

OVERVIEW OF ETHICAL ISSUES FOR LAWYERS IN SPECIAL EDUCATION



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§ 81.1 Preamble: A Lawyer's Responsibilities

- 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 a special responsibility for the quality of justice.

- As a representative of clients, a lawyer performs various functions. As ADVISOR, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As ADVOCATE, a lawyer zealously asserts the client's position under the rules of the adversary system. As NEGOTIATOR, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an EVALUATOR, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

- In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

- A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

§ 81.1 Preamble: A Lawyer's Responsibilities Continued

- As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.
- Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

- Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

- A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

- In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

- The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

STATISTICS FROM PENNSYLVANIA DISCIPLINARY BOARD

19 matters in last 60 days

- 3 resulted in decision to disbar
 - 1 because of reciprocal discipline in New Jersey
 - 1 because of misuse of funds received for client (lying about contingency fee percentage, using the money, not giving client the money in a timely manner, paying it back from the wrong account, etc.)
 - 1 because of numerous complaints from 6 clients
- 10 resulted in decision to suspend
- 4 resulted in decision to issue a public reprimand
- 1 was a reinstatement from a 1 year suspension
- 1 held pending disciplinary proceedings in abeyance and transferred attorney to inactive status upon attorney's admission of disability

WHO IS THE CLIENT IN SPECIAL EDUCATION MATTERS?

- For the school side, is it:
 - The School District or Intermediate Unit?
 - The Superintendent?
 - The Director of Special Education?
 - The special education teacher of the child involved?
- For the parent side, is it:
 - The child?
 - The parents?
 - The parent with physical custody?
 - The parent who calls the most?
 - The very involved grandma?
 - The court appointed guardian ad litem?



RULE 1.13 ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.

WHO CAN OPPOSING COUNSEL TALK TO?

Rule 4.2 Communication with Person Represented by Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- Comments to Rule 4.2:
 - In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
 - Consent of the organization's lawyer is not required for communication with a former constituent.
 - If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.



WHAT IF THERE IS NO OPPOSING COUNSEL?

- **Rule 4.3. Dealing with Unrepresented Person.**
- During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.
- This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 3.7 LAWYER AS WITNESS

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
 - Lawyers attending IEP team meetings?
 - Lawyers handling communications between their clients?



RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent.

COMMENTS TO RULE 1.7 REGARDING CONFLICTS OF INTEREST

- A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).
- Comments to Rule 1.8 further explain that when the client is an organization, Rule 1.8(j) prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer *concerning the organization's legal matters*.



CONFLICTS OF INTEREST CONTINUED: WHO IS PAYING?

- A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
- A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
- A lawyer shall abide by a client's decision whether to settle a matter.

WHAT IF THE LAWYER AND CLIENT DISAGREE?



- Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.
- Other law may be applicable and should be consulted by the lawyer.
- The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement.
- If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

UNAUTHORIZED PRACTICE OF LAW

- Take into consideration where:
 - Parent advocates provide legal advice.
 - Attorneys providing legal advice to individuals in a state where they are not licensed.
- The Unauthorized Practice of Law under 42 Pa.C.S.A Section 2524(a):
 - It is a misdemeanor for “any person...who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law...in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law...”
 - “Where...a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for.” *Shortz v. Farrell*, 327 Pa. 81, 85, 193 A. 20, 21 (1973).

ETHICAL CONSIDERATIONS AND PARENT ADVOCATES

- Client confusion between role of advocate and attorney.
- Where does advice go beyond education and support to aid families in participating in the IEP process?
- Where does Advocate recognize the need for legal representation?
- Assistance in preparing “legal instrument or document.”
- Advice in decision to file for due process hearing.
- Review of settlement agreement.

HYPOTHETICAL

Parent contacts Attorney and assumes that the Attorney is aware of her case. Parent asks Attorney if she has talked to Advocate. Parent has been paying the Advocate. Advocate has frequently mentioned Attorney to Parent. Attorney has never heard of and has not talked to the Advocate. Advocate advised Parent that she has settled numerous cases and provides details to Parent about settlement figures in these cases. Advocate provided specific suggestions to Parent about how to proceed with case; proposals to make to the District about services; when to file for due process; and makes suggestions about settlement. Parent relies upon the advice of Advocate in making decisions about her case. She expected the Attorney to be ready to file for due process when she makes her initial call to the Attorney.

SUGGESTIONS FOR ETHICAL CONDUCT OF ADVOCATES

- An advocate should evidence a high level of competence.
- An advocate should maintain a high level of professional conduct and personal integrity.
- An advocate should receive training about the difference between their supportive role and what constitutes legal advice.
- An advocate should preserve client confidentiality at all times.
- An advocate should avoid conflicts of interest and should disclose potential conflicts to clients.
- An advocate should clearly define their role to the client and shall not engage in the unauthorized practice of law.

