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## For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge

Michele N Struffolino

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# FOR MEN ONLY: A GAP IN THE RULES ALLOWS SEX DISCRIMINATION TO AVOID ETHICAL CHALLENGE

MICHELE N. STRUFFOLINO\*

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I. INTRODUCTION

The billboard states: "Divorce: Men Only."<sup>1</sup> The website more specifically targets a particular class of men: "[the firm] appreciates the hard work performed by all law enforcement officers and *firemen* in keeping our communities safe. As such, we offer discounts for these individuals."<sup>2</sup> The website states that the law firm believes in "fighting for men's rights."<sup>3</sup>

The reaction is one of confusion. Something just does not seem right. Isn't this discrimination? What if the billboard stated, "Divorce: Whites only"? Does this message violate ethical rules? The message appears to reach out to men who are about to face, or are already going through, a divorce; men that have income, assets and benefits they need to protect.<sup>4</sup> Is the system willing to allow this apparent gender discrimination to continue because the need to protect men's rights in divorce outweighs the systemic and societal harms associated with the message? This message, should, at least, trigger further inquiry.

A little more internet browsing reveals that there are actually several firms that seek to represent only one gender in family matters.<sup>5</sup> Some

1. Fla. 'Men's Rights' Law Firm Fights for Dads in Divorces, CHANNEL 8 WFLA.COM (Mar. 6, 2014, 5:20 PM), <http://www.wfla.com/story/24908527/fla-mens-rights-law-firm-fights-for-dads-in-divorces> (last visited Dec. 24, 2014) [hereinafter 'Men's Rights' Firm Fights].

2. FAQs, Cordell & Cordell, <http://cordellcordell.com/about/frequently-asked-questions/#faq-7> (last visited May 10, 2015) (emphasis added).

3. Firm Profile, Kenny Leigh & Assocs. <http://www.menonlyfamilylawonly.com/bocaraton/firm-profile/> (last visited Jun. 20, 2014).

4. About Attorney Johnny D. Drizis, DIVORCE FOR MEN, <http://www.divorceformen.org> (last visited Jan. 20, 2015).

5. Firm FAQs, CHARLES R. HOFHEIMER, PC, <http://www.divorceandcustody4women.com/firmfaqs.htm> (last visited Jan. 20, 2015); MILTON FAMILY LAW, <http://www.womensdivorcerights.com/> (last visited Jan. 20, 2015); A BETTER ATTORNEY FOR WOMEN, <http://www.attorneyforwomen.net/> (last visited Jan. 20, 2015); DADS DIVORCE, <http://www.dadsdivorce.com/> (last visited Jan.

firms, as seen on the “men only” billboard, explicitly and intentionally exclude an entire class of clients from the availability of their services.<sup>6</sup> Other firms are more subtle. These firms implicitly indicate that only one gender is welcome to seek their services.<sup>7</sup> Firm names, such as *Divorce for Men*<sup>8</sup> and *The Women’s Law Group*<sup>9</sup>, deliver the message. Some firms simply boast a cause: One firm is “dedicated to addressing gender bias against men”<sup>10</sup> while another is “designed to exclusively meet the needs of women.”<sup>11</sup>

Further investigation reveals that the issue of gender bias in client selection has received little attention since the late 1990’s when the Massachusetts Commission Against Discrimination found a female attorney liable for her discriminatory practice of refusing to represent men in domestic relations matters.<sup>12</sup> This decision sparked scholarly discussion examining the rights of clients and attorneys in the client selection process and the publication of practice pointers for avoiding discrimination claims.<sup>13</sup> Over the past decade however, as the discussion receded, gender based firms appear to have gone unchallenged.

Although this article focuses on the ethical issues associated with firms that exclude women from its domestic relations services, the existence of women-only law firms is acknowledged. The analysis of the ethical issues raised by these gender specific firms is somewhat the same regardless of

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20, 2015); KENNY LEIGH & ASSOCS., <http://www.menonlyfamilylawonly.com/> (last visited Jan. 20, 2015); MEN’S DIVORCE LAW FIRM, <http://www.mensdivorcelaw.com/> (last visited Jan. 20, 2015); DIVORCE FOR MEN, <http://www.divorceformen.org> (last visited Jan. 20, 2015).

6. *Firm Profile*, *supra* note 2; THE FIRM FOR MEN, [www.thefirmformen.com](http://www.thefirmformen.com) (last visited Jan. 20, 2015).

7. THE WOMEN’S LAW GROUP, <http://www.thewomenslawgroup.com/> (last visited Jan. 20, 2015) (“We practice law from a woman’s perspective.”); BLOCH & CHAPLEAU, LLC, <http://www.blochchapleau.com/mens-rights-in-divorce> (last visited Feb. 5, 2015) (“Emphasizing the representation of men in Family law and Divorce matters.”).

8. THE FIRM FOR MEN, *supra* note 6.

9. THE WOMEN’S LAW GROUP, *supra* note 7.

10. DIVORCE FOR MEN, *supra* note 4.

11. MILTON FAMILY LAW, *supra* note 5.

12. *Stropnick v. Nathanson*, No. 91-BPA-0061, 1999 WL 33453078, at \* 2 (M.C.A.D.1999), *aff’d* 2003 WL 22480688, at \*1 (Mass. Super. 2003).

13. See Samuel Stonefield, *Lawyer Discrimination Against Clients: Outright Rejection—No; Limitations on Issues and Arguments—Yes*, 20 W. NEW ENG. L. REV. 103, 109 (1998); see also Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 33 (1998); see also Steven Berenson, *Politics and Plurality in a Lawyer’s Choice of Clients: The Case of Stropnick v. Nathanson*, 35 SAN DIEGO L. REV. 1, 8 (1998).

what gender is excluded.<sup>14</sup> Because the exclusion occurs before any contact with a particular client, few ethical or legal rules even apply.<sup>15</sup> In addition, there is no client, or even potential client, to complain about the message.<sup>16</sup> The analysis should not end there. It should extend to the broad legal and moral principles that govern an attorney's ethical obligations.<sup>17</sup>

The exclusion of women raises specific concerns regarding the balance of ethical rules and principles. For example, the message infers that men, as a class, need special consideration to protect their rights in divorce actions and that this can only be accomplished by firms that exclusively represent men. The inference is that men are being treated unfairly in the system and that a fight may be needed to accomplish a just result.<sup>18</sup> Further analysis is necessary here to test this inference; to the extent the inference of a danger of an unjust result exists, further analysis is necessary to opine whether the danger justifies the harm caused by the systemic acquiescence to disparate treatment of women. Offering services only to men may actually perpetuate stereotypical gender differences and preconceived fears and misconceptions about the divorce process.

This article begins with a discussion of moral and ethical rules and principles that guide an analysis of the propriety of a gender specific client selection process.<sup>19</sup> This includes a discussion of the theory underlying the differing views of attorney autonomy and identity and clarifies the moral considerations inherent in the client selection process.<sup>20</sup> When ethical rules and principles are considered along extrinsic legal rules, such as those stemming from freedom of speech considerations and state anti-discrimination laws, this article exposes the gap that allows the practice to avoid challenge.<sup>21</sup> At this point, the analysis narrows from a discussion of gender specific client selection to the specific ethical concerns associated with firms that exclude women from the client selection pool and whether the need to service only men is justified under principles of fairness and justice.<sup>22</sup> Finally, after suggesting that a need to protect men's rights in divorce should not justify a systemic acquiescence to the exclusion of all women from the potential client pool, this article advocates for systemic

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14. See discussion *infra* Part II.

15. See discussion *infra* Part II.B.2.b.

16. See discussion *infra* Part II.

17. See discussion *infra* Part II.B.

18. *Firm Profile*, *supra* note 2

19. See discussion *infra* Parts II.A–B.

20. See discussion *infra* Parts II.A.1–3.

21. See discussion *infra* Part II.C.

22. See discussion *infra* Part II.D.

action by the legal profession challenging the discriminatory practice of exclusion of all women as potential clients solely because of gender in order to protect the integrity of the profession and the legal system.<sup>23</sup>

## II. MORAL, ETHICAL, AND LEGAL CONSIDERATIONS IN THE CLIENT SELECTION PROCESS

Is a pre-emptive exclusion of an entire gender, approximately half of the population in the United States,<sup>24</sup> from an attorney's client selection base ethical? Finding the answer requires an analysis of ethical, moral and legal considerations. Although one Massachusetts court held that such a practice was unlawful discrimination and a violation of the state anti-discrimination statute,<sup>25</sup> the disparate treatment evades ethical challenge.

The client selection process usually begins with an intake or client interview.<sup>26</sup> In this face-to-face meeting both the client and the attorney determine whether establishing an attorney-client relationship is appropriate;<sup>27</sup> time constraints, the attorney's professional experience, and the existence of potential conflicts need to be considered when making this determination.<sup>28</sup> It is during this meeting that the attorney obtains a preliminary understanding of the issues involved and the client's objectives. The attorney also assesses whether she can assist the potential client in achieving these goals.<sup>29</sup> At the very least, the attorney must determine if the client has a legally recognizable claim and is entitled to relief.<sup>30</sup> If as a result of the intake, the attorney believes that representing the client will involve a legal or ethical wrong, or that the representation will create a conflict with current or future clients, the attorney is free, or required, to decline the case and the decision to do so will be supported by

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23. See discussion *infra* Part III.

24. LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, PUB. NO. C2010BR-03, AGE AND SEX COMPOSITION: 2010, 2, (May 2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

25. See *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, at \*1 (Mass. Super. Ct. Sept. 16, 2003).

26. See DONALD G. TYE, ET AL., TRYING DIVORCE CASES IN MASSACHUSETTS § 1.3 (3d ed. 2013).

27. *Id.*

28. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (2015), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation/comment\\_on\\_rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/comment_on_rule_1_16_declining_or_terminating_representation.html).

29. See TYE, *supra* note 26, at § 1.3.

30. W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 1029 (2006).

the bar.<sup>31</sup> Other than declining representation because the client does not present a legally cognizable interest or because representation will involve a legal or ethical wrong, the appropriate degree of autonomy the attorney enjoys in the client selection process has been the subject of great debate among ethical scholars.<sup>32</sup>

Here, however, a pre-intake client selection issue, one in which an entire class of individuals never make it in the door, is involved. In these situations, the specific ethical rules provide little explicit guidance. The analysis requires a broader analysis of a lawyer's overall moral and ethical responsibilities. First, understanding a lawyer's obligations in the pre-client selection stage requires a discussion of the extent to which an attorney's own morals should drive the decision making process. It is traditionally thought that an attorney can decline to represent the client for almost any reason.<sup>33</sup> Whether an attorney should decline to represent a client if, as a result of the intake, the attorney believes that the representation will create a conflict with the attorney's own beliefs, is at the center of the debate. Next, a review of the ethical rules that directly address the issue reveals the need to apply broad ethical principles that provide the foundation for specific ethical rules. Finally, examining the legal issues triggered by the decision to opt in or out of representation provides a glimpse into why, despite an explicit discriminatory action, the practice has been allowed to continue.

