WINTER 2021

NYSBA

Perspective

A publication of the Young Lawyers Section of the New York State Bar Association

Who Gets the Pet in a Divorce? From Chattel to Childlike Custody
Ryan J. McCall

'Take It or Leave It' Approach Benefits Under Section 2610
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Laura Cohen, Christopher Haughey, and Matthew Zapata

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Perspective

This newsletter is published for members of the Young Lawyers Section of the New York State Bar Association. The views expressed in articles in this newsletter represent only the viewpoint of the authors and not necessarily the view of the Section's editors, officers, or Executive Committee.

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Young Lawyers Section

Section Officers

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Message from the Chair

This year we are excited about changes taking place to the Section's publications as part of our ongoing efforts to examine and update everything we do to bring the New York State Bar Association Young Lawyers Section into the new era. The legal profession has been undergoing significant change over the past few decades. Increasingly, young lawyers are faced with new challenges including the ever- increasing burden of student debt mixed with a tough job market and a decrease in the willingness of many employers to support young lawyers in our bar association activities. The result has been that those valuable contributions of each and every member of the Section often come at a greater financial cost, and often the contributions you make have to be accomplished on your own time.

With that in mind, many of the changes we are making are targeted at providing for the precise needs of today's young lawyers. We have reorganized the way we conduct meetings by having shorter, more frequent meetings online to save valuable time and increase the number of members who can attend. These changes have proved successful.

As part of our evolution we have now dramatically overhauled our publications to reflect the modern era and the challenges faced by our members. We have decided to discontinue the millennial era blog, *Electronically in Touch*, redirecting our energy to *Perspective*, our formal journal. We have created an editorial board to assist our Editor-in-Chief in concentrating efforts on the journal. We expect that these changes will assist the editors of *Perspective* in continuing to produce high quality publications without overburdening those members participating in the process.

Anne LaBarbera

By doing this we have freed up time and energy that we are using to modernize the publication with an eye on the future and to achieving our ambitious diversity goals. We have made the decision to publish one printed (with a digital version available online) and one online-only issue of the journal each year. We are also excited to announce that we are moving forward with a pilot program by which we hope to regularly bring our members articles that are not in the English language. We hope to leverage technology by including our first article not in the English language in our next online issue, which will offer the possibility for our English-speaking members to click a link to read the same article in English.

Please join us on this exciting journey of modernization and forward progress.

Anne LaBarbera

Message from the Editor

Dear Members:

Karen Eng

By way of introduction, I am the incoming Editor-in-Chief for *Perspective*. I would also like to introduce our new associate editors: Kristen Hazlet, Stephanie McDermott, and Daniel Speranza.

As you may know, *Perspective* is a newsletter that is circulated to members of the Section free of charge. Topics for these articles can be diverse and can range from current events, legal practice tips, general knowledge about certain areas of law, helpful tips for being an attorney, etc. We are proud to be an integral part of this Section to help fellow lawyers. Thank you to those who have contributed to this issue. We hope you enjoy reading this issue and that you learn something new.

Special thank you to Kristen, Stephanie, and Daniel for their dedications and assistances so that this issue can be published in a timely manner. Also, a special thank you to Julie Houth, former Editor-in-Chief for *Perspective*, for her guidance as I take on this new role.

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Request for Articles

If you have written an article and would like to have it considered for publication in *Perspective*, please e-mail it to:

Karen Eng, karenengesq@gmail.com

Guidelines

Articles can range from op-eds, current events pieces, short-form law reviews, and articles that highlight certain aspects of law or policy. Articles should be submitted in electronic document format (pdfs are NOT acceptable), and include a brief bio.

NYSBA.ORG/YOUNG-LAWYERS-SECTION

Now or Too Late: The Growing Impact of Globalization and U.S. Legal Practice

By Gizem Halis Kasap

Introduction

"Why would economic globalization be important to a lawyer or law firm practicing real estate, trusts and estates and personal injury litigation in Upstate New York?"

This was one of the eight questions posed in the introduction of the globalization program at the 2008 New York State Bar Association Presidential Summit, and one that we often overlook to ask, even today.[1] While lawyers in the large global law firms usually are aware of why globalization is pertinent to them, lawyers who are practicing law in a small or medium-sized law firm all over the United States might view their practice as being purely domestic and easily think that the globalization phenomenon does not affect them. Yet, in an increasingly interdependent world, the implications of globalization have been felt no less in law than in other fields.

Yuval Harari notes that since the 2008 global financial crisis, people all over the world have become increasingly disillusioned with the ideas of liberalism and globalization, and this disillusionment has reached its peak with Brexit and the rise of resistance to immigration and to trade agreements.[2] He nonetheless adds that humans, as they currently stand, do not have any other ideologies offered to choose from, unlike in the 20th century, which saw great ideological battles between fascism, communism, and liberalism.[3] Thus, liberalization and globalization are still defining concepts of our time. As the law and the legal profession are constantly evolving in the United States due to globalization, it poses continuous challenges and opportunities for U.S. lawyers, who must assess this evolving legal and economic context for their clients.

Situating American Law Students and Lawyers in a Global Context

Gizem Halis Kasap

Prompted by the globalization of the world economy, globalization of law is a term that has been used to describe a harmonization and unification of domestic legal principles, resulting in the increasing importance of non-state actors and the deterioration of the Westphalian state system.[4] In this sense, the legal exchange between domestic law and global law is thought to be a two-way

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street. In truth, despite proliferation of international legal issues in U.S. practice, the legal exchange has mainly been a one-way street, from the United States to the rest of the world.[5]

Globalization of the U.S. law school curriculum is one of the prongs that needs consideration in this regard. At first glance, it appears that globalization has significantly affected U.S. law schools' curricula and the degree programs offered by the schools. Many U.S. law schools, for example, have created elective courses and co-curricular activities, such as journals and moot court competitions on topics that deal with foreign or international laws. An increasing number of schools are also offering study abroad programs located in popular tourist locations for their students.[6]

Against this backdrop, the lack of meaningful globalization of U.S. legal education may lead to shortcomings in preparing graduating law students to practice effectively in cross-border contexts or serve domestic clients whose legal problems are gaining an increasingly global character. For example, taking a closer look at the awareness of the United Nations Convention on Contracts for the International Sale of Goods (CISG) among American lawyers reveals how such shortcomings operate in practice. Empirical evidence and research suggest that U.S. lawyers routinely exclude the CISG's operation under Art. 6, or advise U.S. parties not to select the CISG as the law to govern their contracts.[10] Moreover, U.S. lawyers are frequently unaware that choosing the law of a specific U.S. domestic regime can result in the application of the CISG.[11]

"The lack of meaningful globalization of U.S. legal education may lead to shortcomings in preparing graduating law students to practice effectively in cross-border contexts or serve domestic clients whose legal problems are gaining an increasingly global character."

Although it is undeniable that these efforts help raise awareness of legal distinctions between jurisdictions, they nonetheless fall short of providing meaningful integration of globalization into legal education.[7] This is because these offerings remain largely additive rather than being integrative. Take the study abroad programs as an example; these programs cannot reach a large portion of the student body because of cost concerns, much less for other reasons. Similarly, courses or co-curricular activities with foreign or international components reach only those who choose to study them, as they are largely elective.

