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James A. Gardner

University at Buffalo School of Law

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SECTION 98 AND THE SPECIALIZED PRACTICE OF CIVIL RIGHTS LAW

JAMES A. GARDNER*

In *Stropnicky v. Nathanson*,¹ the Massachusetts Commission Against Discrimination (“MCAD”) ruled that Judith Nathanson violated a Massachusetts antidiscrimination statute by confining her law practice to the feminist-oriented representation of women in divorce proceedings. Some of the participants in this Symposium have criticized the Agency’s decision on constitutional or jurisprudential grounds, but I think the ruling suffers from a more fundamental problem: it rests on a poor reading of the underlying statute. My argument, reduced to its essence, is simply this: it is perverse to interpret a civil rights statute in a way that curtails the effectiveness and availability of civil rights representation.

I. THE AGENCY’S READING OF THE STATUTE

A. *The MCAD Ruling*

Section 98 of Chapter 272 of the Massachusetts General Laws provides:

Whoever makes any distinction, discrimination or restriction on account of . . . sex . . . relative to the admission of any person to, or his treatment in any place of public accommodation, . . . as defined in section ninety-two A, . . . shall be punished²

Section 92A of Chapter 272 defines a “place of public accommodation” as “any place . . . which is open to and accepts or solicits the patronage of the general public. . . .”³ This language is followed by ten nonexclusive examples, including an “establishment . . . dispensing personal services”⁴ In his opinion for the Agency, the Hearing Commissioner found that the practice of law involves the

* Professor of Law, Western New England College School of Law. Thanks to Anne Goldstein and Val Vojdik for commenting on an earlier draft.

1. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

2. MASS. GEN. LAWS ch. 272, § 98 (1997).

3. *Id.* § 92A.

4. *Id.* § 92A(3).

dispensing of personal services and that Nathanson had advertised her services to the general public, thereby soliciting its business. Consequently, her law office was a "place of public accommodation" within the meaning of Section 92A,⁵ and she was thus required to comply with the nondiscrimination requirements of Section 98.

The Hearing Commissioner found Nathanson liable under Section 98 by a seemingly straightforward application of precedent. Nathanson had refused to represent Joseph Stropnick, a male seeking representation in a divorce proceeding, a fact that Nathanson did not dispute. Stropnick thus made out an undisputed *prima facie* case of discrimination by showing that he was a member of a class protected by the statute (males), and that he was denied service in a place of public accommodation.⁶ Nathanson's refusal to represent Stropnick, the Hearing Commissioner held, thus constituted a denial of service amounting to a "distinction, discrimination or restriction" within the meaning of Section 98,⁷ and he ordered Nathanson to pay a fine of \$5,000.⁸

B. *Legal Specialization as Discrimination*

Let us assume that the Hearing Commissioner correctly found Nathanson's law office to be a place of public accommodation subject to the nondiscrimination requirement of Section 98. It does not follow nearly so directly, however, that Nathanson's refusal to represent Stropnick constitutes "discrimination" within the meaning of Section 98.

How, precisely, does prohibited discrimination occur under Section 98? The examples given in Section 92A reveal the statutory paradigm of illegal discrimination: a retail store offers to sell merchandise to the public, but refuses to sell to blacks;⁹ a hotel offers to rent rooms to the public but refuses to rent to gays;¹⁰ a restaurant offers to serve meals to the public but refuses to serve Jews.¹¹ In each case, a service that is offered generally to the public is denied solely on the basis of some statutorily protected trait. In *Stropnick*, MCAD made an obvious attempt to force Nathanson's

5. *Stropnick*, 19 M.D.L.R. at 40-41.

6. *See id.* at 41.

7. *Id.*

8. *See id.* at 42.

9. *See* § 92A(3).

10. *See id.* § 92A(1).

11. *See id.* § 92A(4).

behavior into this mold. The Hearing Commissioner found, for example, that Nathanson “practices law for a profit,” “solicits business” by advertising,¹² and “provides a service and solicits the business of the general public”¹³—in other words, that she was in the business of practicing law. By this definition of Nathanson’s practice, her refusal to represent Stropnicky naturally constitutes just the kind of discrimination prohibited by Section 98.

