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COMPELLED LAWYER REPRESENTATION AND THE FREE SPEECH RIGHTS OF ATTORNEYS

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INTRODUCTION

When a Hearing Commissioner for the Massachusetts Commission Against Discrimination ("MCAD") ruled this year that a woman lawyer could not refuse to represent men in divorce actions under the state's public accommodation statute, the decision set off a firestorm of reaction.[1] In his decision in *Stropnicky v. Nathanson*,[2] the Commissioner refused to rule on the lawyer's First Amendment defense, reasoning that such a constitutional challenge was beyond the scope of his authority.[3] It is just that First Amendment question that I will consider.

Stropnicky arose when an attorney, Judith Nathanson, refused to represent Joseph Stropnicky. Mr. Stropnicky sought out her services in a divorce action in order to review a separation agreement that had been drafted by a lawyer/mediator. In refusing to represent him, Ms. Nathanson informed Mr. Stropnicky that she only represented women in divorce cases. Mr. Stropnicky thereafter filed a complaint with the MCAD. On February 25, 1997, a Hearing Commissioner found Ms. Nathanson's behavior to be violative of a state statute that outlawed discrimination in places of public accommodation.[4] The Commissioner ordered her to pay $5000 in damages to Mr. Stropnicky and to cease refusing to represent clients on account of their gender.

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1. *See* Peter S. Canellos, *Wanted: Advocate or a Free Agent? The Question Goes to the Heart of Whether Lawyers Should Work for Just Anyone, or Follow Their Own 'Moral Compass,'* BOSTON GLOBE, May 18, 1997, at C1.

2. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

3. *See id.* at 42.

4. *See* MASS. GEN. LAWS ch. 272, § 98 (1996).

In hearing about the *Stropnicky* case, my initial reaction was that the case was strikingly similar to the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[5] In *Hurley*, the United States Supreme Court ruled that the Massachusetts public accommodation law could not be applied to force the South Boston Allied War Veterans Council ("the Council") to include the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") in its St. Patrick's Day/Evacuation Day Parade. In reaching that conclusion, the Court reasoned that compelling the Council to include GLIB against its will was a clear violation of the First Amendment protection against compelled expression,[6] the same doctrine that prevents a Jehovah's Witness from being forced to salute the flag.[7]

The parallels between *Stropnicky* and *Hurley* are obvious. Both involve applications of the Massachusetts public accommodation law. Both involve compelled association with a cause that is not supported by the speaker, the gay/lesbian/bisexual movement in *Hurley* and the plight of men in divorce actions in *Stropnicky*. There are, of course, also differences. *Stropnicky* involves representation by a lawyer. Lawyers, in certain circumstances, have been held to have fewer First Amendment rights than other citizens.[8] Further, in *Hurley*, the Court concluded that the St. Patrick's Day Parade was an example of communication protected by the First Amendment.[9] An attorney representing a client in a divorce action is not as clearly engaging in First Amendment speech for several reasons. First, unlike the parade, the lawyer's expression, in the typical case, is not engaged in primarily as an act of political speech in order to inform the public. Second, the lawyer is expressing the views of her client and not necessarily her own views. While the lawyer is without doubt forced into an association with the client, First Amendment claims based on compelled association[10] have not

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5. 515 U.S. 557 (1995).

6. *See id.* at 581.

7. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817 (1986).

8. *See* Gentile v. State Bar, 501 U.S. 1030, 1074 (1991).

9. *See* 515 U.S. at 568 (1995).

10. *See* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988) (upholding city's ban on discrimination in places of public accommodation as applied to private clubs with more than 400 members); Board of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548-49 (1987) (upholding application of California antidiscrimination law to prevent local Rotary clubs from excluding women from membership); Roberts v. United States Jaycees, 468 U.S. 609, 628-29 (1984) (upholding

been as successful as compelled expression claims.[11]

This article will examine the Supreme Court's decision in *Hurley* and compare it to the decision in *Stropnicky*. It will then consider whether there are sufficient distinctions between the two cases so as to defeat the First Amendment argument that was successful in *Hurley*. It will conclude that the differences between the two cases are not sufficiently significant from the point of view of the First Amendment and that the application of the state public accommodation statute to a lawyer's ideologically motivated decision not to represent a client violates the First Amendment.

I. *HURLEY V. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON*[12]

Each March 17 a parade to celebrate both St. Patrick's Day and Evacuation Day is held in South Boston. Until 1947, the City of Boston formally sponsored the parade. In that year, the City gave permission to the South Boston Allied War Veterans Council to conduct the parade. A parade permit has been issued to the Veterans Council each year since 1947.

In 1992, the Irish American Gay, Lesbian and Bisexual Group of Boston was formed to give gay, lesbian and bisexual persons of Irish ancestry a presence in the annual parade. The Council denied GLIB's request that it be permitted to participate in the parade, but GLIB obtained an order from a state court and the organization participated in the parade under court order. In 1993, the Council again refused GLIB permission to march and GLIB filed suit claiming that the refusal violated the state and federal constitutions[13] and

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application of state human rights law to prohibit the Jaycees from excluding women from membership).

11. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (striking down requirement that campaign literature contain the name of the author of the publication); Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 15-17 (1985) (invalidating utilities commission order mandating that surplus space in utility billing envelope be made available to group disagreeing with the views of the utility); Wooley v. Maynard, 430 U.S. 705, 715-17 (1977) (enjoining enforcement of state requirement that all license plates display the state motto as applied to persons who objected to the motto on religious and political grounds); *Barnette*, 319 U.S. at 642 (1943) (enjoining enforcement of mandatory flag salute requirement as applied to students and their parents who objected to participating in the salute on religious grounds).

12. 515 U.S. 557 (1995).