Vast numbers of U.S. law schools are offering LL.M. degree programs and admitting non-U.S. law graduates, who later serve as agents of a process of global dissemination of the U.S. culture and approach to law. Yet, required courses for first-year J.D. students are tied to give students the foundations for bar passage, instead of embedding and validating the cultures and approaches to law in other parts of the world. Professor Silver makes a succinct analogy that all these additions, in an attempt to globalize U.S. legal education, are like reading about the internet rather than using it.[8] Overall, when, elsewhere—particularly in Europe and Asia—globalization of legal education is of great importance, globalization of U.S. legal education creates an appearance of globalization, rather than a reality. [9]

Ratified by 84 states, the CISG has been a tremendous international success in the globalization of contract and trade law, and it could substantially eliminate the need for a choice-of-law analysis by American courts in cases involving international sales.[12] Although the United States was among the earliest jurisdictions to ratify the Convention, the CISG has yet to achieve widespread acceptance in the U.S. legal profession. This is even though UCC Article 2 has dramatically influenced the CISG, and it is as much a part of U.S. domestic law as the UCC, under the Supremacy Clause.

All in all, globalization of law is increasingly becoming a part of U.S. lawyers' practice, whether they know it or not. A recent example is the enactment of the General Data Protection Regulation (GDPR), which forces U.S. lawyers to be familiar with GDPR requirements because of its extremely broad application. Thus, for example, a lawyer from Upstate New York who provides consultation to a U.S.-based real estate company that currently has, or plans to collect, the personal data of EU residents may have to deal with GDPR compliance. Similarly, the process of U.S. discovery that involves the processing and cross-border transfer of personal data may require the transfer of potential evidence originating or stored in the EU to the U.S., which will often trigger obligations under the GDPR. Therefore, it has become important that U.S.

attorneys be familiar with the GDPR to represent their clients properly.

Conclusion

Turning back to the question of whether a U.S. lawyer who does not practice in a global law firm should care about globalization, the answer is yes. Given the trend toward increased interdependence due to globalization, U.S. lawyers should have at least a fundamental approach to correlate different legal systems so that they may meet the challenges of modern legal practice.[13] This is especially true for young lawyers, who owe it to themselves to become better lawyers and constantly improve their skills, address their weaknesses, and build on their strengths.

Legal futurist Richard Susskind predicts that "advanced systems, or less costly workers supported by technology or standard processes, or lay people armed with online self-help tools" will displace traditional lawyers in many ways.[14] Yet, jobs that require high-level interaction with other people, superior communication abilities, empathy, or passion will be predicted to survive in the future.[15] With this idea in mind, young lawyers should not only minimize the globalization of law to learn technical details and applicable law but also aim to work successfully with people from different countries and cultures, which requires a range of skills that are more people-oriented than substantive.

Endnotes

1. Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. Int'l L. & Bus. 527, 528 (2007-2008)
2. Yuval Noah Harari, 21 Lessons for the 21st Century 3-6 (2018).
3. *Id*. at 5-6.
4. Pierrick Le Golf, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 Ind. J. Global Legal Stud. 119, 126-27 (2007); Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 Penn St. Int'l L. Rev. 493, 498 (2000).
5. *See, e.g.*, Rosa Kim, *Globalizing the Law Curriculum for Twenty-First-Century Lawyering*, 67 J. Legal Educ. 905, 914 (2018).
6. Summer Study Abroad Law School Programs, Amerıcan Bar Associatıon, https://abaforlawstudents.com/stay-informed/summer-study-abroad-law-school-programs/ (last visited Aug. 23, 2021).
7. James Maxeiner, *Learning From Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums*, 32 Fordham Int'l L.J. 32, 37-42 (2008).
8. Carole Silver, *The Future of the Legal Profession: Article: Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 Stan. L. & Pol'y Rev 457, 458-59 (2013).
9. Kim, *supra* note 5, at 912.
10 *E.g.*, John F. Coyle, *The Role of the CISG in U.S. Contract Practice: An Empirical Study*, 38 U. Pa. J. Int' L. 195 (2016); Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems*, 20 Pace Int'l L. Rev. 45, 46-48 (2008) (discussing the survey results conducted with U.S. lawyers in 2004-2005 which found that 55.6% of the participants "mostly explicitly excluded" the CISG from their contracts); George V. Philippopoulos, *Awareness of the CISG Among American Attorneys*, 40 UCC L.J. 357, 361, 363 (2008).
11 M.W. Gordon, *Some Thoughts on the Receptiveness of Contracts Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 Am. J. Comp. L. 361 (1998).
12 Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & Com. 155, 155 (2001).
13 *See* Alan Watson, Legal Transplants: An Approach to Comparative Law 7 (2d ed. 1993).
14 Richard Susskind, The End of Lawyers 2 (2008).
15 Megan Beck & Barry Libert, *The Rise of AI Makes Emotional Intelligence More Important*, Harvard Bus. Rev. (Feb. 15, 2017), https://hbr.org/2017/02/the-rise-of-ai-makes-emotional-intelligence-more-important.

Who Gets the Pet in a Divorce? From Chattel to Childlike Custody

By Ryan J. McCall

Child custody cases can be some of the most emotionally charged battles a person can experience in the course of his or her life. But these days the fight for custody has been extending beyond children— what about precious household pets? Recently, the New York State Senate passed S.4248. This bill, if signed by the governor, will change how the courts interpret animal custody for parties in divorce proceedings. What are your rights when the battle shifts to custody of Kitty and Fido?

Previously, the courts have not had much discretion in addressing animal custody rights. Judges and officers of the court, some of whom may never have owned an animal or pet in their lives, were forced to deal with an issue that to many may seem trivial but to true pet lovers, it is one of, if not the most important, thing in their lives. In the past, courts chose to adopt the property law approach of "whoever purchased the animal owned the animal." In other words, animals were "chattel" or mere property where title to ownership would control and only the fair value of the animal, as property, could be divided—which in many cases was neither fair nor equitable.

This growing issue was first addressed at length in the 2013 New York State Supreme Court decision *Travis v. Murray*. The court stated that "there has been a slow but steady move in New York case law away from looking at dogs and other household pets in what may be seen as an overly reductionist and utilitarian manner."[1]

This logic followed the precedent in *Corso v. Crawford* (1979), which was one of original New York State cases to address an animal having more value than "market value," which, as many pet owners know, is a far cry from the real value one gives their pets. In *Corso*,

> a veterinarian who wrongfully disposed of the remains of the plaintiff's poodle and then attempted to conceal the fact by putting the body of a dead cat in the dog's casket. Finding that the distressed and anguished plaintiff was entitled to recover damages beyond the market value of the dog, the court held that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property.[2]

New York, although not archaic in its views on animal custody rights, has been far from the forefront when addressing this very real and growing area of judicial intervention. Alaska and Illinois, states which have some of the most well-defined statutes, have effectively begun taking a "best interests" approach toward deciding custody of a pet. In Alaska, dogs and other animals can be named victims of orders of protection in domestic violence cases and convicted offenders can be mandated to pay costs associated with animals who are named victims of domestic violence.

Ryan J. McCall

Currently, New York State Bill S.4248 passed through the Senate and awaits approval on the governor's desk. This bill effectively would give pet owners and individuals who have cared for and nurtured pets legal protections under the law during divorce proceedings.