Yet this view is grossly oversimplified, for it ignores the nature of the services that Nathanson actually offered to provide. She did not publicly offer to provide general legal representation to prospective clients; she practiced only family law. Neither did she offer to provide representation in family law matters generally; rather, she offered only to represent women in family law matters, and then only from a feminist point of view. Stropnicky, on the other hand, sought a somewhat different service: representation of him as the husband in a divorce proceeding to dissolve a nontraditional marriage.¹⁴ This is not a service that Nathanson had ever offered to the public. Nathanson was thus found guilty of violating Section 98 for refusing to provide Stropnicky with a kind of legal representation that she never held herself out as willing to provide, or that she even claimed she was capable of providing.

If the Agency’s decision is to make sense, then, it must rely on a different understanding of the meaning of “discrimination” under Section 98. Nathanson’s liability must result not from her denial to Stropnicky of a service she freely provided to others, but from the fact that the kind of service she offered to provide—feminist-oriented representation of women in divorce proceedings—is a kind of service that Section 98 simply does not permit lawyers to offer. Underlying the Hearing Commissioner’s ruling, then, is the conclusion that Nathanson’s chosen area of legal specialization was too narrow in a way that offended Section 98. Presumably, in MCAD’s view, a lawyer may limit her practice to family law, to divorce, to contested divorce, to the defense of contested divorces, and the like, but not to the representation of women in those fields of specialization.

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

12. *Stropnicky*, 19 M.D.L.R. at 39.

13. *Id.* at 41.

14. *See id.* at 39-40.

rowly defining the services they choose to offer to the public. It would make little sense to interpret a statute like Section 98 to prohibit the racially discriminatory denial of restaurant service, for example, but to permit restaurants to avoid liability by deliberately and openly offering to serve only whites, or by characterizing their service as specializing in the culinary needs of whites. Racially segregated service is clearly one of the main targets of Sections 98 and 92A. This approach makes just as much sense when applied to the practice of law. Lawyers should no more be able than hotels or restaurants to offer whites-only service, and MCAD's finding that Stropnický had made out a *prima facie* case of discrimination seems unobjectionable to the extent that it forces lawyers, like any other entrepreneurs, to justify their service policies.

MCAD, however, went considerably beyond merely holding that a female-only form of legal service made out a *prima facie* case under Section 98: it held that liability followed automatically because there was no conceivable justification, within the contemplation of the statute, for maintaining a law practice open only to women.¹⁵ Such a ruling has extremely serious consequences for the practice of all areas of civil rights law. For example, by MCAD's reasoning, Section 98 would permit a lawyer to limit his practice to vote dilution claims, but not to vote dilution claims on behalf of racial minorities. Thus, a voting rights lawyer who had dedicated his practice to seeking fair representation for blacks through the creation of majority-minority election districts would, under MCAD's reading of Section 98, be unable to turn away white plaintiffs who sought to challenge such districts under *Shaw v. Reno*.¹⁶ Similarly, a lawyer could choose to specialize in the defense of child neglect cases, but not to specialize in the defense of such cases brought against Christian Scientists. What MCAD seems to be saying, in other words, is that Section 98 condemns a legal service as discriminatory where the boundaries of a lawyer's practice coincide with the traits that make a group a protected class under the statute. This view, I believe, rests on a very poor interpretation of Section 98, one that should not be attributed to the legislature.

15. This approach is implicit in the Hearing Commissioner's repeated insistence that Nathanson's denial of representation to Stropnický could not under Section 98 be considered anything other than the denial of service *solely* on the basis of the client's gender. *See id.* at 41-42.

16. 509 U.S. 630 (1993). The Court held in *Shaw* that the Equal Protection Clause prohibits the use of race-conscious districting to increase the electoral power of blacks at the expense of whites. *See id.* at 642-44.

II. THE WEAKNESS OF THE AGENCY'S APPROACH

A. *The Meaningfulness of Civil Rights Specialization*

The notion that specialization in the provision of services to the public can by itself amount to wrongful discrimination derives its power from a simple proposition: the traits that distinguish members of protected groups are irrelevant to their ability to enjoy the offered services. What converts otherwise harmless specialization into undesirable discrimination is the belief that a person's capacity to derive the benefits of a restaurant meal, a hotel room, a library, a department store, or even the professional services of a doctor or dentist, is unaffected by his or her race, religion, ethnicity, gender, or sexual orientation. On this view, "specialization" in the needs of whites, men, or heterosexuals can only be a pretext for naked discrimination, since this kind of specialization in the provision of food, housing or dentistry is not meaningfully possible.

