12181(7)(F); see also Frierson, supra note 278, at 402-403.

283. See supra text accompanying notes 73-74.
who seek the lawyer's legal services. For example, a female criminal defense attorney who consistently refuses to represent males who are indicted for rape may refuse to represent a disabled male who is indicted for rape: the decision to reject the client, being based on the type of crime, or even gender, rather than on disability, would not be improper in New York. Similarly, a lawyer who limits his or her practice to corporate taxation would not be in violation of the Act for refusing to represent an individual with a disability who is seeking a divorce. Refusal to accept a potential client because that individual would not or could not pay the legal fees or retainers normally charged by the lawyer for equivalent services would not violate the Act even if the individual had a disability. A lawyer may not, however, require a surcharge for individuals or groups with disabilities "to cover the costs of measures . . . that are required to provide that individual or group with the nondiscriminatory treatment required by the Act," but a lawyer may charge for any additional time that is required in specific cases to provide legal services.

An individual with a disability who is discriminatorily rejected as a client by a lawyer in violation of the Americans With Disabilities Act may institute a civil action seeking equitable relief, monetary damages, and civil penalties. The Attorney General may also commence a civil action in the United States District Court when discrimination against an individual or group with disabilities raises an issue of general public importance. A resulting determination by the court that a lawyer unlawfully discriminated in the practice of law by refusing to provide legal services to individuals with

284. See infra text accompanying notes 348-52; see also supra note 10.
285. See 28 C.F.R. § 36.302(b) (1992). The regulation reads:

A public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

. . . A healthcare provider may refer an individual with a disability to another provider, if that individual is seeking, or requires, treatment or services outside of the referring provider's area of specialization, and if the referring provider would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.

A physician who specializes in treating only a particular condition cannot refuse to treat an individual with a disability for that condition, but is not required to treat the individual for a different condition.

Id.

286. Other ethical considerations relating to service to the poor and those unable to pay a full fee might, however, be implicated. See Model Code EC 2-24; Model Code 2-25.
287. 28 C.F.R. § 36.301(c) (1992).
288. ADA HandBook, supra note 276, at III-72.

While the Americans With Disabilities Act clearly prohibits discrimination in the selection of clients based on disability, other federal civil rights statutes either have not defined law offices as places of public accommodation or have requirements, such as "acting under color of state law" or "state action," which exclude most lawyers in private practice. There is, however, a federal antidiscrimination statute which potentially has a broad enough scope to be used as a mechanism for challenging the lawyers' right to discriminate on the basis of race or ethnic origin. 42 U.S.C. § 1981(a) provides that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." This provision has no "state action" or "color of law" requirement and therefore applies to a refusal to enter into contractual relationships between private parties due to one of the parties' race or national origin. The courts have interpreted this statute in a manner which, at least arguably, appears to extend its protections to contracts for services between lawyers and some potential clients.

The leading case construing the scope of section 1981 is Runyon v. McCrary. In Runyon, the United States Supreme Court held that section 1981 prohibited a private, commercially operated, nonsectarian school from denying admission to prospective students due to their race; the opinion also held that section 1981 was constitutional. The Court stated that "it is now well established that . . . § 1981, prohibits racial discrimination in the making and enforcement of private contracts." In Runyon, the Court viewed the racial exclusion practiced by two private schools to be a "classic violation of § 1981." The facts were quite simple.

293. For a description of the provisions of § 1981(a), see supra note 123. For cases holding the provision applicable to private conduct, see infra note 295. It should be noted, that while the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (amending § 1981 of 42 U.S.C.) amended § 1981, it did not amend the basic text which appears in subsection (a).
The parents of prospective students wished to enter into a contractual relationship with the schools for educational services. The schools were to be paid for services rendered, and the students were to receive instruction in return for the payment. The schools' educational services "were advertised and offered to members of the general public." 297 Neither of the schools offered their educational "services on an equal basis to white and nonwhite students." 298 The students were denied admission, that is, access to educational services, simply because of their race, and therefore the statute was violated. 299

The Supreme Court rejected the schools' argument that section 1981 "does not reach private acts of racial discrimination" based on an analysis of the legislative history of the statute and earlier case law. 300 In upholding the constitutionality of section 1981, the Court also rejected arguments premised on freedom of association, 301 the parental right to send children to the private school of their choice, 302 and a right of privacy implicating parental interests. 303 Section 1981 was ultimately upheld "as an exercise of federal legislative power under section 2 of the Thirteenth Amendment." 304

The Runyon Court's analysis of a "classic violation of § 1981" can be applied to a legal services setting. In the hypothetical at the beginning of this article, a prospective client, Gwendolyn, wished to enter into a contractual relationship with the attorney Blackstone for legal services to obtain a divorce. Blackstone's legal services were advertised and offered to members of the general public. The attorney's legal services were not rendered on an equal basis to white and non-white potential clients. Gwendolyn was denied access to contractual legal services simply because of her race. This analysis seems to suggest that section 1981 should be applicable to the legal services contract in the hypothetical. However, a more detailed examination of Runyon suggests that this conclusion may not be appropriate in all factual settings.