13. The trial court dismissed GLIB's First and Fourteenth Amendment claims because it found there was no state action in the Council's refusal to permit GLIB to march. *See id.* at 563 n.1. The Massachusetts Supreme Judicial Court did not overturn this finding. *See* Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of

the state public accommodation law. The state courts found that the parade was a place of public accommodation within the meaning of the state statute and that it lacked a "'specific expressive purpose entitling the parade to protection under the First Amendment.'"[14]

The Supreme Court reversed. It found that most parades were protected expression under the First Amendment and that the South Boston parade was no exception.[15] The Council was not stripped of First Amendment protection either because the parade did not communicate a "succinctly articulable message"[16] or because the organizers brought together various groups that participated in the parade and did not originate the content of the parade.[17]

The Court found the state courts' application of the public accommodation law violative of "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[18] Speaker autonomy includes the right to decide what to say as well as the right to decide what not to say. The Court had no trouble concluding that the Council had "decided to exclude a message it did not like from the communication it chose to make . . . ."[19] The Court found the point of view the Council had decided to exclude sufficiently identifiable to establish the Council's right to First Amendment protection.[20]

Boston, 636 N.E.2d 1293, 1297 (Mass. 1994). The United States Supreme Court noted that the state action question was not raised in GLIB's cross-petition for certiorari or in GLIB's briefs. Moreover, GLIB specifically stated it was not pressing the state action issue when questioned at oral argument. *See Hurley*, 515 U.S. at 566.

14. *Hurley*, 515 U.S. at 563 (quoting from Appellant's Petition for Certiorari at B25); *see also id.* at 564 (citing *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 636 N.E.2d at 1299).

15. *See id.* at 569. The only exception identified by the Court was "[i]f there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself." *Id.* at 568.

16. *Id.* at 569.

17. *See id.* at 570 ("Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

18. *Id.* at 573.

19. *Id.* at 574. The Court went on to state that it "is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.*

20. *See id.* at 575-76. The Court stated that

> [t]he message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the

Moreover, the inclusion of GLIB would "alter the expressive content of their parade" because "every participating unit affects the message conveyed by the private organizers."[21]

The Court rejected GLIB's argument that there was no threat to speaker autonomy because the Council would not be perceived as approving of the views expressed by each contingent of marchers. The Court found instead that "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."[22]

No sufficient asserted state interest justified a compromise of the principle of speaker autonomy. Massachusetts was of course entitled to guarantee gays, lesbians and bisexuals access to places of public accommodation in the traditional sense of, for example, preventing restaurant owners from refusing to serve a customer based on the sexual orientation of the customer.[23] However, the state could not require speakers to modify the content of their chosen message in order to express a message that met with state approval.[24]

> organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Id. at 574-75.

21. *Id.* at 572-73.

22. *Id.* at 575. The Court analogized the Council to the publisher of a newspaper. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a requirement that a newspaper grant a right of reply to candidates for public office who had been the subject of negative comments in the paper. In *Hurley*, the Court reasoned that the parade organizers were as entitled to editorial control over the content of their parade as the newspaper was over the content of its pages. *See* 515 U.S. at 575.

23. *See Hurley*, 515 U.S. at 578 ("On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's personal preference.").

24. *See id.* at 579 ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than

II. THE STRENGTH OF THE *HURLEY/STROPNICKY* ANALOGY

Hurley and *Stropnicky* have much in common. Both involve applications of the Massachusetts public accommodation statute. In *Hurley*, the Supreme Court characterized the application of the public accommodation law to the St. Patrick's Day Parade as "peculiar."[25] Under that interpretation of the law, the Council was ordered to permit GLIB to march as a unit in the parade thereby altering the expressive content of the parade. Similarly, the application of the antidiscrimination statute to an attorney's decision whether or not to represent a client could be called peculiar. In *Stropnicky*, the Hearing Commissioner ordered Judith Nathanson to cease refusing to accept male clients because of their gender. The effect of forcing Ms. Nathanson to include men among her clients is to compel Ms. Nathanson to alter the expressive content of her legal arguments in order to represent the interests of male clients.

The principal First Amendment claim in *Hurley* is a claim to speaker autonomy which includes the right to decide what not to say. According to the Court, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[26] Similarly, Nathanson can rest her First Amendment claim on the right to decide what not to say, which she can argue includes the right not to advocate the interests of Mr. Stropnicky. In order to support this argument, Ms. Nathanson would need to establish the same five elements that the Court found to be decisive in *Hurley*.

These five elements are: (1) that the claimant's speech is fully protected by the First Amendment; (2) that the claimant's refusal to speak is based on a dislike of the message she would be forced to communicate; (3) that the claimant would be forced to alter her own message by the addition of the compelled communication; (4) that the compelled message would be perceived as the claimant's own communication; and (5) that the government lacks a sufficiently persuasive state interest to justify infringement of the claimant's right to speaker autonomy.[27]

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promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.").

25. *Id.* at 572.

26. *Id.* at 576.

27. I am assuming for purposes of this article that Ms. Nathanson would need to satisfy all five of the *Hurley* elements. However, convincing arguments can be made

In *Hurley*, the Council was able to satisfy all five of these elements. First, the Court concluded that the parade was symbolic expression within the meaning of the First Amendment. According to the Court, "[n]ot many marches . . . are beyond the realm of expressive parades, and the South Boston celebration is not one of them."[28] Second, the Court found that the Council rejected GLIB's request to participate in the parade because it disagreed with GLIB's message.[29] Third, the Court concluded that the parade's message would be altered by the inclusion of GLIB.[30] Further, the Court dismissed a contention that the participation of GLIB would not be perceived as signifying Council approval of GLIB's message because the Council merely served as "'a conduit' for the speech of participants in the parade 'rather than itself a speaker.'"[31] The Court rejected that argument and concluded that the Council would be assumed to be in support of GLIB's message if GLIB were to participate in the parade.[32] Finally, the Court concluded that compelling the Council to modify its chosen message in order to express a state-approved message was not an adequate justification for the state's intrusion on speaker autonomy.[33]

Ms. Nathanson's task in satisfying all five of these elements is not as easy as in *Hurley*. Ms. Nathanson first must demonstrate that her role as a lawyer involves expression fully protected by the First Amendment. Second, she would need to prove that her refusal to represent Mr. Stropnicky is due to her disagreement with

