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Foreword

This issue marks the inauguration of a new publication by The John Marshall Law School Fair Housing Legal Support Center. The Support Center was founded in 1992 to educate the public on fair housing law and to provide legal assistance to those private or public organizations that are seeking to eliminate discriminatory housing practices. Since 1992, the Center has hosted conferences and trainings throughout the United States for attorneys and fair housing enforcement personnel at the federal, state and local levels of government, housing providers and consumers. In addition, the Center supervises The John Marshall Law School Fair Housing Legal Clinic that represents victims of discriminatory housing practices in the courts and administrative proceedings. The Clinic educates law students in fair housing law and enforcement by having them work on actual cases. The Clinic thus prepares a cadre of future lawyers who are knowledgeable in the law and committed to the cause of fair housing.

The Center has long considered publishing articles and educational materials on fair and affordable housing that will be generally available to the public. This issue of The John Marshall Law School Fair and Affordable Housing Commentary is a result of that quest. Some of the articles will be similar to those found in traditional law reviews and journals, but the Commentary will also publish shorter articles as well as studies and reports so that they are readily available to those working or interested in fair and affordable housing law. Some of the materials will be original; other materials will have been published elsewhere but will be made easily accessible here.

The Center welcomes your input and contributions.

This first issue is entirely derivative. Four articles that first appeared in The John Marshall Law Review in 1992 are reproduced so that they are available electronically for the first time. These articles were the product of a groundbreaking conference held at The John Marshall Law School on maximizing damages in fair housing cases.

This Conference was held shortly after the 1988 Fair Housing Amendments Act was passed, which introduced new remedies for fair housing violations. Even though damages were part of the relief offered by the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, and Title VIII of the Civil Rights
Act of 1968, 42 U.S.C. §§ 3601 et seq., large damage awards for housing discrimination were rare and the primary relief awarded was equitable. Professor Robert Schwemm stated in an article published in 1981 that the range of damage awards in fair housing cases at that time was between $1 and $20,000. Schwemm, *Compensatory Damages in Fair Housing Cases*, 16 Harv. C.R/C.L. Rev. 83 (1981). The Kentucky Commission for Human Rights published a ground-breaking study in 1981 on Damages for Embarrassment and Humiliation in Discrimination Cases, but by the early 1990s this two volume report was out of print and difficult for the average fair housing practitioner to secure. In 1992, most fair housing advocates felt that they had done a good job for their clients if they were able to secure a damage award in the range of $500 to $2,000.

The 1988 Fair Housing Amendments Act expanded the fora were fair housing rights could be litigated. It also inaugurated new ways to analyze fair housing cases and the relief that should be available to victims of housing discrimination. The older damage awards did not come close to recognizing the severe damage that housing discrimination causes to victims and their families and to the community at large. The threat of an award of $1,000 or $2,000 was scarcely a serious deterrent to those who engaged in discriminatory housing practices.

The 1992 conference was aimed at opening the eyes of fair housing advocates to the real damages suffered by victims of housing discrimination and to educate them about how they could increase the damage awards in fair housing cases.

The centerpiece for the 1992 issue was the article of Alan Heifetz, Chief Administrative Law Judge for the Department of Housing and Urban Development (HUD), and Thomas Heinz, Administrative Law Judge for HUD. They outlined step by step the theories available to fair housing advocates and how they could separate objective evidence on damages from mere speculation. Although written almost fifteen years ago, the article is still up-to-date in its approach and still provides the best framework for an attorney to follow when presenting evidence on what a victim suffers as a result of a discriminatory housing practice. What they wrote articulates the principles that guide judges in cases, whether in the judicial or administrative processes at both the state and federal levels.

Larry Rogers and Kelly Kalus discuss what civil rights attorneys can learn from the traditional personal injury bar and why it is not unreasonable to think in terms of hundreds of thousands of dollars when litigating a fair housing case where serious damage has occurred. Dr. Larry Heinrich, a clinical psychologist, explains why mental anguish and humiliation are particularly severe in fair housing cases. Merilyn Brown, an attorney employed today in the Chicago HUD
Regional Office as an Attorney Advisor, Dr. Jay Einhorn, a clinical psychologist, and I wrote an article about counseling a victim of housing discrimination using the perspectives of the client, the attorney, and a clinical psychologist. All of these articles are still current in their content.

Future issues will reprint important articles already published in other journals and provide original articles and commentary on new developments and cases involving fair and affordable housing issues. We welcome your suggestions and submissions to The John Marshall Law School Fair and Affordable Housing Commentary. Knowledge is a powerful weapon in attacking discriminatory housing practices, and we hope that this Commentary will contribute to that knowledge.

I would like to thank Frank Young, one of our Clinical students who will graduate in June 2006, for his inspiration and hard work in inaugurating this Commentary.

Michael P. Seng
Professor of Law and Co-Executive Director,
The John Marshall Law School Fair Housing Legal Support Center
Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications

Alan W. Heifetz and Thomas C. Heinz

Abstract

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Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications

By
Alan W. Heifetz∗ and Thomas C. Heinz∗∗

Introduction

[*3] With the passage of the Fair Housing Act† (“Act”) in 1968, Congress prohibited housing discrimination based on race, color, religion, sex, or national origin. In March of 1989, when the Fair Housing Amendments Act of 1988‡ became effective, Congress extended the protections of the Act to persons with handicaps and families with children. The 1988 amendments not only broadened the substantive reach of the Act, but also created an alternative procedure for resolving individual housing discrimination complaints. Under the original legislation, a federal district court was the exclusive forum for resolving Fair Housing Act issues. Now, parties to a housing discrimination complaint may adjudicate their dispute either before a federal district court or before a federal administrative law judge.

First, this article briefly discusses the nature of adjudicatory responsibility under the Administrative Procedure Act.¶ The article next outlines pertinent provisions of the Fair Housing Amendments Act of 1988. Finally, the article discusses the assessment of damages in housing discrimination cases from the perspective of administrative law judges adjudicating cases under the provisions of [⁎4] both the Administrative Procedure Act and the Act.∑

I. The Administrative Adjudicatory Process

Each year, federal executive departments and independent agencies conduct hearings and make decisions in hundreds of thousands of cases that directly affect the rights and obligations of private parties. Administrative

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∗ Chief Administrative Law Judge, United States Department of Housing and Urban Development; B.A., Syracuse University; J.D., Boston University
∗∗ Administrative Law Judge, United States Department of Housing and Urban Development; B.A., Yale University; J.D., University of Oregon

The authors wish to thank Andrea J. Cali, Dori C. Garmeiser, and Laurence D. Levine for their contributions to this article. The views expressed in this article are solely those of the authors.

∑ This article assumes, arguendo, a finding of liability for unlawful discrimination. However, the authors do not presume to catalog every category and type of damage that may support a damage award under the Fair Housing Act.
adjudication is designed to synthesize subject matter expertise and decisional efficiency. Some courts have described administrative bodies as a “fourth branch” of government that may affect more people, principles, and values through administrative decisions than all of the judicial courts combined.\(^5\) Congress enacted the Administrative Procedure Act to ensure that objectivity and judicial capability of presiding officials in formal administrative proceedings. To that end, the Administrative Procedure Act provides that administrative law judges are to preside over all agency adjudications “required by statute to be determined on the record after opportunity for an agency hearing . . . .”\(^6\) To ensure that administrative law judges remain independent in their decisions and to protect them from any undue influence or pressure, the Administrative Procedure Act provides that agencies may appoint administrative law judges only after the applicants have passed a rigorous “merit selection” examination administered by the Office of Personnel Management.\(^7\) The Office of Personnel Management also has the duty and authority, independent of agency recommendation or rating, to set the pay level of each administrative law judge position and the qualifications for appointment to each level.\(^8\)

Administrative law judges are required by the Administrative Procedure Act to be assigned to cases “in rotation so far as practicable.”\(^9\) They may not perform functions “inconsistent with their duties and responsibilities,”\(^10\) and may not be “responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”\(^11\) They are exempt from agency performance appraisals, \(^*5\)\(^12\) and are subject to discipline and removal only for good cause as determined after a hearing on the record before the Merit Systems Protection Board.\(^13\) As presiding officials, they have authority to administer oaths, issue subpoenas, hold conferences, regulate the course of discovery and hearings, rule on procedural matters, make decisions, and take actions authorized by agency rule.\(^14\)

Decisions of administrative law judges must contain findings and conclusions, with supporting reasons regarding “all the material issues of fact, law, or discretion presented on the record.”\(^15\) Decisions must also explain any “rule, order, sanction, relief, or denial thereof.”\(^16\) Administrative law judges are bound to apply the published rules and policies of the agencies to which they are

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\(^10\) Id.
\(^16\) Id.
assigned; therefore, an agency’s decision to reverse or modify an administrative law judge’s initial decision\(^{17}\) must be adequately justified in its final decision.\(^{18}\) Unless a specific statute provides for *de novo* review, a reviewing court will base its factual review on the substantial evidence test; that is, the court will uphold the administrative law judge’s decision if there is substantial evidence to support it.\(^{19}\)

The United States Supreme Court has recognized that the administrative law judge’s role is “functionally comparable” to a trial judge conducting civil proceedings without a jury.\(^{20}\) The Supreme Court and federal courts of appeal have repeatedly concluded that the federal administrative adjudicatory process is fair, and that the Administrative Procedure Act adequately protects due process rights.\(^{21}\) As one Senate committee observed; “In essence, individuals [*6]* appointed as ALJ’s hold a position with tenure very similar to that provided for Federal judges under the Constitution.”\(^{22}\)

### II. Administrative Adjudication Under the Fair Housing Amendments Act of 1988

To create a mechanism by which the federal government could take an active role in enforcing the law, Congress provided for administrative adjudication of fair housing complaints when the Department of Housing and Urban Development is unable to conciliate the conflict between the parties.\(^{23}\) The Fair Housing Amendments Act of 1988 recognizes the economy and efficiency of administrative proceedings as well as the Administrative Procedure Act mandate to provide due process and a fair hearing.

The Act requires that discovery and a hearing be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights

\(^{17}\) In some cases, the administrative law judge’s initial decision is final as to findings of fact and conclusive if supported by substantial evidence. See Donovan *ex rel.* Chacon v. Phelps Dodge Corp., 709 F.2d 86, 90-92 (D.C. Cir. 1983) (proceeding before the Federal Mine Safety and Health Review Commission).

\(^{18}\) “It is hornbook law that an agency must set forth clearly the basis of reaching its decision.” Caroline Power & Light Co. v. FERC, 716 F.2d 52, 55 (D.C. Cir. 1983).

\(^{19}\) Evidence that supports a different decision must also be considered. 5 U.S.C. § 706(2)(E) (1988). For an explication of the substantial evidence test, see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).


\(^{21}\) See *e.g.*, Marshall v. Jerrico, 446 U.S. 238, 250 (1980) (judge’s “impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime”); NLRB v. Permanent Label Corp., 657 F.2d 512, 527-28 (3d Cir. 1981) (giving reasons why administrative law judges are sufficiently independent and competent) (Aldisert, J., concurring), cert. denied, 455 U.S. 940 (1982); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980) (administrative law judge given standing in case where judicial independence was infringed upon by agency policies; Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973) (administrative law judges are entitled to the Administrative Procedure Act’s procedural protections before being involuntarily retired).


of the parties to obtain evidence and a fair hearing.\textsuperscript{24} To meet these requirements, the Department of Housing and Urban Development issued rules of practice governing administrative hearings that provide an alternative to lengthy, formal trials.\textsuperscript{25} Full discovery is allowed, including depositions,\textsuperscript{26} interrogatories,\textsuperscript{27} production of documents,\textsuperscript{28} and requests for admissions;\textsuperscript{29} however, all discovery must be completed fifteen days before the date scheduled for the hearing. This is usually by the 105th day after the charge of discrimination is issued.\textsuperscript{30} Prehearing conferences may be scheduled, and to avoid delay, they may be held by telephone.\textsuperscript{31} Finally, to encourage and facilitate alternate dispute resolution, the rules provide for the appointment of a settlement judge on the motion of any party or on the initiative of the presiding administrative law judge.\textsuperscript{32}

An administrative hearing must begin no later than 120 days after the charge of discrimination is issued unless any party elects \textsuperscript{[}*7\textsuperscript{]} to have the claims adjudicated in a civil action in lieu of an administrative hearing.\textsuperscript{33} The Federal Rules of Evidence apply as they would in any civil action in a United States district court.\textsuperscript{34} An administrative law judge must issue a decision within sixty days after the end of the hearing, and any agency discretionary review of that decision must be completed not later than thirty days after the decision is issued.\textsuperscript{35}

Upon finding that a respondent has engaged in, or is about to engage in, a discriminatory housing practice, the administrative law judge must issue an order for appropriate relief, \textquoteleft which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief.\textquoteright\textsuperscript{36} In addition, the administrative law judge may, \textquoteleft to vindicate the public interest, assess a civil penalty against the respondent.\textquoteright\textsuperscript{37}

### III. Administrative Law Judges’ Perspective on Damages

Since passage of the Fair Housing Act in 1968, judges have had a difficult and uncertain task in assessing damages to victims of housing discrimination.

\begin{footnotes}
\item[25] 24 C.F.R. § 104 (1992). \textquoteleft\textquoteleft The administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings . . . .\textquoteright\textquoteright Id. § 104.110.
\item[26] Id. § 104.510 (1992).
\item[27] Id. § 104.530 (1992).
\item[28] Id. § 104.540 (1992).
\item[29] Id. § 104.550 (1992).
\item[31] Id. § 104.610 (1992).
\item[32] Id. § 104.620 (1992).
\item[33] 42 U.S.C. § 3612(g) (1988).
\item[34] 42 U.S.C. § 3612(c) (1988).
\item[36] 42 U.S.C. § 3612(g)(3) (1988). On the other hand, if the administrative law judge finds that the respondent has not engaged in, or is not about to engage in, a discriminatory housing practice, the judge must enter and order dismissing the charge. Id. at 42 U.S.C. § 3612(g)(7) (1988).
\end{footnotes}
This uncertainty has been blamed on a number of factors. These factors include the considerable variation in the size of damage awards in district courts over the years, a history of cases with no apparent nexus between evidence of actual injury and the award of damages to the complainant, the difficulty of quantifying intangible injuries, and a paucity of published opinions explaining the basis for the awards.38

Administrative adjudication under the Administrative Procedure Act and the Fair Housing Act reduces the uncertainty of assessing housing discrimination damages because litigants in the administrative forum not only have the right to be heard, but also the right to hear why the judge rendered a particular decision. The requirement for an administrative law judge to state a rationale for findings, conclusions, and orders applies equally to the assessment of damages, as it does to the issue of liability. Fully reasoned written decisions facilitate judicial review, give the parties a sense of satisfaction or vindication, and contribute to the predictability of [8] the law.39 Unfortunately, district court judges who issue opinions after bench trials often do not fully explicate their damage awards,40 and juries in civil trials do not, and have no responsibility to, articulate reasons for their judgments.41 Court decisions, therefore, have provided little guidance for assessing damages. Too often, courts have awarded damages without separating discrete categories of injury, or have justified damage awards by merely referring to the general range of damages awarded by other courts.42 As a result, assessing damages can be a troublesome responsibility, especially where emotional distress or other forms of intangible harm are at issue.