While the majority opinion in Runyon provides an expansive scope to section 1981, the dissenters argued that the statute only outlaws legal rules which disable "any person from making or enforcing a contract, but does not prohibit private racially motivated refusals to contract." 305 The dissenters made the argument that "whites" have "no right to make a contract with

297. Id.
298. Id. at 172-173.
299. Id. at 173.
300. Id. at 173.
301. Id. at 175-76.
302. Id.
303. Id. at 177-178.
304. Id. at 179.
305. Id. at 195 (White, J., dissenting).
an unwilling private person, no matter what that person's motivation for refusing to contract." Since the statute provides non-whites only with the same rights enjoyed by white citizens, the statute therefore confers no rights on non-whites to enter into a contract with an unwilling person. The dissenters might argue that section 1981, for over one hundred years, until the decision in *Runyon*, did not include, and should not now include, a discriminatory refusal to enter into a personal services contract with a non-white.

Justice Powell in his concurrence in *Runyon* assumed a middle ground. He suggested that section 1981 is not applicable to certain personal contracts, "such as those where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association." Some selection by individuals may reflect "a purpose of exclusiveness" which has more to do with long- respected associational rights, rather than a motive to discriminate against non-whites.

Arguing that no "'bright line' can be drawn that easily separates the type of contract offer within the reach of § 1981 from the type without," Justice Powell believed it was clear that section 1981 "does reach certain acts of racial discrimination that are 'private' in the sense that they involve no state action." Private acts within the reach of section 1981 would generally involve a commercial relationship. Advertising or extending an open offer of one's services to the public generally can be construed as an open-ended invitation which can mature into a binding contract if it is accepted by those who meet financial or any "other racially neutral specified conditions" for obtaining the service. Only those entering into a contract

306. *Id.* at 194.

307. *Id.*

308. *Id.* at 194-195; see also Linda A. Lacewell & Paul A. Shelowitz, *Comment, Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 *U. MIAMI L. REV.* 823, 839 & n.102 (1987) (noting that courts have typically held that the purpose of sections 1981 and 1982 is to provide equality of conferred rights between persons of different races); *Note, The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 *HARV. L. REV.* 412, 412 (1976) [hereinafter *Expanding Scope of Section 1981*] (noting the shift in the Court's thinking after a "century of desuetude").


310. *Id.* at 187-88.

311. *Id.* at 187.

312. *Id.* at 188.

313. *Id.*

314. *Id.* at 189 (emphasis in original).

315. *Id.*

316. *Id.* at 188.
that is "private," in that it is "not part of a commercial relationship offered generally or widely," or that reflects a selectivity that would be "exercised by an individual entering into a personal relationship," can escape the reach of section 1981.\(^{317}\)

The Court's interpretation of section 1981 in \textit{Runyon} proved controversial,\(^{318}\) and in 1989, in the case of \textit{Patterson v. McLean Credit Union},\(^{319}\) the Supreme Court raised the question whether \textit{Runyon}'s expansive interpretation should be reconsidered. While admitting "that a strong case could be made for the view that the statute does not reach private conduct,"\(^{320}\) the Court concluded that \textit{Runyon} should not be overruled and reaffirmed its holding "that § 1981 prohibits racial discrimination in the making and enforcement of private contracts."\(^{321}\) The refusal to enter into a contract, based strictly on an individual's race, is prohibited,\(^{322}\) but the ultimate reach of section 1981 remains somewhat murky because of the language used by Justice Powell in his concurring opinion from \textit{Runyon}.

The specific issue whether an attorney's refusal to enter into a contract for legal services because the potential client is non-white has apparently not yet reached the courts. While many of the judicial applications of section 1981 have appeared in employment\(^{323}\) and education\(^{324}\) related matters, it has also been applied to agreements concerning health care

\(^{317}\) Id. at 189.


\(^{319}\) Id. at 189.

\(^{320}\) Id. at 171.

\(^{321}\) Id. at 171-72.

\(^{322}\) Id. at 176-77.


