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in a Fair Housing Case**

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Abstract

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Counseling a Victim of Racial Discrimination in a Fair Housing Case

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Introduction

[*53] Racial discrimination in housing is not an uncommon phenomenon. More and more victims of housing discrimination are seeking help from attorneys or fair housing advocates. They are filing fair housing complaints in the courts,¹ with the Department of Housing and Urban Development (HUD),² or with state or local human rights agencies.³ In appropriate cases, victims will seek relief in the form of a temporary restraining order or a preliminary injunction.⁴ If a settlement is not reached,⁵ the matter will proceed and a successful [*54] complainant can be awarded damages and the right to live in the housing unit.⁶

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¹ An aggrieved person may commence an action for housing discrimination in either state or federal court within two years of the occurrence. The Fair Housing Act, § 813, 42 U.S.C. § 3613 (a)(1)(A) (1988) (as amended by The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988)). An aggrieved person may also commence a judicial action under 42 U.S.C. §§ 1981 and 1982, and, if there is state action, under 42 U.S.C. § 1983.

² Pursuant to 42 U.S.C. § 3610(a)(1)(A)(i) of the Fair Housing Act, an individual may file a complaint for housing discrimination with the Department of Housing and Urban Development (HUD) within one year after the occurrence.

³ Many state and local governments have statutes and ordinances that prohibit housing discrimination. Under the Fair Housing Act, HUD can refer a complaint to a state or local agency if that agency has been certified by HUD. 42 U.S.C. § 3610(f)(1).

⁴ After a complaint has been filed with HUD, the Secretary may request the Justice Department to seek a temporary restraining order or preliminary injunction pending final disposition of the complaint. 42 U.S.C. § 3610(e)(1). An individual who commences a private civil suit may in appropriate cases request the court to grant a temporary restraining order or a preliminary injunction. 42 U.S.C. § 3613(c)(1).

⁵ After a HUD complaint is filed, the Secretary is directed to seek a conciliation agreement between the parties. 42 U.S.C. § 3610(b)(1).

⁶ An individual who files a complaint with HUD may elect, after a HUD charge has been filed and the investigation is completed, to go to trial before an administrative law judge (ALJ). The ALJ may award an aggrieved party actual damages and injunctive relief and can impose civil penalties of up to \$50,000, depending upon whether the

Although there are a number of strategic decisions that must be made along the way that can seriously affect the outcome, most housing discrimination complaints involving racial discrimination are not unduly complicated. However, to the victim, housing discrimination can be very traumatic. The victim is denied one of the basic necessities of life (shelter) and a fundamental freedom (the right to live where one chooses).⁷

Racial discrimination not only produces a societal injury, it strikes at the dignity of the individual. It says to the individual that no matter how much money you have, no matter what your social position is, you cannot live here. To most people, that message is malignant. It strikes at the victim's personhood, and if left to fester, will poison the victim's self-esteem.

Attorneys and fair housing advocates are painfully aware of the societal injuries caused by race discrimination. They are also aware that discrimination can produce compensable "pain and suffering" damages.⁸ Attorneys and

respondent has committed other discriminatory acts. 42 U.S.C. § 3612(g)(3).

The individual can also elect, upon the filing of a HUD charge, to have the Justice Department file suit on the aggrieved party's behalf in the name of the United States. 42 U.S.C. § 3612(a). The Justice Department may seek injunctive relief, damages and a civil penalty of up to \$50,000 for a first violation and up to \$100,000 for any subsequent violation. 42 U.S.C. § 3614(d)(1).

If the individual elects to file a private civil suit, the court may award actual and punitive damages, and injunctive relief, 42 U.S.C. § 3613 (c)(1), as well as costs and reasonable attorney's fees. 42 U.S.C. § 3613(c)(2).

⁷ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (stating that the right to inherit, purchase, lease, sell and convey property was a fundamental right which is the essence of civil freedom).

⁸ In *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974), the Court likened an action to redress housing discrimination to an action for defamation or intentional infliction of mental distress.

Emotional distress may be established solely through the testimony and demeanor of the victim. For instance, in *HUD ex rel Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (award of \$40,000 for emotional distress to the Herrons), the court noted:

In explaining the award of damages for "embarrassment, humiliation, and emotional distress," the ALJ relied upon the Herrons' testimony concerning their disappointment in being unable to move, and the humiliation caused by the knowledge that someone would deny them the right to buy a house because of their race. As Janella Herron testified, "I feel that everything that has been fought for over the last 30 years . . . was a waste of lives, a waste of time on the part of all those people who worked so hard for equal justice Our lives have been put on hold because we are not allowed to live where we can afford and choose to live." Further, the Herrons testified about the invasion of privacy caused by the publicity, and their physical symptoms which included loss of sleep and headaches.

Id. See also *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (award of \$50,000 in compensatory damages based on plaintiff's testimony of her fears and anxieties.); *Bradley v. Carydale Enterprises*, 730 F. Supp. 709 (E.D. Va. 1989) (awarding \$9,000 for emotional distress based on aggrieved party's testimony that she had never sought counseling or taken time off work).

The fact-finder may infer humiliation from the circumstances. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991); *Blackwell*, 908 F.2d at 874 (11th Cir. 1990); *Seaton v. Sky Realty Co. Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). However, appellate courts have reduced awards that were based solely on the victim's testimony. See *Douglas v. Metro Rental Services, Inc.*, 827 F.2d 252 (7th

advocates are frequently the first, and [*55] sometimes the only persons to whom the victim pours out the full story of his or her experience. The attorney's or advocate's verbal and nonverbal responses during the interviews with the victim can either aggravate or alleviate some of the pain and anguish suffered by the victim.

Most attorneys and advocates who counsel the victims of housing discrimination are committed to the cause of fair housing and are sensitive to their client's injuries. Nonetheless, they may fail to pick up on the real hurt and trauma the client experiences during the interview. Because of the necessity to channel the client's complaint into the forms specified in the fair housing laws, the attorney or advocate may miss developing some of the unique injuries suffered by the victim. This failure may seriously affect the outcome of the complaint and it may further scar the victim.