Because administrative law judges are obligated by the Administrative Procedure Act to explain the basis for their decisions, including their assessment of damages, they face the often difficult task of rationally measuring the various

39 Carefully reasoned written decisions also help to save counsel from the wrath of disappointed clients who had not been disabused of unrealistic expectations before the decision was issued.40 While there is no empirical evidence to explain the occasional absence of rationale in district court opinions, it is generally acknowledged that district courts are overburdened with criminal cases and that they do not have the luxury of specializing in discrete areas of civil litigation. Indeed, in order to speed the administration of justice, one federal district judge has proposed, *inter alia*, assignment of specialized cases to judges proficient in that specialty, creation of more specialized Article I courts, and elimination of the requirement in written opinions of findings of fact and conclusions of law. Stanley Sporkin, *End Findings, Begin Fees, Stop Frivolity*, LEGAL TIMES, Apr. 20, 1992 at 26. Creation of the administrative adjudicatory process for housing discrimination cases is congruent with Judge Sporkin’s call for greater effectiveness and efficiency in the disposition of cases that, while important to citizens, overburden the judicial system.41 At least one writer recently has suggested that the United States’ jury system is failing, and that its growing dysfunction might be addressed by abandoning it, at least in civil cases, as has been done in England. He opines that “today, the jury is arguably more the tool of wealthy individuals and corporations than of the common man.” Franklin Strier, *The U.S. Jury System is Failing*, NAT’L L. J., Apr. 12, 1992, at 15.
42 See Schwemm, *supra* note 38, at 83-84.
elements of damages. Principles from the general law of damages, civil rights precedents in general, and housing discrimination precedents in particular, form the background for determining an appropriate damage award. Against that background, judges must analyze and resolve any inconsistencies in the evidence of record, recognize the hyperbole that may characterize victim testimony, and at the same time, hold steady against the current of their own emotional reactions to the case.

The objective criteria used to analyze and measure damages are not in themselves sufficient to determine an appropriate damage award. Even after completing a careful evaluation of purely objective criteria, judges must still transform inherently qualitative facts [*9] into quantitative relief. That is, at best, an intuitive undertaking. However, it is not a leap into the realm of chance, free from the restrictions of reason. Rather, judges arrive at a final assessment of damages by synthesizing their legal knowledge, understanding, and experience, together with the weight of the evidence in the particular case. The process by which the judge maximizes the use of reason and minimizes the use of intuition is an integral component of the art and science of judging.

IV. Assessment of Actual Damages

Actual damages in the administrative forum are synonymous with “compensatory” damages.43 They may be divided into two broad categories: economic or tangible damages (including “out-of-pocket” damages) and intangible damages. Compared to intangible damages, economic damages are generally small, although they can amount to a considerable sum on occasion.44 On the other hand, intangible damage awards for dignitary injuries – that is, injuries to the personality,45 – can be substantial, as shown below. The “actual” damages that administrative law judges46 and the courts47 may award are distinguishable from punitive damages. Punitive damages focus on the discriminator’s conduct rather than on the victim’s reaction to the conduct. Two basic principles govern the assessment of actual damages: the complainant has a

47 42 U.S.C. §§ 3612(c) and 3614(d) (1988).
right to be compensated for actual injuries suffered because of the unlawful acts of a respondent, but the complainant is not entitled to reap a financial windfall at the respondent’s expense.

The amount of money damages the complainant claims obviously plays a role in the court’s determination of the amount awarded. By specifying a particular dollar amount in a prayer for damages, the complaint not only notifies the defendant of the size of the claim, thereby affording an opportunity to mount an appropriate [*10] defense, but it also places the complainant’s evidence in perspective.

A. Economic or Tangible Damages

1. In General

Economic damages are the total of all out-of-pocket and other tangible expenses caused by defendant’s denial of housing. Such expenses include, but are not limited to, the increased cost of alternative housing; wages or other income lost during the time spent looking for alternative housing; moving, storage, or packing costs, including any extra security or casualty costs occasioned by the need to acquire alternative housing; temporary housing costs; any costs of commuting to and from work in excess of those that would have been incurred commuting to and from the denied housing,48 and medical and psychological counseling expenses caused by housing discrimination.49 Although some administrative law judges have awarded these types of expenses based merely on unchallenged testimony, other judges have denied relief in the absence of documentary evidence to corroborate the testimony, or upon a showing that the expenses claimed were reasonable.50 Administrative [*11] law judges have also

48 See, e.g., HUD ex rel. Herron v. Blackwell, 908 F.2d 864, 873 (11th Cir. 1990) (specified repacking and relocating costs); Thronson v. Meisels, 800 F.2d 136, 140 (7th Cir. 1986) (rent on former apartment plaintiffs would not have incurred had they been able to move into defendants’ apartment and sublet the former apartment); Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985) (moving and temporary housing costs); Phillips, 685 F.2d at 190 (moving and storage costs); Steele v. Title reality, 478 F.2d 380, 383-384 (10th Cir. 1973) (telephone, moving and storage costs); Lamb v. Sallee, 417 F.Supp. 282, 287 (E.D. Ky. 1976) ($12.50 for lost wages); HUD v. Lewis, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,035, 25,371 (HUD A.L.J. Aug. 27, 1992) (trash collectors, water services, and telephone transfer costs); HUD v. Wagner, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,302, 25,337 n.13 (HUD A.L.J. Aug. 27, 1992) (extra month’s rent charged when complainant could not timely move out of old housing, plus costs of inducing occupant of the new apartment to move); HUD v. Carter, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,029, 25,320-21 (HUD A.L.J. May 1, 1992) (lost profit on sale of home precluded by respondent’s discriminatory policy); HUD v. Murphy, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,002, 25054-55 (HUD A.L.J. July 13, 1990) (advertising costs for forced sale of mobile home).


denied damages when the complainant has failed to prove a direct causal link between the claimed harm and the respondent’s discriminatory conduct. In addition, contrary to the “American rule,” several cases have awarded damages to complainants for their travel costs, lost wages, and other incidental expenses associated with preparation for, and participation in the hearing. Price of equipment and salary or hourly wage rate); HUD v. TEMS Ass’n, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,028, 25,311 (HUD A.L.J. Apr. 9, 1992) (complainants bound to pay mortgage, taxes, and association dues whether a tenant lived in house or not); HUD v. Rollhaus, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,019, 25,250 (HUD A.L.J. Dec. 9, 1991) (items for which loss of use claimed not specifically identified, and value questionable because complainant ultimately disposed of them); HUD v. Edelstein, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,018, 25,240 (HUD A.L.J. Dec. 9, 1991) (higher rent differential requested denied as unsupported by evidence); HUD v. Gaultney, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,013, 25,194 (HUD A.L.J. Sept. 27, 1991) (in absence of evidence of business expenses, lost profits cannot be reasonably calculated); HUD v. Properties Unlimited, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,150-51 (HUD A.L.J. Aug. 5, 1991) (greater amount of lost wages denied as “unsupported . . . and obviously exaggerated”); HUD v. Jerrard, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,005, 25091 (HUD A.L.J. Sept. 28, 1990) (complainant should have recouped her utility deposit when she moved); Murphy, 2 Fair Hous.-Fair Lend. (P-H) at 25,055 (no “reasonable certainty” that complainants would qualify for mortgage or realize any appreciation on house they intended to buy); HUD v. Blackwell, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,011 (HUD A.L.J. Dec. 21, 1989) (full amount of repacking and relocating expenses requested not shown to be reasonable), aff’d, F.2d 864 (11 Cir. 1990). To the extent that damages have been awarded for the costs of litigation, the award would appear to contravene the “American rule” that in the absence of a specific statute each party bears its expenses of litigation. See 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: § 1331 (1987) (stating that under the “American rule even litigants who are defeated in court do not face the risk of having to bear their opponent’s expenses, as they would be in Great Britain and most other countries”).

The Act also authorizes an award of attorney’s fees and traditional litigation costs to a prevailing respondent or intervenor after the decision becomes final. 42 U.S.C. § 3612(p) (1988).
2. Alternative Housing

To date, the largest recovery in the administrative forum for purely economic loss has been for the difference between the cost of housing unlawfully denied a complainant and the cost of the alternative housing the complainant was constrained to acquire.\(^{54}\) In order to recover the increased cost of alternative housing, the complainant must demonstrate a reasonable effort to “cover” by seeking comparable housing; that is, the discrimination victim is obliged to try to avoid economic waste and to minimize damages.\(^{55}\) If a complainant fails to cover, the court precludes recovery for the greater cost of alternative housing.\(^{56}\)

To the extent that alternative housing is comparable to the denied housing, yet more expensive, the complainant should recover the greater expense of the alternative housing. Numerous factors determine comparability, such as cost, size, style, composition, structural integrity, location, and proximity to transportation, schools, and cultural facilities. Even though the alternative housing in a particular case costs more than the denied housing, this does not necessarily mean that the alternative housing is not comparable. The value of many housing amenities is objectively determined in the marketplace for housing; that is, the market determines a value upon which a willing buyer and a willing seller would agree.\(^{57}\) Aggrieved parties may subjectively value other amenities. Complainants may recover for the deprivation of those characteristics of the denied housing of particular value to them when their subjective valuation of those characteristics is greater than the market’s.\(^{58}\) A complainant may also recover the greater cost of alternative housing even if the alternative housing was superior to the

\(^{54}\) See HUD v. Morgan, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,142 (HUD A.L.J. July 25, 1991) (complainant awarded $7,362.49 for increased carrying cost from purchase date to decision date).

\(^{55}\) Professor Dobbs describes the joinder of the concepts of damage minimization and economic salvage as “avoidable consequences rules.” DOBBS, supra note 45, at 188-89. He also cites two related rules that pertain to the burden of proof. Id. at 189. The first is that the plaintiff has the burden of proving damages; the second is that the defendant has the burden of proving that the plaintiff should have minimized those damages. Id.

\(^{56}\) See, e.g., Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234-35 n.4 (8th Cir. 1986) (the fact that plaintiff declined defendant’s offer of apartment was relevant as to damages); Young v. Parkland Village, Inc., 460 F. Supp. 67, 71 (D. Md. 1978) (complainant failed to mitigate damages by declining apartment). Cf. HUD v. George, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,010, 25,166 (HUD A.L.J. Aug. 16, 1991) (respondents’ illegal refusal to sell did not per se force complainant to buy a more expensive property; furthermore, complainant passed on its increased costs of alternative housing to a nonprofit agency that operates the homes).

\(^{57}\) Where a contract or lease has been signed, the document will, at least presumptively, reflect a market value. Where there is no such document, other evidence, such as an appraisal, will have to be introduced to demonstrate objective market value.

denied housing, provided the record shows that the complainant was unable, with reasonable effort, to find comparable housing at a comparable price.\textsuperscript{59}

However, the issue becomes more complicated when one property is rental and the other is purchased. For example, if a rental was denied, should the measure of damages be the difference between the rental cost of the denied housing and the rental cost of housing the complainant \textit{could have} obtained if he or she had not purchased alternative housing? If not, and the complainant is awarded the difference between the mortgage payment for the alternative housing and the rental payment for the denied housing, should the respondent be entitled to a reduction in the damages based on the capital appreciation of the alternative property since its purchase by the complainant? Regardless of the answers to these kinds of questions, a housing discrimination victim is not entitled to shop for alternative housing with a blank check. Complainants must demonstrate that they attempted to minimize their damages.

Cases raising alternative housing cost issues also require a judge to determine the proper period over which the costs of the alternative housing should be measured. Consistent with the complainant’s duty to minimize damages and avoid economic waste, the period during which the complainant’s damages may accrue must have a reasonable cutoff point. To date, in those cases where both the denied housing and the alternative housing were rental, damages have been measured by the difference in the total amount of rent, including utilities, from the date the victim would have moved into the denied housing until the date of the hearing, or until the expiration date of the alternative housing lease.\textsuperscript{60} Because the complainant should be compensated for the greater cost of alternative housing that had to be obtained as a result of the respondent’s actions, the first date the complainant is no longer obligated to remain in the alternative housing and is free to occupy the denied housing, or the first date the complainant is able to occupy comparable housing \[*14] at a comparable cost,\textsuperscript{61} would appear to be a reasonable cutoff point for the accrual of damages. However, a respondent may question

\textsuperscript{59} See, e.g., Miller v. Apartments and Homes of N.J., Inc., 646 F.2d 101, 112 (3d Cir. 1981) (plaintiffs forced to pay more for substantially same value thereby had less money available for other purposes); HUD v. Morgan, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,138-39 (HUD A.L.J. July 25, 1991) (less expensive available alternative housing provides ceiling on damages where complainant purchased more expensive alternative housing).

\textsuperscript{60} See, e.g., Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985) (additional rent); Miller, 646 F.2d at 112 (plaintiffs awarded difference in rent and utilities); Parkland Village, Inc., 460 F. Supp. at 71 (differences on rent awarded).