\(^{324}\) See, e.g., \textit{Runyon v. McCrary}, 427 U.S. 160 (1976) (holding that private non-sectarian schools cannot deprive admission to prospective students because they are black); \textit{Albert v. Carovano}, 851 F.2d 567 (2d Cir. 1988)(finding suspended students failed to state section 1981 cause of action).
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services, insurance, use of recreational facilities, and even dealings with mortuaries and beauty salons. In as much as section 1981, on its face and as construed by the Runyon majority, would appear to be directly applicable to contracting for the rendition of legal services, it seems remarkable that in the intervening years since Runyon, no case law on the rejection of clients issue has been generated. In fact, there appears to be a dearth of authority relating to the application of section 1981 to personal service contracts by professionals such as lawyers, doctors, and dentists who provide services primarily on a one-to-one basis. Eventually, however, such a case is likely to arise.

At some point in the not-to-distant future, a disgruntled, rejected potential client will bring an action under section 1981. A court will be forced to determine whether the scope of the statute encompasses contracts as personal as that which is inherent in the lawyer-client relationship, or if indeed there are any types of contractual relationships exempt from section 1981’s reach. The court will have to decide whether the plain language of section 1981 and the Runyon majority opinion’s interpretation have completely derogated the ancient contract maxim that an unwilling party cannot be forced to enter into a contract, a concern expressed by the dissenters in Runyon. Or rather, whether there are limits to the scope of the rule, as suggested by Justice Powell’s concurrence, which might exempt legal services as a type of special “individual” relationship.

If there are limits to the reach of section 1981, they must be appropriately


327. See e.g., Wright v. Salisbury Club Ltd., 632 F.2d 309 (4th Cir. 1980) (finding that excluding plaintiff from club membership violated Civil Rights Act in several ways); Olzman v. Lake Hills Swim Club, 495 F.2d 1333 (2d Cir. 1974) (holding that black guests of swim club members have same right as white citizens to make and enforce contracts with the swim club); Hudson v. Charlotte Country Club, 535 F. Supp. 313 (W.D. N.C. 1982) (holding that section 1981 provides no relief in discrimination suit because defendant is a private club).

328. Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) (involving Indian relatives of deceased Indians who brought action against mortuary for refusing to provide funeral services or sell caskets to them).

329. Perry v. Command Performance, 913 F.2d 99 (3d Cir. 1990) (involving a black woman who was refused service by beauty salon’s hairdresser and brought action alleging civil rights violation and intentional infliction of emotional distress).


331. Id. at 186-189 (Powell, J., concurring).
balanced with the underlying purposes of the statute.\textsuperscript{332} A primary purpose of section 1981 is to proscribe racial discrimination "because it denies to its victims important social benefits and because it inflicts upon them psychological injury when manifest publicly".\textsuperscript{333} Section 1981 is also meant to provide "the opportunity to deal in the contractual sphere on equal footing with whites."\textsuperscript{334}

In its attempt to prohibit discrimination which might denigrate or stigmatize non-whites, and to provide equal access to contracted services, a court must nonetheless allow for due consideration of the long standing contract law policy against forcing unwilling parties to enter into contracts.\textsuperscript{335} A recognition that personal choice and individual autonomy have high value in certain contractual relationships should influence the determination of the scope of the rule in a particular factual setting.\textsuperscript{336} It may even be argued that the practice of law, which by its very nature requires a close personal relationship involving trust, loyalty, and fiduciary responsibilities, is a prime example of the type of contractual relationship which Justice Powell felt should not be reached by section 1981.

But if, as Justice Powell has stated, no "bright line" can be drawn for application of the rule,\textsuperscript{337} then there are criteria which, if present, would make the applicability of section 1981 "more" or "less" likely in a particular scenario relating to contracting for legal services.\textsuperscript{338} Criteria making it "more likely" for section 1981 to be applicable include: (1) the lawyer's engagement in a purely commercial rendition of legal services; (2) active, public solicitation of potential clients; (3) appearance that the services are generally available to the white population; and (4) the offering of standard

\textsuperscript{332} Expanding Scope of Section 1981, supra note 308, at 423.

\textsuperscript{333} Id.

\textsuperscript{334} Id. at 424; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) ("[T]he freedom that Congress is empowered to secure [for a black person] under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live where a white man can live.")

\textsuperscript{335} Expanding Scope of Section 1981, supra note 308, at 424.

\textsuperscript{336} Id. at 424-25. It should also be noted that:

[In cases involving contractual refusals which may now be actionable under section 1981, the infringement on these values has been considered sufficient to lead courts acting only on the basis of contract law to refuse to force a party into the given contract. These values underlying contract law are not involved, however, to the same degree in all potential section 1981 cases. Nonetheless contract principles should require the presence of a strong countervailing interest in advancing the policies underlying civil rights legislation where the values of individual choice and personal autonomy are most severely implicated.]