The purpose of this article is to sensitize fair housing attorneys and advocates to the delicacy of the interviewing and counseling process. The article focuses solely on racial discrimination, but one can assume that victims of discrimination on the basis of gender, disability or familial status suffer similar traumas.

The article will center around a hypothetical case. It will begin with a memo prepared by an attorney describing the first interview with a victim of housing discrimination. This will be followed by the hypothetical victim's response to the interview and a psychologist's reaction to the interview and response. The article will conclude with some practical suggestions for the attorney or advocate on improving the interviewing and counseling process. The end result should not only be a higher damage award from the court or administrative agency but a happier and healthier client.

[*56]

I. Hypothetical Memorandum Prepared by an Attorney After an Initial Interview with a Victim of Housing Discrimination Based on Race (Marked "Confidential")

Ms. Williams was referred to me by our local fair housing association. She appeared on schedule at my office, where we conducted our interview. Ms. Williams is a twenty-eight-year-old black woman who is attending a local medical school where she is in her last year. Ms. Williams was dressed in a conservative business suit and had a brisk air about her. She did not appear to be a woman who could be easily intimidated and she spoke with a confident, almost authoritative tone to her voice that made her appear unemotional, indeed almost cold. She impressed me as being a no-nonsense type of person whose story would not be seriously challenged by a trier of fact.

Cir. 1987). Therefore, corroboration by family members, friends, co-workers, or medical or psychological consultants may be useful.

Ms. Williams told me that she had been looking through the papers for an affordable apartment to rent during her final year at medical school. One day she saw a notice on the bulletin board of the student lounge advertising a studio apartment that was within her price range, was only a block away from where she presently lived and within easy commuting distance from the school. The apartment was in a large high-rise building located in a neighborhood that was predominantly white. However, a growing number of minorities, especially professionals and students, were beginning to rent units in the area.

Ms. Williams telephoned the number listed for the management company and told them that she was interested in the apartment. She was given an appointment to see the apartment at 10:30 a.m. the next morning. The management office is situated on the first floor of the building where the apartment is located. Ms. Williams went to the office as scheduled and told the receptionist that she had an appointment to see the apartment. The receptionist looked her up and down and then told her to have a seat in the lobby.

Ms. Williams waited in the lobby for about an hour. During this period, she saw many persons enter the office and saw some of them leave with a young woman who carried a ring of keys. Ms. Williams again approached the receptionist who told her that the rental agent was busy and could not show her an apartment at that time. She suggested that Ms. Williams return that afternoon. Ms. Williams asked the receptionist whom she should ask for and the receptionist replied "Mrs. Lee."

Ms. Williams told me that as she left the apartment building she had an uneasy feeling and the more she thought about it that perhaps she might have been slighted because of her race. However, [*57] because of her professional status and the nature of the neighborhood, Ms. Williams said she brushed that concern aside and was willing to assume that the rental agent was unavoidably busy that morning and that the woman with the keys did not know she was there to see an apartment.

Ms. Williams walked back to the management office that afternoon and again announced herself to the receptionist and asked to see Mrs. Lee. The same receptionist she encountered that morning told her to have a seat. Ms. Williams saw the young woman who had the keys that morning in the back office sitting at a desk. About a half hour later, a surly young man came out and told Ms. Williams that he was the manager of the building and would show her the studio apartment. He never offered Ms. Williams his name. He said that Mrs. Lee was occupied.

The manager took Ms. Williams to a studio apartment on the second floor that was dark and faced a brick wall, but was otherwise acceptable. The price was right and the apartment was in a somewhat better condition than her present apartment. The manager curtly told Ms. Williams that he thought the unit might already have been rented by Mrs. Lee, but that he would check with Mrs. Lee about it. He told Ms. Williams to telephone the next morning to see if the

apartment was available. Ms. Williams asked him if any other apartments in that price range were available in the building and he said, “No.”

The next morning Ms. Williams again went to the management office to inquire about the availability of the apartment and the receptionist told her to wait. The receptionist went to the back of the office and came back and told Ms. Williams that the apartment had been rented. Ms. Williams asked her if anything else was available and the receptionist said, “No.”

At this time Ms. Williams became quite suspicious. She knew of a local fair housing group and telephoned them to tell her story. They said they would conduct a test. Ms. Williams later was told that a white tester was shown the same apartment that Ms. Williams was interested in, and also several other studio apartments that were available which had great views and rented at a comparable price. A black tester experienced similar treatment accorded Ms. Williams.

The fair housing agency referred Ms. Williams to my office. I told Ms. Williams that I thought she had a good case, that I knew the testers, and that they would make credible witnesses. I asked Ms. Williams about any special costs she incurred, but the only things she could identify were the extra trips to the management [*58] office and the delay in getting an apartment.⁹ I asked Ms. Williams about her feelings and she said that she was shocked and hurt by the treatment she received. While I have no doubt that this is true, Ms. Williams said it in such a cold, unemotional way that I had serious doubts that a trier of fact would award her substantial damages for pain and suffering.

I explained to Ms. Williams that while damage awards were increasing, it is often very difficult to convince the trier of fact to award large damages. I explained her legal options and told her that we could go to court to get an immediate temporary restraining order to prevent the studio apartments in the building from being rented to someone else. I told her that we would probably end getting her an apartment in the building and possibly with a monetary settlement. I warned her that it did not appear that hers was the type of case where she could expect a large damage award. The defendants do appear to have a deep pocket,¹⁰ but unless we discover additional evidence of wrongdoing, we probably cannot

⁹ Out-of-pocket expenses are rarely substantial in a fair housing case. For instance, in *Phillips v. Hunter Trials Community Ass’n.*, 685 F.2d 184, 190-91 (7th Cir. 1982), \$2,675 was awarded as out-of-pocket expenses for being forced to stay in hotel and having to store furniture because housing was made unavailable. Out-of-pocket expenses may also include medical or psychological counseling expenses. *See Jones v. Rivers*, 732 F. Supp. 176 (D.C. Cir. 1990).