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that the first and third elements should not need to be satisfied in the circumstances of this case. *See infra* note 34 (arguing that Ms. Nathanson's preference for silence over speech may make unnecessary any inquiry into the character of her lawyer speech); *see also infra* note 74 (arguing that the Court has not considered it relevant whether the compelled expression was likely to be attributed to the claimant). Of the Court's pre-*Hurley* compelled expression cases, the methodology of *Hurley* is somewhat analogous to that employed in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a case in which a shopping center owner unsuccessfully argued that he should not be forced to allow expressive activities to take place on his property over his objection. Among the Court's reasons for rejecting the owner's First Amendment claim was the fact that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." *Id.* at 87. In addition, Justice Powell's concurring opinion noted that the shopping center owner did not allege that he disagreed with the ideas he was forced to allow to be disseminated on his property. *See id.* at 101 (Powell, J., concurring in part and concurring in the judgment).

28. *Hurley*, 515 U.S. at 569.
29. *See id.* at 574.
30. *See id.* at 572-73.
31. *Id.* at 575 (quoting from Brief for Respondent at 21).
32. *See id.*
33. *See id.* at 579.

the ideological stance she would be forced to assume in order to represent him. Third, in addition to disagreeing with Mr. Stropnicky, she would need to show that she would be forced to alter her chosen message by the requirement that she represent Mr. Stropnicky. Further, she would need to demonstrate that her speech on behalf of Mr. Stropnicky would be perceived as Nathanson's own speech thereby creating the impression that she approved of the message she was compelled to express. Finally, she would need to refute the state's argument that its interest in preventing discrimination in the provision of legal services was a compelling government purpose justifying the intrusion on the First Amendment rights of attorneys.

A. *The First Amendment Status of a Lawyer's Speech on a Client's Behalf*

Unlike a parade, a lawyer's performance of her duties is not as obviously expression fully protected by the First Amendment.[34] One difference is that the speech of lawyers can be subject to some forms of regulation that would not be constitutional if applied to the expression of other speakers.

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34. Compelled expression cases can, with some difficulty, be divided into two categories. In one category, the compelled speaker would be silent, but for the government's requirement that she speak. In the other, the compelled speaker has a message to communicate and the government requires a modification of that message. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Maynards were required to display the state motto on their automobile license plate. There is no indication in the case that the Maynards desired to use the license plate to display a message of their own. *See id.* at 713 n.10. Their only action was an effort to cover up the state's message, not to substitute one of their own. *See id.* at 708. Because they preferred silence over speech, the Court did not inquire into whether the Maynards' chosen form of expression was fully protected by the First Amendment. It only looked at their reasons for disagreeing with the motto. *See id.* at 713. By contrast, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), an attorney had chosen to advertise his services. The state required he add to the information presented in his advertisements and therefore modify his chosen message. In this context, the Court considered it relevant that Zauderer's own speech was commercial and not political speech. *See id.* at 651.

An argument can be made that Nathanson is being forced to give up her silence by forced representation of male clients. If successful, such an argument might obviate the need to inquire into the nature of Nathanson's speech. On the other hand, if one looks at Ms. Nathanson's speech on behalf of existing clients as a message she is already communicating, the state is requiring that she modify her chosen message. Under this analysis, the character of her chosen speech would be relevant. Because of the ambiguity that exists on the issue of how to characterize Ms. Nathanson's circumstances, I am assuming she would need to demonstrate that her speech is fully protected by the First Amendment in order to impose the same heavy burden of justification on the state as the Court did in *Hurley*.

In *Gentile v. State Bar*,[35] the state bar disciplined an attorney for statements made at a press conference after the indictment of his client in a high profile criminal case. The Supreme Court reviewed the constitutionality of the reprimand for violating a Nevada Supreme Court Rule prohibiting the making of prejudicial extrajudicial statements about pending litigation. Although the Court struck down the Rule as void for vagueness,[36] Chief Justice Rehnquist spoke for a majority of the Court when he stated that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . . ."[37] The less demanding standard was justified by the fact that lawyers, as officers of the court, "'have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.'"[38] Extrajudicial statements by attorneys "are likely to be received as especially authoritative" and may undermine the fundamental right to a fair trial by impartial jurors.[39]

While the *Gentile* holding identifies some situations in which lawyers have fewer rights than other speakers, the holding does not apply to all speech by lawyers. First, *Gentile* implies a distinction between criminal and civil cases.[40] *Stropnicky* arises in the civil context. Second, the holding is justified by special concerns that arise in the context of pending litigation.[41] *Stropnicky* concerns the review of a separation agreement where the work of Nathanson will not involve courtroom appearances in front of a jury. Third, even in the context of a divorce action that must be resolved in a courtroom, in Massachusetts, as in most states, divorce actions are tried

35. 501 U.S. 1030 (1991).

36. Justice Kennedy wrote for the Court in this aspect of the case in an opinion joined by Justices Marshall, Blackmun and Stevens and concurred in by Justice O'Connor.

37. *Gentile*, 501 U.S. at 1074. This part of Chief Justice Rehnquist's opinion was joined by Justices White, Scalia and Souter and concurred in by Justice O'Connor. The Chief Justice wrote a dissenting opinion on the issue of vagueness in which he disagreed with the majority's view that the Nevada Rule was unconstitutionally vague.

38. *Id.* (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring)).

39. *Id.* at 1074-75.

40. *See id.* at 1074 ("Lawyers representing clients in pending cases are key participants in the *criminal justice system*, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.") (emphasis added).

41. *See id.* at 1072 n.5 ("We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.").

by a judge and not a jury.[42] Thus, juror impartiality cannot be compromised.[43]

Even more significant than these distinctions, the First Amendment right Ms. Nathanson seeks to exercise will have no effect on judicial integrity. She is not seeking to speak on behalf of Mr. Stropnicky in a way that could compromise the impartiality of the judicial process. She is seeking the right not to speak on his behalf. If her claim is upheld, a different attorney will represent Mr. Stropnicky and Ms. Nathanson will make no appearances on his behalf. When an attorney seeks to refuse representation of a client, certainly in a circumstance when other qualified counsel are available,[44] no argument can be made that judicial integrity is threatened. Thus, the *Gentile* limitation on lawyer free speech is inapplicable in the *Stropnicky* context.