\textsuperscript{337} Id. at 425.


\textsuperscript{339} Id. at 188-189; see Expanding Scope of Section 1981, supra note 308, at 425-426 (discussing the situation which arises when a provider of services invites the public or a subgroup to make offers for the services).
legal services. Conversely, a lawyer who does not advertise or generally solicit clients, who provides very specialized services to a limited clientele, perhaps relying strictly on referrals, would be less likely to be subjected to a section 1981 action. A member of the bar with a truly passive practice, as for example a law professor who only drafted an occasional will for a friend or colleague, would seem to be virtually immune from a section 1981 action by a prospective client trying to force the professor to represent him or her.

The United States District Courts have jurisdiction over section 1981 actions and may award damages, equitable relief, or "other relief under any Act of Congress providing for the protection of civil rights." A determination by the District Court that a lawyer had violated section 1981 would thus constitute prima facie evidence of professional misconduct in a disciplinary proceeding in New York.

In addition to the Americans With Disabilities Act which clearly applies to lawyers’ discriminatory refusal to accept clients with disabilities, and section 1981 which may potentially apply to a refusal to enter into a legal services contract with non-whites, lawyers must also be cognizant of state statutes, such as those in New York, which prohibit discriminatory treatment of potential clients.

C. NEW YORK STATE CIVIL RIGHTS AND HUMAN RIGHTS LAWS

New York is among the forty-four states and the District of Columbia which have enacted antidiscrimination statutes targeted at the elimination of invidious discrimination in the provision of goods and services in places of public accommodation. Some state statutes are drafted in a manner

339. See Runyon, 427 U.S. at 188-189 (Powell, J., concurring); Expanding Scope of Section 1981, supra note 308, at 426-427.
340. See Runyon, 427 U.S. at 189 (Powell, J., concurring); Expanding Scope of Section 1981, supra note 308, at 425 (describing the effect of the rule in a passive situation where the offeree did not invite or solicit the offer).

In this situation, there seems little basis for allowing the offeror to bring suit under section 1981. The concerns for personal autonomy and choice embodied in traditional contractual principles are in this case most compelling, since the potential 1981 defendant has been completely passive. Moreover, the policies of section 1981 are here least compelling: because no person of any race in practice enjoys any opportunity to force acceptance of an unsolicited offer, the goal of equal opportunity does not require that a black be given such an opportunity. Finally, since the offeree has remained passive, he has in no way overtly manifested racist motivations.

Id. (citations omitted).
343. For compilations of state statutes relating to public accommodations, see DONALD H. HERMANN & WILLIAM P. SCHUERGIN, LEGAL ASPECTS OF AIDS app. 2A (1991); Kathleen M. Cady,
which appear clearly to cover legal services within the scope of their antidiscrimination provisions. But most do not define a place of public accommodation to include lawyers' offices, thus conforming to the traditional view that law practice is a distinctly private activity: a profession, rather than a business engaged in commerce.

The New York legislature has enacted a detailed scheme of antidiscrimination legislation which prohibits various types of discrimination by both governmental agencies and private persons. Central to this scheme are two statutes, the Civil Rights Law and the Human Rights Law, which prohibit certain types of discrimination in places of public accommodation.

The Civil Rights Law is derived from nineteenth century legislation and is premised on the state’s police power. Section 40 of this law entitles all persons within the jurisdiction of New York State to the “full and equal accommodations, advantages, facilities and privileges of any places of public accommodations.” This provision is limited in scope to discrimination based on race, creed, color, or national origin. The statute’s very detailed definition of place of public accommodation does not specifically include offices of professionals such as doctors or lawyers. In fact, “any


344. See CAL. CIV. CODE § 51.5 (Deering 1993) (“No business establishment of any kind whatsoever shall discriminate against...any person in this state because of the race, creed, religion, color, national origin, sex or disability...”). For the statute’s application to professional offices, see Washington v. Blampin, 38 Cal. Rptr. 235, 238 (Cl. App. 1964) (concluding that the phrase “business establishments of every kind whatsoever” was intended to embrace professional services).

345. See, e.g., N.Y. EXEC. LAW § 292(9) (McKinney 1982).

346. TEMPORARY STATE COMM’N ON THE CONSTITUTIONAL CONVENTION, STATE OF N.Y., INDIVIDUAL FREEDOMS (#10) 56 (March 31, 1967) [hereinafter INDIVIDUAL FREEDOMS].


348. N.Y. EXEC. LAW § 296 (McKinney 1982).

349. 1895 N.Y. LAWS 1042, § 1.