¹⁰ Punitive damages may be awarded in a private civil enforcement action upon a finding that the defendant has acted out of reckless or careless disregard or indifference to the plaintiff’s rights. *See supra* note 6 for an explanation of the civil penalties available. *See also Smith v. Wade*, 461 U.S. 30, 54 (1983).

The defendant’s financial status will be relevant to an award for punitive damages. *Phillips*, 685 F.2d at 191; *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984).

realistically expect more than \$30,000 for damages and even that might be on the high side.¹¹

[*59] We discussed the various options available to Ms. Williams. We decided to file a suit in federal court to seek a temporary restraining order and also to file a complaint with HUD.¹² I told her that I would contact HUD and the Justice Department to see if they might be willing to go independently to court to secure the temporary restraining order.¹³

Ms. Williams thanked me and I told her that I would start working on the matter immediately. I told her I would telephone her as soon as I learned the Justice Department's position, but that if they failed to act we could go to court as early as tomorrow for the temporary restraining order.

I feel that Ms. Williams has a strong liability case and that I can probably get the apartment for her. However, we are going to have a hard time getting substantial damages. Ms. Williams has no real out-of-pocket expenses and she does not appear to be unduly affected emotionally by the discriminatory act. A substantial damage award will probably depend upon how bad the defendants can be made to look. If we can reach an agreement quickly, I will ask for the apartment and \$30,000, but I think we might want to settle for between \$5,000 to \$10,000 if they offer an apartment to her before we have to do substantial legal work. Such a sum would be in the range of other comparable cases I have recently handled.

¹¹ This sum is probably realistic by 1992 standards. In 1981, Professor Robert Schwemm reported that damage awards in fair housing cases ranged from \$1.00 to \$20,000. Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R. - C.L., L. REV. 83 (1981). In the 1991 edition of his treatise on fair housing law, Professor Schwemm stated that awards were as high as \$65,000 or more. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 25.3(2)(a) n. 63 (1990). Awards in fair housing cases remain low when compared with other types of personal injury litigation. While there are recent reports of damages exceeding one million dollars, these should not be assumed to be typical. *See* *Timus v. William J. Davis, Inc.*, No. 8 Fair Hous.-Fair Lend. (P-H) Bull. No. 3 ¶ 3.1 (D.D.C. Sept. 1, 1992) (\$2.4 million); *United States v. New York City Hous. Auth.*, No. 92-4873, 8 Fair Hous.-Fair Lend. (P-H) Bull. No. 2 ¶ 2.3 (S.D.N.Y. Aug. 1, 1992) (\$20 million); *Fiedler v. Dana Properties*, No. 89-1396, 7 Fair Hous.-Fair Lend. (P-H) Bull. No. 9 ¶ 9.1 (E.D. Cal. Mar. 1, 1992) (\$1.65 million); *Mould v. Investment Concepts, Inc.*, No. CA001201, 7 Fair Hous.Fair Lend. (P-H) Bull. No. 8 ¶ 8.3 (Cal. Super. Ct. (Los Angeles) Feb. 1, 1992) (\$1.1 million); *Del Dotto v. Olsen*, No. 85CH08155, 6 Fair Hous.-Fair Lend. (P-H) Bull. No. 12 ¶ 12.1 (Ill. Cir. Ct. (Cook County) June 1, 1991) (\$1.8 million).

By comparison the average award in libel trials has risen to \$9 million in the last two years. In part, this is due to extraordinary sums awarded against two news organizations. But even discounting those awards, the average award was \$5.2 million. *Libel Case Awards Found Increasing*, N.Y. TIMES, Sept. 20, 1992, § 1, p. 34, c. 4.

¹² A litigant can file a complaint with HUD and also file a suit in federal court. The Fair Housing Act 42 U.S.C. § 3614(a)(2) (1988). However, once HUD has issued a charge and an ALJ has commenced hearing on the charge, an aggrieved party is thereafter precluded from commencing a civil action. 42 U.S.C. § 3613(a)(3).

¹³ *See supra* note 4 for an explanation of the Justice Department's role in temporary restraining orders.

II. Diary Entry by a Victim of Racial Discrimination After an Interview with an Attorney

It is now 3:00 a.m. and I have been up all night crying. I cannot seem to control myself. I have been told it sometimes is good therapy to write down your thoughts, so I have decided to see if that helps.

I don't know when I have ever felt so violated. I have been working all my life to be a successful doctor. My parents scraped and saved to support me and my four brothers and sisters. My dad always told me that if you just work hard enough, you can accomplish anything. I believed him. My dad worked for the post office and my mom sometimes did domestic work to help out the family. We lived in a middle class black neighborhood.

[*60] I worked hard in school and got good grades. It was an all black school, and my teachers always assured me that I was capable of competing with the best.

I attended the state university where I again excelled. This was my first opportunity to compete with white students and I was proud that I could hold my own against them. Although most of us black students stuck together for social occasions, I did make a few friends among the white students. I had a part-time job and through loans and scholarships, I managed to survive financially.

I think the happiest day of my life was the day I was accepted into medical school. It had always been my dream to become a doctor so that I could help underprivileged children. Now my dream would come true.

I have really worked hard in medical school. Most of the students are white. I find I have little time for socializing but I get along well with my classmates. We frequently sit in the student lounge and share our dreams for the future. I find I am not alone in wanting to serve the underprivileged. I just hope I can do it and still pay back all the student loans I have incurred.

I was beginning to feel I had almost made it. My dad died last year. I feel bad that he didn't live to see me actually become a doctor. My mother is so proud of me, and my younger brothers and sisters look up to me as a shining example for their lives.

Now this. I was so happy when I saw the ad on the bulletin board. I knew the building and it just seemed to me that it would be a perfect location to live during my last year in medical school. Best of all, I could afford the rent.