This begs the next question of where will the law take this difficult-to-address subject? In New York State, children who are the subject of bitter custody disputes are appointed an attorney, commonly known as an Attorney for the Child. These individuals are tasked with representing the child to advocate what they believe to be in their best interests. Will the court begin using a modified approach to appoint lawyers to represent animals that are at the subject of bitter ownership disputes during a divorce? States such as Alaska have often employed the services of the Animal Legal Defense Fund which, during bitter disputes regarding animal custody, will prepare an amicus brief to send to the presiding judge in order to assist in representing what are the "best interests" of the animal.[3]

With these new sweeping changes, courts will now have to consider myriad factors before deciding an award of custody. These potential, but yet to be developed, fac-

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tors will likely include: (1) who purchased the animal; (2) who has been shown to be the primary caregiver for the animal; (3) who pays for the expenses of the animal; (4) who takes the animal to necessary appointments, and (5) who has the established emotional connection with the subject animal.

This analysis could potentially mirror the case law set forth in the Vermont State Supreme Court, where in *Harment v. Baker* the Court elaborated further on the subject by stating:

> In the case of pets, we hold that the family division may consider other factors not set out in the statute: the welfare of the animal and the emotional connection between the animal and each spouse. These factors underlie our animal welfare laws and our case law, which recognizes the value of the bond between the animal and its owner. See Morgan, 167 Vt. at 103, 702 A.2d at 633 ("Like most pets, [a dog's] worth is not primarily financial, but emotional; its value derives from the animal's relationship with its human companions."). Evidence concerning welfare of the animal includes evidence about its daily routine, comfort, and care. Evidence concerning the emotional connection may include testimony about the role of the animal in the lives of the spouses.[4]

Under this lens, were New York to adopt this similar line of reasoning, spouses going through a divorce who did not actually purchase the subject animal would have an opportunity to show why they should be awarded custody of that same animal. This type of balancing test would be very beneficial to those spouses who may not have purchased the subject animal but have been the ones to take the animal to all appointments, cared for the animal as well as the ones who developed a deep emotional connection with the animal. All of these aforementioned factors could be considered in determining an award of animal custody during divorce proceedings.

Additionally, this could also provide a layer of protection against those who are the victims of domestic abuse by a more monied spouse who may be using the subject animal as a means of control.

Notably, the courts are still reluctant to consider awarding these same types of protections to non-married individuals. The current Senate bill protections only extend to those who are the subject of the divorce proceedings.

Endnotes

1. *Travis v. Murray*, 42 Misc. 3d 447.
2. *Corso v. Crawford*, 97 Misc. 2d 530, 415 N.Y.S.2d (1979).
3. Nicole Pallota, *Alaska Legislature Becomes First To Require Consideration of Animals' Interests in Custody Cases* (2017). https://aldf.org/article/alaska-legislature-becomes-first-torequire-consideration-of-animals-interests-in-custody-cases/.
4. *Hament v. Baker*, 2014 VT 39.

'Take It or Leave It' Approach Benefits Insurers Under Section 2610

By William Murphy

I. Introduction

On paper, New York State has historically supported automobile insureds and their right to freely select auto body shops for accident repairs without interference from insurers. New York Insurance Law § 2610(a) states that "[w]henever a motor vehicle collision or comprehensive loss shall have been suffered by an insured, no insurer providing collision or comprehensive coverage therefore shall require that repairs be made to such vehicle in a particular place or shop or by a particular concern." The statute was enacted to protect the public, which includes independent auto body and repair shops, from the "steering" tactics practiced by some automobile insurers.[1] Steering, when applied to car insurance, is when an insurance provider directs policyholders or third party claimants to get their vehicles repaired at a specific body shop through coercion or enticement.[2] Insurance companies have also been known to steer policyholders away from specific collision providers and instead toward repair shops selected by the insurers.[3]

In furtherance of this legislative intent, N.Y. Ins. Law § 2610(b) additionally provides that "the insurer shall not, unless expressly requested by the insured, recommend or suggest repairs be made to such vehicle in a particular place or shop." Corresponding regulations outline other obligations of both the insurer and insured for negotiating collision claims "in good faith" to reach a "prompt, fair and equitable settlement."[4] However, this does not mean that an insured is automatically entitled to reimbursement for the full amount charged by his or her preferred repair shop. Where the parties cannot reach an agreed price, the insured bears the burden of establishing the reasonable cost of the repairs necessary to bring the vehicle to its condition prior to the loss.[5]

What appears, on its surface at least, as a clear and comprehensive legislative scheme aimed at safeguarding the motorist public as well as small businesses and their labor force has instead functioned as a subversive tool utilized by the major insurance providers to bully consumers into cheaper, inferior auto repair work and local body shops into economic submission or extinction. In response to N.Y. Ins. Law § 2610 and N. Y. Comp. Codes R. & Regs. tit. 11 § 216.7 (N.Y.C.R.R.), large insurers have adopted a "take it or leave it" approach with repair estimates. This leaves insureds with the choice of either suing for the difference between their preferred shop's estimate and the insurer's, or accepting repairs from an unfamiliar shop that honors the insurer's estimate, generally because of the large volume of referral work they receive from the insurer. Similarly, body shops are forced to choose between potential payment battles with insurers over each claim or receiving work from insurers at hourly labor rates far lower than necessary to provide quality while also profiting in the hope that volume will be enough to compensate.

William Murphy

In litigation, insurers have raised arguments ranging in scope from the unreasonableness of a specific body shop's labor rates to First Amendment violations in order to avoid paying claims in full. Troubling however, is that few published opinions considering this issue exist. As typical damages in these cases, rarely more than a few thousand dollars, dictate proceedings in local small claims courts where arbitrators, referees, and judges often just split the difference between the estimates, leaving insureds at a loss. More troubling still is that few insureds initiate lawsuits at all given the investment of time and money required and the tediousness of proving the cost "reasonable" and the repairs "necessary" through expert witnesses when compared to the judgment they stand to receive, *if* they receive one at all. Conversely, large insurance companies equipped with resources and armed with in-house adjusters, frequently employ experienced local law firms to litigate these cases in bulk, leaving insureds and body shops alike at an even greater disadvantage.

William Murphy is an assistant professor of the Division of Criminal Justice, Legal Studies, and Homeland Security in the College of Professional Studies at St. John's University, where he teaches advanced civil litigation and legal research and writing courses. Prior to joining the St. John's University faculty full-time, Professor Murphy represented auto body repair shops and insurance claimants in underpayment suits against insurers under N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7.