\textsuperscript{61} Cf., United States v. Keck, No. C89-1664C, 1990 U.S. Dist. LEXIS 19309, at “16 (W.D. Wash. Nov. 15, 1990) (plaintiffs awarded damages from effective date of the Fair Housing Amendments Act of 1988 until date they actually moved in); Parkland Village Inc., 460 F. Supp. at 71 (time period from date housing should have been available to date defendant actually offered apartment).
whether the term of the alternative housing lease is reasonable or comparable to the term of the denied housing lease.62

If the denied housing was for sale and comparable alternative housing was purchased, the issue becomes whether the respondent should be liable for the increased gross cost of the alternative property, if any, or, if there is a mortgage, the higher carrying cost of the mortgage. If the latter, then should the respondent be liable for the higher cost of the mortgage over its entire life, or for some shorter period?63 Regardless of the methodology used to determine actual damage, the complainant is not entitled to a windfall recovery at the expense of the respondent.

3. Diversion of Resources for Fair Housing Organizations

Fair housing organizations have been established throughout the nation with various goals and purposes, but the primary purpose of most is to help ensure equal housing opportunities for everyone living within the geographical area the organization serves. In pursuit of that purpose, the typical fair housing organization engages in several functions, including the following: (1) educating the general public, housing providers, and tenants; (2) counseling individuals who believe they have been subjected to unlawful discrimination; (3) investigating housing discrimination complaints; and (4) pursuing legal remedies when necessary.64

In order to have standing to assert claims in its own right, a fair housing organization must allege a “concrete and demonstrable injury” to its activities with a “consequent drain on [the organization’s] resources,” and not “simply a setback to the organization’s [*15] abstract social interests.”65 The organization may demonstrate the requisite injury by showing that an act of unlawful

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62 See, e.g., Biggs v. Missouri Comm’n on Human Rights, 830 S.W.2d 512, 516 (Mo. Ct. App. 1992) (Commission awarded difference in rents from date complainant moved into new residence until date of hearing. Court upheld trial court’s limitation of actual damages to the duration of the 12-month lease for the proposed tenancy, stating, “absent an additional agreement, complainant’s right to possession would have ceased at the end of the one-year period . . . . Respondent cannot be said to have caused complainant’s expenses beyond the initial lease period. . . .”).

63 In HUD v. Morgan, respondent was ordered to pay the increased carrying cost of the more expensive alternative housing from the date of purchase until the date of decision. Morgan, 2 Fair Hous.-Fair Lend. (P-H) at 25,139.


65 Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (organization must be able to demonstrate that its role facilitating open housing was impaired); see also Spann v. Colonial Village, Inc., 899 F.2d 24, 29 (D.C. Cir. 1990) (organizations had standing in alleging “concrete drains on their time and resources”); Heights Community Congress v. Hilltop Realty, Inc., 774 F.2d 135,139 n.2 (6th Cir. 1985) (claimed expenditures “were too speculative to support damage award”; nominal damages of $1 affirmed); Berry v. John Doe Managers, No. 91-2891, 1991 U.S. Dist. LEXIS 10159, at *7 (E.D. Pa. July 22, 1991) (organizational standing determined by whether a “distinct and palpable injury” exists, not by “geographical definitions”).
discrimination adds a new burden to the workload of the organization, in addition to the burden of seeking redress for the discrimination.

For example, the federal district court in *Saunders v. General Services Corp.*, relying on *Havens Realty Corp. v. Coleman*, awarded a nonprofit fair housing corporation $2,300 for diversion of resources measured by the time and overhead costs attributable to pursuing its Fair Housing Act claim, and $10,000 for “frustration of its equal housing mission.” The $10,000 award was based on a finding that the defendant’s large-scale discriminatory advertising had caused a subtle but substantial impact on the corporation’s mission to ensure equal housing opportunities, thereby forcing the organization to devote significant resources to identifying and counteracting the effects of such advertising.

Similarly, a fair housing organization may recover the “opportunity costs” of discrimination by demonstrating that the defendant’s conduct caused the organization to divert its resources from fulfilling some of its usual functions, such as providing counseling and referral services, to fulfilling other purposes, such as testing and seeking redress for the defendant’s discriminatory conduct.

In addition to recovering for past investigation and litigation costs, fair housing organizations have also received awards for prospective expenses, such as monitoring records, auditing sales practices, testing respondent’s housing operation, and training respondent’s employees in the requirements of Fair Housing law.

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67 *Havens Realty*, 455 U.S. at 379.
69 *Id.* at 1052, 1054, 1060-61; *see also Spann*, 899 F.2d at 27 (fair housing organization had standing based on allegations that a defendant’s advertising for housing that showed racial preference compelled the organization to expend resources to neutralize the adverse impact of the defendant’s advertising on the local housing climate); *contra* Omni House, Inc. v. Cromwell Fountain Assoc., 2 Fair Hous.-Fair Lend. (P-H) ¶ 15,747, 16,889 n.4 (D. Md. Apr. 7, 1992) (“With due respect for Judge Merhige, this Court does not agree with his reading [in *Saunders v. Gen. Serv. Corp.*] of *Havens Realty*, supra, which would permit damages for an organization’s impairment of objectives and diversion of resources.”).
70 *See*, e.g., Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990) (stating “[t]hese are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the . . . discrimination”); *Saunders*, 659 F. Supp. at 1060 ($2,300 for “diversion of resources”); Davis v. Mansards, 597 F. Supp. 334, 348 (N.D. Ind. 1984) ($1,000 to the housing center for frustration of mission and $4,280 for costs incurred as a result of the defendant’s conduct); HUD V. George, 2 Fair Hous.-Fair Lend. ¶ 25,010, 25,166 (HUD A.L.J. Aug. 16, 1991) (discriminatory conduct “caused CIL [organization] to divert some of its resources from the development of group homes for the mentally handicapped to pursuing a legal remedy for Respondent’s unlawful conduct”).
71 *See* *Saunders*, 659 F. Supp. at 1060 (“While plaintiff may not be entitled to recover such investigative costs, such costs offer a reasonable guideline for ascertaining the value of plaintiff’s ‘diversion of resources’ element of damage, and such sum is thereby awarded.”).
72 *See*, e.g., City of Chicago v. Matchmaker Real Estate, No. 88-C9695, 1991 U.S. Dist. LEXIS 4435, at *11 (N.D. Ill. Apr. 5, 1991) ($3,000 awarded for investigatory audits, $5,000 for monitoring; $6,000 for continued auditing; $16,500 total compensation for diversion of resources
Although the terms “frustration of purpose,” “frustration of mission,” and “impairment of role” have all been used to describe the type of injury that causes a fair housing organization to divert its resources from one activity to another or to pursue a Fair Housing Act claim, it is clear that a claim for damages under any one of these rubrics should not be successful to the extent that it duplicates a claim for diversion of resources. Damages should not be awarded twice for the same injury. Moreover, the rule in *Havens Realty* teaches that these or similar terms cannot denote a mere abstract injury. For a complainant to recover, the injury must be “actual.” Accordingly, there is no compelling authority for the proposition that damages for “frustration of purpose” or “frustration of mission” of a fair housing organization are distinct from damages for injuries that drain or divert the resources of the organization.

**B. Intangible Damages**

Actual damages in housing discrimination cases are not limited to tangible economic or out-of-pocket losses, but may also include damages for intangible injuries, including such psychic harm as embarrassment, humiliation, and emotional distress. In recognizing a “dignitary” interest that is subject to damage by a discriminatory act, the United States Supreme Court in *Curtis v. Loether* made it clear that housing discrimination law was intended to redress harm to the person, as well as harm to the victim’s ability to contract for housing. Intangible...
damages have also been awarded for “loss of civil rights” and for “lost housing opportunity.” 77

1. Damages for Emotional Injuries

Because emotional injuries are by nature subjective and difficult to quantify, courts have awarded damages for emotional harm without requiring the impossible: proof of the exact dollar value of the injury. 78 Under the Fair Housing Act, humiliation can be inferred from the circumstances, as well as established by testimony, 79 even in the absence of evidence of economic or financial 78 loss or medical evidence of mental or emotional impairment. 80 The amount of the award is intended to compensate the complainant for the

77 To recover for loss of civil rights or for lost housing opportunity, complainant must describe any injury with specificity and show that claims for damages under such headings are discrete from any damage claim for emotional distress. See HUD v. Tucker, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,350 n.23 (HUD A.L.J. Aug. 24, 1992).
80 See, e.g., Johnson v. Hale, 940 F.2d 1192 (9th Cir. 1991) (damages for emotional distress may be established by testimony or inferred from the circumstances); Blackwell, 908 F.2d at 874 (testimony of victims support award of damages for emotional distress); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 236 (8th Cir. 1976) (damages for emotional distress may be awarded, even though any award for out-of-pocket damages is limited); Seaton v. Sky Realty, 491 F.2d 634,636 (7th Cir. 1974) (unnecessary to provide “evidence of economic or financial loss, or medical evidence of mental or emotional impairment, for an award of compensatory damages arising from humiliation); Lauden, 694 F. Supp. 253, 255 (complainant’s testimony of humiliation and embarrassment support award of damages); Lamb v. Sallee, 417 F. Supp. 282, 287 (E.D. Ky. 1976) (damages for humiliation and emotional and mental anguish based on testimony and inferences from circumstances).
damage inflicted by the discrimination. As in all civil cases, the damage award should make the victim whole.\(^8\)

Judges have wide discretion in determining what amount of money will make a complainant whole.\(^8\) This does not mean, however, that damage awards for intangible injuries are necessarily grounded on unsubstantiated conclusions or the whims and biases of the fact-finder. Every decision is extremely fact-specific. Past damage awards under the Fair Housing Act have influenced adjudicators, but those precedents are not always a helpful guide because they vary widely depending on the circumstances, ranging in the administrative forum from $150 to one complainant in \textit{HUD v. Murphy}\(^8\) to a total of $100,000 to a couple in \textit{HUD v. Tucker},\(^8\) or to more than $400,000 in the judicial forum.\(^8\) While judges view damage awards in other housing discrimination cases as benchmarks, their reference merely to the size of those awards does not provide a reliable standard of measurement any more than the appraisal of a painting of one size is a valid standard by which to appraise an \(*19\) other painting of the same size. Because the Administrative Procedure Act requires administrative adjudicators to explain and justify damage awards in written opinions, administrative determinations of damage awards must rest firmly on factors demonstrated by the evidence of record.

Without doubt, the most important factor in determining a damage award for intangible injuries is the testimony of the victim. If the victim of housing discrimination is not completely credible, there is little likelihood that the trier of fact will award substantial damages for emotional distress or other subjective complaints. Moreover, it is not enough for an attorney to ask the complainant: “How did you feel when you were discriminated against”; elicit the response: “I felt embarrassed and humiliated”; and then announce: “Your witness!”\(^6\) The

\(81\) See, e.g., \textit{Blackwell}, 2 Fair Hous.-Fair Lend. (P-H) at 25,013 (amount of damages awarded should compensate for the injury suffered so as to make the injured party whole, and should not provide the injured party with a windfall). \textit{See also} Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982) (district court instructed to award plaintiffs an amount that would fairly compensate them for emotional distress); Rogers v. Loether, 467 F.2d 1110, 1122 (7th Cir. 1972) (“The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses - tangible and intangible - which plaintiff has suffered by reason of a breach of duty by defendant.”), \textit{aff’d sub nom.}, Curtis v. Loether, 415 U.S. 189 (1974).

\(82\) See \textit{ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 25.3}(c) (1990).

\(83\) \textit{Murphy}, 2 Fair Hous.-Fair Lend. (P-H) at 25,057.


\(85\) \textit{Timus v. William J. Davis, Inc.}, No. 91-0882 (D.D.C. July 13, 1992) (jury also awarded $2 million punitive damages). \textit{See generally}, SCHWEMM, \textit{supra} note 82, § 25.3(2)(b) & nn.84 & 85.

\(86\) When evidence of emotional distress amounts to no more than a few lines of testimony from the victim, counsel appear to have focused their energies primarily on liability issues to the neglect of remedy issues, which are often the primary, if not exclusive, reason the case progressed to trial. Full and effective development of damage evidence requires complainant’s counsel to have a thorough knowledge of the theory of the case, and familiarity with all facts known to the client, as
strongest cases for the complainant utilize details and incidents from the victim’s life to paint a detailed, fully-shaded, and believable picture of the injuries caused by the discrimination. The picture should show the impact of the respondent’s discriminatory conduct on the victim’s activities of daily living, such as eating, sleeping, playing, and working.87

When evidence is adduced to contrast the complainant’s physical, mental, and emotional state before and after the act of discrimination, the effects of discrimination may be demonstrated through any changes in the victim’s relationships with family members, friends, and co-workers. The general emotional state of an individual may be described by identifying points on a continuum between, for example, happiness and sadness, activity and lethargy, confidence and insecurity, and self-esteem and self-deprecation.88 An individual may at one time manifest an “eat, drink and be merry” enjoyment of life; and, at another, become anhedonic, incapable of [20] enjoying life.89 A victim may exhibit anger, frustration, resentment, humiliation, or shame. Depression may be evidenced by hostility, irritability, or indecision. Mortification in the presence of others and fear of recurrence of the discriminatory conduct may lead the victim to withdraw from contact or diminish emotional involvement with family, friends, or colleagues. Other physical symptoms of mental distress may include indigestion, ulcers, nervousness, loss of appetite or unusual weight gain, loss of sleep or sleep disturbance, impotence, nausea, and intensified allergic reactions.90

The credibility of the victim’s emotional distress testimony will be enhanced by the credible testimony of any individuals to whom the victim communicated contemporaneous feelings of mental distress. Corroboration witnesses can demonstrate not only the nature and extent of the victim’s injuries, but also the impact of the victim’s injuries on other people in the victim’s life, such as family, friends, and co-workers. Although the victim cannot recover for injuries suffered by third parties91 caught in the fall-out from respondent’s

88 See generally, KENTUCKY COMMISSION ON HUMAN RIGHTS, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES II, § 2 (Staff Report 82-8, 1982).
90 For a checklist of elements of damage that may be used to establish mental distress in discrimination actions compiled from decided cases, various treatises, and the testimony of expert witnesses, see id. at 40-42.
91 Emotional distress damages have been awarded directly to third parties, such as spouses of discrimination victims. See, e.g., Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977) ($500 awarded to black husband; “at least nominal damages” must be awarded to white wife); Lamb v. Sallee, 417
conduct, the fact that the victim’s injuries affected other people helps to prove the existence and severity of the victim’s injuries. Moreover, corroboration witnesses can supply descriptive evidence for victims who are unable to articulate their own feelings. Finally, corroboration witnesses tend to dispel the unavoidably self-serving aura surrounding victim testimony.

