

Legal Ethics and Special Education Disputes
Thomas Mayes, Iowa Department of Education
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This session is intended for (but not limited to) attorneys. This session will pay particular attention to ethical issues associated with mediation and negotiations. All attorneys (whether they represent schools and AEs, represent parents and children, or are new to the field) are welcome to attend!

Rather than using a lecture format, this session will be based on an open discussion of eight scenarios. These eight scenarios are adapted from reported cases and ethics opinions, including reported special education cases. Our discussion will be participant-directed, and will focus on the application of the Model Rules of Professional Conduct. All conference sponsor states have adopted the Model Rules. We will focus on the lessons from eight scenarios.

All eight of the scenarios illustrate, to a greater or lesser degree, the troubles encountered when one part of the lawyer's role predominates, to the detriment of other parts. The Model Rules of Professional Conduct provide the following:

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

For example, some scenarios show what happens when an attorney pursues what she feels is her client's interests, but uses that pursuit to justify conduct that is incompatible with her role as an officer of the legal system or a public citizen.

In past versions of this presentation, many participants have mentioned that these are disputes about children. Should that be a factor in the ethics calculus? Should the Model Rules contain a carve-out for attorneys who participate in special education matters? For litigation involving children generally? What would that look like? Which of the Model Rules should be modified? How? Would those carve-outs apply equally to counsel for parents and public agencies? What is the basis for such carve-outs? Why would they be necessary?

Note to Reader: While somewhat derived from reported cases, these eight scenarios are fictional accounts, for education and discussion only, and do not portray any living or dead person, or any present or past organization.

Note on Citation: Iowa, Kansas, and Nebraska have adopted the ABA's Model Rules of Professional Conduct. The citations in these materials are to the Model Rules. Each state's citation format is different. For example, Model Rule 1.1 in Iowa is Iowa Rule of Professional Conduct 32:1.1. Kansas's code is Court Rule 226, and Model Rule 1.1 would be cited KPRC 1.1. Nebraska codifies Model Rule 1.1 at Nebraska Court rule 3.501.1.

Scenario 1

You are corporation counsel for the Forks Community School District. You are at a mediation conference with the parents of Bella and Edward, concerning the children's special education. Bella and Edward are classified as "other health impaired" because of blood disorders and extreme sensitivity to sunlight.

The parents have requested placement at the Twilight School, a specialized school for children such as Bella and Edward. Parents' counsel also seeks attorney fees of \$25,000.00?

The parties meet separately with their respective counsel. Jacob, your client's superintendent, tells you:

I'll do anything to get them out of here. I think the Twilight School is a better placement anyway. We're appropriate, but Twilight's better. I will not authorize fees. Offer them placement at the Twilight School, monthly visits, and a school-paid cellular telephone plan so there are no telephone expenses. Do not offer attorney fees. I do not authorize you to accept any counteroffer containing any amount of attorney fees. Are we clear?

Discussion: What do you do? Why or why not? Is this bargaining strategy permissible under the Model Rules? Does parents' counsel have any ethical problems when you make the offer authorized by your client? What additional conversations could you have with your client's superintendent? What other options may be available to you?

Would your answer have changed if the fee demand were \$2,500.00, rather than \$25,000.00?

See: Model Rules of Professional Conduct 1.2, 1.7
Evans v. Jeff D., 475 U.S. 717 (1986)

Scenario 2

An ALJ has just issued a “split decision” in a highly contentious, twenty-one day due process hearing concerning Marcel M., a child with selective mutism. The ALJ ordered an out-of-state placement at the Panopticon School and two years of compensatory education, but rejected a parent request for an additional two years of compensatory education. The school filed a complaint in federal district court, and the parents counterclaimed.

The following statements were made after the filing of the federal court complaint and counterclaim, and by the following people. Assume all statements are permissible under FERPA, 20 U.S.C. § 1232g, and were made publicly.