II. Labor Rate Disputes

The most common strategy used by large insurers to frustrate the application of N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7 is to simply allege that the cost of an insured's auto repairs were unreasonable. Specifically, insurers focus these arguments on attacking a body shop's hourly labor rate. During 2001, *Rizzo v. Merchants and Businessmen's Mutual Insurance Company* presented the court with this exact scenario.[6] In *Rizzo*, the plaintiff-insured claimed $2,857.29 in damages from the defendant-insurer resulting from a disagreement over reasonable hourly labor rates for necessary automobile repairs.[7] On appeal, the court found the $50 hourly labor rate charged by the plaintiff-insured's preferred body shop reasonable when juxtaposed with the defendant-insurer's contention that an hourly labor rate of only $28 was appropriate.[8]

Two years later, in *Mass v. Melymont*, a court similarly held hourly rates of $50 for body and paint labor and $55 for mechanical and frame labor reasonable.[9] Notably, the court in *Mass* premised its findings on a survey of average hourly labor rates published by the Long Island Auto Body Repairmen's Association in April 2003.[10] Per the 2003 survey, which included 130 repair shops, the average body labor rate was $57.50 per hour, the average paint labor rate was $57.38 per hour, the average mechanical labor rate was $64.10 per hour, and the average frame labor rate was $62.61 per hour.[11] In its opinion, the court observed that even the lowest labor rates reported within the survey were blatantly higher than prevailing labor rates claimed by insurers ranging from $38-$42 per hour and reprimanded the industry for "notoriously and significantly undercut[ting] the prevailing market rate of shops."[12]

Subsequently, the prevailing labor rate acknowledged by courts has risen commensurate with inflation and other factors in sporadic published opinions through the years. In 2007, the court in *Gapud v. Kaur*, the most recent searchable decision addressing specific labor rates, held a rate of $65 to be fair and reasonable.[13] Insurers nevertheless persist in underpaying insured's claims by disputing and purposefully diminishing body shop labor rates to this day. An upstate body shop, Nick's Garage, has engaged in an onslaught of federal litigation against insurers premised on this very situation over the past decade.[14] In response, insurers have maintained on the record that an hourly labor rate of $44-$46 is reasonable

as recently as 2017.[15] They have supported said claims by contending that the overwhelming majority of body shops routinely accept these rates while only a small minority of overpriced outliers do not.[16] The Second Circuit, however, in *Nick's Garage v. Nationwide*, recognized this conduct by insurers as the precise "steering" tactics New York law aimed to protect against in allowing Nick's Garage to move forward with its claims.[17] The court held that although large insurers with the "capacity to bring a substantial volume of business to a repair shop, can prevail upon shops to agree to a particular labor rate," this "does not show that one of the insurer's claimants can reasonably expect to get her car repaired at that rate."[18] Notwithstanding clear and established precedent, these small victories have unfortunately done little to curb the unlawful practices of insurers and level the playing field for the general public as these cases still appear regularly on small claims dockets across the state.

"Notwithstanding clear and established precedent, these small victories have unfortunately done little to curb the unlawful practices of insurers and level the playing field for the general public as these cases still appear regularly on small claims dockets across the state."

III. Other Insurer Tactics

Through the years, insurers have also adopted more creative strategies to undermine N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7. Among them were challenges to the constitutionality of N.Y. Ins. Law § 2610(b) prohibiting the unsolicited recommendation of repair shops by insurers. At issue in *Allstate Insurance Company v. Serio* was an insurer's proposed preferred repairer promotion in which, in exchange for reduced premium payments, insureds agreed that repairs would be completed at a repair shop recommended by the insurer.[19] In *Serio*, the Court of Appeals reinforced the legislative intent behind N.Y. Ins. Law § 2610(b) to protect consumer rights and combat improper enticement by insurers but distinguished the instant proposed promotion as a matter of valid contractual negotiation and obligation occurring prior to an insured's active claim.[20] Additionally, the court permitted the distribution of literature and the installation of signs advertising the insurer's proposed promotion.[21] During a concurrent federal lawsuit, it was determined that N.Y. Ins. Law § 2610(b) need not be evaluated for constitutionality under the First Amendment as the issue was adequately resolved on state law grounds.[22]

Other tactics employed by insurers to avoid full payment for an insured's claims have similarly invoked contract law principles. In *Rizzo*, the court rejected an insurer's argument of accord and satisfaction when the insured accepted checks in the amount of the insurer's estimate of repairs in allowing the insured's suit to move forward.[23] Subsequently, insurers have attempted to delineate between the rights of "first-party" and "third-party" insureds under N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7, resulting in conflicting precedent. For example, in *M.V.B. Collision Inc. v. Allstate Insurance Company*, an individual involved in an automobile accident for which an insurer's insured was 100% at fault was foreclosed from proceeding against the insurer for failure to fully pay her claim because she was an "incidental" rather than "intended" beneficiary of the insured's policy.[24] In other words, under the *M.V.B. Collision* court's "four corners" approach to a typical collision insurance policy, any motorist involved in an automobile accident for which he or she bears no fault is at the complete mercy of the other motorist's insurer when dealing with repairs.[25] Years earlier, however, in *Mass*, the court drew no such distinction in permitting a third-party insured's claim to proceed,[26] leaving an unanswered question for insurers to continue exploiting.

Further, insurers have attacked the rights of body shops, as assignees of insureds, to successfully assert claims. In the automotive repair industry, it is not uncommon for motorists seeking expediency to assign the rights to any insurance payments to their respective repair shops after a loss. In such cases, it is the body shop directly claiming full reimbursement for repair work from insurers. That said, *M.V.B. Collision* casts serious doubt on the feasibility of this consumer-friendly practice moving forward as there, in addition to denying a third-party insured's claim, the court additionally denied the right of a body shop as assignee to proceed with underpayment claims under N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7.

IV. Conclusion

When examining the few published cases dealing with N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7, as

well as local small claims court dockets, a clear and intentional pattern of conduct by insurers emerges and leaves body shops and consumers alike with little recourse. One spirited challenge to this troubling reality was brought by Nick's Garage during its series of lawsuits.[27] Specifically, Nick's Garage broadly alleged that insurers engaged in deceptive trade practices violative of N.Y. Gen. Bus. Law § 349.[28] Although this argument was summarily rejected by lower courts, the Second Circuit in late 2017 found that a genuine issue of material fact existed in evaluating insurer practices, providing a glimmer of hope for body shops and affected insureds.[29] Nevertheless, these practices continue to frustrate motorists, body shops, and legislative schemes, not only across New York, but also across the nation.[30] It is evident that significant reform is necessary to realize the actual intent of N.Y. Ins. Law § 2610 and 11 N.Y.C.R.R. § 216.7.

Endnotes

1. *Rizzo v. Merchants and Businessmen's Mut. Ins. Co*., 188 Misc.2d 188, 727 N.Y.S.2d 250 (Sup. Ct. App. Term, 2d Dep't 2001).
2. A Word About Steering, National Alliance of Paintless Dent Repair Technicians (2018), available at https:// https://napdrt.org/for-consumers/a-word-about-steering/.
3. *Id*.
4. N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7 (N.Y.C.R.R.).
5. *Rizzo*, 188 Misc.2d 188.
6. 188 Misc.2d 188.
7. *Id.*
8. *Id*.
9. 1. Misc.3d 906, 781 N.Y.S.2d 365 (Dist. Ct., Nassau Co. 2003).
10. *Id*.
11. *Id*.
12. *Id*.
13. 15 Misc.3d 1105, 836 N.Y.S.2d 499 (Dist. Ct., Nassau Co. 2007).
14. *Nick's Garage, Inc. v. Nationwide Mut. Ins. Co*., 715 Fed. Appx. 31 (2d Cir. 2017).
15. *Id.*
16. *Id*.
17. *Id*.
18. *Id.*
19. 98 N.Y.2d 198, 746 N.Y.S.2d 416 (2002).
20. *Id.*
21. *Id.*
22. *Allstate Ins. Co. v. Serio*, 2003 WL 21418198 (N.D.N.Y. 2003).
23. 188 Misc.2d 188.
24. 56 Misc.3d 238, 49 N.Y.S.3d 837 (Dist. Ct., Nassau Co. 2017).
25. *Id*.
26. 1. Misc.3d 906.
27. 715 Fed. Appx. 31.
28. *Id*.
29. *Id.*
30. *See Parker's Classic Auto Works, Ltd. v. Nationwide Mut. Ins. Co*., 2019 WL 2710112 (Sup. Ct. Vermont 2019); Florida's Assignment of Benefits Crisis, Insurance Information Institute (December, 2018), available at https:// https://www.iii.org/sites/default/files/docs/pdf/aobfl_wp_12112018.pdf; Phil Ray, *PA Auto Body Shops' Owner Files Lawsuit Against Insurance Companies*, Auto Body News (October 9, 2017), available at https:// https://www.autobodynews.com/index.php/industry-news/item/13965-pa-auto-body-shops-owner-files-second-lawsuit.html.