#### *A. Moral Principles and Client Selection*

The Model Rules of Professional Conduct acknowledge the absence of clear guidance to assist in the determination of whether the attorney should not "opt-in"<sup>34</sup> to an attorney-client relationship. The model rules suggest that lawyers should be guided by moral principles.<sup>35</sup> The questions of what moral principles should guide an attorney and to what extent they should be applied is the subject of intense legal, ethical, sociological, and

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31. *Id.* at 1023, 1029.

32. *Cf.* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 634 (1986); *see also* Wendel, *supra* note 30, at 987.

33. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2, 573 (1986).

34. *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_ethics\\_in\\_lawyer\\_advertising/ethicswhitepaper.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/ethicswhitepaper.html) (last visited Jan. 16, 2015) [hereinafter *Re-Examination of the Model Rules*].

35. Model Rules of Prof'l Conduct Preamble (2013).



philosophical debate.<sup>36</sup> Extensive literature exists on this issue,<sup>37</sup> and a resolution, if possible, is beyond the scope of this article. An understanding of the theoretical paradigms and concerns associated with attorney autonomy, however, is necessary when analyzing client selection issues.

The silence on the client selection process in the ethical rules can be interpreted to support an intention to give great autonomy to attorneys in the client selection process. Those who believe that attorneys should be guided by their own personal morals, or “first-order moral reasons,”<sup>38</sup> advocate for autonomy in the client selection process.<sup>39</sup> The autonomy allows the attorney to choose clients with whom there is a shared identity.<sup>40</sup>

Some, however, see the fact that only a few rules relate to the client selection process as indicating intent to support an inclusive client selection process thus furthering an attorney’s obligations to serve those in need.<sup>41</sup> Those who believe that attorneys should be guided by a systemic approach, or “second order reasons,”<sup>42</sup> adopt the morals of the profession rather than individual morals or desires for identity.

There is inevitably some overlap in an attorney’s professional role and his or her own personal morals, with most attorneys making decisions based on the extent to which they are able to separate the two roles. Attorneys, either subconsciously or altruistically,<sup>43</sup> personally identify with

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36. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 2 (2003).

37. See generally Monroe Freedman: Professor Law and former Dean at Hofstra Law School; lectured at Harvard for 30 years and was a visiting professor at Georgetown Law School from 2007-2012; received the American Bar Association’s highest award for professionalism in recognition of a lifetime of original and influential scholarship in the field of lawyers’ ethics; published *Lawyers’ Ethics in an Adversary System* (1975) and *Understanding Lawyers’ Ethics* (4th ed., 2010). Professor Michael Tigar: Research Professor of Law at American University Washington College of Law; visiting professor at Duke Law School from 2006-2008; former professor at University of Texas; represented controversial clients including: Terry Nichols in the Oklahoma City bombing case and Angela Davis.

38. Wendel, *supra* note 30 at 992.

39. See Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 109 (1998); Stonefield, *supra* note 13, at 122; see also W. William Hodes, *Accepting and Rejecting Clients-The Moral Autonomy of the Second-To-The-Last Lawyer in Town*, 48 U. KAN. L. REV. 977, 982 (2000).

40. Hodes, *supra* note 39, at 982.

41. Spaulding, *supra* note 36, at 19.

42. Wendel, *supra* note 30, at 992.

43. Spaulding, *supra* note 36, at 12-13.

their clients on some level.<sup>44</sup> A lawyer may identify with the client's personal attributes, such as their race or gender.<sup>45</sup> Positional identification refers to attorneys who identify with the client's "cause": "[s]he may identify with the field of law in which the issues are regularly presented, or with the constellation of moral, political, economic, or social interests that underlie the client's position and motivate her to seek representation. . . ."<sup>46</sup>

The level of identification desired influences the client selection process. At its broadest and most extreme level, the discussion centers on the difference between the view that attorneys should enjoy absolute autonomy and complete discretion in the client selection process and those that believe attorneys should have very little choice when selecting clients.<sup>47</sup> Each view is supported by more specific theoretical and philosophical concerns and each is subject to criticism because of those concerns. Because the views are at each end extreme, there is room for a middle ground.

### 1. The "Last Lawyer in Town" theory

The view that an attorney should have absolute discretion over client selection is supported by "[t]he special nature of the attorney-client relationship, the need for the attorney to 'identify' with the client, and the demands of the personal relationship with the client."<sup>48</sup> Advocates of this view believe that this decision should not be in the hands of legislators or outsiders who do not understand the need for "empathy, loyalty, trust, and acceptance between the lawyer and the client."<sup>49</sup>

Those who believe in complete, or near complete autonomy, believe that attorneys should be guided by their own personal moral beliefs, or "first order reasons"<sup>50</sup> and should be allowed to refuse to represent any client who seeks her services as long as other counsel is available.<sup>51</sup> This is the

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44. *Id.* at 11.

45. *Id.* at 12.

46. *Id.*

47. Spaulding, *supra* note 36, at 19-22; Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 204-205 (2000) [hereinafter *Lawyer's License to Discriminate Revoked*].

48. James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 102 (2006).

49. *Id.* at 104.

50. See Hassan El Menyawi, *Same Sex Marriage in Islamic Law*, 2 WAKE FOREST J. L. & POL'Y 375, 427-428 (2012); Wendel, *supra* note 30, at 1016.

51. Spaulding, *supra* note 36, at 29.

“last lawyer in town” view.<sup>52</sup> Advocates of this view see it as being supported by existing law and opine that absent court appointment, “it is well settled that lawyers do not have a legally enforceable obligation to serve any particular client.”<sup>53</sup>

This view provides attorneys the choice to “opt out”<sup>54</sup> of representation when the attorney’s own moral or “practical identity”<sup>55</sup> conflicts with the individual or the issues involved.<sup>56</sup> Because the normative is “client-centered”<sup>57</sup> representation this option is necessary to prevent “role fracturing.”<sup>58</sup> Without this option, lawyers would need to sever their own personal self from their professional role.<sup>59</sup> The danger is that this role fracture may lead to attorneys becoming “moral prostitutes.”<sup>60</sup> “Lawyers are turned into liars, aggressors, friends of rapists and murderers, and all sorts of other practical identities under which no one would choose to value herself.”<sup>61</sup>

Under this view, attorneys are free to only “opt-in”<sup>62</sup> to cases in which he or she identifies with the personal or positional identity of the client,<sup>63</sup> thus serving the attorney’s own personal identity and cause while accomplishing the client’s goals.<sup>64</sup> At its most extreme, intense identification is defined to be “thick.”<sup>65</sup> Thick identity not only defines the attorney–client relationship, but it also defines how third parties or outside observers view the relationship. Here the identities are viewed as being the same.<sup>66</sup> At first glance, this thick identity appears more consistent with a “client centered” model of representation.<sup>67</sup> It also appears to be more palatable than forcing the fracturing of personal and professional identities that is feared when attorneys are forced to advocate for persons who present

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52. *Id.*

53. Wendel, *supra* note 30, at 993.

54. *Id.* at 994.

55. *Id.* at 1001 (citing Christine Korsgaard, *The Authority of Reflection*, in *THE SOURCES OF NORMATIVITY* 90, 93 (Onora O’Neil ed., 1996)).

56. Wendel, *supra* note 30, at 994.

57. Spaulding, *supra* note 36, at 8.

58. *Id.* at 9.

59. Wendel, *supra* note 30, at 1000.

60. *Id.* at 1001.

61. *Id.* at 1002.

62. Spaulding, *supra* note 36, at 28.

63. *Id.* at 18.

64. *Id.* at 23.

65. *Id.* at 18.

66. *Id.* at 28.

67. Spaulding, *supra* note 36, at 8-9.

causes that would violate their own morals and beliefs.<sup>68</sup>

On closer examination, however, using congruence of identity as criteria for client selection can invoke systemic harm; most importantly, negatively impacting the client's ability to achieve a justiciable result. Attorneys are more likely to violate the ethical rules by losing focus of, or even exceeding the client's goals, by "doing too much."<sup>69</sup> This approach can provide a conduit for an attorney to act in his or her own self-interest under the guise of "client centered" representation: "When identification is intense . . . the boundaries between the subject and object of identification can break down and it is all too easy for a lawyer to assume a non-existent congruence of interest . . . . At the extreme, the client may actually disappear or become a mere abstraction of the lawyer's interests . . . ."<sup>70</sup> The attorney who enters the legal profession with the well-intentioned goal of furthering legal rights of a specific class may exemplify this danger.<sup>71</sup> The desire for congruence can lead to incorrect assumptions regarding the client's role or position.<sup>72</sup> These assumptions can be assigned early on thus impacting the client selection decision<sup>73</sup> and can affect the decisions made during the representation.<sup>74</sup> Until the lack of congruence is discovered, client centered representation is not possible.

The congruence upon which a "thick" attorney-client relationship is based cannot be assumed to remain intact throughout the representation. Clients, with the advice of counsel, set the objectives of the representation and attorneys are responsible to assist the client to reevaluate these goals during the representation.<sup>75</sup> This obligation is satisfied as long as the interest of the client and attorney remain the same. At some point, however, the once shared interest can separate; an occurrence that may go unrecognized by the self-interested attorney.<sup>76</sup> Attorneys selecting clients based upon gender risk finding themselves at odds with their clients when the client's objectives shift away from those the attorney has assigned based on stereotypical traits associated with that class.<sup>77</sup> The attorney is unable to render independent professional advice which is essential in the

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68. See *Lawyer's License to Discriminate Revoked*, *supra* note 47, at 183.

69. Spaulding, *supra* note 36, at 26.

70. *Id.* at 23.

71. *Id.* at 26-29.

72. *Id.*

73. *Id.*

74. Spaulding, *supra* note 36, at 26-29.

75. Model Rules of Prof'l Conduct R. 1.2 (2013).

76. Spaulding, *supra* note 36, at 23.

77. *Stropnick v. Nathanson*, No. 91-BPA-0061, 1999 WL 33453078, at \*1 (M.C.A.D.1999), *aff'd* 2003 WL 22480688, at \*1 (Mass. Super. Ct. Sept.16, 2003).

attorney-client relationship: "Thick identity deprives a lawyer of the professional independence so essential to perceiving a client's interest dispassionately and to rendering sound, disinterested advice."<sup>78</sup>

When the lack of actual congruence is discovered, the "role- fracturing" of personal and professional identity that advocates of autonomy in the client selection process seek to avoid can occur.<sup>79</sup> This is particularly harmful to the client because the separation of identities occurs after the attorney-client relationship is created, when the client is contractually and emotionally invested in attaining the goals expressed during the client selection process, and when the attorney's opportunities to "opt out" are limited.<sup>80</sup>

"Thick" identity may also have a negative effect on the administration of justice and public interest.<sup>81</sup> These lawyers may "minimize" or "disregard" their obligations to third parties thus contributing to systemic dysfunction and decreased public confidence in the judicial system.<sup>82</sup> The more an attorney only serve clients with a particular trait or cause, the more the attorney is identified to the public as an attorney who only serves those types of clients or only takes those types of cases.<sup>83</sup> Through both the lawyer's own client selection process and the attorney's reputation within the community, "thick identity significantly narrows the universe of clients the lawyer is open to serve."<sup>84</sup> This is particularly concerning in a system in which diversity among attorneys still does not reflect diversity of the entire potential client pool.<sup>85</sup> Even when the desired identity is based on a trait or cause well represented in the legal community, concerns regarding the inability for lawyers to maintain "professional independence"<sup>86</sup> and the dangers associated with more specialization in the legal community<sup>87</sup> remain.

