Masterpiece Lawshop v. Civil Rights Commission Somewhere Someday

May a lawyer refuse to provide legal services solely because the work would directly or indirectly promote causes that offend the lawyer's religious beliefs?

William J. Maffucci, J.D.[1]

For the litigants of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and the untold millions of close observers throughout the country, the first days of June 2018 were filled with apprehension. Six years had passed since bakery owner Jack Phillips told Charlie Craig and Dave Mullens that he would not design a cake to celebrate their marriage. And six months had passed since the Supreme Court of the United States had heard arguments in the resultant legal battle.

Throughout the nation supporters had rallied behind each side: the devout Christian baker, and the same-sex couple who had married in Massachusetts (the only state that would issue them a marriage license at that time) and who had requested the cake for a celebration back home in Colorado.

Months of media build-up and expert commentary had emphasized that the dispute presented an issue of first impression that could have a profound and permanent impact upon businesses throughout the country: Does the constitutional right to the free exercise of religion preempt federal or state law civil-rights laws that prohibit discrimination? More specifically: Can a business that operates as a "place of public accommodation" refuse to provide a good or service to someone on the ground that doing so would violate the business owner's religious beliefs, even if the refusal would otherwise constitute illegal discrimination based upon the potential customer's race, color, religion, national origin, or other characteristic expressly recognized by civil-rights statutes (such as, in Colorado, sexual orientation)?

The general hope and expectation was that the decision to be handed down at any time would resolve the issue definitively. Within days, SCOTUS would disappoint everyone.

Justice Kennedy drafted the opinion of the seven-justice majority.[2] Reversing every decision of the administrative bodies and appellate court below, the majority concluded that Phillips' right to the free exercise of his religion had been violated — but not because that right prevailed over the countervailing statutory obligation. Instead, the

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[1] Member, Semanoff Ormsby Greenberg & Torchia, LLC, 2617 Huntingdon Pike, Huntingdon Valley PA 19006; wjmaffucci@sogtlaw.com, 267-620-1901.

[2] U.S. Sup. Ct. No 16-111, decided June 4, 2018; 584 U.S. ___, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

violation resulted from Phillips' mistreatment by the Colorado Civil Rights Commission, the initial administrative body below, which had evidenced hostility toward Phillips' religion — as evidenced especially by one commissioner's comments that Phillips had used his religion to "justify discrimination" in ways similar to the justifications used historically to justify slavery and the Holocaust, and that the commissioner considered the use of "religion to hurt others" to be "one of the most despicable pieces of rhetoric . . . ."[3]

Justice Kennedy noted that the Commission's conclusion contrasted starkly with the treatment given by the Colorado Civil Rights Commission (while proceedings were ongoing in *Masterpiece Cakeshop*) in at least three proceedings against bakers who had refused to create cakes with decorations that *demeaned* gay persons or same-sex marriages In each of those cases the Commission ruled that the bakers had acted within the latitude afforded to them not to replicate messages they considered to be offensive.[4] Justice Kennedy concluded that the "Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[5]

> The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the case of the other bakers suggests the same. For these reasons, the order must be set aside.[6]

The disappointment of Phillips' supporters with the *Masterpiece Cakeshop* ruling extended further than SCOTUS's refusal to endorse the principle that statutory prohibitions of prescribed discrimination must yield to the constitutional right to the free exercise of religion. The decision included what could easily be interpreted as two hints that a decision on the merits of that principle, should the Court have occasion to address it squarely, might go the other way. The first was the fact that the opinion noted, and appeared to treat as relevant, the fact that Colorado had not yet recognized same-sex marriage at the time Phillips refused Craig and Mullen's request.[7] The second was Justice Kennedy's

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3 *Id*., slip op. at 13.

4 *Id*., slip op. at 12.

5 *Id*., slip op. at 16.

6 *Id*., slip op. at 18.

