

**The Professional Ethics Committee  
for the State Bar of Texas  
Opinion No. \_\_\_\_\_ [PEC 23-2]**

**Posted for Comment on May 21, 2024**

**Question Presented**

If a lawyer for a governmental entity attends a meeting between a representative of the governmental entity and an individual known to be represented by a lawyer regarding the subject of the meeting, and the individual's lawyer does not attend the meeting, may the lawyer for the governmental entity communicate with the individual without the absent lawyer's consent?

**Statement of Facts**

The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (IDEA), funds public education for children with disabilities. Among other procedures, IDEA requires that schools and parents meet to formulate an Individualized Education Plan (IEP) for any student who has a disability requiring specialized instruction. These meetings, called Admission, Review, and Dismissal (ARD), occur when requested, when changes are made to a student's IEP, or at least annually.

Although both the school and a child's parents are permitted to have their lawyers present at ARDs, "the attendance of attorneys at IEP meetings should be strongly discouraged," according to the U.S. Department of Education. 64 Fed. Reg. 12478. The Department bases this recommendation on its view that the presence of lawyers "would have the potential for creating an adversarial atmosphere that would not necessarily be in the best interests of the child." *Id.*

The Department's view is consistent with IDEA § 1415 (i)(3)(D)(ii):

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

Thus, in most circumstances, neither schools nor parents may recover attorneys' fees for having their lawyers participate in ARDs.

Nevertheless, some schools include their lawyers at ARDs, a practice that has received criticism. See *'Intimidation Tactic'—special ed parents see school attorneys in routine meetings* (Houston Public Media Apr. 26, 2023), available at <https://tinyurl.com/23vz26l9> (last accessed May 17, 2024). In the scenario considered here, a school's attorney knows that a child's parents are represented by an attorney regarding the ARD, but the parents attend the ARD without their lawyer. The school's representative has instructed the school's lawyer to attend the ARD.

## **Discussion**

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct states:

In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment 1 explains that Rule 4.02(a) "is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel." Comment 1 further notes that Rule 4.02(a) "prohibits communications that in form are between a lawyer's client and another person, organization or entity of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government." See Opinion 600 (August 2010) (concluding that a lawyer for a governmental entity may not communicate directly with a person known to be represented in the matter by a lawyer who has not consented to the communications and may not cause or encourage such communications by other agency employees).

The question presented here is the converse of an issue the Committee addressed in Opinion 474 (June 1991). There, the question was whether a lawyer representing an individual in a lawsuit against a city may communicate with a member of the city council about the pending litigation. The Committee concluded that, by doing so, the lawyer violated Rule 4.02.

The same answer applies here. If the school's lawyer knows that another lawyer represents the child's parents in connection with the formulation of an IEP (*i.e.*, the subject matter of the ARD), then Rule 4.02 expressly prohibits the school's lawyer from communicating with the child's parents about that subject without the consent of the parents' lawyer. The school's lawyer may attend the ARD as an observer and as an advisor

to the school's representative, may respond to questions from the school's representative privately, and may privately offer advice to the school's representative about the issues involved. But the lawyer will violate Rule 4.02(a) if he or she communicates directly with the parents about the subject matter of the ARD, or if he or she causes or encourages the school's representative to deliver to the parents what is in essence a communication from the lawyer.

### **Conclusion**

If a lawyer for a governmental entity attends a meeting between a representative of the governmental entity and an individual known to be represented by a lawyer in the matter, and the individual's lawyer does not attend the meeting, the lawyer for the governmental entity may not communicate or cause or encourage another to communicate about the subject matter of the representation with the individual without the absent lawyer's consent.