Statements	Speakers
A. This matter is pending before the court, and no further comment is appropriate.	F. What would you expect from one of those children?
B. The ALJ doesn't care about kids, obviously wasn't paying attention, and the federal court will straighten this mess out.	G. Errors were made by the district, but the amount of compensatory education is inappropriate.
C. This is yet another instance of a school having to take care of a parent's responsibilities.	1. A Federal district judge
D. This decision has helped the healing process.	2. Marcel M.'s parents
E. _____ did nothing wrong and is 110% innocent of any wrongdoing.	3. The school board president
	4. An attorney for a party
	5. An attorney not involved in the present case
	6. The federal judge's law clerk
	7. Mike Janelson, a local AM radio talk show host.

Discussion: Mix-and-match. Are any of these statements problematic from any of these possible speakers? Why or why not?

See: Model Rules of Professional Conduct 3.6, 8.2, 8.4
Ethics Opinion 81-05 (Iowa State Bar Ass'n Feb. 17, 1981).

Scenario 3

Your client agreed to settle an IDEA dispute at a mediation conference about Tammy, a child with a physical disability. The mediator drafted a memo summarizing the verbal agreement and distributed it to the parties, incorporating changes suggested by the parties and counsel. The parties “shook” on the deal, and the attorneys were to draft a “legally binding” document based on the agreement. With the mediator, you and your counterpart draft the document, and you all agree this represents all of the essential terms of the settlement. You forward the settlement agreement to your client for signature. A few days later, the client calls you. The following conversation takes place:

Client: Hello?

You: Hello. This is [insert your name here]. Have you had a chance to sign the settlement agreement?

Client: I’m not signing. I think we can do as well or better with the ALJ ... any ALJ! Before I sign ... if I sign ... I want some more movement my way on that occupational therapy amount! Anyway, something happened at school. Tammy was in a fight ... again! I know I can’t do business with those people.

You [Barely audible sigh of exasperation]: But we had a deal with “those people,” remember?

Client: As far as I’m concerned, I never signed anything! I need you to get me a better deal or get on with filing for due process. You’re my lawyer, remember?

Discussion: Must you continue to represent your client?

Now assume your client is a parent with a low income, and will be unable to secure an attorney to assist him in this dispute. Does this change your decision?

See: Model Rule of Professional Conduct 1.16
Ethics Opinion 07-05 (Iowa State Bar Ass’n Aug. 15, 2007)
Ethics Opinion 80-45 (Iowa State Bar Ass’n Nov. 7, 1980)

Scenario 4

You represent Maxine, a parent of a child with autism. She placed her son, Jack, at the Slidell LaRoux Academy, a private school that advertises itself as the premier residential school for children with autism. She wants the Airmex Local Independent Consolidated Autonomous Community School District to pay for the S-L-A.

At the due process hearing, you allege that Airmex failed to perform a requested independent educational evaluation and that Airmex's offered IEP was not appropriate. You ask for an order requiring Airmex to perform an IEE and for Airmex to reimburse Maxine for placement at S-L-A. At the hearing, Airmex provided evidence that it had conducted the IEE. It also provided evidence that it had provided a FAPE and was not required to reimburse for private school tuition.

The hearing officer concluded that it was "beyond any human doubt" that Airmex had performed the requested IEE. She also concluded that the IEP offered by Airmex, "while not ideal, was reasonably calculated to provide a FAPE."

You file a complaint in federal court, asking for an order reversing the hearing officer on both issues. You were directed to do so by Maxine, who stated:

I wanna go all aerobics instructor on their butts: I wanna "make it burn." When they're done paying for this case, they're gonna wish they had just paid for S-L-A. They're gonna regret ever crossing me. I want this to be so expensive for them. They're gonna take the next parent seriously, and they're gonna think about me when they do it.

When you asked her about the independent educational examination issue, she stated: Make it an issue. Who says the federal judge has to believe the hearing officer?

Discussion: You follow your client's instructions. Is there anything to worry about? What? Why? Is there anything that could be said for Maxine's position? To what extent is Maxine's motive relevant? To what extent is her motive determinative?

If you refuse to follow Maxine's instructions, aren't you denying her a day in court?