350. 1945 N.Y. LAWS 118, art. 12, § 125 (clarifying that the "Law Against Discrimination" is an exercise of the state's police power); see also People v. King, 18 N.E. 245, 249 (N.Y. 1888) (holding that preventing race discrimination is a valid exercise of the police power); Statue Note, Civil Rights — New York Anti-Discrimination Law, 21 N.Y.U. L.Q. REV. 134, 135-36 (1946) (noting that for upholding the Anti-Discrimination Law "as a constitutional and valid exercise of the police power of the state").


352. Id.

353. Id.

354. id.
institution, club or place of accommodation which is in its nature distinctly private" is expressly excluded from the definition.355

The Human Rights Law, in contrast to the Civil Rights Law, was enacted under the authority of the New York State Constitution. Article I, Section 11 of the New York Constitution provides that:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall because of race, color, creed or religion, be subjected to any discrimination, in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.356

Section 11 clearly relates to the acts of private parties and protects civil rights based on four kinds of classifications. The courts have held that the civil rights which are protected by section 11 are only those rights which have been specifically provided by the constitution or statute, and thus section 11 is not self-executing.357 Therefore, it was necessary for the legislature to enact specific provisions if the mandate of the New York Constitution was to be achieved.

In 1945, the New York Legislature, responding to the social and economic changes unleashed by World War II, enacted legislation aimed at combating employment discrimination.358 The State Commission Against Discrimination was created to aid in this effort.359 In 1952, the Commission's mandate was expanded beyond employment discrimination to include the elimination and prevention of certain forms of discrimination in places of

355. Id.
357. Dorsey v. Stuyvesant Town Corp., 87 N.E.2d 541, 548 (N.Y. 1949) (relying on the records of the Constitutional convention of 1938, the court held that the civil rights referred to in § 11 were not self-executing and required legislative implementation), cert. denied, 339 U.S. 981 (1949); see 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1938 1144 (1938) (quoting Mr. H. E. Lewis as saying that he did not believe any provisions in the Constitution were self-executing); but see People v. Kern, 554 N.E.2d 1235, 1241-42 (N.Y. 1990) (refusing to interpret the constitutional provision so narrowly), cert. denied, 498 U.S. 824 (1990).
358. 1945 N.Y. LAWS 118. This act was for the "prevention and elimination of practices of discrimination in employment and otherwise against persons because of race, creed, color or national origin, creating in the executive department a state commission against discrimination . . . ."
359. Id. The act became law on March 12, 1945, before the end of World War II. One of the underlying reasons for its adoption was "encouraging complete utilization in defense work of all patriotic individuals without consideration of race, color, creed, or national origin." KARL DREW HARTZELL, THE EMPIRE STATE AT WAR: WORLD WAR II 67 (1949); see also STATE OF N.Y., PUBLIC PAPERS OF THOMAS E. DREWY 412-413 (1946); JAY HOBEE, DEVELOPMENT AND ADMINISTRATION OF THE NEW YORK STATE LAW AGAINST DISCRIMINATION (1966).
public accommodation, resort, or amusement.\textsuperscript{360} The current version of this provision is section 296 of the Human Rights Law,\textsuperscript{361} which makes it unlawful for a place of public accommodation to discriminate on the basis of race, creed, color, and national origin. This provision is thus similar to Civil Rights Law, section 40. Section 296 also includes sex, disability, and marital status as additional suspect classifications which are not included in the Civil Rights Law.\textsuperscript{362} The Human Rights Law in addition has a long and detailed definition of place of public accommodation.\textsuperscript{363} There is no specific mention of professional offices; however, there is a specific exclusion of any "place of accommodation which is in its nature distinctly private."\textsuperscript{364}

That the legislature has not specifically enumerated professional offices or law offices in its statutory definitions in the Civil Rights or Human Rights Laws does not necessarily exclude professional offices from the reach of these statutes.\textsuperscript{365} Nevertheless, an individual trying to argue that a specific place falls within the statutory definition would have a heavy burden. First, the courts tend to give great weight to the exclusive nature of the classifications enumerated by the legislature.\textsuperscript{366} Since both statutes have a very detailed listing of specific types of locations considered to be public accommodations, there is a presumption that it was the legislature’s intent to limit the application of the statutes to those specified places.\textsuperscript{367} Second, whenever these statutes are deemed as being penal in nature, they are likely to be strictly construed by the courts.\textsuperscript{368} If, however, the statute is viewed as

\textsuperscript{360} 1952 N.Y. LAWS 285. Section 4 of the act amended section 292 of the Executive Law by adding a new subdivision 9 defining "place of public accommodation, resort or amusement." Discrimination in such places based on race, creed, color, or national origin was made unlawful. Id. § 4.