## 2. The "Cab Rank Rule" theory

Those who believe that attorneys should have little discretion in the client selection process, at its most extreme end mimicking the British "cab

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78. Spaulding, *supra* note 36, at 26.

79. *Id.* at 23.

80. *Id.* at 24.

81. *Id.* at 27-28.

82. *Id.* at 26.

83. Spaulding, *supra* note 36, at 27.

84. *Id.* at 28.

85. *Id.*

86. *Id.* at 30.

87. Wendel, *supra* note 30, at 1009.

rank rule,”<sup>88</sup> believe that lawyers should be guided less by their own personal morals and more by a systemic approach, or “second order reasons.”<sup>89</sup> Here the morals involved are those associated with the legal profession and not the attorney’s own personal morals.<sup>90</sup> The level of identification here is weak or “thin.”<sup>91</sup>

While there is no explicit requirement for an inclusive client selection process, proponents find support in the basic underlying principles of the ethical rules.<sup>92</sup> The Model Rules explicitly provide for a separation of client and attorney identity.<sup>93</sup> Explaining the purpose of this separate identity, the comments suggest that it is meant to foster an inclusive client selection process and to discourage using the lack of a shared personal identity or cause as a means to decline representation.<sup>94</sup> An underlying goal of an inclusive client selection process is to insulate attorneys from public criticism associated with taking on unpopular clients or cases; the attorney is simply carrying out a requirement of the profession.<sup>95</sup> This furthers access to justice for all regardless of how repugnant the person or position.<sup>96</sup> As seen above, critics of this view cite the dangers associated with role fracturing that exists without thick identity. In response to those who challenge a requirement that lawyers leave their own moral beliefs out of the client selection decision, role differentiation is explained as being part of the profession: “Becoming a lawyer means accepting the constraints of the range of moral considerations that may be taken into account in practical reasoning. It means participating in activities ‘that honorable and scrupulous people might, *prima facie* at least, be disinclined to do.’”<sup>97</sup> The decision to represent the client should be based upon a “service” principle and not identity. This “service norm” is based on “a combination of dedication to competent service for existing clients and ensuring that all prospective clients have access to legal services . . . .”<sup>98</sup> This approach, in a less dramatic form, is similar to ideals underlying a middle ground.

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88. *Id.* at 994.

89. *Id.* at 992.

90. *Id.* at 988.

91. Spaulding, *supra* note 36, at 17.

92. *See* Spaulding, *supra* note 36, at 21.

93. Model Rules of Prof'l Conduct R. 1.2 (2013).

94. Model Rules of Prof'l Conduct R. 1.2 cmt. 5 (2013).

95. Wendel, *supra* note 30, at 1000.

96. *Id.*

97. *Id.* at 991.

98. Spaulding, *supra* note 36, at 18-19.

### 3. *The Professional Ethical Rules Approach*

In between both of the extremes, complete autonomy and a “cab rank rule” system, exists reason. As the practice of law becomes more specialized, attorneys need, to some degree, to consider client identity in the client selection process. As one author reasons, “[p]oor people do not need lawyers who specialize in asset-backed securities deals, and corporations do not need to hire divorce lawyers . . . .”<sup>99</sup> Rejecting a potential client, however, because of a lack of “enthusiasm” or passion for the client or the cause should not be the norm.<sup>100</sup> Alternatively, declining to represent a client is clearly warranted when the conflict between the attorney’s own moral identity severely conflicts with the client’s personal or positional identity rendering competent representation impossible.<sup>101</sup> These decisions, however, are best made with a systemic approach, utilizing the rules of the profession rather than the attorney’s own personal moral beliefs.<sup>102</sup> Even when the representation will challenge the attorney’s own personal beliefs, the role of attorney demands the ability to render independent professional judgment at all times, especially in the most sensitive of situations.<sup>103</sup> Acting in a professional capacity, lawyers are expected to keep the clients goals in the forefront. As this same author bluntly states, “[i]f [a lawyer] has a ground project that is of such importance that it would be impossible to serve clients regardless of her moral disagreements with them, then that person may wish to rethink her decision to become a lawyer.”<sup>104</sup>

Public confidence in the system is best served when client selection decisions are made in accordance with, and can be justified by, the rules of the profession. The public expects attorneys to objectively engage as part of a system premised upon equal access to justice.<sup>105</sup> The public expects client selection decisions to be based on the legal merits of a claim and not on the identity of the actor or the attorney’s own morals.<sup>106</sup> Although in today’s legal community, rejecting a client will seldom have a direct distributive effect,<sup>107</sup> client selection decisions based upon the personal or practical identity of potential clients, and systemic approval or silence or

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99. Wendel, *supra* note 30, at 1009.

100. *Id.* at 1010.

101. *Id.*

102. *Id.* at 1011.

103. *Id.* at 1010.

104. Wendel, *supra* note 30, at 1016.

105. *Id.*

106. *See id.* at 1026.

107. *Id.* at 997-98.

inaction, can be interpreted as an endorsement of that particular trait or cause. This discourages outliers from seeking to enforce an opposing right.<sup>108</sup>

In some situations, the conflict of identities, personal or positional, is so severe that it cannot be resolved even with the assistance of two decades of discussion about the role an attorney's identity should play in the client selection process.<sup>109</sup> The dilemma is understandable when it involves a decision of whether to represent an accused Nazi death camp guard,<sup>110</sup> or the decision of an African American attorney to represent a Ku Klux Klan member.<sup>111</sup> These are issues that implicate an extreme challenge to the attorney's moral identity, and even under the most inclusive client selection model, should justify a decision to decline representation based on the inability to render competent representation.<sup>112</sup> In contrast, the identity conflict associated with "Men Only" law firms does not trigger this extreme situation. It does, however, lead to a discussion of whether the personal or practical identity conflict justifies a determination that the attorney cannot competently represent an entire class of individuals without even the benefit of a client intake.<sup>113</sup> The Professional Ethical Rules approach is used to analyze this pre-intake client selection process, which excludes those of a particular gender from the potential client pool.

### *B. Ethical Rules*

A gray area exists for those searching the ethical rules to determine whether the pre-client intake exclusion of an entire gender is permissible. There is no rule that directly applies to the pre-client intake client selection process necessitating a deeper examination of the ideals upon which the rules are based. The analysis begins with the threshold requirements of fitness and extends to specific rules including those governing professional conduct and professional misconduct.

#### *1. Threshold Requirement: Fitness to Practice Law and Good Moral Character*

A determination to exclude an entire gender from the client pool may

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108. Spaulding, *supra* note 36, 12-13.

109. See Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995) [hereinafter *Lawyer's Moral Obligation*].

110. See *id.* at 114.

111. See David B. Wilkins, *Race, Ethics, and The First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1030 (1995).

112. See *Lawyer's Moral Obligation*, *supra* note 109 at 117; see also *id.* at 1037-38.

113. See *Stropnick v. Nathanson*, No. 91-BPA-0061, 1999 WL 33453078, at \*1-3 (M.C.A.D. 1999), *aff'd* 2003 WL 22480688, at \*1 (Mass. Super. Ct. Sept. 16, 2003).



implicate fitness concerns. Every state requires a determination that an individual is morally fit to practice law as part of the bar admission process.<sup>114</sup> “Good moral character”<sup>115</sup> is the cornerstone of fitness to practice law.<sup>116</sup> Although there is no set definition of good moral character, the existence of a criminal conviction or documented evidence of dishonesty will easily trigger further investigation or inquiry.<sup>117</sup> Determining good moral character without obvious triggering events is limited by the term’s vagueness.<sup>118</sup> In the context of attorney fitness to practice law, the term has been defined by courts to include a dedication to the overall administration of justice and fairness: a lack of good moral character is indicated by “acts and conduct which would cause a reasonable [person] to have substantial doubts about an individual’s honesty, fairness, and respect for the rights of others, and for the laws of the state and nation.”<sup>119</sup> The obligation to display good moral character does not end upon admission to the bar, as fitness to practice law continues as long as the attorney is a member of the profession.<sup>120</sup> When the test for good moral character is applied to the practice of excluding an entire gender from the client selection pool, the question of the ability to be fair and display respect for others is implicated.

## 2. *The Professional Conduct Requirements*

Because of the lack of specific rules governing the client selection process, a broad view of an attorney’s obligations under the professional conduct rules is necessary. Few of the specific ethical rules apply before an attorney-client relationship is established: “Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer render legal services and the lawyer has agreed to do so.”<sup>121</sup>

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114. Larry Craddock, “Good Moral Character” As a Licensing Standard, 28 J. NAT’L ASS’N ADMIN. L. JUD. 449, 451 (2008).

115. See *id.* at 452 (stating “Black’s Law Dictionary defines the phrase good moral character, in part, as [a] pattern of behavior that is consistent with the community’s current ethical standards and that shows an absence of deceit or morally reprehensible conduct . . . A pattern of behavior conforming to a profession’s ethical standards and showing an absence of moral turpitude. Good moral character is usu[ally] a requirement of persons applying to practice a profession such as law or medicine.”).

116. See *id.* at 451-52.

117. See *id.* at 451, 460 (maintaining that if an investigator finds information contrary to the information provided on a licensing application, the investigator can ask the applicant about the inconsistencies).

118. *Id.* at 451-53.

119. *Id.* at 452-53.

120. See Model Rules of Prof’l Conduct R. 8.1 cmt. 1 (2013).

121. Confidentiality is one duty that exists even prior to the establishment of an

Once an attorney–client relationship exists, the rules provide the framework for resolving conflicts between the attorney’s obligation to zealously work toward attaining the client’s objectives, “within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all involved in the legal system.”<sup>122</sup> Even the rules, which apply to prospective clients, are not applicable to the exclusion of women from the potential client pool because only those who actually consult with a lawyer about the potential for representation are considered prospective clients.<sup>123</sup>

When no attorney–client relationship has yet been established, the attorney’s obligations to the system and the community are at the forefront.<sup>124</sup> At this point, there is no conflict between the attorney’s obligations to zealously represent her client and the public interest.<sup>125</sup> Even absent an attorney–client relationship, attorneys are trained and expected to recognize when any ethical dilemma exists,<sup>126</sup> including those situations that would interfere with the overall obligation to seek justice. This ethical obligation is both an explicit and implicit theme of the Model Rules of Professional Conduct.<sup>127</sup>

#### *a. Preamble*

Lawyers must understand the importance of their role within the legal system because, as stated in the Preamble to the model rules, “[l]awyers play a vital role in the preservation of society.”<sup>128</sup> The first paragraph of the Preamble explicitly states that an attorney’s ethical obligations extend beyond those associated with representing individual clients: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”<sup>129</sup> Other provisions of the Preamble direct attorneys to

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attorney–client relationship. *See* MODEL RULES OF PROF’L CONDUCT Scope (2013); *see also* MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013).