Substituting Judgment: Beware, Attorney for the Child

By Harriet Newman Cohen and Ankit Kapoor

The Hippocratic Oath directs doctors to "do no harm" to their patients. The Codes of Conduct for lawyers direct us to represent our clients zealously, to be chameleons, as it were, changing our colors to blend seamlessly into the needs of our clients. This standard is no different when representing a child client as the Attorney for the Child (AFC).

Harriet Newman Cohen

Questions present themselves: How far can we go in substituting our wishes for the child client's when we think the child's wishes are not in their best interests? What should we do when we cannot convince our child clients as to what we think we know is best for them? When is the situation so fraught with danger for the child client as to make it necessary and proper for us to substitute our judgment for that of our child client? Or is that even the standard? Does the Code of Conduct for the AFC oblige us to advocate the expressed wishes of the child client even if the result will not be in the child client's best interests? These and other related issues are what this article explores.

The Role of the AFC

The role of the AFC has been of much discussion since N.Y. Comp. Codes R. & Regs. tit. 22 § 7.2 (N.Y.C.R.R) was promulgated in 2007. While 22 N.Y.C.R.R. § 7.2 gives the AFC tremendous power to advocate for minor children, it also places limits on that power. 22 N.Y.C.R.R. § 7.2 sets forth that the AFC is a law guardian appointed by the Supreme, Family or Surrogate's Courts, who is subject to the same ethical requirements applicable to all lawyers. This includes ex parte communication, conflicts of interest, and disclosure of client confidences. As important, in proceedings where a child is the subject, 22 N.Y.C.R.R. § 7.2(d) requires the AFC to zealously advocate the child's position, and the AFC "must consult with and advise the child *to the extent of and in a manner consistent with the child's capacities* and have a thorough knowledge of the child's circumstances (emphasis supplied)." The rule further provides that the AFC should be directed by

Ankit Kapoor

the child's wishes, *if the child is capable of knowing, voluntary and considered judgment*. In other words, irrespective of what the AFC may believe is in the child's best interests, the AFC must, *unless the child is incapable of knowing, voluntary and considered judgment*, convey the child's wishes.

But what happens when the AFC believes that the child's wishes are contrary to the child's best interests and finds himself/herself at a crossroads with the child? The AFC must then decide whether it is permissible to use substituted judgment.

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What Triggers an AFC To Substitute Judgment?

22 N.Y.C.R.R. § 7.2(d)(3) states that the AFC can substitute judgment only if he or she "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child (emphasis supplied)." 22 N.Y.C.R.R. § 7.2 only requires the child to have "a basic understanding of the issues in the case and their consequences." Unlike an adult, such as the AFC himself/herself, a child may not—and likely does not—have vast knowledge and experience that would offer greater insight into the impact of a particular decision on a child's life.

Is Age a Factor?

We turn to our courts for guidance on age as a factor because the rule does not give us an age at which a child may be deemed to have basic understanding of a custody case. In *Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652, 653 (3d Dep't 2020), the AFC claimed that his clients, two little girls, ages 6 and 10, were too young to voice their own opinions. The court rejected that claim and stated that the AFC should have consulted with his clients.[1] By neglecting to do so, the AFC was deemed to have "wholly failed to fulfill the obligations" of 22 N.Y.C.R.R. § 7.2(d)(1).[2] This rule requires the AFC to consult with and advise child clients in a manner consistent with their capacities.[3] At the same time, the AFC failed to claim that either child met either of the two exceptions to 22 N.Y.C.R.R. § 7.2(d)(3): first, that they lacked capacity, or second, that there was a risk of imminent harm.[4] This court found that at the age of 10, the older child was old enough to express her wishes.[5] The determination of the younger girl's capacity was not solely dependent on her age, and the AFC should have considered the 6-year-old's level of maturity and verbal abilities to properly assess her cognitive capacity, according to the court.[6] Query: If the AFC is required to consult with a 6-year-old child, does this mean that at the age of 6, the child will be deemed to have a sufficiently basic understanding of the issues in the case as to understand their consequences? In the eyes of this court, the answer was yes.

But at what age is a child too young to understand the far-reaching and profound effects of the words coming out of the mouths of babies? In *Schenectady County Dept. of Social Servs. v. Joshua B.B.*, 168 A.D.3d 1244, 1245 (3d Dep't 2019), the Third Department, in a decision one year before the decision in *Jennifer V.V.*, 182 A.D.3d 652, once again found the AFC wanting in improperly failing to consult with a child. In that case, the child was only between 4½ and 6 years of age during paternity litigation. In *Ford v. Baldi*, 123 A.D.3d 1399, 1400 (3d Dep't 2014), the court held that a 7-year-old child was old enough to have her wishes taken into consideration. In *Seeley v. Seeley*, 119 A.D.3d 1164 (3d Dep't 2014), the court had a 9-year-old before it when it remitted the matter to Family Court for consideration of that child's wishes regarding visitation with a grandfather. Therefore, it is evident that no particular age qualifies (or disqualifies) a child as being capable of "knowing, voluntary and considered judgment;" the AFC must always be able to report to the court that he or she has advised with and consulted the children in order

to fairly assess their ability to understand the issues in the case and their consequences. If the AFCs in these cases had spoken the magic words to the court, "I consulted with them, I explained the ramifications to them, I advised them, and I, thereafter, concluded that the children did not have the capacity to truly understand," would that have made a difference in the outcomes? Should that have made a difference in the outcomes?