[*21] Testimony regarding emotional damages is sometimes discounted or disregarded because the evidence fails to demonstrate the causal link between the respondent’s conduct and the victim’s distress. Expert testimony, while not always necessary, is valuable in many cases to establish this causation convincingly. Of course, in cases where intervention by health-care

F. Supp 282 (E.D. Ky. 1976) (both spouses of interracial marriage awarded damages arising from eviction when landlord discovered wife was black).

92 See, e.g., Littlefield v. McGuffey, 954 F.2d 1337 (7th Cir. 1992) (defendant threatened sister of plaintiff and made harassing telephone calls to family members as well as to plaintiff); Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982) (plaintiffs’ embarrassment and humiliation evidenced by strained relationships at work and among acquaintances); Miller v. Apartments and Homes of N.J., Inc., 646 F.2d 101, 104 n.3 (3d Cir. 1981) (loss of consortium); Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977) (district court ordered to consider any distress occasioned by mother’s inability to enroll child in school until family moved into house, and by her moving children into a house that had been vandalized); Davis v. Mansards, 597 F. Supp. 334, 347-48 (N.D. Ind. 1984) (wife-tester’s relationship with husband and family hampered; husband-tester suffered through wife’s depression); Tucker, 2 Fair Hous.-Fair Lend. (PH) ¶ 25,350 (complainants compensated individually for damage to their relationship as a couple); HUD v. Morgan, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,140 n.27 (HUD A.L.J. July 25, 1991) (complainant could be compensated to the extent that his wife’s suffering affected him).

93 See, e.g., Marr v. Rife, 503 F.2d 735 (6th Cir. 1974) (complainant had a prior history of ulcers, and admitted to eating pickles and sauerkraut shortly before onset of pain); HUD v. Rollhaus, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,019, 25,250 (HUD A.L.J. Dec. 9, 1991) (no medical evidence showing that stress was related to the discrimination); HUD v. Dedham Hous. Auth., 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,015, 25,214 (HUD A.L.J. Nov. 15, 1991) (respondent’s refusal to assign handicapped tenant a reserved parking space not shown to have caused complainant’s fall and subsequent hospitalization), recons’d on other grounds, ¶ 25,023 (Feb. 4, 1992); HUD v. Williams, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,007, 25,126 (HUD A.L.J. Mar. 22, 1991) (respondent’s actions found to have caused complainant AIDS sufferer emotional distress, but not to have been the sole cause of weight loss, nervousness, and other symptoms of the disease). Cf. HUD v. Carter, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,029, 25,321 (HUD A.L.J. May 1, 1992) (while other factors contributed, respondent’s actions were “undoubtedly a major cause of Complainant’s stress and anxiety”).

94 See, e.g., HUD v. Edelstein, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,018, 25,241 (HUD A.L.J. Dec. 9, 1991) (in absence of testimony from daughter, teacher, or other expert, overly speculative to conclude that respondent’s conduct caused change in daughter’s behavior when she moved to a different school in a different school district, and by extension, caused the reported damages claimed by complainant as a consequence of her daughter’s behavior). See also HUD v. Cabusora, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,026, 25,291 (HUD A.L.J. Mar. 22, 1992) (expert testimony lacking to establish cause of complainant’s headaches, stomach pains, and other physical ailments requiring hospitalization and treatment); Dedham Hous. Auth., 2 Fair Hous.-Fair Lend. (P-H) at 25,214 (“Expert testimony is necessary to prove the cause of Complainant’s physical condition, a wholly scientific matter that is far removed from the usual and ordinary experience of the average man.”).
professionals became necessary and medication was prescribed, complainant’s
counsel would want to introduce the relevant facts into the record. This kind of
evidence may go a long way towards dispelling any doubts the judge has about
the severity of the claimed injuries. 95

Housing discriminators must take their victims as they find them; that is,
damages are measured based on the injuries actually suffered by the victim, not
on the injuries that would have been suffered by a reasonable or by an ordinary
person.96 Put otherwise, [*22] judges must take into consideration the
susceptibility of the victim to injury. This rule can work either to the respondent’s
financial advantage or disadvantage.97 If the complainant’s emotional reaction to
the discrimination was more extreme than might be expected from the ordinary
person, complainant’s counsel will attempt to prove pre-existing conditions that
made the complainant more susceptible to injury. Conversely, defense counsel
may attempt to reduce damages by proving that the complainant has an
imperturbable personality and therefore, is incapable of experiencing significant
emotional distress.

Although the focus in determining an appropriate damage award for
intangible injuries must be on the complainant’s reaction to the discrimination, the
conduct of the discriminator is often relevant to that determination. 98 In many

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95 Rollhaus, 2 Fair Hous.-Fair Lend. (P-H) at 25,250 (complainant’s breakdown, hospitalization,
and confinement in a “stress center” occurred more than a year after the discrimination, and there
“was no medical evidence showing that the stress was related to” the discrimination).
96 Williams v. Flannery, No. 89-CV-73, 1989 U.S. Dist. LEXIS 14589, at *17 (N.D.N.Y. Dec. 7,
1989) (plaintiff’s troubled past has “some bearing on the proper assessment of the harm suffered
(plaintiff was poor, powerless and suffered deeply); HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H)
¶ 25,034, 25,362 (HUD A.L.J. Aug. 26, 1992) (damage award gave consideration to fact that
complainant was sensitized by past racial discrimination); HUD v. Properties Unlimited, 2 Fair
consideration to fact that complainant was eight and one-half months pregnant at time of
discriminatory act); HUD v. Jerrard, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,005, 25,091 (HUD A.L.J.
Sept. 28, 1990) (complainant’s “pre-existing emotional problem” taken into consideration in
determining damages for emotional distress).
97 Steele v. Title Realty, 478 F.2d 380, 384 (10th Cir. 1973) (previous discrimination relevant to
determining amount of compensation for emotional distress); Davis v. Mansirs, 597 F. Supp.
334, 347-48 (N.D. Ind. 1984) (wife-tester, “deeply affected” and “decimated emotionally,” was
awarded $5,000, while husband-tester who was “much less profoundly affected,” and displayed a
“degree of cynicism,” was awarded $2,500); Harrison v. Otto G. Heinzereth Mortgage Co., 430 F.
Supp. 893, 897 (N.D. Ohio 1977) (complainant awarded $5000 in compensatory damages because
“upset and troubled” by defendant’s employee’s actions); Gray v. Serruto Builders, 265 A.2d 404,
416 (N.J. Super. Ct. Ch. Div. 1970) (plaintiff awarded only $500 because “he is a man not likely
to be bowed over by a single set-back”); Zamantakis v. Commonwealth Human Relations
Comm’n, 308 A.2d 612, 616 (Pa. Commw. Ct. 1973) (no award for mental damages because the
plaintiff did not place his feelings on the record).
98 While emotional injury is compensable in the absence of egregious conduct, the discriminator’s
temperate conduct may be considered a mitigating circumstance. See Littlefield v. McGuffey, 954
F.2d 1337, 1347-49 (7th Cir. 1992) (defendant’s actions support punitive and compensatory
damages awarded); Steele, 478 F.2d at 384 (defendant’s discrimination which was done in a
cases, there will be a rough equivalence between the egregiousness of the respondent’s behavior and the seriousness of the damage inflicted by that behavior. A judge will ascertain whether, at one extreme, respondent’s conduct was malicious, blatant, public, and intended to injure, or at the other extreme, polite, circumspect, and without rancor. Similarly, a judge will analyze the complainant’s response to that behavior to determine whether it was proportionate to the stimulus. If the complainant’s reaction to the respondent’s conduct seems inordinate, but counsel has not shown that the complainant was especially vulnerable to extreme emotional distress, then the complainant’s credibility is put in doubt. On the other hand, if the complainant’s reaction to allegedly egregious conduct appears minimal, but the complainant does not otherwise appear to be thick-skinned, then the egregiousness of respondent’s conduct is put at issue. By analyzing the complainant’s reaction to the discriminatory conduct, the court places the complainant’s behavior in perspective, and promotes an objective assessment of intangible damage.

The egregiousness of the respondent’s behavior is one of several factors considered by an administrative law judge in determining an award for intangible injuries. However, it cannot by itself fix the size of such an award. If it did, then an emotionally stolid complainant could reap a windfall award from a courteous manner and not vindictive or abusive may be considered as a mitigating circumstance); Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 353 (W.D. Tenn. 1982) (in awarding compensatory damages for humiliation and mental anguish, court noted that “plaintiffs were victims of intentional racial discrimination”); Hughes v. Dyer, 378 F. Supp. 1305, 1310 (W.D. Mo. 1974) (plaintiff’s right to recovery exists even if the discrimination was “perpetrated in a courteous manner and not vindictive or abusive); but see Phillips v. Hunter Trails Community Ass’n, 685 F.2d 184, 191 (7th Cir. 1982) (defendant’s egregious behavior should be reflected in the punitive award but not in the award for actual damages).

99 Littlefield, 954 F.2d at 1341 (defendant made death threats, harassed plaintiff at work, frightened plaintiff’s sister, and left a menacing note at plaintiff’s residence); Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974) (humiliation in the presence of the victim’s children); HUD v. Tucker, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,351 (HUD A.L.J. Aug. 24, 1992) (discrimination was public, blatant, and egregious).

100 See, e.g., Serruto Builders, 265 A.2d at 415 (finding that public and rude acts of discrimination cause more severe humiliation and anguish than polite or entirely private forms of discrimination); Kelly, 2 Fair Hous.-Fair Lend. (P-H) at ¶ 25,362 (respondent’s claimed their “one child per bedroom” policy was formulated merely to comply with occupancy standards in city building code). But query whether subtle acts of discrimination can cause even greater emotional distress than overt discrimination when the hidden motive is finally exposed and victims discover they have been deceived as well as discriminated against?

101 Although egregiousness of the respondent’s conduct governs the assessment of punitive damages by a district court, it is not the sole determinant of civil penalties assessed by an administrative law judge. Determining the size of an appropriate civil penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (4) respondent’s financial resources; and (5) the degree of respondent’s culpability. See H.R. REP. NO. 711, 100th Cong., 2d Sess., at 37 (1988).
respondent whose conduct, while flagrant, caused little actual harm. On the other [*24] hand, the so-called “eggshell” complainant, who is extremely vulnerable, would not be fully compensated for grievous injuries caused by subtle or insidious conduct.

2. **Inconvenience**

At this point in the development of the law of damages under the Fair Housing Act, the term “inconvenience” has been used to lump a variety of damage elements into a catchall. Complainants have sought both tangible and intangible damages under the heading of “inconvenience,” often duplicating elements of claims made in other categories. One administrative decision treated “inconvenience” as a tangible element of damages by compensating a discrimination victim for the costs of additional household moves and additional travel associated with alternative housing. In contrast, some decisions have deemed “inconvenience” a separate category of intangible injury consisting of a variety of elements; others have treated it merely as another description of strictly emotional damage. In *Baumgardner v. HUD ex rel. Holley*, the Sixth Circuit

102 See *Baumgardner v. HUD ex rel. Holley*, 960 F.2d 572, 581 (6th Cir. 1992) (court affirmed administrative law judge award of $500 for emotional distress, noting that complainant “did not appear to the A.L.J. to be a man of vulnerable constitution who could be easily driven to distress. He felt hurt and angry, but it was kind of easy to get over.”); *Hud v. Murphy*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,002, 25,056 (HUD A.L.J. July 13, 1990) (although complainants felt “bad,” their testimony did not establish that “the feelings were sufficiently damaging to justify anything but the award of a nominal sum”); complainants awarded $800 for emotional distress and loss of civil rights; *Hud v. Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,013 (HUD A.L.J. Dec. 21, 1989) ($10,000 award supported by complainants’ testimony and co-workers’ testimony that complainants were very private people; soft spoken and reserved manner of testifying lent credence to how deeply they were affected by the prominent publicity and media attention). See also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII case).

[*25] Court of Appeals considered “inconvenience” to be an intangible injury and questioned whether separate claims should lie for both “inconvenience” and “emotional distress” damages.\textsuperscript{105}

To date, the decisions suggest that none of the litigants in any of the cases has articulated a rationale for a distinct category of damages under the heading “inconvenience.” If inconvenience is to be considered a tangible element of damages, it will have to be distinguished from other tangible opportunity costs in order to avoid a duplicative claim. For example, if a complainant is constrained to acquire alternative housing that increases commuting time and expenses, the complainant cannot recover separately for both increased commuting time and expense, as well as for “inconvenience,” unless “inconvenience” is defined strictly in terms of an intangible, emotional injury. Similarly, if as a part of the claim for emotional distress, a complainant seeks compensation for the intangible emotional toll of a longer commute, then an “inconvenience” damage claim should address only the tangible elements of the injury resulting from the longer commute.

3. **Lost Housing Opportunity**

Complainants in several administrative cases have sought damages for what has been styled as “lost housing opportunity.” The nature of the claim has varied from case to case, and most have been unsuccessful for want of proof.\textsuperscript{106}
Although there is no consensus in the decisions as to precisely what a “lost housing opportunity” is, one thing is clear: it cannot properly be defined as damage resulting from deprivation of the right to choose housing free of [*26] discrimination, per se. That definition merely describes the abstract civil right conferred by the Fair Housing Act as a whole. In other words, that definition summarizes the cause of action created by the Fair Housing Act; it does not define a distinct category of damage separate from other categories of damage.