7 *Id*., slip op. at 11 ("[s]ince the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity").

passage that cited, and was written in a tone consonant with, the Court's decision in *Obergefell v. Hodges* three years earlier:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.[8]

No Rest for the Litigation-Weary

Phillips' Pyrrhic victory provided no respite from the efforts of those who sought to establish that the right to exercise one's religion freely must yield to statutory obligations imposed upon those who provide goods or services in a place of public accommodation. On the very day SCOTUS handed down its decision, Autumn Scardina, a lawyer who identifies as a transgender woman, placed an order with Phillips for a cake with a color scheme symbolic of Scardina's gender identity: blue frosting over a pink interior. Phillips refused, and Scardina, acting pro se, sued him.

Scardina's suit proved to be unsuccessful. But lawyers Paula Greisen and John McHugh, who had not been involved in the action, felt that the courts had not treated Scardina fairly. They filed a second suit on behalf of Scardina against Phillips last June, which is still pending (as of Nov. 7, 2019).[9]

Similar Actions Elsewhere

Similar actions have been brought or prosecuted elsewhere, against not only other bakers but also other places of public accommodation, in the meantime. One, against a couple who owned a bakery ("Sweetcakes by Melissa") that refused to bake a cake for a lesbian wedding, reached SCOTUS, which granted certiorari but remanded the case to the Oregon Court of Appeals for further consideration and clarification in light of SCOTUS's *Masterpiece Cakeshop* decision.[10]

SCOTUS granted a similar writ of certiorari filed by a florist (Barronelle Stutzman of "Arlene's Flowers") in Washington State who refused to design a floral arrangement for a same-sex couple who subsequently sued and obtained a judgment against her, likewise sending that case back to the Supreme Court of Washington for clarification in

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8 *Id.*, slip op. at 9 (citing *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 609 (2015)).

9 The filing was reported in https://denver.cbslocal.com/2019/06/06/discrimination-lawsuit-lakewood-jack-phillips-masterpiece-cakeshop.

10 *Klein v. Oregon Bureau of Labor and Industries*, U.S. Sup. Court 18-547; Order List June 17, 2019. https://www.supremecourt.gov/orders/courtorders/061719zor_4g15.pdf/.

light of *Masterpiece Cakeshop*.[11] The state court did so, issuing an opinion last June indicating that it had found no evidence of religious animus by the adjudicatory bodies.[12]

Videographers in Minnesota (Carl and Angel Larsen) fared better in their action seeking to overrule state laws that required them, against their religious beliefs, to produce "both opposite-sex and same-sex-wedding videos, or none at all." The Larsens based their challenge on their right to free speech, not their right to exercise their religion freely. They argued that creating wedding videos is speech, and that therefore forcing them to create wedding videos for same-sex celebrations would be tantamount to compelling speech that was abhorrent to them. The Eighth Circuit Court of Appeals agreed, ruling in a majority decision handed down last August that "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution."[13] The Court reinstated the Larsens' complaint.[14]

Should Lawyers Be Concerned?

Lawyers who specialize in civil rights or who represent businesses of public accommodation have followed *Masterpiece Cakeshop* and subsequent developments closely. Other lawyers have followed it for its intrinsic intellectual appeal or its potential societal impact. But few lawyers have stopped to consider whether they actually have skin in the game — i.e., whether a decision that rules against the next Jack Phillips or Barronelle Stutzman or Carl and Angel Larsen on the central issue (whether a business that is a place of public accommodation can be forced to provide goods or services that offend the business owners' religious sensibilities) would apply — immediately or by eventual extension — to lawyers, too.

Lawyers generally assume that, regardless of whether SCOTUS (or the highest appellate court of the jurisdiction in which they practice) definitively rules that bakers or florists or videographers must choose between staying in business and violating their consciences, the ruling will have no impact on the provision of legal services. They assume that they will always be able to refuse services to anyone, for any reason — including their personal animus toward or disapproval of people who have the full protections of civil-rights laws in other contexts.

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11 *Arlene's Flowers, Inc., v. Washington*, U.S. Sup. Court 17-108; Order List June 25, 2018; https://www.supremecourt.gov/orders/courtorders/062518zor_g3bh.pdf.

12 *State of Washington v. Arlene Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

13 *Telescope Media Group v. Rebecca Lucero*, No. 17-3351 (8th Cir. Aug. 23, 2019), slip op. at 14.