In general, legal services are justifiably treated in a similar way. A client's race, ethnicity and gender will for the most part be irrelevant to a lawyer's representation of that client for purposes of drafting a will or lease, handling a real estate closing, or bringing a personal injury suit. Thus, a lawyer's claim to specialize in the representation of whites or males in real estate transactions ought to provoke serious skepticism.

The similarity between law and other fields breaks down, however, when it comes to legal representation in civil rights cases involving discrimination. A discrimination case is one to which the client's race, ethnicity or gender is by definition not only relevant, but crucial—the entire case revolves around the trait in question. While the legal principles of nondiscrimination hold constant for any class of citizens protected by antidiscrimination laws like Section 98, it by no means follows that the factual issues, applications of law to fact, means of discovery, methods of proof, or strategies of settlement that arise in the prosecution of a civil rights case are the same for all protected classes. Surely the means used to discriminate against lesbians, for example, differs from the means used to discriminate against Asians or Muslims. Like anything else, discrimination is identified by reference to the context in which people act, and there is no reason to assume that a lawyer who has professional experience working in the context in which one kind of discrimination occurs will be familiar with or nearly as effective working in the contexts in which other kinds of discrimination occur. For example, one kind of evidence of the existence of discrimi-

nation is the use of superficially neutral code words. In some cases, the use of certain language can by itself constitute unlawful discrimination, as in the creation of a hostile workplace environment.¹⁷ There is simply no good reason to suppose that a lawyer who has specialized in workplace discrimination against women, and has invested the time and effort necessary to learn the code words and language of discrimination, the extensive body of law governing the area, and the strategies necessary to ferret out sufficient evidence of discrimination to mount a compelling case, will be nearly as effective handling a workplace discrimination case on behalf of a Buddhist or a gay man. I am not suggesting that such a lawyer would be completely incompetent outside her narrowest field of specialization, the way a tax lawyer might be incompetent to represent a criminal defendant. I am suggesting, though, that a lawyer who specializes in the civil rights claims of Mexican-Americans could do a better job of representing a Mexican-American in a civil rights case than could a lawyer who specializes in the civil rights claims of women or fundamentalist Christians. Thus, the practice of civil rights law is different from the provision of restaurant or hotel services in that the customer's race, religion or gender may greatly affect his or her ability to obtain the benefits of the offered service.

B. *MCAD's Errors of Statutory Interpretation*

Once we recognize the differences between the practice of civil rights law and the provision of other kinds of services or the practice of other kinds of law, the shortcomings of MCAD's interpretation of Section 98 become evident. In *Stropnický*, the Agency construed a civil rights statute in a way that curtails the effectiveness and availability of civil rights representation, a result that the legislature could not have intended the statute to accomplish.

First and foremost, the kind of civil rights subspecialty that Nathanson claimed to practice simply does not implicate the central policy concerns of antidiscrimination law embodied in Section 98. The main purpose of Section 98 is to bar those who provide services to the public from turning away customers solely on the basis of certain traits like race or color. Application of this principle to the practice of law means that lawyers should not be permitted to turn down cases *they would otherwise take* solely on the basis of these prohibited criteria. But Nathanson did not decline to represent *Stropnický* solely because of his gender; she declined to represent

17. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

him because his case was not one that she would ordinarily have taken, and she would not ordinarily have taken his case because it fell outside her chosen area of civil rights specialization.

Second, as a matter of public policy, any statute—but especially civil rights statutes—should be read to encourage effective civil rights representation.¹⁸ MCAD's ruling in *Stropnick* does just the opposite. In Massachusetts, as elsewhere, statutes should be interpreted so as to effectuate their purpose.¹⁹ The purpose of Section 98 is obviously to provide legal protection for the civil rights of members of groups that are commonly the object of discrimination. But Section 98 does so not merely by declaring an abstract right to be free from certain kinds of discrimination, but by making those rights enforceable within a legal regime consisting of enforcement by a state agency²⁰ and review by the state judiciary.²¹ Such a system necessarily contemplates that those who have had their statutory rights violated will seek vindication of those rights with the assistance of counsel.