SOCIAL MEDIA AND LEGAL ETHICS

(SUMMARY POINTS FROM
PBA ETHICAL OPINION: FORMAL OPINION 2014-300)

- Advising Clients about their use of social media
- Connecting with clients or former client on social media
- Contact with other parties or relevant persons while using social media
- Issues involving reviews and endorsements



ADVISING CLIENTS ABOUT THEIR USE OF SOCIAL MEDIA

- Be aware of how social media sites operate in order to advise clients whose matters may be impacted by the use of such sites.
- Consideration needs to be given to privacy issues and the need to preserve information relevant to the client's case.
- Be wary of how social media lends itself to dishonesty and misrepresentation.
- An attorney may advise a client about the client's use of social media. This may be necessary, for example, where there are issues of confidentiality.
- An attorney needs to make a client aware of the ramifications of the client's use of social media; and be aware of the consequences of the advice that is given to the client regarding this issue.

MORE ON THE CLIENT'S USE OF SOCIAL MEDIA

- An attorney can advise a client about the use of privacy settings in social media.
- An attorney cannot instruct a client to destroy social media content that had been posted by the client which has relevant evidentiary value.
- An attorney cannot advise a client to post false information; or use information that the attorney knows to be false.

ISSUES INVOLVING REVIEWS AND ENDORSEMENTS

- Attorneys should monitor their social networking sites.
- There is a duty to verify the accuracy of any information posted.
- Inaccurate information needs to be removed or corrected.
- An attorney can solicit reviews from clients limited to the level of satisfaction with the lawyer-client relationship. Reviews must be accurate.
- An attorney can respond to online reviews and endorsements but cannot disclose confidential client information even when responding to a negative review.
- An attorney may endorse another attorney on social media provided that the information is accurate and not misleading.



RULE 1.5 FEES

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of a fee include the following:

- (1) whether the fee is fixed or contingent;
- (2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount involved and the results obtained;
- (6) the time limitations imposed by the client or by the circumstances;
- (7) the nature and length of the professional relationship with the client; and
- (8) the experience, reputation, and ability of the lawyer or lawyers performing the services.

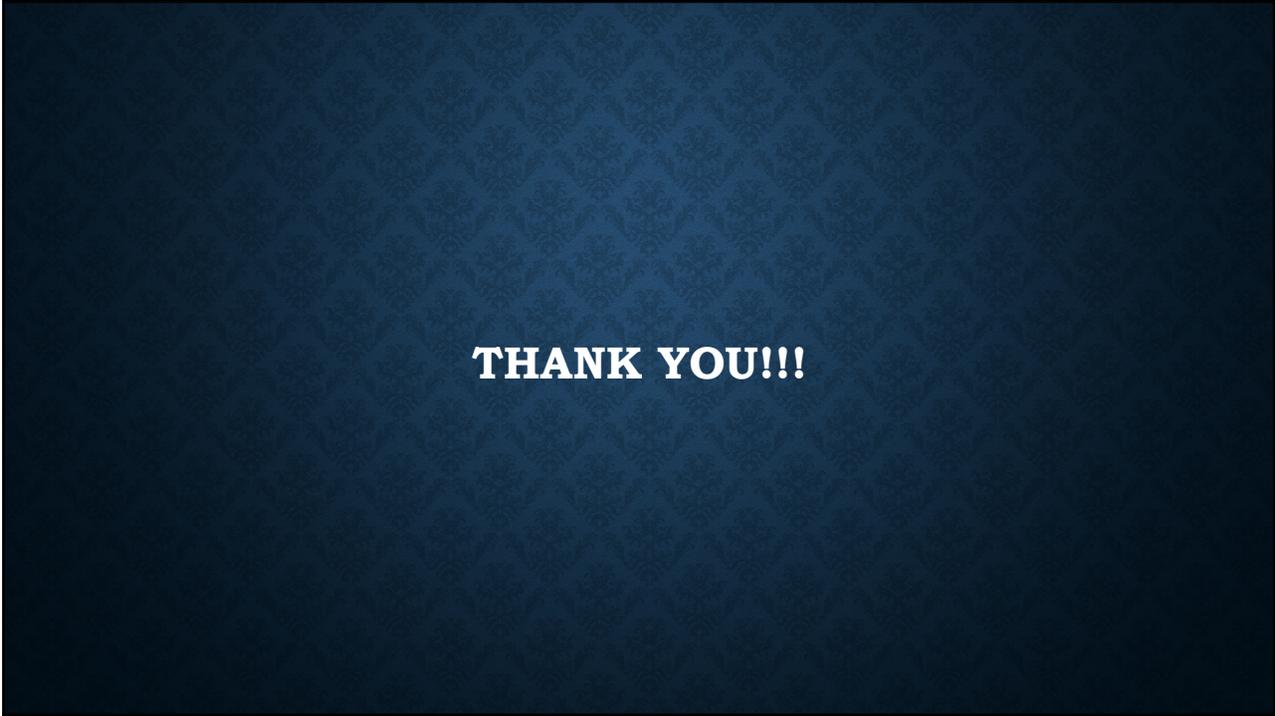
RULE 1.5(C) CONTINGENCY FEES

Rule 1.5(c) states:

- A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- Rule 1.5(d) states:
 - A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support; or
 - (2) a contingent fee for representing a defendant in a criminal case.



ANY QUESTIONS



THANK YOU!!!