This is not to suggest, however, that a discrete category of damage cannot be justified under the heading of “lost housing opportunity.” On the contrary, potential elements of this category could include a variety of intangible factors that are not reflected in the market price of denied housing or otherwise addressed in the prayer for damages. If the denied housing had a location, amenities, aesthetic properties, or other characteristics of particular or uncommon value to the complainant, the loss of such features would be more injurious to the complainant than to the average homeseeker. For example, the proximity of housing to elderly parents may be of prime importance to a complainant, but that factor would not be reflected in the market price of the property. In such a case, if the complainant’s recovery were limited to the difference between the costs of the denied housing and the alternative housing (a calculation based on market prices), the fundamental purpose of the litigation would be frustrated because the award would not make the complainant whole. Similarly, the complainant should recover damages for having to live in inferior housing if the evidence shows that housing comparable to the denied housing was unavailable. Of course, as in every category of potential damages under the Fair Housing Act, a “lost housing opportunity” claim must not duplicate the elements of other damages requested, such as those claimed for emotional distress injuries.

n.24 (award denied because nature of relief requested not made clear); HUD v. George, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,010, 25,167 (HUD A.L.J. Aug. 16, 1991) (no distinct and palpable injury shown); Morgan, 2 Fair Hous.-Fair Lend. (P-H) at 25,139 (no evidence of loss of housing opportunity).

107 See discussion infra section 4, Loss of Civil Rights.

4. **Loss of Civil Rights**

In many of the early Fair Housing Act cases tried administratively, the complainant requested more than nominal damages for “loss of civil rights,” in addition to compensation for other types of injury. Support could be found for those requests in a line of cases [*27] that presumed damage from the denial of a constitutional right without requiring evidence of pecuniary loss or emotional distress. However, it is doubtful whether more than a nominal award for loss of civil rights in a housing discrimination case would survive scrutiny by the United States Supreme Court. In the 1978 case of *Cary v. Phiphus*, an action under 42 U.S.C. section 1983 against school officials where students were found to have been suspended without procedural due process, the Supreme Court held that because the right to procedural due process is “absolute,” its denial is actionable for nominal damages without proof of actual injury. The Court recognized that by vindicating deprivations of such “absolute” rights not shown to have caused actual injury through the award of nominal sums of money, “the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury . . . .” Eight years later in *Memphis Community School District v. Stachura*, another case brought under 42 U.S.C. section 1983 for, *inter alia*, an alleged violation of First Amendment rights, the Supreme Court specifically held that where the basic statutory purpose of awarding damages is to compensate persons for injuries caused by the deprivation of constitutional rights, in the absence of actual damages, only nominal damages may be awarded for the vindication of a lost civil right. The Court ruled that a trier of fact may not award damages based on “subjective perception of the importance of constitutional rights as an abstract matter.” The Court noted that the jury could award both compensatory and punitive damages to the plaintiff, but that damages based on the abstract value or importance of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution:

> History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular

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109 Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919); *see also* Hodge v. Seiler, 558 F.2d 284, 287-88 (5th Cir. 1977) (wife should be awarded punitive damages since husband was); Bradley v. John M. Brabham Agency, 463 F. Supp. 27, 32 (D.S.C. 1978) (plaintiffs awarded $2,000 for emotional distress and $5,000 for loss of civil rights).
111 *Id.* at 266.
113 *Id.* at 308. *See generally,* SCHWEMM, *supra* note 82, § 25.3(2)(b).
defendants . . . . Such damage would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages . . . .

[*28] Relying heavily on Stachura, the Sixth Circuit Court of Appeals in Baumgardner v. HUD ex rel. Holley, set aside a $2,500 award by an administrative law judge for loss of civil rights. The court held that the award was “an unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case.” Since the Baumgardner decision was handed down, no discrimination charge has requested damages for “loss of civil rights.”

Conclusion

The 1988 amendments to the Fair Housing Act extended protection from housing discrimination to two new classes of persons, and conferred upon administrative law judges the authority to adjudicate individual complaints of housing discrimination. Because the administrative adjudicatory process requires administrative law judges to issue written opinions to support their decisions, administrative decisions have been making significant contributions to the development of housing discrimination law. This is particularly true for damage issues, which before 1989 received relatively little explication in the reported decisions. Nevertheless, fundamental issues in the law of damages under the Fair Housing Act remain unresolved. As the law develops, separating objective from subjective elements of damage, and speculative from substantive claims of damage should become easier for both the practitioner and the adjudicator.

114 Stachura, 477 U.S. at 310.
115 960 F.2d 572, 583 (6th Cir. 1992). The Baumgardner court also concluded that the Government’s failures to observe statutory procedures during the investigation of the case, while not a denial of due process, nevertheless had “an adverse effect with regard to ascertaining fair and reasonable damages . . . .” 960 F.2d at 579. The exact import of that conclusion is unclear, because the court’s discussion appears to confuse civil penalties, which are payable only to the Government, with punitive damages, which are awarded only to plaintiffs. The decision correctly states that “42 U.S.C. § 3613 authorizes ‘actual and punitive’ damages as well as injunctive relief.” 960 F.2d at 580. But section 3613 does not apply to administrative proceedings in which punitive damages may not be awarded. Cf. 42 U.S.C. § 3612. The decision reveals similar confusion in a subsection entitled “Civil Penalty—Punitive Damages” where the court concludes “that an award in excess of the allowed compensatory damages of $1500 for a civil penalty would be excessive, unjust, and improper. We, therefore, adjust the civil penalty damage award to $1500. Total damages, therefore, are determined to be $3000.” 960 F.2d at 583 (Emphasis added). Although the text of the decision combines the civil penalty with the compensatory award and refers to the combination as “damages,” the court ordered the respondent to pay the complainant only $1,500, and to pay HUD the remaining $1,500. Accordingly, despite the decision’s apparent confusion of civil penalties with punitive damages, we interpret the decision to hold that the Government’s procedural irregularities may affect the amount of a penalty payable to the Government, but not the amount of damages payable to a complainant. See HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 n.26 (HUD A.L.J. Aug. 26, 1992).
116 Id.
From One Dollar to $2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases Through Basic Tort Litigation Tactics

Larry R. Rogers and Kelly N. Kalus

Abstract

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**From One Dollar to $2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases Through Basic Tort Litigation Tactics**

By

Larry R. Rogers* and Kelly N. Kalus**

**Introduction**

[*29] The Federal Fair Housing Act¹ ensures all persons, regardless of their color, race, religion, or national origin, the right to choose and to purchase housing within their financial means. In spite of this authority and the legal protections that the drafters of the Act aspired to provide, housing discrimination remains a constant, prevalent force. Although courts have compensated victims of housing discrimination by awarding damages, discrepancies exist in the amount of damage awards given. One jurisdiction awarded only one dollar, while another awarded $2.4 million.²

The inequity arising out of the extensive fluctuation of damage awards signifies the need for narrowing the spectrum and for ensuring fair and adequate damage amounts to redress the wrongs suffered by housing discrimination victims. Plaintiff Carrie J. Timus, commenting upon her recent $2.4 million award remarked, “I just took a stand. The law says you should be allowed to live wherever you can afford to live.”³ However, many plaintiffs have not been as adequately compensated as Timus. Admittedly, the discriminatory circumstances of each fair housing case do vary and provide justification for a fluctuation in damage awards. Nonetheless, [*30] many plaintiffs experience hardship in eliciting and fully conveying to the trier of fact those underlying circumstances. Consequently, fair housing plaintiffs frequently do not receive damage awards which adequately reflect the degree of discrimination suffered.

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* Mr. Rogers is a partner with the firm of Power Rogers Lavin, located in Chicago, Illinois. The firm concentrates in tort litigation including wrongful death, medical malpractice, product liability and transportation negligence.

** Ms. Kalus is a third-year law student at Loyola University School of Law and a law clerk with Power Rogers Lavin.


To close the wide range of fair housing damage awards, attorneys must vigorously and effectively litigate a fair housing case. This Article provides suggestions on how to enhance a damage award in a fair housing case by utilizing basic tort tactics. These tactical considerations will enable fair housing plaintiffs to increase their ability to obtain damages and gradually to achieve a more controlled fluctuation of fair housing damage awards.

The Fair Housing Act and its evolving body of case law make available both compensatory and punitive damages for aggrieved parties in fair housing litigation. Included within compensatory damages are tangible, economic damages such as out-of-pocket expenses and intangible, non-economic damages taking the form of mental distress, embarrassment, and emotional injury. Attorneys must take several factors into consideration when they first anticipate litigation, to ensure that the subsequent damage award will be commensurate with the degree of discrimination their client suffered.

I. Plaintiff’s Choice of Forum Affects the Size of the Fair Housing Damage Award

A fair housing plaintiff must select the forum in which to file the complaint and to litigate the fair housing case. A plaintiff must be aware of the social and legal climate within each available forum to determine which forum will fully comprehend and appreciate the nature of the plaintiff’s cause of action. For example, Chicago lawyers who routinely practice in Cook County find it beneficial to their clients to file their actions in the Circuit Court of Cook County rather than the United States District Court for the Northern District of Illinois. In the state court system, potential jurors are selected from the voting registry for Cook County. However, in the federal court system, potential jurors are chosen from a wider geographical area. Consequently, potential jurors in the federal district court system will include jurors from suburban communities who tend to be less attuned to and compassionate about the problems a plaintiff

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4 See 42 U.S.C. § 3613 (c)(1), (2) (Supp. 1991) (authorizing punitive damages, actual damages, injunctive relief, and attorney’s fees and costs). But see United States v. Pelzer Realty Co., 377 F. Supp. 121 (M.D. Ala. 1974) (declining to award damages when pleading sought no damages and plaintiff was unable to afford housing sought).

5 See ROBERT G. SCHWEMM, Compensatory Damages in Federal Fair Housing Cases, 16 HARV. C.R.-C.L. L. REV. 83,90 (1981) (describing housing discrimination claims as “sounding in tort” and observing that compensation principles applicable to tort law, especially compensation for “dignitary torts” govern fair housing damage awards, including damages for economic loss and intangible loss for emotional distress and harm to one’s personality).

6 ILL. REV. STAT. ch. 78, para. 25 (1991). See also COOK CO. CIR. R. 0.4.

7 In the federal system, jurors for the Eastern Division of the Northern District of Illinois are drawn from the City of Chicago, balance of Cook County, Lake County, DuPage County, Grundy County, Kendall County, Will County, LaSalle County, the City of Aurora, and the balance of Kane County. Plan for the Random Selection of Jurors, Approved by the Council of the Seventh Circuit, Feb. 1991, at 2.
experiences in the city. As a result, juries recruited from the suburban communities have proven to be more conservative in awarding damages.

This forum selection strategy is beneficial in the fair housing context. It is crucial that both judge and jury understand the extent of housing discrimination in a particular area. Otherwise, the judge and the jury may minimize the degree of hardship, humiliation, and emotional trauma experienced by victims of discrimination. Accordingly, a fair housing plaintiff will find it beneficial to file an action in the forum where a court will comprehend and adequately compensate the plaintiff. Consequently, a plaintiff must investigate and analyze the demographics of a particular forum before filing the cause of action.

II. Plaintiff Must Recognize the Strategy in Naming Parties to a Fair Housing Case

A plaintiff should consider making individual claims for each member of the family who sought residence in the dwelling. Fair housing courts permit damage awards on an individual basis for husband, wife and each individual child who is a member of the family intending to live in the dwelling.8 Individual claims enable plaintiffs to present an itemized verdict form and to seek an individual verdict from the jury for compensatory damages for each one of the plaintiffs.

Another matter of strategy involves the order in which plaintiffs name the defendants to a housing discrimination action. Corporate defendants should be named first and all individual defendants should be named last and separately. The image of an individual plaintiff battling a large corporation has a psychological effect on a jury which is beneficial to the plaintiff. If the plaintiff seeks punitive damages, the attorney must also consider introducing evidence of the net worth of both the corporate defendants and individual defendants. When a substantial net worth is present, the plaintiff can argue for a percentage of the net worth as an award to [*32] deter the defendant and others from committing similar conduct in the future.

III. Plaintiff Should Evaluate a Claim For Intentional Infliction of Emotional Distress

A fair housing plaintiff should also contemplate an additional claim for intentional infliction of emotional distress where the conduct of the defendants is so egregious that it supports such a theory of recovery. Courts have recognized that the Fair Housing Act encompasses an emotional distress component in a racial discrimination context.9

8 See, e.g., Douglas v. Metro Rental Serv., Inc., 827 F.2d 252 (7th Cir. 1987); Phillips v. Hunter Trails Community Ass’n, 685 F.2d 184 (7th Cir. 1982).
9 See Baumgardner v. HUD ex rel. Holley, 960 F.2d 572, 581 (6th Cir. 1992) (quoting Stewart v. Furton, 774 F.2d 706, 710 (6th Cir. 1985)); Phillips v. Hunter Trails Community Ass’n, 685 F.2d
Phillips v. Hunter Trails Community Association, illustrates the effectiveness of making the additional claim of intentional infliction of emotional distress. In that housing discrimination case, the defendant association accepted the Phillips’ offer of $675,000 for a house and the Phillips’ deposit on the house. The defendant then set a closing date for a few weeks later. A few days before that date, the defendant refused to close the sale on the home and forced the Phillips family, who had sold and moved out of their previous home, to assume a nomadic existence for nearly a month. The court found that the defendant’s conduct was motivated by the race of the Phillips family. The court also found defendant’s conduct so egregious that each family member subjected to this racial animus was entitled to recover $10,000 for emotional distress, in addition to $2,675 for actual expenditures and $100,000 for punitive damages. The additional claims for emotional distress bolstered the size of the damage award which more accurately reflected the degree of discrimination experienced.

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IV. Plaintiff Must Exercise Prudence in Selecting a Jury

The importance of jury selection should be underscored. A plaintiff must act prudently and diligently to assemble a jury that will take its responsibility seriously and make fair, reasonable decisions on the factual issues of the case. A plaintiff must choose a jury that will listen to and assess the evidence using its common sense and that will disallow any individual biases to interfere with its informed assessment of the evidence. Attorneys must gear their questions during

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10 685 F.2d 184.
11 Id. at 189 (concluding that Community Association’s veto of black owner of car wash chain could “only be based on race”).
12 Id. at 191 (reducing compensatory damages for humiliation and embarrassment from $25,000 each to Mr. and Mrs. Phillips to $10,000 each and affirming awards of $2,675 for out-of-pocket expenses and $100,000 in punitive damages, reflecting the egregious nature of the Association’s conduct).
13 See also Littlefield, 750 F. Supp. 1395 (N.D. Ill. 1990) (defendants’ conduct so egregious that a separate cause of action for intentional infliction of emotional distress was pled and the jury awarded $50,000 compensatory and $100,000 for punitive damages).