122. Model Rules of Prof’l Conduct Preamble (2013).

123. Model Rules of Prof’l Conduct R. 1.18(a) (2013).

124. Model Rules of Prof’l Conduct Preamble.

125. *Id.*

126. *See* Fischer, *supra* note 48, at 62.

127. *See* Model Rules of Prof’l Conduct Preamble. The Model Rules of Professional Conduct were published in 1983. The Model Rules are used in this discussion for a national rather than state specific approach. The Model Rules have been adopted or have been the “model” for ethical rules in almost all states; *see also* Day, *supra* note 39, at 27 n.9.

128. *See* Model Rules of Prof’l Conduct Preamble.

129. *See id.*

act with respect toward the legal system<sup>130</sup> to seek the administration of justice,<sup>131</sup> and to “further the public’s understanding of and confidence in the rule of law and the justice system.”<sup>132</sup>

Difficulty in balancing personal needs and the responsibilities of the profession is acknowledged: “In the nature of law practice . . . [v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”<sup>133</sup> While the rules provide the framework for resolving conflicts between an attorney’s personal needs and professional responsibilities, attorneys are expected to use their own personal and professional moral judgment to resolve these dilemmas.<sup>134</sup> Without the existence of duties to a specific client, attorney self-interest must give way to public interest when the conflict is between an attorney’s personal needs and the attorney’s professional responsibility to seek justice.<sup>135</sup> Although limited in number, the few specific ethical rules that apply, absent the existence of an attorney-client relationship, underscore the importance and depth of an attorney’s obligation to the administration of justice.<sup>136</sup>

*b. Specific Rule Governing Client Selection*

The Model Rules provide little explicit regulation of attorney autonomy in the client selection process. The rules do, however, provide protection from criticism should an attorney choose to represent a client when the client or the issues involved are controversial or repugnant.<sup>137</sup> Model Rule 1.2(b) states that “a lawyer’s representation of a client . . . does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>138</sup> Based on the premise that all deserve access to justice, this rule addresses attorney concerns about the personal impact representing controversial or unpopular clients can have.<sup>139</sup>

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130. *See id.*

131. *See id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. *See id.* (stating that lawyers are essentially autonomous and are responsible for following the profession’s regulations in order to further the public interest).

136. *See* Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (prosecutor’s responsibility); *id.* R. 8.3 (reporting lawyer misconduct); *id.* R. 8.4 (types of misconduct).

137. *See id.* R. 1.2 cmt. 5 (“[R]epresenting a client does not constitute approval of the client’s views or activities.”).

138. *Id.* at R. 1.2(b).

139. *See id.* at R. 1.2 cmt. 5

Other specific rules governing client selection assume at least the existence of a specific prospective client. An attorney must decline representation if it would cause a concurrent conflict of interest.<sup>140</sup> This conflict of interest includes not only a conflict with the interest of other clients but may also exist if there is a “significant risk” that the lawyer’s own interest would interfere with the ability to carry out the objectives of the representation.<sup>141</sup>

Model Rule 1.18 specifically addresses obligations to prospective clients.<sup>142</sup> The rule prohibits the representation of a client whose interests are “materially adverse” to a prospective client.<sup>143</sup> It is here that the term “prospective client” is explained to mean one who actually has a consultation with the attorney and would not include one who simply responds to an advertisement without invitation to provide information.<sup>144</sup> This definition appears to make this rule inapplicable to the exclusion of women as potential clients before any contact is made.

Model Rule 1.16 provides the most specific guidance for the client selection process.<sup>145</sup> An attorney must decline representation when, “the

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140. *Id.* R. 1.7(a)(1)-(2). (“[A] lawyer shall not represent a client if . . . representation of one client [would or] will be directly adverse to another client; or . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”).

141. *See id.* at R. 1.7 cmt. 8 (noting that the rule also includes situations where there is a substantial risk that the attorney’s other responsibilities will interfere with accomplishing the prospective client’s objectives).

142. *See generally id.* at R. 1.18.

143. *Id.* at R. 1.18(c); *See* Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1191 (2006) (suggesting Rule 1.18 should be expanded to include a reminder that an attorney, during the intake stage, should not accept representation unless he or she can fulfill the duty of zealous advocacy).

144. Model Rules of Prof’l Conduct R. 1.18 cmt. 2 (“For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. . . . [I]n contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a ‘prospective client.’ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client.’”).

145. *See id.* at R. 1.16 (rule regarding declining or terminating client representation).

representation will result in violation of the rules of professional conduct or other law.”<sup>146</sup> Representation should not occur, “unless it can be performed competently, promptly, without improper conflict of interest, and to completion.”<sup>147</sup> Personal disagreement with a client’s goals is only specifically mentioned as a reason to seek withdrawal from representation: An attorney may withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>148</sup>

Firms that limit the client pool to men only avoid triggering these rules by precluding any intake of women. Specific client interests, goals, or beliefs are not ascertained. Using the purpose and basic premise of the ethical rules and Model Rule 8.4 along with specific jurisdictional ethical rules, this conduct may be, at a minimum, unethical.<sup>149</sup>

### 3. *Professional Misconduct Rules*

The definition of professional misconduct, depending on the jurisdiction, either explicitly or implicitly includes discriminatory actions. Model Rule of Professional Conduct 8.4 provides a list of acts that would be considered professional misconduct.<sup>150</sup> Specifically included in the list is “conduct that is prejudicial to the administration of justice.”<sup>151</sup> While the model rule does not explicitly prohibit discriminatory behavior as conduct that would impede the administration of justice, the comments make this connection: “A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status” engages in professional misconduct “when such actions are prejudicial to the administration of justice.”<sup>152</sup>

Although the rule and comment appear to apply to situations of gender discrimination in client selection, two issues arise. First, although the rule itself applies to all attorney conduct, the comment ties acts of bias to those that occur in the “course of representing a client.”<sup>153</sup> Secondly, the requirement that the attorney knowingly acts in a prejudicial manner

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146. *See id.* at R. 1.16(a)(1).

147. *Id.* at R. 1.16 cmt. 1.

148. *See id.* at R. 1.16(b)(4).

149. *See id.* at R.8.4; *see also id.* at R. 8.4 cmt. 3.

150. *Id.* at R. 8.4.

151. *Id.* at R. 8.4(d).

152. *See id.* at R. 8.4 cmt. 3.

153. *See id.*

implies a finding of unlawful discrimination by an appropriate tribunal.<sup>154</sup> Through state adoption of this, or similarly amended rules, these issues are dealt with in different ways: From specific to more general prohibitions and from rules that apply to all attorney conduct, including the client selection process, to those that specifically exclude the rule's application to the client selection process.<sup>155</sup>

*a. Broad State Anti-Discrimination Misconduct Rules*

Several states, either through adding onto the specific provisions identifying discrimination as conduct that impedes the administration of justice, or through comments clarifying the same, broadened the rule's scope by including within its reach any action performed in the attorney's professional role.<sup>156</sup> These jurisdictions would likely apply the rule to the pre-intake client selection process. Rather than limiting the rule's applicability to actions associated with the representation of a client, many states apply the rule to actions done in "connection with the practice of law."<sup>157</sup> For example, subsection (g) of the Indiana Professional Misconduct Rule 8.4 prohibits an attorney from engaging in "conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors."<sup>158</sup> New Jersey has the same language in rule 8.4(g) and the comments clarify the intent of the language: The addition of paragraph (g) "is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It . . . [covers] activities in the court house . . . as well as . . . activities related to practice outside of the court house, whether or not related to litigation, such as . . . activities in the lawyer's office and firm."<sup>159</sup>

Florida ties the applicability of the rule to the fundamental ideals on which the ethical rules are based. The comments to the Florida professional misconduct rule<sup>160</sup> explain that the rule applies to any activity of an attorney connected with the practice of law. Discriminatory conduct by an attorney "subverts the administration of justice and undermines the

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154. *See id.*

155. *See infra* notes 155–173 and accompanying text.

156. *See, e.g.*, Ark. Prof'l Conduct R. 8.4 cmt. 3 (2014); Fla. Rules of Prof'l Conduct R. 4-8.4 cmt. subdivision (d) (2010); IND. PROF'L CONDUCT R. 8.4(g) (2015); Minn. Prof'l Conduct R. 8.4 cmt. 5 (2015); N.J. Prof'l Conduct R. 8.4(g) (2015).

157. Ark. Prof'l Conduct R. 8.4 cmt. 3; *see also* Ind. Prof'l Conduct R. 8.4(g).

158. Ind. Prof'l Conduct R. 8.4(g).

159. N.J. Prof'l Conduct R. 8.4(g), cmt. 3.

160. Fla. Rules of Prof'l Conduct R. 4-8.4(d).

public's confidence in [the] system of justice, as well as notions of equality."<sup>161</sup>

The Minnesota Rule for Professional Conduct ties discriminatory conduct, whether done within or outside of the practice of law, to attorney character and fitness requirements.<sup>162</sup> While subsection (g) of the Minnesota Rule for Professional Conduct 8.4 prohibits harassment on the basis of sex in connection with a lawyer's professional activities, subsection (h) of rule 8.4 applies to unlawful discrimination "that reflects adversely on the lawyer's fitness as a lawyer."<sup>163</sup> The connection to character and fitness reflects a concern about whether one who fails to recognize the importance of equality to the concept of justice should be part of the 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."<sup>164</sup>

The rules that include discrimination occurring in the course of representing a client as misconduct will most likely not apply to the exclusion of all women from the potential client pool, whereas those that apply the misconduct rule to the "lawyer's professional activities" or to the activities carried on "in the practice of law" may well be broad enough to include the client selection process. Some jurisdictions, however, explicitly either include or exclude client selection from the activities covered by the misconduct rule.<sup>165</sup>

#### *b. Explicit Inclusion or Exclusion of the Client Selection Process*

Both Texas and Washington explicitly exclude the client selection process from the application of the state anti-discrimination misconduct

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161. Fla. Rules of Prof'l Conduct R. 4-8.4 cmt. subdivision d.

162. Minn. Prof'l Conduct R. 8.4 cmt. 5 (2015).

163. *See id.* at R. 8.4(g); *see also id.* at R. 8.4(h) ("factors to consider when deterring whether the discrimination affects the attorney fitness include: "(1) the seriousness of the act, (2) whether the lawyer knew that the act was prohibited by statute or ordinance, (3) whether the act was part of a pattern of prohibited conduct, and (4) whether the act was committed in connection with the lawyer's professional activities. . . .").

164. *See id.* at R. 8.4 cmt. 6.