See: Model Rules of Professional Conduct 3.1, 3.2, 3.3, 3.4, 4.4
Federal Rule of Civil Procedure 11
34 C.F.R. § 300.517(c)(4)
Moser v. Bret Hart Union High Sch., 366 F. Supp. 2d 944 (E.D. Cal. 2005)
Haskell v. Madison County Sch. Dist., 17 Neb. App. 669 (2009)
Pollack v. University of Southern California, 6 Cal. Rptr. 3d 122 (Ct. App. 2003)

Scenario 5

You have a county-seat practice in a small, Midwestern city. You have been retained to represent the interests of Roberta, a child with physical impairments who receives special education from the Breezy Meadows Community School District. Roberta's parents assert that Roberta needs additional physical therapy at school, special transportation, and modifications to the school building to allow access to the program.

You are preparing a demand letter to Breezy Meadows, when you receive a call from Roberta's grandmother. Roberta's grandmother asks you how much this is going to cost. She states, "As you may be aware, I am helping Roberta and her family out. Her father has been laid off and her mother cannot work outside the home. I've been giving them money to get by on, including money to pay your fees. I really need to know how much this is going to cost. Could you check with me before you send this letter to Breezy Meadows? I want to make sure it is do-able, given that I am on a fixed income."

You relay that message to Roberta's parents, who, after a few choice Germanic words, tell you that they suspect Grandmother is "trying to set up a custody case." They report that Grandmother has asked them on numerous occasions, "Don't you think Roberta would be happier with me? You two have too much going on right now." They suspect that Grandmother is trying to "sabotage" their claim against the Breezy Meadows so she can use that against them, by arguing that Roberta should live with her in another district, which has a fully accessible school building.

Discussion: What to do? What to do? Any problem with relaying Grandmother's comments to the parents? Whose directions are you bound to follow? Who is the client? Why does this matter?

Variation 2: You work for a public interest law firm, which receives grant support from the Breezy Meadows Community Foundation, which also provides support to the Breezy Meadows district. The Foundation president asks your firm's managing director whether this case is "really the best thing for the community at large."

Variation 3: You represent Breezy Meadows, and your client's insurance carrier (which pays your reasonable fees as a policy benefit to your client) has given you a hard cap for your fees, above which it not authorize payment. The carrier has concluded that this case is easily resolvable through mediation, and that the demands on behalf of Roberta make business and actuarial sense to settle. Your client wishes to draw a "line in the sand", and that fee cap will soon be exceeded.

See: Model Rule of Professional Conduct 1.8
Central Mich. Bd. of Trustees v. Employers Reinsurance Corp., 117 F. Supp. 2d 627 (E.D. Mich. 2000)

Scenario 6

You represent the interests of Peg and Al, whose son Bud is a child with a disability. You signed a settlement agreement on their behalf with the Marcy Community School District. This settlement agreement provided that Marcy would pay Peg and Al the sum of \$5,000.00, to reimburse them for private school tuition and in full satisfaction of all claims against Marcy. Marcy also agrees to pay \$5,000.00 toward your fees.

Variation 1: Peg and Al come to your office. They object to the settlement agreement: "We didn't tell you we would take that amount of money. We don't remember hearing that number come up. We think we can get more. You need to do what you can to make this better."

Variation 2: Jefferson, Marcy's school board president, brings up the settlement at a school board meeting. The school board passes a resolution requiring you to provide proof that you represent Peg and Al before the settlement is paid. According to Jefferson's statement at the board meeting, Peg and Al did not in fact authorize this settlement, and it represented a fee grab by you.

Discussion: Under either variation, is there a problem? What can the persons asserting the lack of settlement authority do? What is the basis of their claims?