A second limitation on attorney speech occurs in the context of lawyer advertising, which is classified as commercial speech.[45] As a less protected form of expression,[46] commercial speech can some-

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42. *See* SEAN M. DUNPHY, 21 MASSACHUSETTS PRACTICE: PROBATE LAW AND PRACTICE § 3.6 (2d ed. 1997).

43. *See Gentile,* 501 U.S. at 1077 (Rehnquist, C.J., dissenting) ("[The substantial likelihood of prejudice] test will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it.").

44. An argument can be made that the refusal to represent a client in a situation where no other competent attorney is available might impact on the integrity of the judicial process. *Cf.* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423, 425-28 (1990) (upholding application of antitrust laws to a group of lawyers who severely impacted the criminal justice system when they agreed to refuse new court appointments to represent indigent criminal defendants until they received an increase in compensation and rejecting lawyers' First Amendment defense). No such situation arises in *Stropnicky* since Ms. Nathanson's name was included on a list of attorneys given to Mr. Stropnicky by the lawyer/mediator who drafted the settlement agreement.

A similar claim was raised in *Hurley*. In order to gain access to the parade, GLIB claimed that the Council had a monopoly on access to spectators at the parade thereby enabling the Council to "'silence the voice of competing speakers . . . .'" *Hurley*, 515 U.S. at 579 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994)). The Court found no merit in this claim since it concluded that GLIB was eligible to file an application to sponsor a parade of its own. While this response by the Court may seem somewhat unrealistic in the context of the St. Patrick's Day parade, the argument that Stropnicky will be able to find other well-qualified counsel is quite realistic.

45. *See* Bates v. State Bar, 433 U.S. 350, 383 (1977) (holding that lawyer advertising that is not false or misleading is protected commercial speech within the scope of the First Amendment).

46. Restrictions on commercial speech are analyzed under the three-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). The *Central Hudson* test subjects restrictions on commercial speech to intermediate and not strict scrutiny review.

times be regulated in ways that would not be appropriate if the speech at issue were fully protected.[47] This principle also applies when the regulation does not involve a ban on commercial speech, but instead involves compelled commercial expression. An example of this phenomenon is the case of *Zauderer v. Office of Disciplinary Counsel*.[48] *Zauderer* was a challenge to restrictions on attorney advertising by an attorney who had been disciplined for violating a number of those restrictions. Among the challenged restrictions was a requirement that attorneys who advertised that they took cases on a contingent fee basis disclose the fact that clients might be liable for substantial costs even if their lawsuits were not successful. While striking down other aspects of the law,[49] the Court upheld this forced disclosure as justified by the value to consumers of such speech,[50] and the fact that the disclosure requirement was "reasonably related to the State's interest in preventing deception of consumers."[51]

While advertising by lawyers is commercial speech, the lawyer speech in *Stropnicky* involves much more than the advertising of legal services and therefore does not implicate the commercial speech doctrine. Nathanson's speech goes beyond the advertisement of legal services to the provision of those services. Ironically, while the cases in which state-imposed lawyer advertising restrictions have been upheld usually involve lawyers who aggressively pursue legal business in unseemly ways,[52] Nathanson is a lawyer who wants to turn down a client and is being prevented from doing so by the state.

A more difficult issue in establishing free speech protection in *Stropnicky* is the issue of whether a lawyer's actions on behalf of her clients qualify as speech under the First Amendment; an issue

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47. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding Florida Bar regulation prohibiting the sending of targeted direct-mail solicitations to accident victims for the 30 day period following the accident or disaster); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978) (permitting state to discipline attorneys for face-to-face solicitation of prospective fee-paying clients).

48. 471 U.S. 626 (1985).

49. The Court struck down a prohibition on advertisements that offer legal advice relating to a specific legal problem in order to solicit clients, *see id.* at 647, as well as a ban on the use of illustrations in lawyer advertising, *see id.* at 649.

50. *See id.* at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.") (citation omitted).

51. *Id.*

52. See *supra* note 47 for examples.

that does not arise in *Hurley*. In *Hurley*, the parade, while not consisting of pure speech, qualified as symbolic speech under the First Amendment.[53] The parade was purposefully designed as a communicative act performed before members of the public. Its First Amendment status was unclouded by any issue of ambiguous behavior that may sometimes be engaged in as an expressive act and other times be engaged in as an action with no communicative purpose.[54]

Attorney speech does not fall as neatly into the category of protected expression. An attorney's work involves a variety of activities, some protected by the First Amendment and others not. First, an attorney's work often uses traditional protected forms of communication: oral communication in conversations with clients, opposing counsel and in courtroom appearances, and written communication in letters written and briefs and motions filed with the court. Other work is not "speech" within the meaning of the First Amendment. Examples include researching points of law, listening to the speech of others, and conceiving of an appropriate legal strategy. Most lawyering involves some combination of speech and nonspeech elements.[55]

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53. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (citing National Socialist Party of Am. v. Skokie, 432 U.S. 43, 43 (1977) (swastika); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (black arm band); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) (flag salute); Stromberg v. California, 283 U.S. 359, 369 (1931) (red flag)). While under some circumstances symbolic speech receives less protection than pure speech, *Hurley* does not present such a case. Under the two-track analysis of *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), the government would need to satisfy strict scrutiny to justify regulating the parade because the government's motive for regulating the parade is a desire to alter the Council's expression due to its discriminatory content. *See* Texas v. Johnson, 491 U.S. 397, 407, 412 (1989).