Substituting Judgment in Cases With Parental Alienation

The courts have accepted the AFC's substitution of judgment in cases with proven parental alienation. In *Vega v. Delgado*, 195 A.D.3d 1555, 1556 (4th Dep't 2021), a proceeding involving the custody of a child born in 2009, the court rejected the mother's contention that the AFC improperly substituted judgment where the court found that the mother's persistent and pervasive pattern of alienation of the child from the father would likely result in a substantial risk of imminent, serious harm to the child. There the court held that the AFC properly substituted judgment, even though the AFC advocated for a position contrary to the child's wishes.[7] The AFC had informed the court of the child's wishes, *and only then* took a different position from that of the child.[8]

Similarly, in *Viscuso v. Viscuso*, 129 A.D.3d 1679, 1680-81 (4th Dep't 2015), the court held that the AFC properly substituted judgment instead of following the child's wishes. *Viscuso* was a custody case in which the court stated that following the child's wishes "would be tantamount to severing her relationship with her father" and not result in what is in the child's best interests.[9] The mother in *Viscuso* constantly violated the court's order not to discuss the litigation with the child, tried to make the child fearful of the father, and even went as far as to encourage the child to self-medicate before her visitation with the father.[10] The court, citing to *Amanda B. v. Anthony B.*, 13 A.D.3d 1126, 1127 (4th Dep't 2004), stated that a "concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent."[11] Accordingly, the court granted sole custody to the father with visitation to the mother and ordered the mother to pay the father's counsel fees.[12]

In custody cases where parental alienation exists, such as *Vega* and *Viscuso*, the AFC must navigate the complexity of the alienating parent's potential brainwashing or manipulation of the child. If the AFC decides to substitute judgment because the child is of diminished capacity and unable to formulate an independent position, the AFC should work to advocate for the position that the child would likely take if the child was not affected by the alienating parent.[13] Although it is crucial that the child feel that his or her voice is heard and valued by the AFC and the court, the child—and the alienating parent who may be manipulating the child—must also understand that ultimately the determination of the child's best interests will be made by the court, not the AFC. To that end, it likely behooves the AFC to ask for a Lincoln Hearing. Its grant or denial may be in the sound discretion of the court, but the request is an important safeguard, both for the AFC and for the welfare of the child.

New York does not recognize the "parental alienation syndrome," a now discredited "disorder" that was coined by Dr. Richard A. Gardner in 1985, that this and other states have rejected. Legitimate questions concerning the alleged syndrome's admissibility and reliability as evidence in family law proceedings made it controversial, especially in light of its undeniable negative effect on custody litigation and its anti-mother connotations.

How To Substitute Judgment Properly

If, after consultation with the children, the AFC decides to substitute judgment, he or she must inform the court as to the basis of that decision and provide evidence as to why it is necessary. This involves the AFC conducting a thorough investigation of the child's case, which can include consultations with the child's therapist, caretakers, schoolteachers, and any other individuals who are knowledgeable about the child's emotional condition and the implications of the court proceedings on the child. These are also the standards for whether the AFC should be a proponent of having the child make court appearances or give testimony.[14]

The AFC must demonstrate either that the child is incapable of understanding the issues of the case, or that following the child's wishes would result in imminent harm. In *Audreanna V.V. v. Nancy W.W.*, 158 A.D.3d 1007, 1011 (3d Dep't 2018), the court found that the AFC had properly substituted judgment for his two young clients. In that case, the Third Department affirmed the decision of the judge below that left custody of the children with the mother and rejected the grandmother's claim that the AFC had improperly substituted judgment.[15] The older child, a 9-year-old boy, was autistic.[16] The younger child, age 8, had developmental delays.[17] Therefore, both children were deemed incapable of knowing, voluntary and considered judgment, and the substituted judgment was proper.[18]

It is also worthy of note that when the child client is too young, or is incapable of knowing, voluntary and considered judgment, even if the child voices a position that the AFC believes is in the child's best interests, the AFC should, nevertheless, declare to the court that he or she is substituting judgment and follow the procedure set forth in 22 N.Y.C.R.R. § 7.2.

Questions Answered

We can substitute our judgment for the child client's when the criteria set forth in 22 N.Y.C.R.R. § 7.2 are met.

When we cannot convince our child clients as to what is best for them, and they do not meet the criteria in 22 N.Y.C.R.R. § 7.2, we must speak with the child's voice or resign if we cannot tolerate the potential result from such a requirement. When we believe that the situation is so fraught with danger for the child that following the child's wishes would likely result in imminent harm, we have met one of the criteria of 22 N.Y.C.R.R. § 7.2 and can substitute our judgment for that of the child—but only if we articulate fully to the court the client's own wishes and describe persuasively what we see the imminent harm to be. The Code of Conduct for the AFC does oblige us to advocate the expressed wishes of the child client even if the result will not be in the child client's best interests—absent meeting the criteria of 22 N.Y.C.R.R. § 7.2. And we should substitute judgment when the child client is too young, or is incapable of knowing, voluntary and considered judgment, even if the child voices a position with which we concur.

"The Code of Conduct for the AFC does oblige us to advocate the expressed wishes of the child client even if the result will not be in the child client's best interests—absent meeting the criteria of 22 N.Y.C.R.R. § 7.2."

Dangers in Improperly Substituting Judgment

In *Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652, 653, 654 n. 1 (3d Dep't 2020), where the AFC did not consider the children's wishes as required under 22 N.Y.C.R.R. § 7.2(d), or conduct an analysis of the children's capacities that could justify the AFC's advocating a position contrary to the children's wishes when the AFC did not agree with the children, the court remonstrated with the AFC, explaining that it is not the AFC's role to determine what constitutes the children's best interests. Such determination is made by the court. The AFC is solely responsible for conveying the children's wishes.[19]

Jennifer V.V., 182 A.D.3d 652, exemplifies the danger in substituting judgment instead of following the procedure outlined in 22 N.Y.C.R.R. § 7.2(d). The AFC in *Kleinbach v. Cullerton*, 151 A.D.3d 1686, 1688-89 (4th Dep't 2017), who declared during the first court appearance and before speaking with the child, that he would be substituting judgment, was similarly found to have failed to fulfill his ethical duties by not conducting the comprehensive analysis required by 22 N.Y.C.R.R. § 7.2(d). He "should not have [had] a particular position or decision in mind at the outset of the case before the gathering of evidence."[20] The decisions of the Third and Fourth Departments provide a cautionary tale for AFCs who attempt to substitute judgment without following the rules.

The important Second Department case of *Silverman v. Silverman*, 186 A.D.3d 123, 3d (2d Dep't 2020), authored by Justice Christopher and concurred in by Justices Scheinkman, Rivera and Roman, further illustrates the pitfalls for the AFC who improperly substitutes judgment. In *Silverman*, the Second Department reversed Justice James F. Quinn, who changed custody from the mother to the father over the wishes of two daughters, ages 11 and 13.[21] The girls did not suffer from a mental, physical, or emotional disability to such an extent that their ability to make a knowing, voluntary, and considered judgment was impaired; they were high honor roll students and involved in extracurricular activities who wanted residential custody to be with their mother.[22] The AFC disagreed.[23]

The *Silverman* court reversed.[24] The children did not receive meaningful assistance of counsel in the opinion of the court, as the AFC improperly substituted judgment (in both Suffolk County Supreme Court and in the Second Department).[25] The AFC had consistently supported the father's position, opposing the introduction of evidence that would have supported the mother's position, including evidence that potentially substantiated one child's claim that the father attempted to strangle her.[26] The AFC failed to zealously advocate for her clients' best interests, including by not calling the forensic evaluator who had prepared a report recommending custody to the mother.[27] The court removed the AFC from the case when the AFC failed to fulfill her ethical duties as an attorney.[28] It also reversed the amended order which had awarded residential custody to the father, reinstated the mother's residential custody, and remitted the matter to the Supreme Court in Suffolk County, with instructions to appoint a new AFC and hold a de novo hearing to address the father's motion to modify the custody arrangement in the parties' settlement agreement.[29] Not to be overlooked is the always present danger of being taken to the disciplinary committee for the improper substitution of judgment. A one-page complaint from a disgruntled parent will require a 20-page response from the AFC and may result in an admonition, a censure, or worse.