See: Model Rules of Professional Conduct 1.2, 1.4
Retzlaff v. Grand Forks Pub. Sch. Dist., 424 N.W.2d 637 (N.D. 1988)

Scenario 7

You are trial court law clerk. Your judge is presiding over a massive, consolidated class action challenging your state's special education funding and teacher credentialing schemes. Before the court are several motions to disqualify counsel, and your judge has asked you to prepare a bench memo on each. There are three plaintiff classes:

- Class X, a class of students of low income who also have disabilities, which allege the state's scheme systemically underfunds their schools and causes poor teachers to be placed in their schools, both in violations of the IDEA;
- Class Y, a class of African American students in special education, which alleges the state special education funding scheme violates their rights under the Equal Protection Clause and results in violations of a prior consent decree, in which the plaintiff class was the prevailing party; and
- Class Z, a class of resource-poor school districts, which alleges that that the special education funding scheme violates the state constitution's "efficient education" clause.

The state is the first named defendant. A group of resource-rich school districts intervened as defendants. The state teachers' union has filed briefs as amicus curiae, in support of Class X.

Class X is represented by a public interest law firm that represents persons of low income. Class Y is represented by an attorney retained by a civil rights law firm. Class Z is represented by students and faculty from the community development law clinic at the state university's law school. The state is represented by an assistant attorney general. The resource-rich districts are represented by the state school board association's legal advocacy team. The union is represented by its staff counsel.

The following motions are pending.

1. A motion by the state to disqualify the state university's legal clinic from representing Class Z, because no state lawyer may advance positions contrary to the attorney general's.
2. A motion by Class Z to disqualify the school board association's advocacy team, because Class Z's members are members of the school board association and because several of the members submitted questions about the school funding scheme through an e-mail link found on the association's "ask your legal team" web page.
3. A motion by Class Y to disqualify the assistant attorney general, because the assistant attorney general was the class's counsel in the action resulting in the consent decree.
4. A motion by the resource-rich districts to disqualify the union's staff counsel, because most of the resource-rich districts' employees are union members.
5. A motion by the attorney general to disqualify Class X's counsel, because a new staff attorney at the firm did an internship in the attorney general's criminal appeals division.

Discussion: Which motions do you recommend granting and why? What additional questions of fact would you suggest your judge ask during oral argument?

See: Model Rules of Professional Conduct 1.7 to 1.11
Jenkins v. State of Missouri, 931 F.2d 470 (8th Cir. 1991)
Cole v. Ruidoso Municipal Schs., 43 F.3d 1373 (10th Cir. 1994)
Elliott v. McFarland Unified Sch. Dist., 211 Cal. Rptr. 802 (Ct. App. 1985)

Scenario 8

You represent the Bedrock Community School District. There is a pending due process complaint brought by Fred and Wilma on behalf of their daughter, Pebbles. Fred and Wilma allege that Pebbles was delayed in her speech, that Bedrock should have identified her as eligible for special education five years ago, and that Bedrock owes five years of tuition for the private school in which they enrolled Pebbles.

Fred and Wilma are not represented by counsel. Their complaint alleges acts that would be barred by the statute of limitations. Fred and Wilma have had many ex parte conversations with the administrative law judge. They have filed many papers that they did not serve on you or your client. Their papers are single-spaced and double-sided, in violation with agency rules on document formatting.

Fred and Wilma have filed a "Statement of Charges" containing an inaccurate statement of your jurisdiction's standard for determining whether a school should have evaluated a child. Their misstatement of your jurisdiction's child-find rules has caused them to place an improperly high burden on themselves. However, under any possible rule, you would assert the facts compel a conclusion that your client met its child-find requirements.

Discussion: What do you do? What will likely happen? Is there a sequence of actions that is proper? If so, what sequence and why?

After filing your motion, Fred and Wilma ask the ALJ to "cut us some slack." They also ask you, "If what we're doing is wrong, then why don't you show us how to do it right?" What kind of "slack" may the ALJ "cut" Fred and Wilma? What kind of help may Fred and Wilma demand of you, if any, as adverse counsel? What kind of help are you obliged to provide, if any, as an officer of the court?

See: Model Rule of Professional Conduct 3.3
Forbes v. State Univ. of New York, Stony Brook, 259 F. Supp. 2d 227 (E.D.N.Y 2003)