54. By way of contrast to *Hurley*, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), the Court assumed, but did not decide, that overnight sleeping in connection with a demonstration to call attention to the problem of homelessness was protected by the First Amendment. In reflecting on sleep as symbolic conduct, the dissent commented:

> It is true that we all go to sleep as part of our daily regimen and that, for the most part, sleep represents a physical necessity and not a vehicle for expression. But these characteristics need not prevent an activity that is normally devoid of expressive purpose from being used as a novel mode of communication.

Id. at 306 (Marshall, J., dissenting); *see also* Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467 (1984).

55. While an argument can be made that the full protection of the First Amendment is not available when speech and nonspeech elements combine, *see O'Brien*, 391 U.S. at 376, this argument seems inapplicable to Nathanson's situation. First, Nathanson's performance of individual lawyering tasks is not symbolic conduct under the

According to the facts of *Stropnicky*, Nathanson, among other areas of practice, represents clients in divorce actions. Her work, therefore, involves the typical combination of speech and nonspeech elements ranging from reading documents in the privacy of her office to presenting arguments in the public forum of a courtroom. The particular task at issue in *Stropnicky* was the review of a separation agreement drafted by a mediator. That review involves a number of nonspeech acts such as reading the agreement, thinking about its provisions, and reviewing information gathered about the family and financial circumstances of her client in light of the provisions of the agreement. It would also involve elements of speech such as talking to her client about the agreement, writing an evaluation of the agreement, drafting alternative provisions to those in the agreement and negotiating with opposing counsel about contested provisions.

While a sufficient amount of Nathanson's work involves oral or written speech to qualify as speech under the First Amendment, a second problem arises. Each individual item of speech may not be engaged in to promote a political cause or otherwise enrich public debate.[56] The client in a divorce action seeks an end to her marriage, a matter of great personal concern, but she does not seek to promote a political agenda. Using a distinction relevant in the public employee[57] and libel[58] contexts, it is speech about a matter of private and not public concern. For that reason, it does not fall neatly into existing First Amendment categories.

There are two responses to this apparent First Amendment difficulty. First, Nathanson's speech cannot be evaluated by looking

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O'Brien rationale. Second, the state's effort to regulate Nathanson's behavior is directed at both the speech and nonspeech aspects of her law practice. The requirement that she represent male clients is not limited to the nonspeech elements of legal representation.

56. Litigation is protected by the First Amendment when it is engaged in as a means of furthering political objectives. *See* NAACP v. Button, 371 U.S. 415, 429 (1963) ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.").

57. *See* Connick v. Myers, 461 U.S. 138, 142 (1983). For more recent applications of the *Connick* public concern/private concern distinction in the public employee context see Waters v. Churchill, 511 U.S. 661, 668 (1994); Rankin v. McPherson, 483 U.S. 378, 384-87 (1987).

58. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 755 (1985).

only at her speech on behalf of individual clients. It is necessary to focus on her law practice in its entirety as the speech she seeks to communicate. Through her choice of women clients and her efforts to vindicate their rights in marital disputes, Nathanson communicates the message that she is a lawyer who seeks to advance the interests of women within the legal system. While this message is not necessarily communicated directly by Nathanson,[59] her message need not be explicitly articulated in order to be protected by the First Amendment.

A related issue arose in *Hurley* based on GLIB's claim, supported by the state courts, that the parade did not communicate a sufficiently articulate message. The Court rejected this argument by pointing to the clearly protected paintings of Jackson Pollock and the Jabberwocky verse of Lewis Carroll and concluding that speech need not communicate a succinct message in order to receive First Amendment protection.[60] Even inarticulate speech is protected by the First Amendment.

This arguable broadening of the First Amendment horizons to eliminate any need for the speech to communicate a specific message[61] provides support in the *Stropnicky* case if Nathanson's speech is the message she communicates by her choice of clients and her advocacy on their behalf. However, if Nathanson's speech is not characterized by the nature of her law practice in its entirety, but instead by evaluating her speech on behalf of individual clients, the issue arises as to whether she can claim full First Amendment protection for this private concern speech.[62]

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59. Judith Nathanson engaged in one form of direct communication of her desire to represent only women in divorce proceedings. "[H]er advertisements for divorce clients were clearly and explicitly directed toward potential clients who were women." Respondent's Proposed Findings and Rulings at 3, Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

60. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

61. In an earlier symbolic speech case, *see* Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (striking down conviction under state flag misuse statute), the Court had suggested that for symbolic speech to be protected it was necessary that it convey a "particularized message." *Id.* at 411.

62. The one exception to this private concern characterization would be in those instances where Nathanson's speech took place in a courtroom. All courtroom speech, because it informs the public about the judicial system, may qualify as public concern speech even though any single case may be pursued out of private motives. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) ("Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted . . . ."). Cases since *Richmond Newspapers* have expanded the First Amendment right of access to judicial

The issue of whether all private concern speech has a lesser First Amendment status has rarely been addressed directly by the Supreme Court. One significant comment by the Court occurred in *Connick v. Myers*,[63] a seminal case clarifying the rights of public employees to engage in expression without fear of losing their government jobs. In *Connick*, the Court made clear that only the "public concern"[64] speech of public employees required a balancing "'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[65]

Despite the critical character of the public concern/private concern distinction in the context of the rights of government employees, the Court refused to declare this distinction to be generally applicable to the First Amendment:

> We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.[66]

The *Connick* statement on this issue has not been qualified in any way since that case. Therefore, it is reasonable to assume that private concern speech that does not fall within any of the lesser protected categories of speech, such as commercial advertising, receives the full protection of the First Amendment.

This analysis establishes that Ms. Nathanson's speech as an at-

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proceedings recognized in that case to other aspects of the criminal process beyond the trial itself. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986) (Press-Enterprise II) (preliminary hearing); Waller v. Georgia, 467 U.S. 39, 48 (1984) (suppression hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-10 (1984) (voir dire). Thus far the Supreme Court has not explicitly recognized an equivalent right of access to civil trials, although statements by the Court support that view. *See Richmond Newspapers*, 448 U.S. at 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

63. 461 U.S. 138 (1983).