Conclusion

This article has discussed the substitution of judgment—proper and improper. It has told a cautionary tale about the pitfalls for the AFC who substitutes judgment without strictly adhering to the rules set forth by 22 N.Y.C.R.R. § 7.2—in form as well as substance. It has revisited the controversial nature of claims of parental alienation and the rejection of the parental alienation syndrome, while, nevertheless, recognizing that children found to have been influenced by their mothers are not infrequently deemed incapable of exercising knowing judgment, thereby justifying the substitution of judgment. When all is said and done, representing children can be incredibly rewarding and should not be eschewed. However, attorneys who represent child clients need to be wary and should not rush in where angels fear to tread.

Endnotes

1 *Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652, 653 (3d Dep't 2020).

2 *Id.* at 654.

3 *Id.* (*citing* 22 N.Y.C.R.R. § 7.2(d)(1)).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 129 A.D. 3d at 1680.

10 *Id.* at 1681.

11 *Id.*

12 *Id.* at 1680.

13 Jamie Rosen, *The Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity*, 51 Fam. Ct. Rev. 330 (2013).

14 New York State Bar Association Committee on Children and the Law, *Standards for Attorneys Representing Children in Custody, Visitation, and Guardianship Proceedings*, D-5 at p. 19 (2015).

15 *Id.*

16 *Id.* at 1009.

17 *Id.*

18 *Id.* at 1011.

19 *Id.* at 654 n. 1.

20 *Id.* at 1689 (*citing Carballeira v. Shumway*, 273 A.D.2d 753, 756 (3d Dep't 2000), *lv denied* 95 N.Y.2d 764 (N.Y. 2000)).

21 186 A.D.3d at 124.

22 *Id.* at 127.

23 *Id.*

24 86 A.D.3d at 124.

25 *Id.* at 129.

26 *Id.* at 127-28.

27 *Id.* at 129.

28 *Id.* at 130.

29 *Id.*

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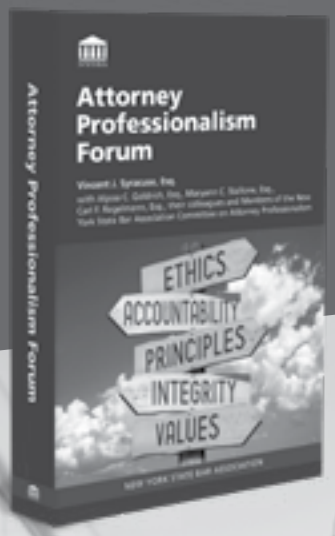

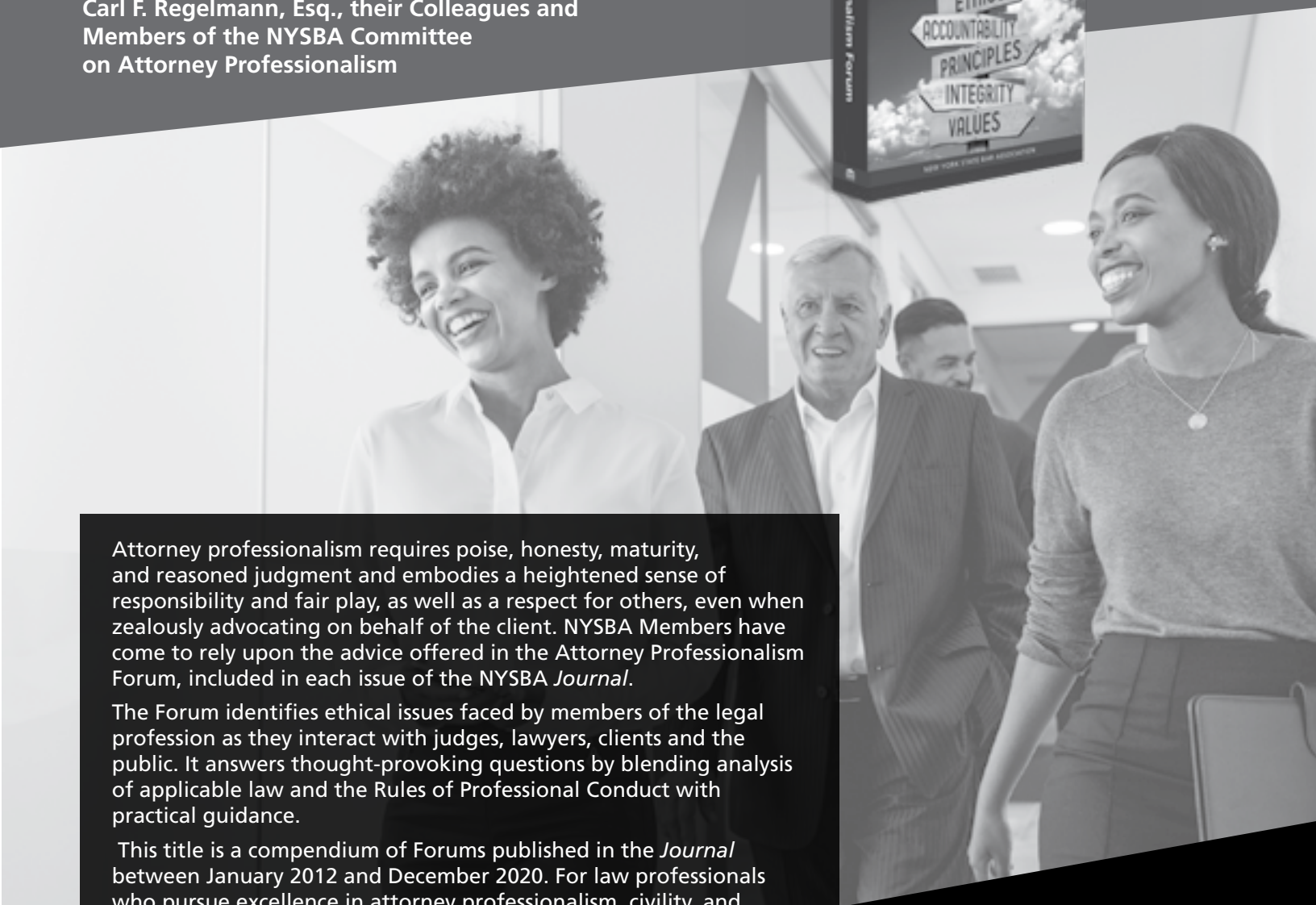

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Lessons on Students' First Amendment Rights From the Supreme Court's *Mahanoy Area School* District Decision

By Laura Cohen, Christopher Haughey and Matthew Zapata

Laura Cohen

Christopher Haughey

Matthew Zapata

This article will discuss the U.S. Supreme Court's 2021 decision *Mahanoy Area School District v. B.L. by and through Levy* and will provide guidance on American public schools' ability to regulate students' off-campus speech moving forward.

In *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court recognized that students' First Amendment rights can be limited at school because schools have a substantial interest in regulating student on-campus speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." The *Mahanoy* decision neither challenged nor altered this settled law. Instead, the Supreme Court undertook a fact-specific analysis to determine whether the interests that schools have in regulating on-campus speech extend to students' *off-campus* speech. Although the Supreme Court ultimately found that Mahanoy Area High School violated Brandi Levy's First Amendment rights, not all student off-campus speech will be free from school regulation going forward. The circumstances of Levy's's case will remain helpful to understand how courts will analyze future student First Amendment cases.