165. *Compare* TEX. DISCIPLINARY R. OF PROF'L CONDUCT R. 5.08 (2015) (noting that prohibited discriminatory practices do not apply when a lawyer is determining whether to represent a client), *and* WASH. R. OF PROF'L CONDUCT R. 8.4(g) (2015) (stating that a lawyer is not limited by the prohibited discriminatory practices when deciding to represent an individual), *with* N.J. PROF'L CONDUCT R. 8.4(g) (2015) (implying that a lawyer cannot discriminate when choosing a client because a lawyer cannot discriminate "in a professional capacity").

rule.<sup>166</sup> Texas has a separate anti-discrimination conduct rule.<sup>167</sup> Rule 5.08 (a) states that an attorney “in connection with an adjudicatory proceeding” shall not “manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.”<sup>168</sup> Even though the language of the rule is to be broadly interpreted to include conduct both inside of and outside of court proceedings,<sup>169</sup> the rule explicitly excludes the client selection process from its application: The rule, “does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding . . . .”<sup>170</sup> Although Washington broadly applies its antidiscrimination misconduct rule to conduct within the lawyer’s professional activities, attorney autonomy in the client selection process is preserved: “This rule shall not limit the ability of a lawyer to accept [or] decline . . . representation of a client in accordance with Rule 1.16.”<sup>171</sup>

While many anti-discrimination misconduct rules can be interpreted to implicitly apply to the client selection process, at least one jurisdiction explicitly prohibits unlawful discrimination in the client selection process.<sup>172</sup> California, like Texas, has a separate professional conduct rule addressing discriminatory actions by an attorney.<sup>173</sup> California, however, takes the opposite position regarding client selection. Rule 2-400 states, “[i]n the management or operation of a law practice, a [lawyer] shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race[,] national origin, sex, sexual orientation, religion, age or disability in . . . accepting or terminating representation of any client.”<sup>174</sup> This provision, like many others, requires the discrimination to be unlawful.<sup>175</sup> As a result, no disciplinary action can occur unless there is first a determination of unlawful discrimination by an appropriate tribunal.<sup>176</sup> Thus, the issue remains whether the exclusion of women from

166. See TEX. DISCIPLINARY R. OF PROF’L CONDUCT R. 5.08; see also WASH. R. OF PROF’L CONDUCT R. 8.4(g).

167. See TEX. DISCIPLINARY R. OF PROF’L CONDUCT R. 5.08.

168. *Id.* at R. 5.08(a).

169. See *id.* at R. 5.08 cmt. 1.

170. *Id.* at R. 5.08.

171. See WASH. R. OF PROF’L CONDUCT R. 8.4(g).

172. See CAL. R. OF PROF’L CONDUCT R. 2-400(B)(2) (2013).

173. See *id.* at R. 2-400.

174. See *id.* at R. 2-400(B)(2); see also CAL. PROPOSED R. OF PROF’L CONDUCT R. 8.4.1(b) (Proposed Oct. 2010).

175. See *infra* Part II.D.

176. See CAL. R. OF PROF’L CONDUCT R. 2-400(C).



the client selection process is “unlawful.”<sup>177</sup>

### *C. Legal Implications*

The timing of the discriminatory conduct, pre-client intake, may not only shield attorneys from misconduct claims when excluding women from the client selection pool, but it may also provide protection against legal challenges. Two examples of this can be seen in freedom of speech defenses to the application of attorney advertising rules and the inapplicability of the state anti-discrimination statutes to the law office.

#### *1. Attorney Freedom of Speech Considerations*

Because the exclusion of women from the client pool is largely accomplished through advertising, the intersection of ethical principles and freedom of speech considerations deserves mention. While ethical rules still prohibit in-person solicitation,<sup>178</sup> attorney advertising is allowed as long as such advertising is not false, misleading, or potentially misleading.<sup>179</sup> With this caveat, advertising to the “general public” through the use of a billboard or a website is allowed because it does not involve the danger for abuse associated with in-person or direct solicitation of clients who may be “overwhelmed” with a legal crisis.<sup>180</sup>

Absent a finding that the message is unlawful or false, attorney advertising is commercial speech that enjoys First Amendment protection.<sup>181</sup> When a state rule or regulation regarding attorney advertising is challenged, the Supreme Court applies the *Central Hudson* test to provide limited protection.<sup>182</sup> The “*Central Hudson* test requires the government to show (1) that a substantial governmental interest supports the regulation, (2) that the regulation “directly and materially” advances the interest and (3) that the regulation is “narrowly drawn” to “achieve the desired result.”<sup>183</sup> If the court finds the advertisement is false or unlawful,

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177. See *infra* Part II.C.2.

178. See Model Rules of Professional Conduct R. 7.3(a) (2013).

179. See *id.* at R. 7.2-7.3; see also *id.* at R. 7.1 (stating “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).

180. See *id.* at R. 7.3 cmt. 1, 2.

181. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995) (applying the *Central Hudson* test).

182. MONROE H. FREEDMAN & ADDE SMITH, UNDERSTANDING LAWYERS’ ETHICS 333 (4th ed. 2010) (referencing *Florida Bar*, 515 U.S. at 622-23, 635).

183. See *id.* at 333 n.66 (stating “[A] fit that is not necessarily perfect, but

the government automatically satisfies its burden.<sup>184</sup>

This test was used in *Florida Bar v. Went for It* to uphold Florida's rule prohibiting direct mail solicitation to victims or their families within thirty days of an accident or injury.<sup>185</sup> In finding that the state satisfied the first prong of the test, the Court acknowledged that "[o]n various occasions we have accepted the proposition that 'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'"<sup>186</sup> The direct mail solicitation involved targeting a specific group of individuals and not the general public.<sup>187</sup> This fact also supported the Court's finding that the government also satisfied the second and third prongs of the *Central Hudson* test. Under the second prong, the time limitation imposed on sending letters targeting victims directly and materially advanced the state's interest in protecting the privacy interest of the injured victims at a time of grief or distress.<sup>188</sup> It also advanced the state's interest in protecting the reputation of the legal profession: "The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered."<sup>189</sup> Finally, in finding that the third prong of the test was also satisfied, Justice Sandra Day O'Connor reasoned that the ban on communicating with potential clients was sufficiently narrow in time and scope and that less intrusive means to reach the injured were available.<sup>190</sup> For example, attorneys could still advertise to the general public rather than to a specific targeted group.<sup>191</sup> The Court made a clear distinction between the least restrictive means test required under strict scrutiny and that required in commercial speech matters: "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,"[sic] a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but

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reasonable . . .") (quoting *Florida Bar*, 515 U.S. at 632).

184. See *Florida Bar*, 515 U.S. at 623-24.

185. See *id.*; See FREEDMAN, *supra* note 182, at 335.

186. *Florida Bar*, 515 U.S. at 625 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

187. See *id.* (noting that direct-mail solicitations harmed the legal profession's reputation).

188. See *id.* at 625-26, 628.

189. See *id.* at 631.

190. See *id.* at 633-34.

191. See *id.*

one whose scope is ‘in proportion to the interest served,’ that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”<sup>192</sup>

The state’s interest in protecting the integrity of the bar includes discouraging a stereotypical and unflattering view of the attorney’s role in litigation. In one instance, an attorney’s advertisement that exploited the need to have a combative attorney to get results was held to be unethical and attorney misconduct.<sup>193</sup> In *Florida Bar v. Pape*, a law firm’s commercial depicted an image of a pitbull and used the term pitbull in the firm telephone number.<sup>194</sup> The Florida Supreme Court disagreed with the referee’s finding that the advertisement was commercially protected speech.<sup>195</sup>

The Court found the advertisement to be inherently deceptive, misleading, and manipulative.<sup>196</sup> The Court noted the state’s interest in preserving the integrity of the judicial system: “Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system.”<sup>197</sup>

While the First Amendment provides some protection against claims that attorney advertising targeting only men to the exclusion of all women is unethical, the state’s heightened interest in regulating the practice of law within its borders and its interest in maintaining the integrity of the legal system remain. Under the *Central Hudson* test, a state’s substantial interest in protecting the integrity of the legal profession can justify regulation of the “Men Only” advertisement even absent a finding of unlawful discrimination or attorney misconduct.<sup>198</sup> Banning this type of advertising advances the state’s interest while leaving less restrictive means intact. Attorney autonomy in the client selection process remains intact once a particular client seeks the attorney’s services.<sup>199</sup>

In addition, no First Amendment protection exists, or at least the three

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192. *Id.* at 632 (noting that the “least restrictive means” test is not used when analyzing commercial speech).

193. *See Florida Bar v. Pape*, 918 So. 2d 240, 244 (Fla. 2005).

194. *Id.* (advertising phone number as 1-800-PITBULL).

195. *Id.* at 249-50.

196. *Id.* at 244.

197. *Id.* at 246-47.

198. *See infra* Part III.

199. *See infra* Part IV.

part test of the second part of the *Central Hudson* test is not even implicated, if the advertisement is unlawful.<sup>200</sup> A finding that the “Men Only” client selection process constitutes unlawful discrimination would automatically preclude any First Amendment protection. With the exception of one case,<sup>201</sup> however, the lawfulness of the practice of preemptively excluding an entire gender from the potential client pool has remained unchallenged.

## 2. *Applicability of State Anti-Discrimination Laws*

Limiting the potential client selection pool to one gender avoids challenge because, absent a finding of “unlawful” discrimination, attorney conduct rules in most jurisdictions will not apply and freedom of speech protections do apply.<sup>202</sup> Unlawful discrimination exists if there is a finding that the actions violated anti-discrimination laws by the appropriate tribunal.<sup>203</sup> The reality is, however, that law firms escape the reach of the anti-discrimination laws because anti-discrimination statutes do not apply unless the conduct occurs in a place of public accommodation.<sup>204</sup> While a complete discussion of the federal and state anti-discrimination laws is beyond the scope of this article, a brief discussion is necessary in order to understand why the legality of “Men Only” law firms has basically gone unchallenged. A discussion of one case in which the state anti-discrimination statute was found to apply to a law firm exemplifies the reach of anti-discrimination statutes once this threshold hurdle is cleared.

### a. *The Law Office as a Place of Public Accommodation*

The Americans With Disabilities Act is the only federal anti-discrimination statute that explicitly applies to law offices.<sup>205</sup> The Act prohibits discrimination on the basis of disability in “places of public accommodation” and lists law firms as a place of public accommodation

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200. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995).

201. See generally *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, at \*1 (Mass. Sept. 16, 2003) (holding that a female attorney was unlawfully discriminating against prospective male clients at her divorce practice; the court ordered that she must stop her discriminatory practices).

202. See *infra* Part II.

203. See *Begg*, *supra* note 47, at 157-58.

204. See 42 U.S.C. § 12182 (2009) (prohibiting discrimination of people with disabilities in public accommodations only); see also 42 U.S.C. § 12181(7)(F) (2009) (noting that a law office is only a public place for the purpose of accommodations for people with disabilities).