64. *Id.* at 146. The Court defined public concern speech as speech "relating to any matter of political, social or other concern to the community . . . ." *Id.*

65. *Id.* at 142 (quoting from Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

66. *Id.* at 147 (citations omitted).

torney is fully protected by the First Amendment. Therefore, Ms. Nathanson can satisfy the first of the requirements to make out a successful First Amendment claim.

B. *A Lawyer's Refusal to Represent a Client Based on a Desire not to Advance the Client's Legal Interests*

The second element Ms. Nathanson would be required to satisfy is that her reasons for refusing to represent Mr. Stropnicky fall within the ambit of the First Amendment. In its compelled expression cases, the Supreme Court has not engaged in a searching inquiry into the reason a compelled speaker objects to uttering a government-required message.[67] Instead, the Court usually has accepted a speaker's assertion that he or she dislikes the compelled message.[68]

In the MCAD hearing, Ms. Nathanson offered several different reasons for her refusal to represent Mr. Stropnicky. She "testified that she represented only women in divorce cases, in part, because she sought to devote her expertise to eliminating gender bias in the court system."[69] This explanation easily qualifies as a political motivation for her refusal to represent male clients. In her statement, Ms. Nathanson makes clear that the point of view she seeks to advance is the equal treatment of women in divorce cases. Representation of Mr. Stropnicky would not further Ms. Nathanson's political agenda.[70] Indeed, arguably, by lending her support to a

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67. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), for example, the Court did not rely specifically on the challengers' religious objections to the mandatory flag salute, but instead more broadly spoke of "politics, nationalism, religion, or other matters of opinion" which could be a subject of disagreement between citizens and their government. *Id.* at 642.

68. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574 (1995). One exception to the Court's willingness to accept a claimant's assertion of disagreement with a state-imposed message is found in *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997). In *Glickman*, the inability to show that money raised through mandatory contributions by tree fruit growers was used to fund generic advertising with which the objecting growers disagreed was one reason for the defeat of a compelled expression claim. In its list of reasons for rejecting the claim, the Court stated, "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." *Id.* at 2138.

69. Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39, 40 (MCAD Feb. 25, 1997).

70. Mr. Stropnicky argues that his divorce raises issues that are "traditionally associated with women in divorce proceedings," *id.* at 40, because he is a "non-traditional" male who stayed home to care for his children while his wife worked outside the home, *id.* at 39. His argument is an effort to suggest that representation of Mr.

male divorce client and thereby switching sides, she would be forced to undermine the cause she seeks to promote.

In addition to the elimination of gender bias, Ms. Nathanson also "testified that she needs to feel a personal commitment to her client's cause in order to function effectively as an advocate, and that in family law she has only experienced this sense of personal commitment in representing women."[71] This description of her personal commitment to particular clients is also sufficient to qualify as an ideological motive for her refusal. Ms. Nathanson's comfort level with advancing the interests of women and discomfort at promoting the interests of men is sufficient to satisfy the requirement that she be forced to communicate a message with which she disagrees.

C. *The Alteration of a Lawyer's Chosen Message by Compelled Client Representation*

The third element that Ms. Nathanson would need to satisfy to make out a claim that her right to speaker autonomy had been violated is that she would be forced to alter the message she seeks to communicate by the requirement that she represent male clients. In *Hurley*, this element was satisfied by the Court's finding that the expressive message communicated by the parade would be altered by the inclusion of any single group in the parade.[72]

In *Stropnicky*, Ms. Nathanson's chosen message, communicated through her choice of clients and her representation of the interests of those clients, is that she is an attorney who exclusively advocates the interests of women in divorce actions. Ms. Nathanson testified that she believed female divorce clients took comfort in the fact that she only represented the interests of women. Her clients "feel comfortable sharing their anxieties and concerns with an advocate . . . they trust to be wholeheartedly as well as intellectually committed to their interests."[73] Ms. Nathanson's ability to present herself as an attorney who exclusively advocates the rights

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Stropnicky would be consistent with Ms. Nathanson's desire to eliminate gender bias. However, Ms. Nathanson is entitled to define her own beliefs. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court validated the Maynards' deeply felt religious and political objection to the presence of the New Hampshire motto on their automobile license plate despite the fact that not all Jehovah's Witnesses shared the view that the motto violated their religion. *See* Brief for Appellees at 59 n.35, Wooley v. Maynard, 430 U.S. 705 (1977).

71. *Stropnicky*, 19 M.D.L.R. at 40.

72. *See* 515 U.S. at 572-73.

73. *Stropnicky*, 19 M.D.L.R. at 40.

of women would be compromised if the state required that she also represent men. The mere fact of representation of men is enough to signify support for the rights of men in divorce actions and thereby compromise Ms. Nathanson's ability to communicate a women's rights message.

Looked at this way, the parallel is sufficiently close between *Hurley* and *Stropnicky*. In *Hurley*, the Court reasoned that the Council would be forced to communicate a pro-GLIB message against its will if GLIB were allowed to participate in the parade. Similarly, Ms. Nathanson would be forced to communicate a pro-male message if she were forced to represent Mr. Stropnicky against her will. This satisfies the third *Hurley* element.

D. *Perceived Speaker Agreement with the Message when a Lawyer Speaks on Behalf of a Client*

The fourth element that Ms. Nathanson would need to satisfy in establishing her First Amendment defense is that as an attorney representing male clients, she would be perceived as approving of the claims she presented on their behalf.[74] In considering this element in *Hurley*, GLIB attempted to defeat the Council's First Amendment claim by arguing the Council only served as a conduit for the speech of others and was not itself a speaker with a message of its own to communicate. As a mere conduit, so the argument went, there would be no public perception that the Council approved of GLIB's message. The Court rejected this argument by reasoning that organizers of the speech of others are just as entitled to First Amendment protection as direct speakers and that, as the parade organizer, the Council would be perceived of approving of every group it permitted to march in the parade.[75]

In many ways, *Stropnicky* is the stronger case on the issue of Nathanson's First Amendment status as compared to the Council's status. According to the Court in *Hurley*, the right of speaker autonomy is compromised "when dissemination of a view contrary to

74. While the Court discussed this aspect of the case and appeared to find it significant, the Court acknowledged that it was not "deciding on the precise significance of the likelihood of misattribution . . . ." *Hurley*, 515 U.S. at 577. In other compelled expression cases, the Court has not considered the danger of misattribution of the speech to be critical to the success of the claim. In *Maynard*, there was little likelihood that the presence of the state motto on a vehicle's license plate would suggest that the driver of the car shared the view expressed in the motto. Nevertheless, only Justice Rehnquist's dissenting opinion found this fact to be significant. *See Maynard*, 430 U.S. at 721-22 (Rehnquist, J., dissenting).