Facts and Procedural Posture

Brandi Levy was a student at Mahanoy Area High School, a public school in Pennsylvania. At the end of her freshman year, she tried out for the school's varsity cheerleading squad. When Levy heard that she had not made the varsity team, but an incoming freshman did, she expressed her frustrations on social media. On a Saturday evening at a local convenience store, Levy took a photo with a friend on her personal cellphone and posted it onto her private Snapchat story. In the photo, Levy raised her middle fingers and added the text, "f**k school f**k softball f**k cheer f**k everything." She then made another post stating, "Love how me and [friend] get told

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The co-authors were encouraged to write this scholarly article under the supervision of Kimberly C. Lau, supervising Attorney/partner at Warshaw Burstein, and Aubre Dean, associate at Warshaw Burstein.

we need a year of jv before we make varsity but that[] doesn't matter to anyone else?" These posts were viewable for 24 hours to her roughly 250 Snapchat "friends," including fellow students and teammates on the cheerleading squad.

Although Levy's Snapchat story was temporary and private, her classmates took screenshots of the posts to show them to their parents and cheer coaches. Other students also expressed to the coaches that they thought the posts were inappropriate, and a brief five-minute discussion about the posts occurred during an algebra class. The cheer coaches determined thereafter that Levy had violated the cheer team conduct rules, which Levy had acknowledged before joining the team, that required cheerleaders to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." They also felt that Levy's posts violated a school rule requiring student athletes to "conduct[] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." Consequently, the coaches suspended Levy from the squad for one year.

Levy's father met with the school's athletic director, principal, superintendent, and school board to appeal for her reinstatement, but the school board affirmed the suspension. Levy, together with her parents, then filed suit in a Pennsylvania Federal District Court. The district court found in Levy's favor and instructed the school to reinstate her to the cheerleading squad. Relying on *Tinker* and Third Circuit precedent, the district court concluded that the school's conduct violated the First Amendment, reasoning that Levy's posts had not caused substantial disruption at the school because "'general rumblings' do not amount to substantial disruption."

On appeal, the Third Circuit affirmed the judgment but reasoned that *Tinker* does not apply at all because schools do not have special license to regulate student speech made off campus. The school district appealed to the Supreme Court and asked the Court to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." The Supreme Court agreed to hear the case.

The Supreme Court's Holding

The Supreme Court affirmed the motion for summary judgment granted to Levy but refused to endorse the Third Circuit's reasoning that the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. Instead, the Supreme Court recognized that a school's regulatory interest remains

significant in some off-campus circumstances, including, but not limited to, (1) serious or severe bullying or harassment targeting particular individuals, (2) threats aimed at teachers or other students, (3) the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities, and (4) breaches of school security devices.

However, the Supreme Court explicitly refused to create or limit a list of appropriate exceptions or carveouts to when schools' special interests disappear off campus. The exact boundary between student speech protected under the First Amendment and off-campus speech that may be regulated by schools is an open question under *Mahanoy*. Even so, the Supreme Court explained that there are three features of student off-campus speech that, when taken together, often, if not always, diminish schools' interests in and abilities to regulate such speech.

First, a school will rarely stand *in loco parentis* when a student speaks off campus. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility. Second, courts must remain skeptical of schools' efforts to regulate off-campus speech; otherwise, schools would regulate student speech 24 hours a day. Third, schools themselves have an interest in protecting students' unpopular expressions, especially when such expressions take place off campus, because America's public schools are the "nurseries of democracy."

The Supreme Court then turned to rule on Levy's circumstances, which now provide just one example of how courts should evaluate these multiple features to determine if a school has a legitimate interest in diminishing students' First Amendment rights by regulating their off-campus speech.

First, the context of Levy's speech weighed heavily in the Supreme Court's determination that the school could not regulate it—she used her personal cellphone to communicate privately with friends while off campus and outside of school hours. Further, the Supreme Court found that Levy's posts reflected criticisms of her team, her coaches, and her school—communities of which she was a member. While the Court acknowledged that Levy's posts contained vulgarity, it held that they did not contain "obscene" words—expressions that must be, in some significant way, erotic—or "fighting words"—directed epithets that are inherently likely to provoke violent reaction. Further, Levy neither identified the school nor targeted any member of the school community, thus removing her speech from the school's concern. Therefore, Levy's Snapchat posts contained the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection.

Given the time, place, and content of the Snapchat posts, the Supreme Court held that the school neither stood *in loco parentis* when Levy posted on Snapchat nor had sufficient interests in teaching good manners to overcome her right to free expression. Additionally, the Supreme Court found that the short discussion that occurred during an algebra class and the few complaints by teammates to coaches did not constitute sufficient evidence demonstrating that Levy's off-campus speech created the sort of on-campus disruption of school activity, threats to the rights of others, or serious decline in team morale to justify the school's actions. In sum, the Mahanoy Area High School did not identify adequate reasons for it to have such a strong interest in regulating Levy's off-campus speech to overcome her First Amendment rights.

Considerations Moving Forward

Since Levy's case is but one example of how courts will apply the *Mahanoy* features going forward, this guide will outline lessons that students and their parents should take into consideration before communicating off campus. However, it is worth bearing in mind that the vast majority of school speech issues will not be resolved in court. Further, although Levy ultimately won, by the time the Supreme Court ruled, she had served her year-long suspension from the cheer team. Therefore, all students should side with caution when speaking off campus and understand that just because a school cannot regulate certain off-campus speech does not mean that it will not try to.

This guide concerns only truly off-campus speech, not on-campus or school-sponsored speech. Further, the guide is intended to help only students in American K-12 public schools; different legal analyses might apply for private school and university students. This is not a checklist, and the lessons should be thought of in context with one another, rather than as individual elements. Additionally, certain of the below lessons could be weighed against one another. For example, in *Mahanoy*, the Supreme Court considered the time and place of Levy's speech *against* her school's interest to show that such an interest was diminished considering the elements in the aggregate. With that in mind, we encourage students and parents to consider the following:

- Wearing school-affiliated attire while engaging in off-campus speech may be interpreted as school-sponsored speech and thus weigh against First Amendment protection. Avoid including any school symbols or items in posts that could lead others to presume that you are a representative of your school.
- Schools will likely have more control over the content of your off-campus speech if you post it on a school-provided electronic device, particularly if you have signed or been made aware of any guidelines to use such electronic device.
- Schools will also likely have more power to regulate off-campus speech that is posted using the school's server, such as via a school email address or school portal.
- Posting during school hours, even if you are off campus, will weaken your First Amendment protection against school regulation as the school will likely still stand *in loco parentis*.
- Schools will have a strong interest in regulating any off-campus speech that targets an individual, a specific group of individuals, or the school itself.
- Consider who your audience is or could be; schools will not be very concerned with private communications between friends after school hours but will have a strong interest in regulating student speech that is both inappropriate and widely available to the school community.
- While the Supreme Court has held that, unequivocally, unpopular opinions, political speech, religious speech, and other types of pure speech need to have a space to be heard, such speech can still be regulated if it impermissibly targets other students or causes substantial disruption on campus.
- If your school maintains a mission statement, has a strict policy on bullying, or has any other requirements for off-campus conduct, your school may be in a stronger position to regulate your speech. Consult your student code of conduct and any other team or club rules that you have agreed to be bound by.

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