Other victims of discrimination have attempted to include a claim for “loss of civil rights” in addition to a claim for intentional infliction of emotional distress. See, e.g., Baumgardner, 960 F.2d at 588-81. The presumption underlying this type of claim is that damages for deprivation of a civil right, although abstract, unconditionally emerge from the abridgement of that significant civil right. Id. In Baumgardner, the court refused to allow this type of claim, finding a loss of civil rights claim an “unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case. We have presumed some damages for intangible dignitary interests . . . [including emotional distress] . . . in the total amount of $1500.” Id. at 583. The court intimated that even if it were to acknowledge the viability of a “loss of civil rights” claim, that claim had to be independently substantiated, not automatically presumed. Id.
voir dire examination toward uncovering those values which hold significance in the lives of the potential jurors, those prejudices that potential jurors may harbor, and those similarities that jurors may share with the plaintiff. Crucial to the successful litigation of a fair housing case is procuring a jury that will be keenly attuned to the potential for discriminatory practices within the plaintiff’s surroundings.14

V. Plaintiff Must Choose Evidence Which Will Most Firmly Secure the Jury’s Return of an Adequate Damage Award

A fair housing plaintiff’s primary objective is to receive a damage award commensurate with the degree of discrimination experienced. In furtherance of this goal, the plaintiff must determine whether to present out-of-pocket damages.15 Routinely in plaintiffs’ tort cases, where the economic out-of-pocket damages are nominal and the non-economic damages are substantial, parties do not present evidence of the economic loss to the jury. The rationale underlying this tactical move is that a small out-of-pocket request will tend to limit the amount of money awarded by the jury on the non-economic elements of damage. For example, a family seeking housing who suffers emotional stress from racial discrimination resulting [*34] in psychological counseling for a substantial period of time, but who has only a small, $2,000 out-of-pocket loss, would be seeking substantial non-economic damages for the emotional distress experienced. In that situation, the plaintiff would benefit more by dropping the $2,000 out-of-pocket damage claim and arguing instead for a substantial non-economic award itemized separately for each family member. A plaintiff may even want to request punitive damages itemized separately for each family member which would be in addition to the non-economic damage award. Therefore, from a tactical standpoint, a fair housing plaintiff should not request compensation for a small economic loss where the non-economic loss is substantial.

Fair housing plaintiffs must give great consideration to witnesses and sources of proof. While it is imperative that each plaintiff testify concerning the emotional stress suffered as a result of the discrimination,16 the plaintiff should present other witnesses to offer testimony in support of these claims. These other witnesses may include relatives, friends, co-workers, teachers, treating physicians


15 Out-of-pocket damages are actual or compensatory damages. See Steven H. Gifis, Law Dictionary 114 (2d ed. 1984) (defining actual, compensatory, and general damages as monetary compensation awarded to one “who has been injured by the act of another”).

16 Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977) (extent of intangible harms may be established by testimony of the plaintiff).
and counselors who can describe the changes in the plaintiff’s behavior and activities which may be attributable to the discriminatory conduct. 17

Expert testimony should be presented whenever available. A plaintiff should tender psychologists who have examined the plaintiff and who can testify about the plaintiff’s emotional strain, the requirements for treatment, and the treatment’s impact upon the plaintiff’s life. Sociologists also must be presented to render expert testimony on the effects of discrimination in society, its impact upon the plaintiff, and its effect on the plaintiff’s status in society as a member of a particular racial group. Courts have acknowledged that sociologists qualify as expert witnesses and must be permitted to testify. 18 A sociological perspective is crucial to a fair housing case since it explains to the jury how racial discrimination feeds upon itself, how it fosters additional racial discrimination, how it tends to reduce the value of persons discriminated against in the eyes of those who commit the discriminatory acts and how it lowers the self-esteem of those suffering from the discrimination.

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VI. Plaintiff Must Effectively Cross-Examine the Defendant

Effective cross-examination is a powerful facet of litigation which, in a fair housing context, can destroy the defendant’s credibility, expose ingrained racial prejudices, and demonstrate the defendant’s inevitable use of those prejudices in housing practice. 19 The forcefulness of cross-examination hinges on the extent of pretrial preparation. The defendant’s discovery deposition becomes a cornerstone from which to launch an attack on the defendant’s credibility at trial. During the discovery deposition, a plaintiff’s attorney should carefully phrase questions in a simple and concise manner so that an unequivocal conclusion can be drawn from the answers given. Also, a plaintiff should pose questions which not only will allow the plaintiff to prove the elements of the fair housing case, but also, will impeach the credibility of the defendant, if the defendant attempts to offer different testimony at trial.

At the fair housing trial, the same concise questions should be asked and impeachment performed when the witness gives contrary answers to those given at the deposition. Impeachment forcefully undermines the credibility of the defendant’s testimony. As in any tort case, counsel for the fair housing plaintiff must exercise complete control over the defendant during cross-examination.

17 See, e.g., Littlefield, 750 F. Supp. at 1397 (plaintiff called her brother-in-laws, friends, and co-workers as witnesses to illustrate the existence and the extent of defendant’s discrimination).
19 See, e.g., Littlefield, 750 F. Supp. at 1397-401 (stating that to “put it mildly,” the defendant had major credibility problems; plaintiff effectively accentuated that on cross-examination).
requiring the defendant to answer the questions directly and restraining the
defendant from offering additional, self-serving, non-responsive answers. Counsel
should always make objections and motions to strike non-responsive portions of
the answers, as well as requests of the court to instruct the witness to answer the
questions directly.

VII. Plaintiff Must Consider Additional Strategies Which Can Affect
the Size of the Fair Housing Damage Award

Attorneys in fair housing cases should consider additional strategies to
increase the jury award. Plaintiff’s counsel should recognize the familiar tenet that
the lawyer who is best prepared will be most successful at trial. Discovery in the
form of interrogatories, production requests and depositions is one manner to
assure optimal trial preparation. Counsel should conduct these discovery
procedures thoroughly and expeditiously so that all beneficial evidence which
supports the plaintiff’s claim will be discovered rapidly. [*36] Plaintiff and
counsel may then evaluate the case and formulate a useful strategy to enhance and
to expedite trial preparation.

At the trial stage, counsel should always offer jury instructions in a form
which attempts to personalize a plaintiff’s claim. Generic forms of instruction
which use the terms “plaintiffs” and “defendants” should be avoided where
possible and the names of the plaintiffs and defendants inserted. Obviously,
counsel must make appropriate objections to instructions offered by opposing
counsel in order to preserve the record for appeal.20

Finally, the plaintiff’s closing argument can be the most powerful weapon
a fair housing plaintiff possesses. Although, trial lawyers disagree on how the
closing argument affects the jury’s verdict, all trial lawyers will agree that a
complete command of the evidence and the facts in the case has a profound
impact upon the persuasive nature of the closing argument. Counsel should have
elicited testimony from fact witnesses, the plaintiff, and third-party witnesses
concerning the impact of the emotional distress upon the plaintiff’s life. This
testimony will then form the basis for expert opinions rendered by psychologists
and sociologists. Use of all of this testimony enables plaintiff’s counsel to present
a creative, dynamic closing argument which accentuates the extreme degree of the
plaintiff’s distress, the duration of the plaintiff’s distress, and the egregious nature
of the defendant’s conduct which led to that distress. Counsel must argue all of
these factors convincingly so that when the plaintiff requests a substantial award
for the non-economic aspect of the injury, the plaintiff’s credibility will not be
negatively impacted by the amount requested. The plaintiff who requests the jury
to render a substantial award, but who presents a weak evidentiary foundation for

20 “No party may raise on appeal the failure to give an instruction unless
that request, will lose credibility. Without credibility, the plaintiff’s chance of receiving an adequate damage award is significantly reduced.

**Conclusion**

The Federal Fair Housing Act and its progeny unequivocally acknowledge the right of every individual to live wherever that individual can afford to live. Against this backdrop, the countless incidents of housing discrimination which have ensued since the inception of the Act, demonstrate that for many individuals the Act embodies only an empty right. As the drafters of the Act contemplated when establishing the Act’s remedies for private civil suits,\(^\text{21}\) both compensatory and punitive damage awards carry immense potential for seizing the attention of those who practice discrimination and for demonstrating that those discriminatory acts will not go unchecked.

Housing discrimination will be deterred through the use of financial penalties only when damage awards in fair housing litigation are large enough to reflect the harshness of the discrimination committed. Presently, the highly-fluctuating spectrum of damage awards denotes that some fair housing plaintiffs are being adequately redressed for the indignities directed at them, whereas others still suffer from deficient damage awards. The trial tactics discussed in this Article will enable fair housing plaintiffs to enhance these deficient damage awards to an amount that fairly compensates them for the humiliation, emotional trauma, and ill-will that they have endured.

\(^{21}\) See 1988 U.S.C.C.A.N. 2173, 2176 (1988) (amending Fair Housing Act to eliminate $1,000 cap on punitive damages and to provide more effective means of enforcement on grounds that “limited means for enforcing the law” represents “primary weakness” in 1968 Act).
The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination

Larry Heinrich

Abstract

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The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination

By
Larry Heinrich, Ph.D.*

Introduction

[*39] With increasingly large settlements in fair housing suits such as the *Fairfield North* case¹ and the open discussion of feelings concerning sexual harassment following the Clarence Thomas/Anita Hill hearings,² the issues of mental anguish and humiliation take on greater importance in damage consideration in housing discrimination suits.³ Recently, in a legal conference in

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¹ Fiedler v. Dana Properties, No. 89-1396 (E.D. Cal. amended complaint filed May 29, 1990). Better known as the Fairfield North case, Fiedler represents the largest settlement to date in the area of sexual harassment in housing. Candy J. Cooper, *Unprecedented Court Victory For Harassed Women*, S.F. EXAMINER, July 7, 1991, at A1. The 1991 out-of-court settlement yielded thirteen of the women plaintiffs and their children nearly $600,000 plus an additional $200,000 for attorney’s fees. The plaintiffs in *Fiedler* consisted primarily of poor, single mothers and their small children residing in the Fairfield North housing complex. The plaintiffs alleged that the manager of the complex had repeatedly harassed them. The incidents of harassment ranged from tampering with mail and rummaging through the tenants’ personal belongings to hiding in closets, threatening the women and children with guns, and sexually abusing the female tenants. If the tenant protested, she was threatened with eviction, an unbearable alternative to the already poverty-stricken single mother. For more than two years, the plaintiffs’ efforts to find representation for their complaints proved unsuccessful, largely because of the difficulty in establishing damages. The owners of the complex ultimately settled the case out of court, compensating the plaintiffs for mental anguish suffered as a result of the manager’s harassment and awarding plaintiffs’ attorney’s fees. *Id.*


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* Larry Heinrich, Ph.D. a graduate of Loyola University, Chicago, is a licensed clinical psychologist, practicing in Northfield, Illinois. He has testified before the Illinois Human Rights Commission as well as served as consultant and expert witness in criminal and civil matters (the author’s testimony was accepted in appellate review as basis for standard in permitting federal sentencing guideline departure based on diminished mental capacity; U.S. v. Ruklick 919 F.2d 95 (8th Cir. 1990)) In addition to his practice of clinical and forensic psychology, Dr. Heinrich is an instructor with the Loyola Graduate School of Counseling and Educational Psychology.
which the topic was [*40] mental anguish and humiliation in civil rights and harassment suits, a speaker stated that at the time lawyers receive their law degree, they seem to lose both their right and ability to have and be sensitive to feelings. Nevertheless, attorneys experienced in harassment and discrimination suits understand the importance, and yet, the difficulty of addressing the issue of compensatory damages in relation to personal anguish and humiliation of the victims of social injustice. Considering the interrogative and investigative style which attorneys use to establish evidence for the violation itself, it is precisely that emphasis on “objectiveness” which may inhibit the disclosure of a client’s emotional vulnerability and embarrassment. Healthy and psychologically well-defended individuals are not likely to allow themselves to appear “emotionally vulnerable” when narrating events and facts to attorneys. However, it is important to remember that individuals will seek redress not simply because a law has been violated, but because they have been personally offended. There is pain, anger and hurt underlying the client’s move to take legal action against a landlord or seller. Although this pain is not necessarily related to a physical injury, courts do recognize it as a psychic injury for which compensatory damages may be awarded.

It may appear difficult to present convincing evidence of mental anguish and humiliation in court. Occasionally, a client [*41] clearly expresses his or her emotional pain in court. More often than not, however, the client is unable to articulate this pain. If attorneys better understand how anguish and humiliation are expressed not only in words, but also in behavior and symptoms, they will have the opportunity to consider other means to effectively place those facts before the court.

This article briefly discusses four specific areas relating to mental anguish and humiliation suffered by victims of harassment and housing discrimination.

(6th Cir. 1985); Phillips v. Hunter Trails Community Ass’n, 685 F.2d 184, 190 (7th Cir. 1982); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 235 (8th Cir. 1976); Williams v. Matthews Co., 499 F.2d 819, 829 (8th Cir. 1974), cert. denied, 419 U.S. 1021 (1974); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970); KENTUCKY COMMISSION ON HUMAN RIGHTS, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES, at 3 (1980) (stating “[t]he theory of the availability of recovery for damages to “intangible” interests is being increasingly applied in cases of housing discrimination, both by specific statutory authorization, and by analogy of the psychic injury resulting from the act of discrimination to the so-called ‘dignity’ injury, similar to the defamation action”’) [hereinafter KENTUCKY COMMISSION].


5 For further discussion, see KENTUCKY COMMISSION, supra note 3.

6 Courts have noted the inherent difficulties of evaluating emotional injuries resulting from civil rights deprivations and do not demand precise proof to support a reasonable award of damages for such injuries. Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1244 (8th Cir. 1983); see also Phillips, 685 F.2d 184 (7th Cir. 1982) (district court based award for mental and emotional distress on the plaintiff’s testimony and demeanor); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974) (damages for emotional humiliation resulting from violations of §§ 1982 and 3604 inferred from surrounding circumstances).
Part I presents instances in which an attorney may utilize expert witnesses in preparing his client’s case. Part II analyzes how to recognize and identify the feelings, behaviors, symptoms and manifestations of pain and humiliation in a client which may have been caused by an act of discrimination or harassment. Part III details how a forensic evaluation differs from therapy and other clinical evaluations. Finally, Part IV concludes with a brief discussion of specific legal issues and problems that are likely to occur when an individual’s pain, suffering and personal anguish are before the court and become subject to direct and cross examination. The foundation for the assessment and forensic presentation of issues of personal anguish and humiliation in discrimination and harassment cases comes from the evaluation and treatment of individuals who have experienced traumatic stress as well as the evaluation and treatment of individuals who claim psychic injury and disability because of injury or work related stress.