I walked into the management office so happy and confident - and then I met the receptionist. She stared me up and down, sort of implying, "and who are you?" But I didn't think much of it - she was probably underpaid and was having a bad day.

I sat down and waited. Several persons walked through the office and stared at me, but I didn't think anything of it. All I could think of was how I was going to decorate my apartment. I began to think it strange that no one got back to me. I just sat there while all these white people walked in and out. It was as though I was invisible. I never think about race, but all of a sudden it dawned on

me that I was a black woman sitting there in the midst of all of those white people. I became uncomfortable. I really can't explain why. I just felt strange.

Finally, I got up the nerve to go back to the receptionist. Normally I am not shy, but for some reason I was reluctant to call attention to myself. The receptionist told me everyone was busy and to come back in the afternoon.

[*61] I couldn't help but think as I left the office that I was the victim of racial discrimination. But then I shook myself. This is 1992. I am a medical student. I present a nice appearance. These are business people running a building in a neighborhood that is fairly well integrated. Why would they discriminate against me? No need to become paranoid - I would go back that afternoon and see the apartment.

I again felt good. I was going back to see my dream apartment. I walked into the office. The receptionist again gave me a stare, but I wasn't going to let that bother me. I sat down and waited - I again had the feeling I was invisible.

Finally, after what seemed an eternity, this gruff-talking young man in his early thirties came out and said he would show me the apartment. I'm glad it was daytime because, if it had been dark, I would have been afraid to accompany him. He took me to the second floor and unlocked the door and said, "this is it."

The apartment wasn't as nice as I expected. It was dark and it looked out onto a brick wall. The rug was worn. But it was an improvement over my old apartment and the price was right. I thought I could brighten it up. I asked the manager some questions and he answered back in monosyllabic words. I asked him if there were any other studio apartments available to rent and he said, "no." When I expressed interest in this apartment and asked him about a security deposit, he grunted that it might be rented, but to check back the next day.

I cannot express how I felt. I felt so humiliated and violated. Nonetheless, I came back the next day. My legs were weak. My stomach was churning. I felt terrible. I didn't think I could walk into the office. I steadied myself and went through the ritual of getting rejected. I wanted to burst out crying, but I held it all in.

At first I wanted to wipe it out of my mind. I couldn't discuss it with anyone. How could I call my mother and tell her what had happened to me? None of my friends would understand how I felt.

I got mad. They cannot do this to me. Then I called the fair housing agency. They saw me immediately. I told them my story and they said that my concerns appeared to be real and that they would conduct a test. The next day they telephoned me and told me that the test was positive. They suggested I see an attorney. They recommended one to me who they said was one of the leading fair housing attorneys in the city. I called him and made an appointment for that afternoon.

The attorney, Mr. Stone, was a middle aged, white man who occupied offices in one of the downtown highrise office buildings. I was reluctant to see him. I sat down before I left my apartment and had a good cry and then told myself: "Look girl, get a hold on yourself. [*62] You cannot let these people get

by with what they did to you. You just put on a mask to hide your feelings and tell your story to the lawyer. Don't let those white folks get you down. Tell your story just like it didn't bother you at all. Come on, be strong, girl."

But could I really tell my story to a white man? Ever since this incident happened I haven't been able to look a white person in the face. I keep thinking that they all must know what has happened to me and that they are laughing at me behind my back. Every time a white person walks past the empty seat next to me on a bus to sit in another seat further back - every time a white person pushes ahead of me in line, I think, "They wouldn't treat me this way if I were white." How do I know that the white lawyer isn't looking down on me because of my color? How can I put my trust, indeed my very life into his hands?

Well, I saw the lawyer and told him my story. I didn't cry or anything, although there were times I wanted to cry and times I wanted to scream. Although Mr. Stone had a very kind and professional air about him, there was no way I was going to tell him how deeply I had been hurt. He listened politely and asked me a few questions. Then he explained the law to me and my legal options. But he never really understood my hurt.

I could have screamed at him when he told me that my case wasn't worth very much. I felt someone had taken away my life and he said it isn't worth very much - maybe \$30,000 at most. How could he say that? Didn't he know that slavery ended more than a hundred years ago and didn't he know that it had been almost twenty-five years since Congress outlawed racial discrimination in housing? He seemed kind and I know he is sympathetic and experienced in these cases, but he just didn't seem to understand. It took all my energy to tell him my story. I felt like I had exposed my insides to him. When I finished I wanted to go home and collapse. My legs were weak and it took all of my strength to hold up my head, and he said my case wasn't worth very much. He just didn't understand.

He said he could get the apartment for me. I was too ashamed and scared to say that I didn't want it. I don't think I can live there even if a judge says I can. How can I walk past those people every day when I know they hate me? What if something goes wrong in the apartment and I have to ask them to make repairs? How can I go into their office to pay my rent? How can I ever feel secure in that apartment and call it home? I would be afraid to close my eyes. I would always see that surly young man coming to get me.

I left the lawyer's office feeling really let down. I got home and I have cried and cried and cried. I feel lifeless. I feel that I cannot go back to the medical school. I feel a hate rising in me against all [*63] white people. How can I trust my white professors and the white students I work with?

I really thought I had made it - that I was equal to anybody and that people respected me and admired me for my accomplishments. Now I feel like they have all thrown mud at me. White people see me and they look down on me solely because of the color of my skin. I also feel uncomfortable with my black friends. Will they laugh at me and think I am a traitor to my race because I am letting some white bigots get to me? I don't feel myself as being in the tradition of a

W.E.B. Dubois, or a Martin Luther King, or a Malcolm X. I don't see myself taking that seat on the bus in Birmingham along side Rosa Parks. They were strong. Why am I so weak?

I can rationalize and say that this isn't so - that the people in the rental office were ignorant bigots and that most people - most white people - are not like that. But deep down I'm not so sure. I feel violated. I feel unworthy. I sit down and look at my hands and I begin to cry. I don't know who to blame. I hate myself and I hate everybody else also. My whole outlook has been altered. I see things differently. All my hard work and sacrifice has been for nothing. I am still unworthy to enter the promised land.