\textsuperscript{361} N.Y. EXEC. LAW § 296(2)(a) (McKinney 1982).

\textsuperscript{362} Compare id. with N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992).

\textsuperscript{363} N.Y. EXEC. LAW § 292(9) (McKinney 1982).

\textsuperscript{364} Id.

\textsuperscript{365} See Gibbs v. Arras Bros., Inc., 118 N.E. 857 (N.Y. 1918) (holding that "the Legislature clearly had in mind in enacting this statute that it should apply only to those [businesses] it selected . . . and to such others, if any, devoted to the general advantage, comfort or benefit, and essential or directly auxiliary to the prosperity, health, development, or happiness of a citizen"). (emphasis added).

\textsuperscript{366} Delaney v. Central Valley Golf Club, 28 N.Y.S.2d 932, 935-36 (Sup. Ct. 1941) (extending the statute to include additional classifications is better left to the legislature), aff’d, 43 N.E.2d 716 (N.Y. 1942).


\textsuperscript{368} See Pryce v. Swedish-American Lines, 30 F. Supp. 371, 372 (S.D.N.Y. 1939) (refusing to apply the Civil Rights Law and its penal nature to a passenger contract); Gibbs, 118 N.E. at 857-58
remedial in nature, the courts may allow a more liberal construction. 369
Finally, these statutes are also likely to be strictly construed because they
abrogate rights established at common law. 370 Except in the case of
innkeepers or common carriers, businesses under the common law could
determine whom they wished to serve. 371
In addition to sections 296 and 40 not listing professional offices as
places of public accommodation, the statutes specifically exclude places
which by their nature are distinctly private. Lawyers could argue that their
offices are inherently private places, where confidential conversations take place in
relatively intimate surroundings, and that the attorney-client relationship is
a distinctly and necessarily private relationship. Lawyers could also point
to the fact that there is no precedent in New York for holding attorneys' offices
to be places of public accommodation for either the Civil Rights Act or the
Human Rights Act.

However, there is some precedent indicating a potential for a lawyer's of
ce being viewed as a place of public accommodation for purposes of
these state statutes. Recent challenges have been made to the status of
doctors' and dentists' offices by AIDS activists through the Division
of Human Rights. The Division has taken the position that doctors' and
dentists' offices are places of public accommodation. 372 This administrative
viewpoint has been challenged in the courts but there is still no clear
appellate decision upholding or rejecting the Human Rights Division's
position. 373 If the courts do find doctors' offices to be included as places of

("[T]he statute must be strictly construed . . . ."); Burks v. Bosco, 73 N.E. 58, 59 (N.Y. 1905) (stating
that "purely statutory offenses cannot be established by implication, and that acts in and of
themselves innocent and lawful cannot be held to be criminal, unless there is a clear and
unequivocal expression of the legislative intent to make them such"); Delaney, 28 N.Y.S.2d 932, 936
(stating that the Civil Rights Law must be strictly construed because it imposes restrictions
on private property and is both penal and criminal in nature).
Rights Law "is a remedial statute and must be liberally construed") (citation omitted).
Rights Act on common law rights); Christie v. 46th St. Theatre Corp., 39 N.Y.S.2d 454, 457 (App.
Div. 1942) (statting rights of property created by the common law cannot be taken away without due
process), aff'd, 54 N.E.2d 206 (N.Y.), remittitur amended, 55 N.Y.S.2d 512 (N.Y.), certi. denied, 323 U.S.
710 (1944).
371. Woodcott, 111 N.E. at 829-30 (holding that owners of a theater could exclude someone who
wrote a bad review because the theater is in no sense a public property or a public enterprise and
that it was within the owner's common law rights to do so).
(overturning lower court's dismissal of complaint by the State Division of Human Rights, which
made a preliminary finding of discrimination by a doctor who refused to treat an AIDS patient),
373. Id. at 517. The court held that "[i]nasmuch as no administrative hearing has yet been held to
allow the SDHR to determine whether . . . [a doctor's office] is a place of public accomodation
. . . and because the agency's final determination is subject to judicial review . . . relief [for the
doctor] by way of a writ of prohibition is not an appropriate remedy." Id. (citations omitted).
public accommodation, it would establish a persuasive precedent to be used against other licensed professionals such as accountants and lawyers.\(^{374}\)

Nevertheless, at this time, New York's antidiscrimination statutes are not generally viewed as being applicable to a lawyer's rejection of a client, even if based on purely racist, sexist, or other invidiously discriminatory motives. Therefore the statutes' remedies are currently unavailable.\(^{375}\)

A similar result would have been reached in the case of a lawyer practicing law in New York City prior to 1991 under the provisions of the city's Administrative Code.\(^{376}\) In 1991, however, the City Code's definition of place of public accommodation\(^ {377}\) was amended in a manner which may have significant consequences for legal practitioners.