I. The Role of an Expert Witness in Discrimination Suits

There are several very different and distinct ways a mental health specialist or expert witness may prove useful in dealing with the issues of emotional and psychological distress. “Expert witnesses” refers not only to physicians, psychiatrists, psychologists, social workers and therapists, but also, to a broader range of social scientists that includes social researchers, sociologists and cultural anthropologists. An expert in the diagnosis of emotional distress or a treating therapist may assist an attorney in preparing or elaborating on the client’s anguish and humiliation. Conversely, the social scientist can assist the attorney in developing relevant social information and data. Whether or not this latter individual would testify as an expert witness would be optional. A social scientist could prove helpful by identifying how the reality of discrimination is identified in on-going research. An example of this would be defining and describing the social context and framework in which discrimination occurs or is likely to occur in our society.

A recent edition of the American Psychologist, the official journal of the American Psychological Association, discusses expanded roles for social scientists in the courtroom. The edition reviews the Price-Waterhouse v. 

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7 A forensic evaluation is a diagnostic assessment completed by a professional who has had specific training in identifying mental health issues which are, or can be, an issue in litigation. Some of these issues include competency, fitness, sanity, mitigation, exacerbation, dangerousness, custody, psychic trauma and abuse. In addition, the forensic evaluator is familiar with the demands that are placed on a professional who testifies as an expert witness.

8 Herbert Modlin, Civil Law and Psychiatric Testimony, in FORENSIC PSYCHIATRY AND PSYCHOLOGY 469 (William J. Curran et al. eds., 1986).


case in which the court recognized psychological and social research as an evidentiary basis for identifying cognitive approaches to gender and racial stereotyping. The case centered on an accounting firm’s refusal to make Ann Hopkins a partner. The plaintiff’s counsel successfully argued that the company’s refusal was based on gender stereotyping. Ann Hopkins had been described by some of her colleagues as acting in a way which “overcompensated for being a woman.” She had also been described as having interpersonal problems. In the Hopkins case, psychological and social researchers successfully demonstrated that sex stereotyping in relation to employment expectations and evaluations could be clearly identified. Expert witness testimony “drew on both laboratory and field research to describe antecedent conditions that encourage stereotyping, indicators [*43] that reveal stereotyping, consequences of stereotyping for outgroups, and feasible remedies to prevent the intrusion of stereotyping into decision making.” Convinced by the expert testimony, the Hopkins’ court ultimately ruled that an “employer that treats a woman with an assertive personality in a different manner than if she had been a man is guilty of sex discrimination.” As a result, the Hopkins case expanded the role of social scientists as expert witnesses. This was “... extraordinary to have [psychological] research, in an area so well established and thriving, be confronted by some of the most prominent legal minds in the country.”

A more familiar example of using a professional as an expert witness is when the client has sought medical attention or counseling services as a result of stress following the discriminatory incident. It may be advisable, however, to use

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11 Price-Waterhouse v. Hopkins, 618 F. Supp. 1109 (D.D.C. 1985), aff’d in part, rev’d in part, 825 F.2d 458 (D.C. Cir. 1987), rev’d, 490 U.S. 228 (1989). The district court held that even though a plaintiff in a Title VII case proves that her gender has played a part in an employment decision, the defendant may still avoid liability by proving by clear and convincing evidence that it would have made the same decision even without taking the plaintiff’s gender into account. Id. at 1120. The court of appeals affirmed the clear and convincing standard. 825 F.2d at 472. In reversing both the district court and the court of appeals, the Supreme Court held that a defendant employer in a Title VII action may avoid liability by proving by a preponderance of the evidence that the same employment decision would have been reached even if it had not taken the plaintiff’s gender into account. 490 U.S. at 253.

12 Hopkins, 618 F. Supp. at 1111.

13 Id. at 1116-17. At the time the plaintiff was denied partnership, the accounting firm had 662 partners of whom only seven were women. Id. at 1112. Of the 88 candidates for partnership that year, Hopkins was the only female. Id. None of the other candidates had comparable records with respect to securing major contracts for the firm. Id. One partner advised that Hopkins could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Id. at 1117. See also Susan T. Fiske et al., Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1050 (1991).

14 Hopkins, 618 F. Supp. at 1116-17.

15 Id. at 1113-14.

16 Fiske, supra note 13, at 1050.

17 Hopkins, 618 F. Supp. at 1119.

18 Fiske, supra note 13, at 1057.
the therapist as a factual witness. Without qualifying the therapist as an expert in the stress response syndrome, the therapist could explain how the client sought relief from anxiety, depression or other symptoms.

Finally, there are cases in which a specific evaluation might be helpful for the identification and presentation of clinical evidence supporting a claim of psychological and emotional distress as a result of the discrimination. Testimony by a panel of legal experts before the Kentucky Commission on Human Rights in 1980 indicated that there is a legitimate presumption of embarrassment and humiliation in all instances of discrimination. Discrimination itself is described as an assault on personhood. Individuals will handle this stress with a variety of psychological defenses, some more successfully than others. Because of this insult towards the person, the Commission discussed a basic monetary standard for compensation. Such a basic (presumed) standard ranged from $1,500.00 to $15,000.00. In the vast majority of discrimination cases, however, an expert witness is not necessary. Nevertheless, an expert witness may be helpful if there are exacerbating circumstances of the discriminatory act or an increased vulnerability within the client.

While the court may rely heavily on the plaintiff’s testimony and demeanor in assessing damage awards, other determinants may expand the evidentiary foundation for damage awards. In Phillips v. Hunter Trails

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19 The essential feature of this syndrome, a cluster or complex of symptoms, is that it characteristically follows a specific distressing event. Professionals use various labels from the Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised, such as acute reaction to stress, adjustment reaction, anxiety reaction, or post traumatic syndrome response, to describe this. AMERICAN PSYCHIATRIC ASSOCIATION, DSM-III-R, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (1987). The handbook of diagnostic categories and labels is commonly referred to as “DSM III-Revised” and is used by all psychiatrists and psychologists.

20 Both legal and non-legal experts were invited to testify in public hearings before the Commission in the area of compensatory damage in discrimination cases. During the February, 1980 hearings in Covington, Kentucky, the participants were: R.F. Laufman, Laufman, Quinn & Gerhardstein, Cincinnati, Ohio; Dr. J. Titchener, Psychiatrist, Cincinnati General Hospital; K. F. Holbert, Special Advisor, General Counsel’s Office, Dep’t. of Hous. and Urban Dev., Washington, D.C.; O. H. McDonald, Il, Doctoral Candidate, Univ. of Cincinnati; and R.L. Schwemm, Associate Professor of Law, Univ. of Kentucky. In hearings during March, 1980, testimony from experts included F.W. Caruso, General Counsel, Leadership Council for Metropolitan Open Communities, Chicago, Illinois; R.L. Tucker, Tucker & Watson, Chicago, Illinois; A.S. Friedman, Chief Counsel, The Housing Advocates, Inc., Cleveland, Ohio; W.H. Hickman, Polleti, Frieden, Prasker, Feldman & Gartner, New York, New York. KENTUCKY COMMISSION, supra note 3.

21 Dr. Titchener, in his testimony, described a sense of self worth that is needed for human survival. He further described the home as an extension of the self so that discrimination brings “reflexive and automatic feelings of humiliation and shame . . . .” Id. at 45.

22 In identifying this insult to the person, the Commission stated that “feelings of inferiority, personal humiliation and the like are the rule rather than the exception in incidents of discrimination.” Id. at 4.

Community Association, the court reduced the initial compensatory damage amount of $50,000.00. It appears that the court reduced the award because only the testimony and demeanor of the plaintiff were used as the basis for the award. However, in other cases, such as Seaton v. Sky Realty and Phiffer v. Proud Parrot Hotel, Inc., compensatory and damage awards included humiliation.

24 685 F.2d 184 (7th Cir. 1982). In Hunter Trails, a black couple applied to purchase a private home in a subdivision of Oak Brook, Illinois. Id. at 185. The couple were financially successful and qualified for a mortgage. Id. Four days before the closing, the Hunter Trails Community Association, in lieu of exercising their right of first refusal, informed the couple that they had assigned this right to a third party. Id. at 186. The assignment prevented the couple from purchasing the home. The couple then filed suit under Section 1 of the Civil Rights Act of 1866 and the Fair Housing Act, seeking an immediate injunction as well as compensatory and punitive damages. The trial court awarded the couple $52,675 in actual damages and $100,000 in punitive damages. Id. $2,675 out of the $52,675 was not objected to on appeal since it was for out-of-pocket expenses. Id. at 190. However, the Association did object to the court awarding $25,000 to each plaintiff for “humiliation and embarrassment.”

On appeal, the Hunter Trails court reduced the compensatory damages to $10,000 for each plaintiff. The court reasoned that since the testimony and demeanor of the plaintiffs were the only bases for awarding damages for mental and emotional distress, $50,000 was excessive. In reaching this conclusion, the Hunter Trails court compared the lower court’s award with other awards granted in the circuit. Id. The court then concluded that in light of other Fair Housing discrimination suit awards, $10,000 per plaintiff was more appropriate. Id. at 191. The court did, however, indicate that had the lower court taken into account the recent developments and new-found knowledge about the “damaging effects of discrimination in housing,” the large award may have been justified. Id. at 190-191.

25 491 F.2d 634 (7th Cir. 1974). In Sky Realty, a black couple inquired about a home which had been advertised for sale in a predominantly white neighborhood. Id. at 636. The couple contended that due to their race, Sky Realty refused to negotiate on their behalf. At trial, evidence was introduced to show that Sky Realty was racially motivated. Among the evidence presented was the prospect sheet, containing the notation “col” as an abbreviation for colored. Finding that the plaintiff “suffered great embarrassment because of the actions of the defendants during his attempt with his wife to visit the property . . . .” the district court granted the plaintiff $500 in damages for humiliation. Id.

On appeal, the Sky Realty court affirmed the district court’s award. Id. at 637-638. First, the court stated that under 42 U.S.C. § 1982, compensation can be awarded for humiliation of the type involved in this case. Id. at 636. According to the court, the plaintiff suffered humiliation for being subjected to racial indignity. The court characterized this indignity as “one of the relics of slavery which 42 U.S.C. § 1982 was enacted to eradicate.” Id. Second, the Sky Realty court concluded that this form of humiliation can be inferred from the circumstances. Id. at 637. In comparing discrimination under § 1982 to deprivation of the right to vote, the court noted that:

[i]n the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.

Id. at 638 (quoting Wayne v. Venable, 260 F.2d 64,66 (8th Cir. 1919)).

26 648 F.2d 548 (9th Cir. 1980). In Proud Parrot, a black couple attempted to rent office space in a motel. Id. at 550. The motel informed the couple that the advertised space would be reserved for them. When the couple returned the following day with a deposit, however, the motel refused to rent them the space. At this point the wife, suspecting the real motivation behind the refusal to rent was racial, became upset and left the premises crying. Id. In a subsequent action for violation of
inferred from the circumstances; the victims were embarrassed and humiliated in front of others, specifically wives and children. Although the record does not indicate that expert witnesses were utilized in these cases, the possibility remains that a forensic mental health expert’s consultation may have contributed even further to the final damage awards by expanding on the impact of personal versus public humiliation.

II. Identifying Anguish and Humiliation Resulting from Discrimination

How does an attorney recognize in a specific case that the intensity of anguish, humiliation, psychological and emotional distress is a factor which needs to be highlighted and specifically [*46] addressed in the case preparation and settlement considerations? From the first meeting with a client, the attorney needs to be aware of clues which indicate that the client has experienced significant or exceptional personal distress from the discrimination. While a client may verbalize how hurt, upset or angry they were by the discriminatory act, it is important for the attorney to comprehend how the feelings are expressed or played out in symptoms and behavior. It would be useful, for example, for attorneys to be familiar with the checklist of fifty-nine symptoms mentioned in Damages for Embarrassment and Humiliation in Discrimination Cases.27 In particular, red flags go up if the client mentions sleeping or eating problems, nightmares, restlessness, avoidance of or change in social interactions, irritability, fatigue, unusual fears, bouts of tearfulness or anxiety, an experience of increased and generalized distrust, loss of drive and enthusiasm to pursue personal responsibilities and daily activities.28 When asking questions such as “how did that (action or incident) make you feel?” and “how have you been feeling about yourself since then?”, the attorney must be particularly tuned in to the demeanor and responses of the client. A trained professional is not always needed to ascertain that an individual is depressed or defeated since slumped shoulders, slower speech, downcast eyes, and held back tears are all signals which are visible to any individual.29 An attorney must also determine any changes in the client’s adjustment since the discriminatory act. Does the client report on-going feelings

their civil rights, the district court awarded general damages to both plaintiffs for the “considerable emotional distress and humiliation” that they suffered. Id. at 551-52.

On appeal, the court affirmed the damage award. Id. at 553. The court stated that the wife’s testimony as well as her overt reactions when told they could not rent the space were enough for the court to infer her humiliation. Id. at 552-53. Furthermore, the court held that humiliation can be inferred from surrounding circumstances and need not be based solely on the testimony and demeanor of the witness. Id.

27 KENTUCKY COMMISSION, supra note 3.
28 DSM-III-R lists these symptoms as indicators of anxiety, depression or response to stressful situations. American Psychiatric Association, supra note 19, at 250.
29 For a more extended discussion of behavior during interviews see Joseph Matarazzo, The Interview, in HANDBOOK OF CLINICAL PSYCHOLOGY 403, 450 (Benjamin Wolman, ed., 1965).
of depression, anger, or hurt? Were there any changes in interactions with people at home or at work? Did the discriminatory act make the person feel differently about himself or herself or cause some re-evaluation of attitudes, priorities or perceptions of fairness? A specific change in mood of the individual known as “anhedonia” or “hedonic loss” is of particular clinical and forensic importance. Anhedonia is best described as a “loss of pleasure” in one’s everyday activities and it underlies many of the symptoms already mentioned. Certainly the suggestion of loss of interest, enthusiasm or loss of pleasure in everyday activities as well as any combination of the aforementioned symptoms would warrant further clinical evaluation.