75. *See Hurley*, 515 U.S. at 575.

one's own is forced upon a speaker intimately connected with the communication advanced."[76] The Court found that intimate connection even though the Council served as the organizer of the parade, but did not itself speak. As a sponsor of the speech of others, it still could claim First Amendment protection.[77] Nathanson, by contrast, is herself the speaker. Moreover, unlike cases where the government compels a speaker to recite or display a state-composed message, Nathanson would be forced to use her intellectual abilities to craft original speech to advance Stropnicky's interests. No prior compelled expression case has involved such an intimate connection between the speaker and the compelled communication. In that sense, *Stropnicky* is the quintessential example of a loss of the "intellectual individualism" Justice Jackson spoke of in *West Virginia State Board of Education v. Barnette*,[78] the first compelled expression case decided by the Court.

Despite this intimate connection between the speaker and the speech, Stropnicky may claim that Nathanson only speaks as a lawyer because she is hired by a client.[79] In that sense, the client is the sponsor of the speech in much the way that the Council is the sponsor of the St. Patrick's Day Parade. Because Nathanson is uttering her words as a conduit, a voice, for the positions of Stropnicky, it is possible for Stropnicky to claim that Nathanson is entitled to less First Amendment protection. This argument makes it necessary to consider the issue of whether the Court's response to the conduit argument in *Hurley*, that the Council, as the parade's sponsor,

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76. *Id.* at 576.

77. The fact that the Council was not compelled to speak in the traditional sense may explain why the Court has classified *Hurley* as a compelled association case as compared to a compelled expression case in at least one subsequent reference to the case. *See* Glickman v. Wileman Bros. & Elliot, Inc., 117 S. Ct. 2130, 2138 n.13 (1997). I have not analyzed Ms. Nathanson's situation as a compelled association case because compelled association claims have not been successful when used as a vehicle for challenging antidiscrimination statutes. See *supra* note 10 for examples.

78. 319 U.S. 624, 641-42 (1943) ("We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.").

79. The fact that Nathanson receives compensation for her speech does not reduce its protected status. Much speech is engaged in to make money. Authors write books, movie producers distribute films, and speakers give lectures all for financial rewards. The fact that the speaker is being paid does not deprive the speech of its protected character. *See, e.g.*, Smith v. California, 361 U.S. 147, 150 (1959) (books); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (motion pictures). The key factor is the content of the speech and not the motive of the speaker. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1965) (editorial advertisements).

would be perceived as approving of GLIB's message, applies to the lawyer/client relationship.

This issue raises complex questions about the lawyer's role and societal perceptions of that role. One scenario paints the lawyer as a "hired gun," making arguments on behalf of her client, but not necessarily believing in those arguments. If this view is accepted, then no one would assume a lawyer personally believes any arguments she presents on behalf of her client. This view is supported by the ABA Model Rules of Professional Conduct which state 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."[80]

Another view of the lawyer assumes a total identify of lawyer and client. Under this view, the lawyer is assumed to be a carbon copy of the client she represents, a form of guilt by association. Under this view of the lawyer's role, the lawyer is personally held responsible for her legal arguments and her choices of legal strategy.

While the Hobson's choice between these two perceptions of the lawyer as either a "mouthpiece" or speaking on her own behalf is a complex question in general, the situation in *Stropnicky* does not require that a choice be made. In *Stropnicky*, this element is satisfied even if Nathanson is not perceived as agreeing with Stropnicky on issues of support and custody. Under the MCAD's interpretation of the public accommodation law, Judith Nathanson would be forced to represent a male client in a divorce action and protect that client's interests in the drafting of the settlement agreement. Public perception, under any view of the lawyer's role, would at least suggest that Ms. Nathanson is willing to represent males in divorce actions and that she is willing to vigorously advocate for the rights of men in contests over the allocation of marital assets and custody of children. Since the public would perceive Ms. Nathanson as a willing defender of the rights of men, her First Amendment claim satisfies the fourth element that she be perceived as agreeing with the speech she is forced to engage in on behalf of male clients.

The only generally recognized technique for disavowing support for a position one appears to embrace is through the use of a disclaimer. This technique has been suggested as effective to disassociate the government from a message it does not wish to appear

80. MODEL RULES OF PROFESSIONAL CONDUCT ("MODEL RULES") Rule 1.2(b) (1996).

to endorse such as a religious display on public property,[81] as well as for a shopping center owner who is forced to permit political activists to use the shopping center as the site for political activities.[82] In *Hurley*, the Court also considered the utility of a disclaimer in the context of the parade. The Court rejected this option, concluding that there is no "customary practice" of the use of disclaimers by the sponsors of a parade and that "such disclaimers would be quite curious in a moving parade."[83]

This conclusion is even more necessary in the context of attorney representation. First, disclaimers are only an option in cases of sponsorship of the speech of another, as would be the case if the Council were forced to include GLIB in its parade. Under the MCAD interpretation of the antidiscrimination statute, Ms. Nathanson would herself be forced to speak on behalf of Mr. Stropnicky, not just to sponsor his speech. Additionally, a disclaimer would be "quite curious" in the context of the representation of a client. No appropriate mechanism exists for an attorney to append a disclaimer to an argument made on behalf of a client. Moreover, even if there was such a mechanism, an attorney has an ethical obligation to zealously represent her clients.[84] Disavowing agreement with a position presented on behalf of a client would violate that obligation.