D. NEW YORK CITY HUMAN RIGHTS LAW

The City of New York has created a Commission on Human Rights "with power to eliminate and prevent discrimination from playing any role in actions relating to... public accommodations..."\(^ {378}\) Prior to 1991, the definition of place of public accommodation was the same in pertinent part as that of the New York State Human Rights Law.\(^ {379}\) Efforts by AIDS activists to broaden the definition of place of public accommodation to reach professional offices, such as those of dentists,\(^ {380}\) were, at first, no more

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374. John F. O'Brien, AIDS Bias Claim Upheld Against Doctor, N.Y. L.J., May 17, 1990, at 2 (raising the possibility that the decision in Elstein could lead to the classification of other professionals' offices as "places of public accommodation").

375. For full text making this clear, see N.Y. EXEC. LAW §§ 297(4)(c), (9), 298 (McKinney 1992); N.Y. CIV. RIGHTS LAW § 40-d, 41 (McKinney 1992).


378. Id. § 8-101. See also id. § 8-103 (explaining the structure of the commission).


380. See Sattler, 580 N.Y.S.2d 35. The holding affirmed the N.Y. Supreme Court's holding that a one-chair dentist's office, which did not operate as a clinic, was not a place of public accommodation within the definition contained in NEW YORK, N.Y., CITY CHARTER & ADMIN. CODE § 8-102(9) (1986). The court noted that:

Administrative Code § 8-102(9) was amended in 1991 after the Supreme Court issued its decision in this case. The amended version provides, inter alia, that a "place or provider of public accommodation" shall include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind". The phrase at issue on this appeal, "retail stores and establishments dealing with goods and services of any kind", has been deleted, and we do not pass on whether the petitioner's one-chair dental practice would be considered a "place of public accommodation" under the amended version.

successful at the local level than they were under the state Human Rights Law.\textsuperscript{381}

In 1991, the New York City Human Rights Law was amended to define “place or provider of public accommodation” in more generalized terms, though without enumerated examples. The result was a very broad and far reaching definition:

The term “place or provider of public accommodation” shall include providers, whether licensed or unlicensed of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold or otherwise made available.\textsuperscript{382}

The only specific exclusions to this provision are clubs which, by their very nature, are distinctly private, and certain benevolent and religious organizations.\textsuperscript{383} This exclusion is far less extensive than that in the state Civil Rights Act and the Human Rights Act. There, “any institution, club or place of accommodation which is in its nature distinctly private” is excluded.\textsuperscript{384} An argument that a law office or provider of legal services is not covered by the City Code’s definition because the practice of law is premised on a confidential, extremely personal relationship is not likely to be effective or successful.

Although there is presently no caselaw holding professional offices to be places of public accommodation under New York City’s amended definition of public accommodation,\textsuperscript{385} the New York City Commission on Human Rights did view even the old definition quite expansively to include professional offices.\textsuperscript{386} An equally expansive view of the new definition by the

\textsuperscript{1187} (N.Y. 1990). In \textit{Harwitz}, a dentist attempted to prevent the City Human Rights Commission from holding a hearing or taking action against him for his refusal to further treat a patient with AIDS. The N.Y. Supreme Court held:

Since the Commission would not be acting wholly outside of or in excess of its powers but merely following its mandate in making a determination of whether petitioner’s dental office is a place of public accommodation, and its final determination would be reviewable, prohibition cannot be invoked with respect to this issue.

\textit{Id.} at 1012.

\textsuperscript{381} See \textit{supra} note 372.

\textsuperscript{382} \textsc{new york}, N.Y., \textsc{city charter & admin. code} § 8-102(9) (1986 & supp. 1992).

\textsuperscript{383} \textit{Id.}

\textsuperscript{384} Compare \textit{id.} § 8-102(9) with \textsc{n.y. civ. rights law} § 40 (\textsc{mckinney} 1992) and \textsc{n.y. exec. law} § 292(9) (\textsc{mckinney} 1982).

\textsuperscript{385} The Appellate Division in \textit{Sattler v. New York Commission on Human Rights}, 580 N.Y.S.2d 35, 37 (App. Div. 1992), appeal denied, 610 N.E.2d 388 (1992), specifically refused to pass on whether the dental practice would be a place of public accommodation under the version of § 8-102(9) which was amended in 1991 and is currently in force. See \textit{supra} note 376.