205. See 42 U.S.C. § 12181(7)(F).

when defining the phrase.<sup>206</sup> Many state statutes that prohibit gender discrimination include that same “place of public accommodation” prerequisite; however, unlike in the ADA, law firms are not explicitly included in the definition.<sup>207</sup> This absence of an explicit inclusion of law firms as a place of public accommodation, or a broad definition of the term,<sup>208</sup> enhances a lawyer’s autonomy in the client selection process. The law firm has traditionally been viewed as a place in which a distinctly private professional relationship is established, thus eluding the reach of anti-discrimination laws.<sup>209</sup> The growing sentiment against discrimination when providing services to the public, and using the ADA as support, demonstrates that firms can be, and have been, included as places of public accommodation under state anti-discrimination laws.<sup>210</sup> The inclusion of law firms in this definition would trigger the applicability of state anti-discrimination statutes to “Men Only” law firms.

*b. Finding Gender Specific Client Selection Unlawful Discrimination*

A decision from the Massachusetts Commission Against Discrimination in 1999 sparked scholarly debate about the level of autonomy an attorney should have in the client selection process.<sup>211</sup> The case directly involved discrimination against potential clients on the basis of gender.<sup>212</sup> Although the decision was based on a violation of the state anti-discrimination statute, it also addressed issues relevant to a broader analysis.<sup>213</sup> The way the claim arose highlights why the practice of excluding potential clients on the basis of gender has gone relatively unchallenged. It is unlikely that clients want to hire an attorney who clearly does not want to represent

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206. See 42 U.S.C. § 12182; see also 42 U.S.C. § 12181(7)(F).

207. See N.Y. EXEC. LAW § 292(9) (McKinney 2014) (listing all of the places that do and do not fall into the public category; law offices are never mentioned); *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, at \*3-4 (Mass. Super. Ct. Sept. 16, 2003) (comparing public places within the ADA with those in the legal regulations); see also *Begg*, *supra* note 47, at 165 nn.53-54.

208. See, e.g., *Begg*, *supra* note 47, at 165 n.53 (citing CAL. CIV. CODE § 51 (West 1982 & Supp. 2000)).

209. *Id.* at 162-63.

210. See *Nathanson*, 2003 WL 22480688, at \*3-4; see also *Begg*, *supra* note 47, at 170-71.

211. See generally *Stropnick v. Nathanson*, No. 91-BPA-0061, 1999 WL 33453078, at \*1 (M.C.A.D. 1999) (holding that a female lawyer was unlawfully discriminating against prospective male clients), *aff'd* 2003 WL 22480688, at \*1 (Mass. Super. Ct. Sept. 16, 2003).

212. See *id.*

213. See *id.* at \*3 (discussing the right to refuse to speak and the circumstances when the government can require speech without violating the Constitution).

them.<sup>214</sup> Here, however, a member of the excluded class, a male, actually sought the legal services of an attorney who was known to accept only women divorce clients.<sup>215</sup>

This case involved a female attorney who, in 1991, admittedly only represented wives in her divorce practice.<sup>216</sup> In support of this practice, Nathanson argued a cause: the ongoing gender bias against women in the system.<sup>217</sup> In support of the cause, she cited a gender bias study indicating that “women were disadvantaged relative to men in access to the judicial system and treatment within that system.”<sup>218</sup> She claimed that her personal decision to become an attorney was based on a professional goal of “helping to advance the status of women in the legal system.”<sup>219</sup>

Declining to represent this male, however, exposed a wrinkle in Nathanson’s defense. Stropnick, the male, was the homemaker and primary caretaker of the children, and he maintained this role while his wife finished medical school.<sup>220</sup> The wife’s income far exceeded that of Stropnick. Stropnick claimed his marital role was similar to that typically held by females in divorce, specifically because his homemaker and caretaker responsibilities contributed to his wife’s success.<sup>221</sup> Nathanson, presumably operating under “thick” identity ideals,<sup>222</sup> assumed a generalized positional practice to only represent those with a specific trait, here gender.<sup>223</sup> Although the issues and needs Stropnick presented mimicked those typically associate with the clients who Nathanson chose to dedicate her practice to, she declined to represent him, admittedly, solely because he was male.<sup>224</sup>

Stropnick filed a complaint alleging a violation of the state anti-discrimination statute which prohibited discrimination on the basis of gender in any place of public accommodation.<sup>225</sup> A hearing commissioner found in favor of Stropnick, determining that Nathanson’s practice of excluding men from her divorce practice violated the anti-discrimination

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214. See *The Lawyer’s License to Discriminate Revoked*, *supra* note 47, at 216.

215. *Stropnick*, 1999 WL 33453078, at \*1.

216. *Id.*

217. *Id.* at \*2.

218. *Id.* at \*7 n.1.

219. *Id.* at \*7.

220. *Id.* at \*7 n.6.

221. *Id.*

222. See *id.* at \*7 n.1.

223. *Id.*

224. *Id.* at \*1.

225. *Id.* (citing MGL 272 § 98).

statute. The court ordered Nathanson to cease and desist this discriminatory practice and ordered her to pay emotional distress damages.<sup>226</sup> This order was affirmed both on review by the full commission and on appeal to the state superior court.<sup>227</sup>

While most states and the federal civil rights statutes have yet to address the issue of whether a law office is a place of public accommodation, a usual prerequisite for seeking protection under anti-discrimination legislation, the issue was directly addressed in *Nathanson*.<sup>228</sup> Here, using the ADA for support, the court found the law firm was a place of public accommodation as defined in the state anti-discrimination statute.<sup>229</sup> The duty attorneys owe to the public and to the administration of justice further supported this finding because “attorneys are licensed by the state, are trained to bring claims that protect the individual as well as the public’s rights, and are considered ‘officer[s] of the legal system.’”<sup>230</sup>

Basic ethical considerations also supported the commissioner’s findings. Nathanson claimed that the commission lacked jurisdiction because only the Massachusetts Supreme Judicial Court and the Board of Bar Overseers had jurisdiction to hear claims of attorney misconduct.<sup>231</sup> Turning this argument around, the superior court held that in fact the ethical rules require that attorneys uphold the law and a finding of unlawful conduct by a tribunal other than through bar disciplinary proceedings was nothing new.<sup>232</sup>

Relying on ethical rules to further argue against the commission’s jurisdiction, Nathanson claimed that her ethical obligation to zealously represent her female clients precluded her ability to zealously represent men. She claimed the commission could not force her to act against her ethical obligations.<sup>233</sup> The court dismissed this argument comparing it to the absurdity of “an attorney with white supremacist views arguing that he or she may decline nonwhite clients because such a commitment to white supremacy would be undermined.”<sup>234</sup> Citing both the ethical duty to maintain the integrity of the legal system and to refrain from taking any action that is prejudicial to the administration of justice, the commission

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226. *See id.* at \*7 n.7.

227. *Id.* at \*1, 7.

228. *Id.* at \*7 (referring to the Federal Court’s affirming judgment).

229. *Id.* at \*4.

230. *Id.* at \*4-5.

231. *Id.* at \*2.

232. *Id.*

233. *See id.*

234. *Id.* at \*7 n.5.

reasoned that the duty to zealously represent a client could not justify illegal activity.<sup>235</sup>

Nathanson also challenged the commission's findings by claiming freedom of association and freedom of speech protections.<sup>236</sup> In rejecting the freedom of association claims, the court found that no "intimate relationship" triggering protection is created when selecting or rejecting clients based simply upon their gender.<sup>237</sup> In addition, applying the anti-discrimination statute to prohibit discrimination in the client selection process did not preclude other avenues of expressible association.<sup>238</sup> Nathanson was free to express her views outside of the attorney-client relationship.<sup>239</sup>

Nathanson's free speech claims were likewise dismissed. The court questioned whether Nathanson's rejection of male clients based on gender and not based on a message would even trigger freedom of speech protections.<sup>240</sup> First, Nathanson, as an attorney, was acting more as a "conduit for speech" rather than as the speaker.<sup>241</sup> In addition, the state anti-discrimination statute targets the act of discrimination not speech.<sup>242</sup> Even if the practice was found to trigger freedom of speech protections, the state satisfied its burden by showing a compelling state interest supported the regulation. The state's need to abate gender discrimination provided this interest: "The Commonwealth's compelling interest in abating gender discrimination outweighs Nathanson's constitutionally protected right to free speech in her capacity as a private attorney."<sup>243</sup>

Once the "public accommodation" hurdle was cleared, a domino effect occurred. Nathanson's pleas for autonomy in the client selection process did not justify admitted discrimination based on gender.<sup>244</sup> Once the actions were seen as unlawful, no claims of freedom of speech protections could be successful.<sup>245</sup> This case, however, exemplifies a unique situation that subjected the practice to scrutiny. First, a member of the client pool

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235. *Id.* at \*2.

236. *Id.* at \*4.

237. *Id.*

238. *Id.* at \*4.

239. *Id.*

240. *Id.*

241. *Id.* (stating that a private attorney, when representing a client, operates more as a conduit for the speech and expression of the client, rather than as a speaker herself).

242. *Id.* at \*6.

243. *Id.*

244. *See id.*

245. *Id.* at \*7.



who the attorney sought to exclude actually sought the services of the attorney who admittedly did not want to represent him; secondly, the state found that law firms are places of public accommodation thus triggering the applicability of the state anti-discrimination statute. Absent a complaining client and the applicability of federal and state anti-discrimination laws, however, the legality of discrimination in the client selection process will remain unchallenged.

*D. "Men Only" Law Firms Fly Under the Radar*

"Men Only" law firms remain unchallenged because ethical complaints and actions under state anti-discrimination statutes are typically initiated by a specific individual harmed by the discriminatory conduct. Because the message of "Men Only" is sent prior to establishing a status of even a "prospective client,"<sup>246</sup> it is unlikely that a female will seek representation by the messenger. The fact that few potential clients will seek out attorneys who patently do not want to represent them allows the continued acquiescence to this practice.<sup>247</sup>

Even if challenged, little recourse is available. Under the ethical rules, the practice will not be viewed as attorney misconduct unless the jurisdiction has adopted a version of Rule 8.4 that is broad enough to reach attorney conduct before the attorney-client relationship is established.<sup>248</sup> Even then, unless the conduct is found to be unlawful, Rule 8.4 will not apply in most jurisdictions. Should a woman call a law office to schedule an appointment and is refused; only then is a *Nathanson* situation created. The woman, at that point, can bring an action under the state anti-discrimination law.<sup>249</sup> Here, the claim will only proceed if the statute in that jurisdiction has a broad enough scope to cover attorney conduct outside client representation, and if the statute explicitly or implicitly includes a law firm as a place of public accommodation.<sup>250</sup> Even if these battles are won, the woman must successfully maneuver her way through the substantive law associated with her discrimination claim against a lawyer.<sup>251</sup>

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246. See *Firm Profile*, *supra* note 3.

247. Begg, *supra* note 47, at 219.

248. See *supra* notes 155-173.

249. See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 1996-97 (2003).

250. Debra S. Katz & Richard Koffman, *Ethical Issues in Employment Law Practice: Discrimination in Client Selection-Can Attorneys Lawfully Reject Certain Classes of Clients?*, *CURRENT DEVELOPMENTS IN EMPLOYMENT LAW* 1017, 1022 (A.L.I. 1998).