E. *State Efforts to Eradicate Discrimination as a Compelling Government Interest*

The final element in Ms. Nathanson's case is the adequacy of the state justification for intrusion on her right to speaker autonomy. Once Ms. Nathanson establishes the first four elements of her claim, the burden shifts to the government to justify its intrusion on her First Amendment rights. In *Hurley*, the Court gave short shrift

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81. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

82. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

83. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 576-77 (1995). While the Court in *Hurley* seemed to consider the availability of a disclaimer as an alternative means of protecting the Council's First Amendment rights, a disclaimer has not always been deemed adequate protection by the Court. The compelled expression claim was successful in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), despite the fact that TURN, the group authorized to include messages in PG&E's billing envelopes, was required to attach a disclaimer to its messages stating that the views expressed were not those of the utility. *See id.* at 15 n.11.

84. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES Preamble para. 2.

to the state's asserted justification. It concluded that the application of the public accommodation law to the parade was unlike traditional applications of that statute designed to prevent discriminatory conduct such as refusals to serve customers in a restaurant on account of their race. Since the parade organizers were willing to allow members of GLIB to march under the banner of other parade participants, the Council's exclusion of GLIB was not based on the sexual orientation of GLIB's members.[85] Instead, it was based on dislike of GLIB's message. According to the Court, the state ordered the inclusion of GLIB in order to assure the parade reflected a message that met with state approval.[86] The Court was dismissive of such a state objective since it was an objective that was contrary to the First Amendment.[87]

In similar fashion, other state efforts to mandate state-favored messages such as patriotism have been invalidated by the Court.[88] By contrast, state attempts to outlaw discriminatory behavior have usually met with more favorable results even when pitted against claims of constitutional magnitude.[89] The distinction between state efforts to outlaw discriminatory speech (forbidden)[90] and efforts to eradicate discriminatory behavior (permitted)[91] is not always easy to discern.[92] This problem surfaces in *Stropnicky*.

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85. *See Hurley*, 515 U.S. at 572.

86. *See id.* at 578 ("When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.").

87. *See id.* at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.").

88. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

89. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (freedom of association); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (free exercise of religion).

90. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

91. *See Roberts*, 468 U.S. at 622-29.

92. A rich literature has developed on the difficulties of drawing a line between protected speech and actionable conduct in the analogous context of Title VII sexual harassment cases. *See* Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1; Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003 (1993); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sex-*

One solution to this dilemma in *Stropnicky* is that Ms. Nathanson has available to her a parallel argument to the one accepted by the Court in *Hurley*. She is not discriminating against Mr. Stropnicky solely on account of his gender. In her law practice, she willingly represents males in other legal matters.[93] Her objection to representing Mr. Stropnicky is rooted in the legal arguments she would be forced to make on his behalf. Therefore, as in *Hurley*, the state's interest is not in preventing discrimination against males, but in forcing Ms. Nathanson to communicate views that meet with state approval.

Another argument available to Ms. Nathanson is that no state interest, no matter how compelling, can justify compelled advocacy. In all of the compelled expression cases that have come before the Supreme Court in which the Court has recognized the existence of a substantial infringement on speaker autonomy rights, the Court has never suggested that forcing a speaker to communicate a message she disagrees with could ever be an acceptable means to even the most compelling of ends. In addition, while the Court has upheld antidiscrimination laws even when they intrude on constitutional interests, none of these cases has involved an infringement on the right of speaker autonomy.[94] Arguably, the Court is of the view that the use of compelled expression is an impermissible means to any end since it is a means that strikes at the foundations of the First Amendment.[95] Under that view, just by establishing that the state is interfering with her right to speaker autonomy through its regulation of her client selection decisions, Ms. Nathanson has prevented the state from defending its behavior by offering a compelling justification.

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ual Harassment and the First Amendment: No Collision in Sight, 47 RUTGERS L. REV. 461 (1995).

93. *See* Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39, 40 (MCAD Feb. 25, 1997).

94. See *supra* notes 10, 89 for cases.

95. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court phrased the question it confronted in these terms: "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *Id.* at 640. The answer the Court gave was a resounding no:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Under either of the two theories offered by Ms. Nathanson, the state will not be able to persuade a court that it has an adequate justification for its use of the constitutionally suspect means of forcing Ms. Nathanson to communicate a message against her will.

CONCLUSION

First Amendment claims of speaker autonomy do not always meet with success. To assure success, a speaker must be able to demonstrate that her expression receives the full protection of the First Amendment, that her refusal to support the state's compelled message is politically motivated, that the state is forcing her to communicate a message to the public that she disagrees with, that the public would perceive that message as endorsed by the speaker, and that the state lacks a sufficient justification to intrude on the right to speaker autonomy. In *Hurley*, in striking down the application of the Massachusetts public accommodation law to the St. Patrick's Day/Evacuation Day Parade, the Supreme Court relied on the principle of speaker autonomy to protect the South Boston Allied War Veterans Council from being compelled to include the Irish-American Gay, Lesbian and Bisexual Group of Boston as a marcher in the parade.

Stropnicky v. Nathanson raises a similar issue of speaker autonomy. Ms. Nathanson raises a claim of speaker autonomy to prevent the application of the Massachusetts public accommodation law to her ideologically motivated decision to represent only women clients in divorce actions. As in *Hurley*, Ms. Nathanson's claim should succeed. First, she can demonstrate that her speech on behalf of the clients she has chosen to represent receives the full protection of the First Amendment. Second, her objection to representing Mr. Stropnicky is based on her political decision to support the rights of women. Third, she would be forced to communicate to the public a willingness to represent men in divorce matters and to advocate their rights, a message that is contrary to her self-selected message as an exclusive advocate of the rights of women. Fourth, because of her compelled representation of men, the public would perceive the pro-male message she would be forced to communicate as one endorsed by Ms. Nathanson, a message she would not be able to disclaim. Finally, the state cannot justify its interest in forcing Ms. Nathanson to communicate a state-favored message by its desire to eradicate discrimination in places of public accommodation.