\textsuperscript{386} See \textit{supra} text accompanying note 379.
Commission is very likely, and any reasonable facial interpretation of the definition appears to include professional offices such as those of dentists, physicians, and attorneys. Given the aggressive approach of New York City AIDS and minority activists toward their civil and human rights and the Commission’s very broad definition of “place or provider of public accommodation,” it may well be only a matter of time before such a judicial interpretation of the New York City provision is rendered.

If lawyers are found to be within the reach of the New York City Human Rights Law, it would be an unlawful discriminatory practice for a lawyer, directly or indirectly, to refuse, withhold, or deny the accommodations, advantages, facilities, or privileges provided by the lawyer or his office, because of actual or perceived suspect criteria. These criteria include race, creed, color, national origin, age, gender, disability, marital status, sexual orientation, alienage, or citizenship status. The refusal of an attorney to accept an individual as a client because of one of these suspect criteria would be an unlawful discriminatory practice.

Any person aggrieved by a lawyer’s refusal to accept that person as a client due to an actual or perceived suspect criteria may file a complaint with the City Commission on Human Rights, or the Commission itself has the authority to file a complaint alleging that a lawyer has committed an unlawful discriminatory practice. If probable cause of an unlawful practice exists, the matter would be referred to an administrative law judge, although the Commission may attempt to resolve the complaint through mediation or conciliation. If after a hearing a lawyer is found to have engaged in an unlawful discriminatory practice by refusing to accept a particular person as a client, the lawyer may be ordered to take affirmative action to correct the discriminatory action, or equitable relief and civil or criminal penalties may be invoked. The decision of the tribunal

387. Since New York City’s Human Rights Commission believed professional offices fell within the definition of place of public accommodation under the old version of § 8-102(9), as evidenced by Sattler and Hurwitz cases, the Commission would unquestionably assume a similar position under the amended provision which is clearly much broader in scope.


389. Id.

390. Id. § 8-109(a).

391. Id. § 8-109(c).

392. Id. § 8-116(c).

393. Id. § 8-115(a).

394. Id. § 8-119.

395. Id. § 8-120(a).

396. Id. § 8-122.

397. Id. §§ 8-124, 8-126.

398. Id. § 8-129.
would also constitute a prima facie violation of New York’s antidiscrimination disciplinary rule, potentially resulting in discipline.399

XII. CONCLUSION

Some of the views and interpretations presented in this article will be troublesome to many within the legal community. Nevertheless, the fundamental right of a lawyer to represent only those persons whom the lawyer wishes to represent is being questioned and characterized as anachronistic in light of modern legal practices. The argument that lawyers should be free arbitrarily to reject potential clients because lawyers need absolute personal and professional autonomy to practice law effectively has been found wanting when weighed against the public policy of eliminating invidious discrimination in our society generally, and in the practice of law specifically. Lawyers’ perceived freedom from the reach of antidiscrimination statutes has also been challenged, and an argument has been presented that the scope and application of New York’s antidiscrimination disciplinary rule400 will be found by the courts to be far greater than the state bar association, or at least the rule’s proponents, had perhaps originally intended.

The legal profession in New York has recognized that discrimination does exist in the practice of law and in the administration of justice.401 New York, in its adoption of an antidiscrimination disciplinary rule402 and an ethical consideration403 targeted at bias and condescension toward those involved in the legal process, makes this abundantly clear. Yet additional steps can and should be taken to clarify the lawyers’ responsibilities relative to potential clients. The New York State Bar Association should amend EC 2-26 to make it clear that rejection of clients based on invidiously discriminatory criteria is unethical.404 The ABA should adopt a model rule prohibiting improper discrimination in the practice of law.405 This model rule should be clearly drafted to prohibit improper discrimination in the selection of clients, as does the proposed California rule.406 This may lead other states to accept rules and standards prohibiting improper bias and discrimination.

399. N.Y. CODE DR 1-102(A)(6).
400. Id.
401. See REPORT OF THE SPECIAL COMMITTEE ON WOMEN, supra note 156; TASK FORCE REPORT, supra note 145; REPORT OF THE COMMITTEE ON MINORITIES, supra note 154 (all recognizing discrimination in the legal profession).
402. N.Y. CODE DR 1-102(A)(6).
403. N.Y. CODE EC 1-7.
404. The criteria listed in DR 1-102(A)(6) could be utilized.
405. Such a rule is currently under consideration. See supra note 229.
406. See supra note 216.
by attorneys. Finally, the drafters of the tentative drafts of the *Restatement* \(^{407}\) may wish to revise its language to make clear that the right to select one's client is not absolute, especially in light of the Americans With Disabilities Act, applicable civil rights legislation, and recently enacted antidiscrimination ethics rules.