251. See *id.* at 1022-24.

The practice also evades challenge by the bar based on the local attorney-advertising rules because unless the practice is found to be “unlawful” or “misleading,” this form of commercial speech places the burden on the state to show that regulating or prohibiting the practice meets the three-part *Central Hudson* test.<sup>252</sup> Without private complainants or public outcry, such an intense analysis is unlikely.

The state bars could, and should, examine the impact this type of message has both on the system and the public and find that this type of advertising is misleading.<sup>253</sup> As reasoned in *Pape*, advertising that promotes misleading and manipulative stereotypical images<sup>254</sup> associated with the system interferes with an attorney’s obligation to preserve the integrity of the legal system and to promote public trust and confidence in the system.<sup>255</sup> The “Men Only” practice not only sends a message that appears to condone discrimination on the basis of gender, it lacks moral, ethical, and public policy justification.

### III. EXCLUDING WOMEN FROM THE POTENTIAL CLIENT POOL

At this point, the analysis of gender specific client selection divides with the focus being on the exclusion of women. While the practice of an assertive exclusion of clients based on gender, or any other protected classification, raises ethical concerns, the practice of offering services only to men and excluding women in divorce actions implicates serious systemic and public harms.<sup>256</sup> The continued silence by the bar appears to indicate public policy justifying its existence: the system treats men unfairly and the need to protect men’s rights outweighs the impact such discriminatory practices can have on the administration of justice and the duty or preserve public confidence in the judicial system.<sup>257</sup> This argument is flawed for two reasons. First, despite decades of reform in the family law system, women continue to be at a disadvantage to men in divorce

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252. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980).

253. See *Florida Bar v. Pape*, 918 So. 2d 240, 246-47 (Fla. 2005).

254. *Id.* at 246.

255. *Id.* at 244.

256. Kellie A. Cameron Baker, *Letters, Legal Discrimination?*, THE FLORIDA BAR NEWS (Oct. 1, 2013), <https://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/E888FC1B0BA5BF7785257BEF004411EB>.

257. See *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, at \*5 (Mass. Super. Ct. Sept. 16, 2003) (holding any freedom of speech claims must give way to the compelling state interest to abate gender discrimination).

actions.<sup>258</sup> Second, the practice, being void of the need to protect the individual needs of men, harms all involved in the system and reinforces the stereotypical, inaccurate, and negative public opinion of the needs of families in crisis and the legal profession.

*A. Increased Women's Equality Leads to Reform*

The efforts to create gender neutrality in the family court system have led to more inequality than equality in the administration of justice.<sup>259</sup> This inequality is on the female side. Successes in the feminist movement, state anti-discrimination laws, and advances in female reproductive autonomy have resulted in increased economic opportunities for women.<sup>260</sup> The women's movement advocated for equality as a means to insure financial independence for women.<sup>261</sup> Women are now empowered to work outside of the home full-time, are less financially dependent on their husbands during the marriage, and have less financial need upon divorce.

Women, having won the public opinion battle for more equality in the work force, are expected to concede to the outcry of equal rights for men in divorce.<sup>262</sup> The increased income equality between women and men has impacted the family court system. For example, men's rights groups now seek to limit post-marriage financial obligations and to increase the parenting time granted to men.<sup>263</sup> The state's view that women now have the educational and occupational opportunity to earn more income, and therefore need to rely less on their husband's financial support during and after marriage, has led to widespread reform of state alimony laws.<sup>264</sup> Today, most states have abolished permanent alimony awards with several states recognizing only short term or rehabilitative alimony after divorce.<sup>265</sup>

With the opportunity for both parents to work fulltime outside the home during the marriage, equality in household management and child care would presumably follow.<sup>266</sup> This assumption supports the efforts of fathers' rights groups fighting for parenting time equality.<sup>267</sup> Today, most

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258. See Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law Revaluing the Caretaker Role*, 31 HARV. J. L. & GENDER 1, 22 (2008).

259. See *id.* at 12.

260. See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1200 (2013).

261. *Id.*

262. See *id.* at 1202.

263. *Id.* at 1203.

264. *Id.*

265. *Id.*

266. Laufer-Ukeles, *supra* note 258, at 18.

267. *Id.* at 18.

states' child care laws have gender neutral language and states have done away with language that furthers traditional views of parental roles post-divorce.<sup>268</sup> For example, the terms "custody" and "visitation" are seldom found in laws governing parenting.<sup>269</sup> Traditional parenting roles are no longer used to support traditional child development theories.<sup>270</sup> The "tender years" doctrine, which recognized the child's need to remain in the custody of the primary care giver, typically and traditionally the mother, after divorce no longer supports a mother's claims for primary parenting responsibilities post-marriage.<sup>271</sup> Although the case-by-case and highly discretionary "best interest" standard continues to be used for establishing childcare responsibility, gender neutral language and changing views regarding parental responsibility means a court will no longer necessarily apply the presumption of the mother-as-caretaker in custody determinations.<sup>272</sup> Rather, in some cases, courts will now presume that the "best interest" is joint-custody.<sup>273</sup>

Perceptions of equality also impacted child support determinations. The combination of a mother's increased earning capacity and with fathers being awarded more, or equal, parenting time with the children, ordering the father to pay guideline child support appeared inequitable.<sup>274</sup> Shared parenting arrangements post-divorce opened the door to child support orders that, using the same calculations often criticized by men in the past to lead to unfair results, were more likely to limit or even eliminate child support obligations.<sup>275</sup>

These perceptions of equality appear to justify "Men Only" law firms; men need assurance that they will be treated fairly in light of women's increased financial equality and men's increased care-taking responsibilities.<sup>276</sup>

### *B. Women's needs in the age of reform*

The reality is that a woman's role in marriage and her needs in divorce differ significantly than those portrayed by public opinion and legislative reform. Today, despite strides toward equality outside the home, women

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268. See *Carbone*, *supra* note 260, at 1200.

269. See *Laufer-Ukeles*, *supra* note 248, at 19.

270. See *id.* at 19-20.

271. See *id.* at 26.

272. See *Laufer-Ukeles*, *supra* note 258, at 18.

273. *Id.* at 18.

274. *Carbone*, *supra* note 260, at 1203-04.

275. *Laufer-Ukeles*, *supra* note 258, at 54-55.

276. See *About Drizis*, *supra* note 4.

still earn less than men<sup>277</sup> and they remain at a financial and emotional disadvantage in divorce.<sup>278</sup>

The typical family is still comprised of a married couple and their children.<sup>279</sup> Over seventy percent of marriages produce children.<sup>280</sup> In 1970, over forty percent of children were being raised by stay-at-home mothers as compared to twenty percent in 2012.<sup>281</sup> Despite the increase of women in the work force however, women are still more likely than men to be the primary care-taker in the family.<sup>282</sup> In addition, recent trends show that over the past decade, the percentage of stay-at-home-mothers has actually increased to twenty-nine percent.<sup>283</sup> Therefore, more women are foregoing opportunities in the workforce to take on a full-time caretaking role. Even in families with mothers who work outside the home, it is the mother “in the vast majority of cases” that “modifies her potential for income in the workplace in order to care for the children.”<sup>284</sup> Because mothers still typically remain the primary caretaker of the children, they work fewer hours. And, when mothers work outside the home, their caretaking responsibilities may well be “outsourced” rather than shared.<sup>285</sup> The result is that during marriage, mothers work fewer hours for less money than fathers.<sup>286</sup> This arrangement may serve family needs during the marriage, however, when divorce is a reality, women find themselves in a system built on the altruistic ideal of gender neutrality when their needs are far from equal.

Gender-neutral divorce laws, although meant to advance equality, actually widened the gap between the genders because they are based on notions that “idealize the male norm.”<sup>287</sup> In the current system, traits associated with male occupations such as full-time work and long hours are

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277. Spaulding, *supra* note 36, at 266.

278. Laufer-Ukeles, *supra* note 258, at 22.

279. *Id.* at 2.

280. *Id.*

281. Greg Toppo, *More Women Staying Home With Young Kids*, USA TODAY, <http://www.usatoday.com/story/news/nation/2014/04/08/women-stay-at-home-mothers-work/7468163/> (last visited Feb. 19, 2015).

282. Laufer-Ukeles, *supra* note 258, at 6.

283. Toppo, *supra* note 281 (stating that the percentage of mothers of children under age eighteen who do not work outside the home reached an all-time low of twenty-three percent in 1999, and has since increased back up to twenty-nine percent).

284. Laufer-Ukeles, *supra* note 258, at 2.

285. *Id.* at 10 (referring to Herma Hill Kay’s market-work/caretaking structure that equates daycare to the “outsourcing” of the female role).

286. *See id.* at 46-47.

287. *Id.* at 9.

given significant weight in property distribution and support awards.<sup>288</sup> While the husband is given credit for his hard work outside the home, the woman may be criticized for a lack of enthusiasm about the opportunities that await her in the workforce.<sup>289</sup> In some situations, the wife's decision to work fewer hours for less pay during the marriage can be seen as voluntary decision to remain underemployed.<sup>290</sup> In such circumstances, income, calculated based upon the male ideal of working capacity and income, can be imputed to the wife.<sup>291</sup>

Gender bias remains in parenting determinations as well. Within the discretionary "best interest" standard, considerations continue to focus on traits such financial stability and earning power as well as those associated with past and future primary caretaking abilities.<sup>292</sup> The often-superior occupational or professional financial position of the father is credited toward the father's economic stability, while the time away from the children necessitated by perusing the mother's occupational or financial opportunities may be negatively considered when assessing the mother's caretaking abilities.<sup>293</sup> Because of this highly discretionary determination and the associated risks, women are "motivate[d]" to negotiate private agreements with their spouses outside of court in order to maintain some control over the outcome.<sup>294</sup>

Women, however, do not necessarily fare better when they enter into private settlement agreements. First, gender bias does not disappear in the settlement process; second, limited court oversight of settlement agreements provides little protection from an inequitable resolution.<sup>295</sup> Most marriages today are dissolved though private agreement and are reviewed using basic contract principles.<sup>296</sup> These basic contract principles presume equal bargaining power.<sup>297</sup> Efforts toward gender neutrality in family law, however, have been linked to women's reduced bargaining power in divorce.<sup>298</sup>

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288. See Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co- Parenting Commitments*, 54 ARIZ. L. REV. 197, 203 (2012).

289. Carbone, *supra* note 260, at 1203.

290. *Id.*

291. See Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?* 9 J. CONTEMP. LEGAL ISSUES 279, 315 (1998).

292. Laufer-Ukeles, *supra* note 258, at 19-20.

293. *Id.*

294. See *id.* at 22.

295. *Id.* at 23. 291.

296. *Id.* at 12-13.

297. *Id.*

298. *Id.* at 21.