I want to drop the suit, but I don't even have the courage to tell this to the lawyer. He will consider me even more unworthy if I drop that suit. I feel trapped and there is no one who can help me. I want my life back. I want my pride back. I want my personhood back. All that was stolen from me when I went to look at that horrible apartment.

III. Clinical Evaluation by a Psychologist (Marked "Confidential")

I was initially skeptical about this concept of psychological damage as a result of housing discrimination. It seemed farfetched when discrimination is so publicly acknowledged, if not condoned; another scam to jack up damages, a way for angry and opportunistic people to take advantage of the system. So it came as a real surprise when I conducted my first evaluation of a client who had been the victim of housing discrimination, to discover how badly she had been hurt. The emotional turbulence and confusion of identity that the event triggered was a genuine psychological crisis, contributing toward severe psychosomatic symptoms. The power of discriminatory victimization to set off acute psychological crises is also demonstrated by the case of Ms. Williams.

At first, Ms. Williams was articulate, poised, and professional. As we explored her feelings more substantially, her surface layer of self-possession crumbled to reveal the turbulence underneath; the [*64] deep, deep wound affecting her perceptions and emotions concerning who she was and whether she was fundamentally of any value. She felt unable to have "eye level"¹⁴ relationships with others, and her self-doubt even extended to whether she could complete medical training and eventually practice successfully as a physician.

In her case, as I had seen before, the more fundamental emotional and identity damage took place well before the act of discriminatory victimization, which reopened and exacerbated it.¹⁵ The psychological impact of persistent

¹⁴ See ARTHUR J. DEIKMAN, *THE WRONG WAY HOME: UNCOVERING THE PATTERNS OF CULT BEHAVIOR IN AMERICAN SOCIETY* (1990).

¹⁵ It is basic tort law that a tortfeasor takes a victim as is. If the wrongful act aggravated a pre-existing condition, the tortfeasor is liable for the resulting damage. See, e.g., *Steinhauser v. Hertz Corp.* 421 F.2d 1169, 1172-73 (2d Cir. 1970); *Bartolone v. Jeckovich*, 103 A.D. 2d 632 (1984);

discrimination on personality development in victims is too little studied and understood in our society.¹⁶ Racial discrimination had a pathologizing impact on Ms. Williams' family, and she has absorbed influences both from the larger society and from her family as she grew up. She used denial as a coping mechanism, encapsulating the pain and anger, confusion and self-doubt, engendered by these experiences, as it were sealing them off. She assumed that all that was behind her now; instead of integrating these parts of herself into her conscious personality and worldview, she designated them ancient history, split them off and buried them. Thus, what was so profoundly upsetting to her was not so much the discriminatory victimization itself, but rather, the triggering by that victimization of profound, turbulent and deepseeded pain, fear, anger and confusion about herself. Also, pain and confusion about who she is and what her possibilities in life and relationships are, which appear to have been adequately defended up to that time.

Her entire professional identity was threatened by this victimization. She had incorporated values from her parents and others, about what was good and bad and what it meant to be a worthwhile person, into her decision to become a professional. Being a physician was good, helpful and powerful. Along with these values, she accepted and internalized certain confusing and conflicting [*65] messages without conscious analysis. Certain positive qualities were labeled "white," other negative ones, "black." Certain standards had been set for her at home which, in school and in the community, meant being more like white people. Certain confusions about this had been absorbed from her family, as part of the determination, engendered and encouraged by her parents, to rise above the level of their economic and social circumstances.

The result of the convergence of these impacts was that she did not feel she was a person of sufficient worth or value. She had to change and become more like what, in her socially, familiarly, and personally induced confusion, she perceived white people to be like, in order to be worthwhile. She never really accepted that people are people, and that every racial group displays the whole range of human qualities, both positive and negative. She had never learned to identify herself as human first, and then as someone of this or that race and gender.

When she qualified for professional training, and progressed through her academic preparation, Ms. Williams felt that she had increasingly entered, and

McCahill v. New York Transp. Co., 94 N.E. 616 (1911); *Dulieu v. White*, 2 K.B. 169 at 679 (1901) (eggshell skull).

¹⁶ This topic was never broached at any time during Dr. Einhorn's professional training, and a search of the Psychindex keying for "racial discrimination and identity" and "racial discrimination and self-esteem" produced only one reference that squarely addressed "the importance of circumstantial uniqueness, or continual victimization by racist strategies, as a factor in black personality development." Barbara E. Shannon, *The Impact Of Racism On Personality Development*, 54 SOCIAL CASEWORK, 519-525 (Nov. 1973). From the point of view of psychological research, this area is an unexplored gold mine lying right out in the open, waiting for a generation of researchers who can recognize and appreciate it.

was about to become fully accepted into that “other” kind of life in which people were competent, powerful, respected and secure. If, with all her training and academic accomplishments, she could still be victimized because of her race, then these values were empty and false. Although she felt anger, she was more disabled by feelings of helplessness and hopelessness.

The timing of this event in her life is a significant factor in its being so hurtful for her. Had this happened a decade later, after she had been through the rough-and-tumble professional life, she might well have been more psychologically robust, less damaged by this kind of victimization and more certain of herself. Occurring just as she was approaching the completion of her training, the event hit her at a particularly vulnerable point in her life. Her self-doubts and anxieties about her ability to graduate and make the successful transition from school to the world of professional work were most acute.

Even now, weeks after the event and after she has obtained legal support and taken action against those who treated her so outrageously, Ms. Williams continues to be seriously disabled by all these feelings. She cannot talk to a white person without being acutely conscious of race. She is afraid to look for a new home for herself on her own, and feels unable to take care of herself in a hostile world. Professionally, although she had been considering entering private practice, she is now leaning strongly toward working within the framework of some sort of institution which would provide much more structure and security, and much less risk and reward. In personal relationships, she is much more fearful, anticipating [*66] rejection rather than approval and constantly trying to earn acceptance and approval by being helpful.