14 The appellees in *Telescope Media Group* eventually chose not to petition SCOTUS for a writ of certiorari, prompting an enraged Minnesota Attorney General Keith Ellison to declare in a Minnesota *Star Tribune* op-ed piece that he would fight the Eight Circuit's decision and seek to squash "discriminatory speech" in all forms. *See* https://www.libertyheadlines.com/ellison-defies-ruling-lgbt-wedding.

Are they right?

The short answer is yes — at least for now, and at least in states (such as Pennsylvania) whose laws generally mirror federal law. And the reason why lawyers would be largely unaffected by a dispositive ruling that forced bakers, florists, and videographers to choose between their chosen professions and their consciences is simpler than many lawyers might think.

A. Say What?

Ask a hundred lawyers whether they have the right to refuse any potential client for any potential reason, and you're likely to get one response: an emphatic yes. But ask the same lawyers why they should be exempted from the laws affecting other businesses, and you're likely to get no consensus at all.

- Some will say that lawyers are "professionals" in the original (exalted) sense, and as such they are exempt to laws applicable generally to persons who are effectively retail merchants.

  But this is a self-defeating and ironic argument:

  — It's self-defeating because the bodies that grant lawyers admission to practice often impose upon them at least limited obligations to represent people against their will. Some lawyers are professionally obliged or financially constrained to accept court appointments without objection. And litigators know that, once they enter their appearance for a client, the court might not allow them to withdraw before the case is complete, despite any regret that might have developed.

  — It's ironic because most members of the other original categories of "professional" — doctors and clergy — would make the opposite argument: their professions embrace the obligation to serve anyone who seeks their care and is otherwise qualified to receive it.[15]

[15] One such attorney, who had served as a professor emeritus of criminal justice at a prestigious university, tried to explain this position as such:

> Attorneys, unless they are working for a firm or have been appointed to a case by the court, are independent professionals. As such they can refuse pretty much any client they choose to refuse. While it may seem a bit arrogant on their part just keep in mind that attorneys handle information that is very sensitive. Just as you probably would not want a brain surgeon being forced to operate on you, you really don't want an attorney being forced to represent you.

(Typos corrected. Citation omitted.)

- Some will simply affirm that they may refuse to represent anyone they wish, and then immediately point out that there are many situations (most involving conflicts of interests) in which they are ethically obliged *not* to accept a representation.

  If the latter point is meant to prove the former statement, the argument is fallacious. The fact that a lawyer might be excluded from representing a client does not in any way establish that the lawyer may voluntarily choose not to represent another client.

- Some will pose a stronger argument: Since a lawyer is ethically bound to provide zealous representation to a client, and since a lawyer who dislikes a potential client (even if only for a reason, such as the potential client's race or religion, that would not permit discrimination in other contexts) cannot be expected to muster the energy and summon the resources necessary for zealous representation, a lawyer must have complete freedom to refuse any representation at all.

  This argument is a bit disingenuous. Taken to its extreme, it would dilute into insignificance the ethical obligation upon which it is based. Lawyers who like their clients and are able and eager to help them will do so zealously for those reasons alone and not because the ethical rules require it. The fact that the ethical rules impose the obligation of zealousness presumes that the lawyer might not do so in other circumstances.

- Many will argue that they must be free to reject any potential client because, as business people, they must be able to assess countless factors — particularly the potential client's ability to pay — necessary to ensure a successful and tolerable engagement.

  The flaw in this argument is that offers no basis for refusing a representation when the potential client *is* able to fulfill every criterion the lawyer articulates.

- Some will offer no explanation at all. They'll simply beg the question.[16]

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[16] A delightful example was provided by attorney Alice Baker. She explained that she might refuse a representation for any of several common-sense reasons based on real lived experiences (e.g., she's too busy, there's not enough money involved). "But I don't have to have a good reason," she added. "If for some reason I wanted to adopt a silly rule, like refusing to accept any client who tries to hire me on a Tuesday, it would be legal for me to do so." https://www.quora.com/How-much-latitude-does-a-lawyer-have-in-rejecting-a-client-Does-a-lawyer-need-a-reason-to-refuse-taking-on-a-client.