Today, it is still more often the woman who is financially dependent on her spouse.<sup>299</sup> Perceptions of equality, again, detrimentally impact women. This is supported by the finding that although the wife is more likely to file for divorce, women are also more likely to bargain against their own financial stability, and to give away more than they may be awarded through a judicial determination, in order to preserve their parenting and childcare roles.<sup>300</sup> Further, although the number of men seeking joint custody has increased, so too has there been an increase in the number of men who conceded to reduced custody in return for reduced financial support obligations.<sup>301</sup> Support and parenting obligations are subject to judicial review, but in the age of no fault divorce and notions of equality, judges are reluctant to interfere with parties resolving the issues privately.<sup>302</sup> The lack of meaningful judicial review allows inequitable results to remain undiscovered.<sup>303</sup>

It is therefore not men who experience such a level of injustice in the system that a systemic acquiescence to a discriminatory practice is justified. Men continue to fare better than women in the process. Despite criticism of the percentages reported,<sup>304</sup> there is consensus that divorce is financially devastating for the women who assume the role of caretaker in the marriage.

Although family court practices have become somewhat more just over the past twenty years, women still tend to suffer a substantial decrease in standard of living after divorce. Estimates of the decrease range from fifteen to twenty-seven percent.<sup>305</sup> Alimony awards are rare and, when offered, are often inadequate. Most scholars agree “divorce under the new divorce laws has been economically devastating for many women and children.”<sup>306</sup>

The effects of this economic devastation extend well beyond the individual spouses. The 2010 Census reported that 40% of households

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299. *Id.* at 15.

300. *Id.* at 22.

301. *See id.* at 21.

302. *Id.* at 13-14.

303. *Id.* at 23.

304. *See* Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 264 (2013) (citing LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 274-275 (1987)) (reporting that women experienced a 73% decline in standard of living one year after divorce while men enjoyed a 42% increase in standard of living).

305. *Id.* at 264

306. *Id.*

headed by women live in poverty.<sup>307</sup> The societal costs associated with this reality cannot and should not be ignored or furthered by the legal profession. It is up to the legal profession to close the gap.

#### IV. CLOSING THE GAP

A blatantly discriminatory practice remains relatively unchallenged because of a gap in timing. Women are excluded before they even request the attorney's services preempting individual standing to challenge the practice. The result is silence. Ironically, in a system founded on notions of fairness, the silence allows attorneys to cloak self-centered goals with a seemingly altruistic, yet unsupported, cause. This gap can be closed, however, by using the same self-governing principles, which form the foundation of the legal profession.

From the start, claims for the need for attorney autonomy can be addressed through application of the basic fairness and justice principles. If complete autonomy in the client selection process is intact, an attorney is free to refuse to represent women simply because of their gender.<sup>308</sup> A firm that excludes all women as potential clients in divorce actions simply because they are women indicates that a firm is comprised of attorneys who operate under a "thick identity"<sup>309</sup> and who choose clients based on "first order reasons."<sup>310</sup> These attorneys may justify their actions based upon a client-centered practice but, as demonstrated above, attorneys who choose clients based on congruence of morals and beliefs or based upon a trait, are more likely to violate ethical obligations owed to clients.<sup>311</sup>

Complete autonomy, however, is not, nor has it ever been, the norm.<sup>312</sup> Client based representation has been the norm and any analysis of the appropriateness of refusing to represent women should be analyzed using this premise.<sup>313</sup> While systemic and societal costs of allowing such a

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307. See *Insecure and Unequal Poverty and Income Among Women and Families*, NATIONAL WOMEN'S LAW CENTER, [http://www.nwlc.org/sites/default/files/pdfs/final\\_2013\\_nwlc\\_povertyreport.pdf](http://www.nwlc.org/sites/default/files/pdfs/final_2013_nwlc_povertyreport.pdf) (last visited May 11, 2015).

308. Berenson, *supra* note 13, at 42.

309. Spaulding, *supra* note 36, at 18.

310. *Id.* (stating that these attorneys seek great autonomy in choosing clients and are guided by their own personal morals or beliefs); see also Wendel, *supra* note 30, at 1017.

311. See Wendel, *supra* note 30, at 1000.

312. Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 288 (1993) [hereinafter *Demise of a Traditional Professional Prerogative*].

313. See Spaulding, *supra* note 36, at 22.



practice are great, clearly prohibiting a preemptive exclusion based on gender will have little negative impact on attorney autonomy in the client selection process. Once an attorney's services are requested, the attorney can rely on traditional gatekeeping rules to decline to represent a client based on objective or subjective factors, other than gender, that may interfere with the obligation to competently represent the client.<sup>314</sup> Therefore, even under the existing rules, there appears to be little need to take advantage of the absence of a clear rule prohibiting gender discrimination when defining the potential client pool. The practice of excluding all women from the potential client pool, however, takes the analysis away from the discourse – there is no attorney client relationship.<sup>315</sup> All that remains are the broad systemic goals of justice and fairness.<sup>316</sup> It is therefore up to the profession to further these goals.

The American Bar Association and local organizations can close the gap by applying the broad concepts of fairness and justice, upon which the ethical rules are based.<sup>317</sup> For entry into the legal profession, good moral character is required. The practice of excluding all women as potential clients, despite conflicting data regarding the need to protect men's rights in divorce, may well raise "substantial doubts" about the attorney's "respect for the rights of others."<sup>318</sup> If our ethical rules recognize the important role attorneys play in furthering societal order and that attorneys are an integral part of building and maintaining the public's confidence in our judicial system,<sup>319</sup> then blatant discrimination in the messages sent to the public should not be condoned absent strong public policy considerations.<sup>320</sup>

Finding that such conduct is unlawful should not need to wait until state anti-discrimination statutes recognize law firms as places of public accommodation. The legal profession is founded upon the obligation to

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314. *Lawyer's License to Discriminate Revoked*, *supra* note 47, at 209-10 (giving objective reasons to decline representation, including rule-based reasons such as a desire not to pursue a frivolous or illegal claim. Subjective reasons include an attorney's personal disagreement with a particular cause or issue which will typically justify a decision to decline representation as long as it is not "a subterfuge for rejecting a client based on unlawful motives.").

315. *Id.* at 211.

316. *See id.* at 209.

317. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2015), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation/comment\\_on\\_rule\\_1\\_16\\_declining\\_or\\_terminating\\_representation.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/comment_on_rule_1_16_declining_or_terminating_representation.html).

318. Craddock, *supra* note 114, at 452-53.

319. MODEL RULES OF PROF'L CONDUCT Preamble (2013).

320. Stonefield, *supra* note 13, at 115-16.

accommodate the public.<sup>321</sup> It is therefore up to the American Bar Association, as well as state and local bar associations, to police this obligation.

The framework for systemic action exists and the action should not wait until a member of the public complains. The ABA mission statement specifically includes an obligation to prevent discrimination against women in the legal system. Included in its stated goals is its objective to “eliminate bias . . . in the justice system.”<sup>322</sup> In addition, in 2012, the American Bar Association Commission on Women of the Legal Profession was established not only to address issues related to woman in the legal profession, but also to address “gender equality issues . . . in society at large.”<sup>323</sup> Further examination by this commission, or by any faction of the ABA, of the propriety of “Men Only” law firms would be a justifiable task and the findings could have a system-wide impact.

This examination should include reviewing existing ethical rules for opportunities to take the lead in clearly prohibiting discrimination in the practice of law. This can begin with revisiting the comment to Model Rule 8.4 to broaden its application from conduct that occurs in the course of representing a client to any activity of the attorney in his or her professional capacity.<sup>324</sup> The professional capacity language should include conduct that affects members of the public, not just clients or potential clients.<sup>325</sup>

“Men Only” law firms exhibit a facially discriminatory practice. According to *Central Hudson* analysis,<sup>326</sup> when conduct is facially invalid, there is no need for further analysis.<sup>327</sup> When attorney conduct is facially discriminatory, it should support a finding that it is unlawful, thus eliminating the need for a determination under anti-discrimination statutes and eliminating freedom of speech defenses.<sup>328</sup>

321. See Elina Tetelbaum, *Check Your Identity-Baggage at the Firm Door: The Ethical Difficulty of Zealous Advocacy in Bias-Ridden Courtrooms* 14 TEX. J. C.L. & C.R. 261, 289 (2009).

322. ABA Mission and Goals, A.B.A., [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited Feb. 12, 2015).

323. Women Lawyers, A.B.A., [http://www.americanbar.org/diversity/women\\_lawyers.html](http://www.americanbar.org/diversity/women_lawyers.html) (last visited Feb. 12, 2015).

324. See *supra* notes 142-150.

325. See *Lawyer's License to Discriminate*, *supra* note 47, at 210.

326. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

327. *Id.* at 563.

328. See *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, at \*5 (Mass. Super. Ct. Sept. 16, 2003).

Changes in the model rules by the ABA will encourage states and local bars to adopt changes or clarifications to local rules. The gap will narrow as a result of the danger of violating a clear, applicable rule. The power that professional groups, such as the ABA, have in protecting the integrity of the legal profession should not be underestimated. For example, a television series depicting a female judge as “unethical, lazy, crude and hypersexualized” was cancelled partially in response to challenges by Florida’s Women’s Bar Association that the show disseminated stereotypical and harmful information to the public.<sup>329</sup>

Although no similar organizational outcry against gender discrimination in the client selection process has been found, one “Men Only” billboard sparked a Florida attorney to question the appropriateness of such a practice in a profession that is premised on ideals of inclusion:

Being female, I would certainly like the phrase explained to me so that I am not just presuming that the phrase “men’s rights” and the discrimination against me is simply an amazing marketing technique that preys on the stereotype that men will lose everything in a divorce, when that stereotype is completely contrary to statute and how family law judges decide cases. Surely a phrase that makes people think that the courts treat men and women differently in family law cases, coupled with discrimination against women, cannot be just an effortless way to make a ton of money from men who do not know the law.<sup>330</sup>

## V. CONCLUSION

The fact that an attorney’s conduct is not unethical or illegal under existing rules should not end the analysis of whether it is appropriate and whether the system should allow it to continue. In a system founded on justice and fairness, a message sent, and seemingly accepted, by the legal system that discriminates against women undermines public confidence in the system. No explicit rules should be necessary to prohibit what is obviously, at the least, an overgeneralization of a need based on stereotypical gender roles and a questionable cause. The mere existence of such a practice, however, indicates a need for clarity. While most ethical challenges can be resolved within the framework of a claim brought by a client, a system wide approach is essential when the harm occurs before the

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329. Debra Cassens Weiss, “*Bad Judge*” TV Show is Canceled After Lawyer Group Protests, ABA J., [http://www.abajournal.com/mobile/article/bad\\_judge\\_tv\\_show\\_is\\_canceled\\_after\\_lawyer\\_group\\_protests](http://www.abajournal.com/mobile/article/bad_judge_tv_show_is_canceled_after_lawyer_group_protests) (last updated Nov. 6, 2014).

330. Baker, *supra* note 256.

specific rules apply. When looked at from the perspective of the existence of a “gap” that has allowed the practice to go unchallenged, philosophical and moral debates can be avoided and the issues can be addressed through a self-governing approach headed by those involved in the system.