Ms. Williams has recently begun to experience anxiety attacks, which she is extremely reluctant to discuss. She also suffers from tension headaches, which she had suffered as a teenager but has not suffered for several years. These psychosomatic symptoms have caused her to miss classes and have impaired her ability to study for exams. They seem to be brought on by spontaneous memories of being victimized, often superimposed over older memories of her childhood including various implications that being black was inferior to being white and that she was fundamentally inferior by virtue of being black.

It is going to take a lot of psychotherapy to help her work through the damage that has been done to her by the act of discrimination. This will probably take two to four years of psychodynamically oriented individual therapy, preferably two to three times per week for about half the overall length of treatment. Ms. Williams should work with a therapist who can help her to integrate the painful material from her past into her conscious personality, while simultaneously developing a more realistic perspective and successful adjustment to life as it is. She is the product of a multicultural society whose conflicts exist within herself and have become part of the framework of her identity. Becoming a healthy person requires that she face these conflicts and resolve them within herself in a way that will enable her to accept herself much more fundamentally than she now does.

With help, we expect Ms. Williams to regain her emotional balance and achieve a substantial measure of personal and professional success. Without it, she is likely to either create a lifestyle based on defensiveness and attempted compensation for profound feelings of inferiority, or to cycle back and forth between feelings of inferiority and grandiosity. Either would obviously have a negative impact on her personal and professional aspirations and success.

This is going to be a costly matter and the courts will have to determine who will pay for it. Another person, with less extreme or better defended self-doubts, might react to this kind of discrimination with more anger or indifference, less disorientation and quicker recovery. However, this person, given the time in her life when this traumatic event happened, has reacted to it. The measure of success, happiness and fulfillment in her life may be profoundly affected by how well and thoroughly she can recover from the trauma caused by this particular act of discrimination.

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IV. Suggestions for Interviewing and Counseling a Victim of Housing Discrimination

The above scenario is neither typical nor atypical. Victims of housing discrimination suffer emotional damage. They may react in different ways. Our hypothetical victim feigned a toughness to mask her deep hurt. Other victims will react with great anger or by crying in the lawyer's office. Other victims will react philosophically by expressing the imperfection of humankind. Others are almost "happy" that it happened in that it confirms their belief that we really do live in a racist society. Our hypothetical victim is a young woman, but the question of gender is irrelevant. The pain and humiliation suffered by a man can be equally devastating.

The civil rights attorney must be prepared to deal with each one of these clients and with the many other forms of suffering that manifest themselves in victims of racial discrimination. Unfortunately, there have been few psychological or legal studies done that help a lawyer cope with these victims. Experience counseling victims of sexual abuse or other similar trauma may provide some insight to the lawyer on how to approach the victim of racial discrimination in a fair housing case.

Our hypothetical does not take into account the other types of discrimination which occur in housing situations: sexual harassment, discrimination against the disabled, and discrimination against families with children. These types of discrimination will present their own hurts. The suggestions we give for dealing with a victim of racial discrimination may well be useful in interviewing and counseling these other victims.

It may be trite to say, but what we have in our hypothetical is a failure to communicate. The attorney sees a cool, collected client who can make a convincing presentation on the issue of the landlord's liability for

discrimination.¹⁷ However, the client has put on a mask and has not revealed the true extent of her injuries. Moreover the attorney has failed to tear away that mask. We see from the client's diary the full extent of her hurt and frustration. We see from her psychological evaluation that her hurt and frustration are real.

The dilemma for a fair housing attorney is how to get the client to open up without the attorney putting words in the client's mouth. Although attorneys are trained in the law, very few are trained psychologists or psychiatrists. One of the essential roles of an [*68] attorney is that of counselor, but that does not mean that an attorney is equipped to give the client the type of psychological counseling that may be necessary to make the client well again. An important function of the attorney may be to assist the client in getting such help.

A. The Character and Demeanor of the Attorney

In our hypothetical we have a young black woman studying to be a doctor seeking the help of an experienced white male attorney. One of the primary culprits who perpetrated the discriminatory acts was a white male.

One of the first considerations is the race and sex of the attorney relative to the victim. The victim expressed hesitation about seeing a white male, especially when her injuries were inflicted by a white male. Would it have been better for her to have consulted an African-American attorney or a woman? It could be hypothesized that consulting another African-American would have been less traumatic. It could be hypothesized that women are more likely to share their emotions with other women than with men, especially men who are strangers.

It is the authors' experience that the relationship of the race and sex of the attorney relative to the client can be overemphasized. The best attorney for a client is one who has the best professional skills to accomplish the task at hand. Some clients may feel more comfortable with an attorney of the same race or sex as their own. Clearly, one of the benefits of educating more minority and women lawyers is to give clients a wider choice of attorneys. Fair housing groups that make referrals must consider, when possible, giving clients the names of several attorneys who are of different races and sexes so that the client can select an attorney on that basis if it is important to the client to do so.

Based on this hypothetical, the race or gender of the attorney was probably at most only a minor consideration in contributing to the hurt suffered by the client. She sees white males as the enemy, but there is nothing in the fact scenario that indicates that the client would have been more at ease talking to a woman.

The race of the lawyer presents a deeper problem. Although the client no doubt resents members of the white race, she also expresses ambivalence about other African-Americans. She might well have put on the same mask when seeing

¹⁷ Indeed it would appear that the attorney has done an effective job in getting the essential elements for a case of *prima facie* discrimination from the client.

an African-American lawyer because she did not want to appear weak. An African-American may or may not have been more adept in uncovering the frightened individual behind the mask of competent professionalism.