Each of these answers, even those that are somewhat illogical, has elements that are consistent with the actual reason that lawyers would not have been affected immediately by a ruling against Jack Phillips on the central issue in *Masterpiece Cakeshop*. But the reason itself is simple and tidy: Most law offices are not "places of public accommodation" for purposes of Title II of the federal Civil Rights Act of 1964 (or of the counterpart provisions of state and local law).

Civil Rights Act of 1964

The Civil Rights Act of 1964[17] was omnibus legislation passed to protect civil rights and prevent discrimination based on race, color, religion, sex, or national origin. It comprised multiple titles addressing broad spheres of life: voting, commerce, education, employment, housing, eligibility for federal funding, and employment. The protections in some spheres extended further than those provided by other titles.

Only two of the Act's titles address the types of discrimination or civil-rights violation that a law firm in private practice might commit in the ordinary course of its business: Title VII, covering employment, and Title II, covering commerce generally.

Title VII makes no specific references to law offices, but the fact that its definitional provisions are sufficiently broad to extend to law offices is beyond cavil: "person"[18] includes virtually every form of business entity, and "employer"[19] is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

What about Title II? It explains that all persons should be entitled to the full and equal enjoyment of the goods and services provided by any business serving as a "place of public accommodation."[20] It then provides a list of "establishments" that constitute places of public accommodation:

> (1) any **inn**, **hotel**, **motel**, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

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17 Pub. L. 88–352, 78 Stat. 241.

18 42 U.S.C. § 2000e(a).

19 *Id.* § 2000e(b).

20 42 U.S.C. § 2000a(a).

(2) any **restaurant**, **cafeteria**, **lunchroom**, **lunch counter**, **soda fountain**, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;

(3) any **motion picture house**, **theater**, **concert hall, sports arena**, **stadium** or other **place of exhibition or entertainment**; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment and (B) which holds itself out as serving patrons of any such covered establishment.[21]

All of the specific examples of businesses that are "places of public accommodation" provide food, lodging, or entertainment. None provide the services of people known generally as "professionals" (even in the modern, expanded sense), and nothing elsewhere in the definition refers to "service" providers or other businesses that might be considered analogous to lawyers. It might not be surprising, then, that an exhaustive search of Title II cases and commentary produces no evidence that any court or tribunal has considered seriously the argument that law offices are bound by the provisions of Title II.

Other Federal Law

The Civil Rights Act of 1964 is not the only federal legislative framework to combat discrimination. Another is the Americans with Disabilities Act of 1990.[22]

The ADA seeks to preclude discrimination by businesses serving as a "public accommodation." Its definition of that term is completely different from, and far more inclusive than, Title II's definition of "place of public accommodation." It contains far more express examples of covered entities, and one of them is the "office of a[] . . . lawyer."[23]

The fact that the ADA's express examples of "public accommodation" include law offices makes it very difficult to argue (given the principle *expressio unius est exclusio alterius*), by analogy, that Title II should also apply to law offices. But that argument would have been hard to make even if the ADA defined "public accommodation" only with generic terms, such as "provider of services," given the broader remedial scope of the ADA. The ADA seeks to ensure that all persons (regardless of any disability) have access to places of

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21 *Id.* § 2000a(b) (emphasis added).

22 42 U.S.C. § 12101 *et seq.*

23 42 U.S.C. § 12181(7)(F) (including "office of an accountant or lawyer" in list of private entities that "are considered public accommodations" if they affect commerce).

public accommodation, while the Civil Rights Acts seeks to ensure discrimination against specified "protected classes" of persons. None of the reasons that lawyers regularly offer as justifying their right to refuse legal service to any person likewise justifies denying disabled persons who visit law offices the protections of the ADA.

Other federal laws have expanded the categories of protections to include age,[24] pregnancy,[25] or genetic information.[26] None of these laws expressly or by necessary implication state that lawyers, too, cannot consider those factors in deciding whom they choose to represent.

State and Local Laws

The fact that no federal statute currently supports an argument that lawyers are bound by the prohibitions of Title II does not end the analysis. States have also enacted legislation prohibiting discrimination and civil-rights abuses. Most have mirrored federal law, but some have gone much further.