Perversely, the interpretation of Section 98 offered in *Stropnick* only thwarts the ability of civil rights plaintiffs to obtain effective representation. It does so in two ways. First, by prohibiting civil rights lawyers from specializing in the problems facing members of particular protected classes, the Agency's interpretation curtails the ability of civil rights lawyers to develop the kinds of specific expertise that would make them as effective as possible in pursuing the interests of their clients. It is hard to see why the legislature, in its regulation of the legal profession, would allow members of the public to retain lawyers with extremely narrow expertise in the most arcane areas of tax, bankruptcy, securities, or environmental law, but would remand those seeking representation in civil rights matters to generalists.

Second, the Agency's interpretation of Section 98 would curtail the availability of civil rights representation by forcing lawyers like Nathanson to take on cases they would otherwise decline. One of the cold facts of civil rights law is that few lawyers choose it as a

18. For example the Supreme Judicial Court recognized this principle in *Concord Rod & Gun Club, Inc. v. MCAD*, 524 N.E.2d 1364 (Mass. 1988), where it held that Section 92A is to be read subject to a "rule of liberal construction." *Id.* at 1367.

19. See *Everett Town Taxi, Inc. v. Board of Aldermen*, 320 N.E.2d 896 (Mass. 1974) (courts have a duty "to construe a legislative act so as to effectuate fully the statutory purpose").

20. See MASS. GEN. LAWS ch. 151B, § 5 (1997) (MCAD jurisdiction over Section 98 claims).

21. See *id.* § 6 (judicial review of MCAD rulings).

specialty. Public interest law of any kind pays poorly, and civil rights law is no exception, especially when potential clients are disproportionately drawn from society's most disadvantaged sectors. This, of course, is why so many legislatures are forced to dangle the promise of attorney fees to induce lawyers to take civil rights cases.²² MCAD's interpretation of Section 98 takes a bad situation and makes it worse. It forces those few lawyers who have made the commitment to civil rights law to spend their very limited time on cases that they would not otherwise take, thus inevitably crowding out claims that the lawyers believe deserve representation. This in turn forces potential clients either to abandon possibly meritorious claims or to shop them around to practitioners with lesser expertise who specialize in other areas, with a concomitant reduction in the effectiveness of the representation obtained.

Perhaps the ultimate irony of MCAD's interpretation of Section 98 is that it can only hurt the Agency itself in the long run. Section 98 identifies a plethora of protected classes having little in common except their experience as frequent targets of discrimination. In so doing, Section 98 practically invites lawyers to develop subspecialties in the various kinds of claims that fall within the statute's wide scope. Moreover, MCAD itself would clearly benefit from such specialization: a claim before the Agency will likely be better and more efficiently litigated if it is handled by an experienced lawyer with a well-developed subspecialty in that particular kind of claim. By hindering the development of such subspecialties, the Agency's position in *Stropnicki* can only harm the quality of advocacy in cases that MCAD is likely to hear, including cases like *Stropnicki* itself.

In light of these considerations, a far better interpretation of Section 98 is one that would allow lawyers to rebut a *prima facie* showing of discrimination by demonstrating that they are *bona fide* specialists in particular areas of civil rights law. This, indeed, was precisely Nathanson's defense.²³ In my view, the only questions legitimately before the Agency were whether the feminist-oriented representation of women on family law issues is properly considered a branch of civil rights law—a question I would answer affirmatively—and the factual question of whether Nathanson actually

22. The Massachusetts legislature itself provided for the award of attorney fees in suits brought to enforce Section 98 and other state antidiscrimination statutes. See *id.* § 9.

23. See *Stropnicki v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39, 41 (MCAD Feb. 25, 1997).

specialized in that area of law, a contention that Stropnický apparently did not dispute.

CONCLUSION

Civil rights lawyers should be rewarded for their sacrifices, not punished by being forced to take cases outside their chosen area of specialization. Similarly, civil rights litigants should be able to obtain the best possible representation from lawyers who have had the opportunity to develop the greatest possible expertise in the kinds of claims for which those litigants seek representation. MCAD's interpretation of Section 98 achieves the opposite effects, and does so, ironically, through the misinterpretation of one of the state's most important civil rights statutes, a statute designed to improve, not to thwart, the ability of victims of discrimination to obtain redress.