[*69] The hypothetical presents the white lawyer as experienced, polite and sensitive. He probably would have been quick to sense any crack in the client's armor. He may have been the best choice as an attorney for this client. The fact that a lawyer is a good listener, can draw the client out, is empathetic to the client's needs, and can ask penetrating questions without offending the client may be more important characteristics than the attorney's race or gender. In this scenario, perhaps it is best for the client to work with a white male. She perceives that a white male caused her hurt and perhaps a white male can help her redress that hurt.

Of course these are generalizations, but it is possible to over-generalize. In some cases the lawyer's race and gender may be very important to the client, but the authors feel that even in those cases, a lawyer of a different race or sex can overcome these obstacles through good counseling and interviewing techniques. Indeed, the establishment of beneficial relationships with people of a different race or gender is an important part of the healing process.

B. Making Sure the Attorney Gets the Full Facts

Much has been written about the art of active listening: letting the client tell her story with positive, reinforcing questions from the attorney.¹⁸ This is probably the best model to use in interviewing a victim of racial discrimination.

The lawyer, by demeanor and questions, should put the client at ease. The lawyer might first discuss the attorney's role, the nature of a housing discrimination case in general, and the application of the attorney-client privilege. The lawyer should explain to the client why the lawyer needs all the facts in precise detail and should empathize with the client by conveying his or her knowledge about how traumatic and difficult it is for a client to recreate the scenes that lead the client to the lawyer in the first place. The purpose of these initial remarks is to make the client comfortable and to establish a relationship of trust and respect between the attorney and the client.

The client should then be allowed to tell her story in her own words. The lawyer's comments are for the purpose of keeping the client on track and reassuring the client that the lawyer understands what she is saying.

The lawyer will want to take a few notes to highlight the points made by the client. This will reassure the client that the lawyer thinks what she is saying is important. But the lawyer does not [*70] want to become so involved in taking notes that the lawyer ceases to be a good listener. The lawyer should consider tape

¹⁸ See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 124 (1978); DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT - CENTERED APPROACH* 46 (1991); THOMAS SHAFFER & JAMES ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 121 (2d ed. 1987).

recording the interview, but this should be discussed first with the client. Many clients will be nervous about the idea of being recorded, and it is the experience of the authors that recording the initial interview is probably not desirable in most cases.

After the client has told her story, the lawyer should succinctly summarize what the client has said¹⁹ and then ask more detailed questions on points raised by the client and on points not covered by the client but necessary to the case. Normally, the lawyer should not assume the mode of a hostile cross-examiner. The lawyer should exhibit respect for the client and show empathy for the difficulty the client has in repeating painful details.²⁰ It may be helpful for the attorney to explain to the client that the client's feelings are often experienced by people who have been discriminated against.

The lawyer should be flexible. Some clients may not be comfortable speaking with an attorney, and the lawyer may have to ask specific questions to find out what happened. Other clients may be so angry that no coherent story emerges beyond the client's venom against the defendant. The lawyer may want to let the client vent her anger before proceeding further. But at some stage, the lawyer will have to explain to the client that it is facts that win a lawsuit and that while anger is justified, the cold facts must be put down on paper.

On occasion, if the client is too emotional, it may be necessary for the attorney to schedule another interview. Often it is a good practice, even if the interview has gone well, to suggest that the client sit down at home and write a chronological account of what has happened.

The hypothetical presents an experienced lawyer who obtained the facts from the client in good order. The client appears to have [*71] recognized the importance of being precise.²¹ What is lacking is any penetration of the client's

¹⁹ A brief summary tells the client what the lawyer has seen and heard and enables the client to correct any misimpressions the lawyer may have received during the interview. *See* HARRY STACK SULLIVAN, *THE PSYCHIATRIC INTERVIEW* 80-33 (1970).

²⁰ Dr. Sullivan notes the following observations about a therapist-patient interview:

The interviewer actually gives signs by tonal gestures, by physical gestures, and by verbal statements, which can be, and are, interpreted and misinterpreted by the interviewee. The skill in interviewing lies in not doing this in the wrong way. These gestures and signs of the interviewer may not be greatly revealing of his ideas regarding the discussion currently in progress, but they do serve to indicate to the interviewee that the interviewer is a human being, and that is sufficiently reassuring, makes the interviewee sufficiently comfortable, so that he is able to go on without getting completely tied up in his uncertainty and anxiety.

Id. at 98.

²¹ Many details of course have been left out of our hypothetical. The lawyer would have wanted more precision on times and physical descriptions of the persons encountered by the client at the rental office as well as a detailed physical description of the rental office, the building, the apartment that was shown and the neighborhood. The lawyer would also inquire about other eyewitnesses and would ask the client to recreate the conversations as precisely as possible. The lawyer would ask for other evidence of discrimination, including the advertisement of the apartment and any brochures or forms that may have been given to the client. Many lawyers who handle fair housing cases have checklists to make sure they obtain all the relevant facts.

psyche by the lawyer. The lawyer no doubt asked the client about her pain and suffering, but the client was unwilling to level with the lawyer on that score. All experienced civil rights lawyers will recognize that victims of racial discrimination suffer some humiliation and damage, but this client presents a tough challenge. Is she really one of those rare persons who is so well adjusted that her psyche is not easily influenced by external events? Or is she so damaged that she cannot bear to reveal the full extent of her injury?

In many situations, the lawyer may be advised to raise the issue of emotional pain and suffering in the initial interview but then to pursue it in a later interview after they know each other better and after a more trusting relationship has been established. This may not, however, be possible in the typical fair housing case.

In many fair housing cases the lawyer will want to seek emergency relief. The major objective of these cases is to preserve the apartment so that the client does not lose her option to rent it. That means getting a quick temporary restraining order. The lawyer will want to start assembling his staff and drafting the necessary documents to go immediately to court. The lawyer may also want to telephone officials at HUD and the Justice Department and alert them of the need for immediate action. The question of how to value pain and suffering will take second place to these tasks.