The principal way in which jurisdictions extend protections beyond those imposed by federal law is to add yet additional protected classes, such as sexual orientation. California and the District of Columbia have extended their list of protected classes perhaps further than any other states. California's Unruh Civil Rights Act prohibits discrimination based upon fourteen classes or characteristics (including "primary language" and "immigration status"),[27] and courts have interpreted them to extend to association with a person having long hair and "unusual dress" and to one's status as a police officer.[28] The D.C. Human Rights Act lists thirteen primary protected traits of general applicability and another eight applicable in certain circumstances.[29] Among the former are "political affiliation."[30] (That didn't help Sarah Sanders last year. The Red Hen restaurant, from

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[24] 29 U.S.C. §§ 621-634 (Age Discrimination in Employment Act); 29 U.S.C. §§ 6101-6107 (Age Discrimination Act of 1975).

[25] Pregnancy Discrimination Act of 1978, P.L. 95-1555 (amending Title VII to add a new subsection, 42 U.S.C. § 2000e(k)).

[26] Genetic Information Nondisclosure Act of 2008, P.L. 110-233 (amending VII to add a new subsection, 42 U.S.C. § 2000ff-1(b)).

[27] Cal. Civil Code § 51(b).

[28] *See* https://www.calbizlit.com/cal_biz_lit/2007/06/californias_unr.html.

[29] *See* https://ohr.dc.gov/protectedtraits.

[30] *See* https://www.cnn.com/2018/06/29/us/when-businesses-can-deny-you-service-trnd/index.html.

which owner Stephanie Wilkinson asked her to leave, is located on the other side of the Potomac.[31])

Even when states have failed to act, municipalities can. In states like Arizona, which do not categorically prohibit discrimination based upon sexual orientation, certain cities have stepped in to prohibit it by ordinance within their municipal limits.[32]

Pennsylvania generally mirrors federal law. Its principal civil-rights protections are set forth in the Pennsylvania Human Relations Act,[33] which defines "public accommodation" as part of the term "public accommodation, resort or amusement."[34] — a lengthy definition that contains dozens of express examples. But neither law offices nor offices for providing other specialized professional services are included, and there is no generic language to include them by extension.

Neither, apparently, have the laws of any other state expressly imposed obligations similar to those under Title II to law firms expressly. The only argument for applying the protections to law offices would be identify a generic term that might be read broadly enough to include law offices.

Missouri's definition of "places of public accommodation," for example, begins as follows:

> all places or businesses offering or holding out to the general public, goods, services, privileges, facilities, advantages or accommodations for the peace, comfort, health, welfare and safety of the general public or such public places providing food, shelter, recreation and amusement . . . .[35]

Although law offices are certainly "businesses offering or holding out to the general public . . . services," and although those services arguably are provided for the "welfare" of the general public, the principle *ejusdem generis* makes that argument hard to defend, because the boilerplate is followed by an extensive list of specified "places of public accommodation" that, as with the examples in Pennsylvania's statute, bear no resemblance to law offices or other providers of professional service[36]

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31 *Id.*

32 *See* https://en.wikipedia.org/wiki/LGBT_rights_in_Arizona.

33 43 Pa. Stat. §§ 951-963.

34 *Id.* at § 954(l).

35 Missouri Laws § 230.010(16).

36 Here's the language:

In Summary

Although SCOTUS's *Masterpiece Cakeshop* decision did not resolve the critical civil-rights issue presented, for many lawyers that issue is largely moot. They already have decided, for many reasons — good business, good policy, good conscience — not to discriminate against potential clients (or against certain potential clients) for any, some, or all of the categories as to which such discrimination in places of public accommodation is prohibited.

But there's no effort afoot to compel them to make that decision. And, unless Title II or the counterpart state and local laws are amended to specify that law offices are "places of public accommodation," lawyers need not worry that a future SCOTUS decision resolving the issue skirted in *Masterpiece Cakeshop* would immediately compel them to represent causes abhorrent to their religious beliefs.

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment;
(c) Any gasoline station, including all facilities located on the premises of such gasoline station and made available to the patrons thereof;
(d) Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
(e) Any public facility owned, operated, or managed by or on behalf of this state or any agency or subdivision thereof, or any public corporation; and any such facility supported in whole or in part by public funds;
(f) Any establishment which is physically located within the premises of any establishment otherwise covered by this section or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.