III. Forensic Evaluations in Contrast to Other Clinical Examinations and Therapy

The forensic evaluation is a diagnostic interview and procedure which is unique and specialized in several aspects. In the first session, the forensic professional advises the client that the doctor-patient privilege needs to be voluntarily waived because the doctor will share results with counsel. It is also important that the evaluator clearly explains to the client that the diagnostic assessment is only an evaluation and the examiner may not be asked to appear in Court. My own procedure in these cases is to begin with a single clinical interview so that I can obtain a sense of whether or not the issues of personal anguish and humiliation are particularly noteworthy in this individual. In the event that the initial interview suggests intensified personal anguish and humiliation, it is likely that I might recommend additional psychological testing and clinical (forensic) evaluation.

The forensic evaluation is different from an ordinary clinical evaluation at several levels. The forensic evaluator is alert for evidence or signs that the individual may be malingering, faking, or exaggerating symptoms in order to increase a damage award. The forensic evaluation also differs from the ordinary clinical interview because the forensic evaluator is willing to consider outside sources of validation including individuals who come forward to support or refute

31 An expert may not be asked or choose not to testify for a variety of reasons. In the diagnostic process, the client may become more open and in touch with the hurt and humiliation and may be more capable of presenting the best testimony. In addition, the diagnostician may uncover malingering, lying or such serious psychopathology that testimony by the forensic evaluator may not be helpful to the client’s case.
32 Certain tests, such as the MINNEAPOLIS MULTIPHASIC PERSONALITY INVENTORY II, are designed and scored with specific indicators to assist the examiner in determining the probability or likelihood of malingering (faking or exaggerating symptoms and complaints) as well as excessive use of denial or inability to acknowledge problems. Minneapolis Multiphasic Personality Inventory II (Univ. of Minn. Press) (distributed by National Computer Systems, Minn. MN).
the plaintiff. The forensic evaluator attempts to objectively determine differences in the plaintiff’s functioning prior to and following the discrimination incident.

In general, the forensic evaluator looks for a syndrome; a group or complex of specific behaviors and complaints which are associated with reactive depression and increased anxiety. The syndrome is similar to those symptoms that are associated with the Post Traumatic Stress Syndrome. In discrimination cases, however, a “traumatic” precipitating incident generally has not occurred. The discrimination or harassment certainly is subjectively traumatic to the individual, but it would generally not be classified as the result of an objective “trauma”. In order for the forensic evaluator to assist the client as well as the attorney, it is critical for the evaluator to identify the manifestations of anguish and humiliation which result from the discriminatory act. As Dr. Titchener pointed out in his testimony before the Kentucky Commission on Human Rights, denial plays a significant role in masking some of the symptoms and changes which have resulted from the embarrassment and humiliation. On occasion, it is this writer’s experience that following referral of clients for a forensic evaluation, attorneys have reported that depressed clients find it easier to talk more openly about the embarrassment and humiliation connected with the discrimination or harassment. In other instances, it may be appropriate for the evaluator to recommend to the client and attorney that no further evaluation be undertaken. An evaluator may recommend this for a variety of reasons, including the fact that opening up the client’s mental and emotional state to direct and cross examination would be unwise. On other occasions, it may be appropriate to recommend further counseling or therapy for the individual. The evaluator needs to make it clear to the client and attorney that he cannot provide additional therapy since it would present a potential (financial) conflict of interest if the evaluator is called upon to testify in court. In instances where this writer recommends therapy, the client is given an article which explains how to select a suitable therapist.

IV. Special Problems and Issues

If the client has already contacted a therapist or counselor, the client and the attorney need to discuss with the therapist the advisability and feasibility of having the therapist testify at trial. A large number of professionals, especially those engaged in psychotherapy, shun court appearances and avoid court

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33 DSM-III-R describes the essential feature of post traumatic stress disorder as development of symptoms following “a psychologically distressing event that is outside the range of usual human experience [i.e. outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marital conflict].” American Psychiatric Association, supra note 19, at 247.
34 KENTUCKY COMMISSION, supra note 3, at 32.
35 Steven J. Gross, CHOOSING A THERAPIST (1983) (copies can be obtained by writing Dr. Steven Gross, 540 Frontage Road, Suite 3215, Northfield, Illinois 60093).
testimony whenever possible. It is also advisable to interview the therapist prior to having him or her testify. In a recent civil case in which I was asked to be a consultant for the defense, the plaintiff’s counsel offered a therapist as an expert witness in relation to psychic injury. The therapist’s notes contained a major misdiagnosis and the therapist could not effectively identify the therapeutic intervention geared to target symptoms. Furthermore, the therapist had taken a simplistic approach to support the client who tended to dramatize hysterical complaints. The therapist did not explore the history of the plaintiff which was replete with other psychological dynamics and stressors which accounted for numerous neurotic complaints. Following the depositions of the “experts” on both sides, it was apparent the plaintiff’s case lacked adequate foundation and the matter was successfully arbitrated.

One of the problem issues or questions that I foresee in maximizing damages as a result of personal anguish and humiliation will be when the defense asks the “but for” question. Let me make an analogy from another legal area, criminal proceedings. In order to establish lack of culpability in an insanity defense, the “but for” question must be answered firmly and without clinical doubt that mental disease, illness or defect substantially impaired the defendant’s understanding at the time of the offense or prevented him from conforming his behavior to the requirements of the law. In other words, there must be a direct causal link between action and the emotional or psychological issues.

36 Professionals are generally untrained and very uncomfortable with the process of cross examination. Most professionals do not expect that their statements, conclusions or the approach to the specific treatment may be called into question.

37 ILL. REV. STAT. ch. 38, para. 6-2 (1991); State v. Pike, 49 N.H. 399 (1870). The “but for” test is part of what is commonly known as the “product test.” See, e.g., Campbell v. United States, 307 F.2d 597 (D.C. Cir. 1962); Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957). For a defendant to escape culpability under the product test, the defendant must show that the act complained of was the product of a mental disease or mental defect. State v. White, 374 P.2d 942 (Wash. 1962). In defining the term “product,” the court explained that a “defendant was entitled to a judgment of not guilty by reason of insanity if he would not have committed the offense ‘but for’ or ‘except for’ the mental disorder.” Carter, 252 F.2d at 617.

The product test received widespread notoriety after being accepted by the District of Columbia in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). However, almost two decades later this circuit overruled the Durham rule in favor of the now common “substantial capacity” test. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The “substantial capacity” test, promulgated by the American Law Institute, is currently being used in most state courts and all federal circuits. See, e.g., United States v. Holt, 450 F.2d 868 (5th Cir. 1971); People v. Drew, 583 P.2d 1318 (Cal. 1978). Under the Model Penal Code, “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” MODEL PENAL CODE § 4.01(1) (1962).

One of the earliest cases recognizing a “defense on the grounds of insanity” was the M’Naghten case. 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843). In M’Naghten, Daniel M’Naghten mistook Edward Drummond for Sir Robert Peel and killed him. M’Naghten subsequently was found “not guilty by reason of insanity.” After the case was decided, the House of Lords put certain questions to the judges to determine the parameters of the insanity defense. Id. at 721. The answers given
The strict “but for” standard will generally not apply in assessing damages within employment, fair housing or civil rights actions. Opposing counsel may suggest that the personal anguish and humiliation is caused not by the discrimination, but by the client’s vulnerability. This claim, however, does not vitiate the claim for damages. Certainly individuals are more “vulnerable” to stress at a given moment in time, but that vulnerability does not diminish the wrongfulness of the discrimination or necessarily negate the client’s emotional response.

It is anticipated that the defense counsel could suggest to the judge or jury that a client was referred by the plaintiff’s counsel for therapy to enhance damage awards. The plaintiff’s attorney may actually be safeguarded by referring the client for forensic evaluation. The issue of significant personal anguish, humiliation, emotional or psychological distress then rests, to a large degree, on the credibility of the plaintiff and the expert witness. Whether or not the plaintiff

became known as the M’Naghten rule. See generally PERKINS & BOYCE, CRIMINAL LAW & PROCEDURE 597 (6th ed. 1985). Simply stated, the M’Naghten rule is a right/wrong test. PERKINS & BOYCE, supra at 597. If at the time of committing an offense the defendant was “laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what was wrong,” he is entitled to the insanity defense. Id. The M’Naghten test replaced the prior good/evil test where an accused could escape punishment if he did “not know what he is doing, no more than . . . a wild beast.” Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724).

In the early nineteenth century the M’Naghten rule came under attack for its inadequacy and inability to take into account psychic realities and scientific knowledge. Durham, 214 F.2d at 874. Specifically, the test does not recognize that insanity not only affects a person’s cognitive and/or intellectual faculties, but also, a person’s emotions. People v. Drew, 583 P.2d 1318 (Cal. 1978). Therefore, an insane person may know and recognize the nature of his act, namely that it is wrong and unlawful, and yet be unable to control himself due to his mental illness. Id. But see State v. White, 374 P.2d 942, 965 (Wash. 1962) (the M’Naghten rule is preferable because there is no more psychiatric certainty today than there was years ago). See also Sol Rubin, A New Approach to M’Naghten v. Durham, 45 J. AM. JUD. SOC’Y 133, 136 (1961). Furthermore, the M’Naghten rule was only based upon one symptom, namely defect of reason, and could not be properly and adequately applied in all circumstances. Id.

Consequently, some courts adopted the “irresistible impulse” test. See, e.g., Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929). However, this test also came under attack for not taking into account mental illnesses caused by “brooding and reflection.” Durham, 214 F.2d at 874; accord, People v. Gorshen, 336 P.2d 492 (Cal. 1959) (irresistible impulse test not recognized). Due to the inherent problems in both the M’Naghten and irresistible impulse tests, the product test and the substantial impairment tests were adopted to keep up with current legal and psychological thought. Id.


See generally Nathan T. Sidley, Proximate Cause and Traumatic Neurosis, 11 BULL. AM. ACAD. PSYCHIATRY 197 (1983). Cf. Baumgardner v. United States Dep’t. of Hous. and Urban Dev., 960 F.2d 572 (6th Cir. 1992). Although the court in Baumgardner gave the injured party the “benefit of the doubt” in affirming the emotional distress award, the court noted that the party did not seem to be “a man of vulnerable constitution easily driven to distress.” Id. at 581.

In other words, the symptoms and manifestations of anguish and humiliation are identified and verified by a source not vested in final damage settlement.
has sought therapy or counseling may or may not become an issue. Individuals who are depressed, anxious and display a number of symptoms may not go to a therapist for a variety of reasons, the most common reasons being financial concerns or general distrust of therapy.

The defense may question whether the emotional distress was attributable not to the discrimination, but to the actions of the complaining party. If this situation is anticipated, again it is helpful if the plaintiff has been evaluated by a forensic professional. Let me give you an example. In one case, I was asked to evaluate a potential plaintiff who alleged discriminatory racial incidents at work. In the clinical interview, it became apparent that her allegations of discrimination extended beyond the immediate work environment and related to her “special” relationship with religious and political leaders as well as her special religious powers and mission from God. It would have been unwise to bring this client’s mental status into question in open court.

Finally, be wary of “experts” who are willing to testify dogmatically that significant emotional and mental distress are the result of a single stressor. If an expert does not give realistic consideration to other possible conditions for the client’s intense responses of anguish, then defense counsel can readily introduce other clinical experts who will bring these multiple compounding stressors to the attention of the court. As you are aware, there are psychiatrists and psychologists who are self proclaimed experts and like “fools, rush in where wise men dare to tread.” The courts are not impressed with such superficial dogmatism in an area which is not a strict and definitive science, but an art as well. It is my experience that the court will be more open to the expert witness who draws clear boundaries about what is known and what is not known and what can be stated with clinical certainty as opposed to mere hypothesis. An attorney needs to discuss the risk factor of exposing the client to brutal cross examination about past history. In addition, an attorney needs to discuss the client’s general mental and emotional functioning with the expert witness prior to placing the client on the witness stand.

**Conclusion**

In summary, it is important to consider that discrimination suits are filed not solely on the basis of principles of justice or violations of written law, but more likely because there is the personal experience of pain, hurt, humiliation and insult. These feelings are not only capable of being verbalized by the client, but oftentimes, manifest themselves in symptoms and behaviors that even the client does not understand. A forensic mental health specialist may be very helpful in

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41 A stressor is defined as any event, condition, conflict or occurrence that produces stress. In psychodiagnostics, however, it is important for the evaluator to determine all concurrent stressors at the time of psychological distress, including possible stressors associated with interpersonal problems, occupational conditions, living circumstances, financial and legal problems, developmental difficulties as well as physical illness or injury.
the identification and explanation of reactive anxiety and reactive depression. While a forensic evaluation or expert witness may not be appropriate or useful in the majority of legal actions, certainly there are cases in which such consultation or assistance may significantly affect settlement considerations as well as final damage awards.
Counseling a Victim of Racial Discrimination in a Fair Housing Case

Michael P. Seng
Jay Einhorn
Merilyn D. Brown

Abstract

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Counseling a Victim of Racial Discrimination in a Fair Housing Case

By

Michael P. Seng
Jay Einhorn
Merilyn D. Brown

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, with the Department of Housing and Urban Development (HUD), or with state or local human rights agencies. In appropriate cases, victims will seek relief in the form of a temporary restraining order or a preliminary injunction. If a settlement is not reached, the matter will proceed and a successful complainant can be awarded damages and the right to live in the housing unit.

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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.

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 telephon ed 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 women 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 office and the delay in getting an apartment. 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, but unless we discover additional evidence of wrongdoing, we probably cannot

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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.


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. Du Bois, 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 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

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 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, familialy, 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

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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. 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 said\(^\text{19}\) 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.\(^\text{20}\) 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.\(^\text{21}\) 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

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

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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.