Nonetheless, the issue of pain and suffering is important. Fair housing cases are frequently settled at an early stage. The landlord may offer the apartment and a small amount of money to compensate the client for her inconvenience. Such fast track maneuvers do not lend themselves to careful, objective discussions about the degree of personal damage suffered by the client. Therefore, the option of exploring the issue in another interview may not be possible. The next interview may take place in court at 4:00 p.m. on a Friday with the judge stating he wants the whole thing wrapped up by 5:00 p.m.

The lawyer in a fair housing suit must get the facts from the client in the initial interview or there may never be another opportunity to do so. No matter what the pressure to start work on the [*72] temporary restraining order, the lawyer must devote time to getting behind the facade erected by the client. The lawyer might express surprise about the client's resilience and give the client examples of other cases where a client was deeply affected by the discrimination. Such devices may help the client to realize that her feelings are not unique and that it is acceptable to show vulnerability. However, they present the risk that the lawyer may actually be manufacturing testimony for the client.

No matter how experienced and adept the lawyer is, the full extent of the client's feelings is never revealed in the initial interview. Frequently, the client herself has no idea about the extent of her injury. This may be revealed only through time. The attorney and client must jointly discuss this problem and the desirability of taking a quick settlement or prolonging the process. Prolonging the process may give everyone a better appreciation for what is at risk, but it may also prolong and aggravate the injury.

We have another problem presented by our hypothetical. The attorney explained to the client the possibility of getting a temporary restraining order and ultimately of getting the apartment. This is routine practice in every fair housing case, but the client is too ashamed and too afraid to state that she might not even want to move into the apartment.

One way to alleviate this problem is for the attorney to refrain from explaining to the client her options immediately. Rather, the attorney might ask the client what she wants. Is possession of the apartment the client's first concern? Or are monetary damages the client's first concern? What kind of monetary damages is the client thinking of? The figure stated by the client may indicate the extent to which the client thinks she has been damaged? If the client has unreasonable expectations in light of the case she has presented, this may prompt further discussion.

Balanced against this is the fact that good attorneys are always busy and frequently clients get uneasy if the lawyer questions them in too great detail. There are no ready answers. Lawyers must be alert to pick up clues about the client's feelings during the interview and not to be too quick to inject their evaluation of what a lawsuit is worth.

Ultimately, being a good interviewer and counselor is related to the lawyer's ability to change places with the client and to experience events as the client experiences them. Lawyers must be professionals, but they must also be good human beings. Human beings make mistakes in judging other human beings, but the longer the lawyer can withhold judgment and allow the client to reveal herself, the closer the lawyer will probably come to a full understanding of the client's problem.

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C. Persuading the Client to Get Additional Counseling

The client in our hypothetical can probably benefit from counseling from a trained professional. The psychological evaluation indicates that the discriminatory treatment she received triggered other feelings of inferiority that she may have been masking for years. The attorney may therefore want to send her to a psychologist or psychiatrist for two reasons: 1) to establish a basis for expert opinion at trial on the full extent of her damage, and 2) to help her in remedying the condition that is causing her suffering.

In cases where the damage is less severe, the sessions with the lawyer and the positive reinforcement provided by resorting to the fair housing laws may be sufficient to help the client overcome her pain and suffering. Discussions with a clergyman and family friend may also assist some clients. But some clients may require professional therapy. Psychological counseling is expensive, and the treatment she is required to receive is compensable in her damage award.²²

²² See *Jones v. Rivers*, 732 F. Supp. 176 (D.C. Cir. 1990).

How to broach professional help to a client may be troublesome.²³ If the evaluation is needed as proof in the lawsuit, the task is made somewhat easier because the lawyer may rely on his expertise in stating that the evaluation is necessary to maximize damages. Some clients may balk at even this type of contact with a psychologist or psychiatrist, but the client can often be persuaded by the fact that such testimony is a routine way of establishing psychological damage.

Once the client has seen the professional, the professional can advise the client to continue treatment if necessary. However, when that does not happen, the lawyer may have the responsibility of persuading the client to seek treatment. The best approach is for the lawyer to be honest and reassuring with the client.

A problem often arises when the client refuses to seek professional help and has inflated expectations of what can be accomplished through the law. While winning a lawsuit and getting damages can have a beneficial effect on a client, no one has ever claimed that a lawsuit will wipe away the victim's feelings of hurt and humiliation.

If the victim's aim is to punish the offender, no amount of damages, punitive or otherwise, will ever satisfy a truly vindictive plaintiff. This should be explained to the client early in the process; although the message seldom sinks through. A client whose sole aim is to punish or humiliate the defendant will never be satisfied and will normally be a difficult client to represent.

[*74] The lawyer should explain to the client at the beginning and remind the client periodically, that injunctive or damage relief will never truly take away the injury that the plaintiff has suffered, although it can help. The lawyer should also explain to the client that the court or tribunal will never punish the defendant sufficiently to satisfy the sense of retribution that the client may insist on. The lawyer might remind the client that one major purpose of a fair housing action is to see that the defendant never harms someone else in the same way in the future. The injunction and damages will deter the defendant from doing so. Therefore, the plaintiff is acting not only to benefit herself, instead she is joining the ranks of W.E.B. Dubois, Martin Luther King, Malcolm X, and Rosa Parks in fighting for the rights of others. Such a perspective may be helpful in restoring the victim's dignity and enabling her to look into the eyes of persons of her own race, as well as into the eyes of those persons she may now perceive as enemies.²⁴

The attorney fulfills a difficult role. The attorney is more than a technician. The attorney will no doubt like to wash his or her hands of the role of a psychological counselor and concentrate solely on the "legal" aspects of the proceeding. But a good attorney cannot do that. A good attorney will know when

²³ See BINDER, *supra* note 18, at 211.

²⁴ There has long been a debate about whether the primary focus of poverty law and civil rights lawyers should be on serving the particular client or reforming the system that caused the client's problem. See Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992). By proceeding as suggested, the lawyer in our hypothetical will be serving both purposes.



to refer the client for professional psychological counseling, and a good attorney will also know that everything he or she does will affect the psychological health and well-being of the client. The good attorney will act accordingly.