

Legal Ethics and Special Education Disputes
Tri-State Special Education Law Conference, November 3, 2016
Session 1 of 2
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The Unfortunate Case of Patrick S. Dow
In re Dow, 933 P.2d 666, *further proceedings*, 935 P.2d 1041 (Kan. 1997)

This session considers the disciplinary actions taken against an attorney for unprofessional conduct arising in part from his representation in a special education dispute. Here are some of the findings of fact from the Kansas Supreme Court opinion cited above.

Source of Law

The following case involves application of the American Bar Association's Model Rules of Professional Conduct by the supreme courts of the three host states. The Model Rules are located here:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

Iowa, Kansas, and Nebraska have adopted the Model Rules. State-specific resources are listed below.

- Iowa:
<https://www.legis.iowa.gov/docs/ACO/CR/LINC/05-29-2015.chapter.32.pdf>
- Kansas:
<http://www.kscourts.org/rules/Rule-List.asp?r1=Rules+Relating+to+Discipline+of+Attorneys>
- Nebraska:
<https://supremecourt.nebraska.gov/supreme-court-rules/ch3/art5>

Introductory Matters

1. *Please come and go as you please.* These ethics sessions are offered as a courtesy to you. If you need to meet with clients, adverse counsel, or take a call, please feel free to step out. If there are other sessions that you wish to attend, please feel free to switch sessions. In addition, I am on the planning committee, and we work hard to bring in great speakers. Feel free to go hear them!

2. *Please ask questions.* These sessions, to work (especially on such an uncivilized hour of the morning), must be interactive. Share your experiences. Challenge my conclusions and observations. Learn from each other.
3. *Ethics hours are something that you must do, so make the most of them.* Ethics hours are like stretching out after a run. You may not feel like doing it, but you'll be hurting if you don't.
4. *What is an "hour"?* In Iowa and in Nebraska CLE rules, an "hour" is sixty minutes. In Kansas, an "hour" is fifty minutes. Kansas rounds down to the nearest half hour, so Kansas attorneys (even if they stay through both parts) will only get two hours. For the benefit of Kansas attorneys, I will announce at fifty minutes in each session and at one hundred minutes in the second session.

The Case

Chapter 1: The Complainants and the Initial Referral

Steve and Karla McG have a son, Nate. Nate has severe autism. The McGs eventually filed two of the complaints against Mr. Dow.

According to the court opinion:

During Nate's preschool years, the [parents] worked with expert consultants to develop an intensive in-home developmental program for Nate. In the 1992 to 1993 time period, Nate was seven years old and the [parents] had concerns about getting the Lawrence public school system to provide, what [the parents] believed to be an appropriate [individualized education program] (IEP) for their son.

The parents wrote letters to the LEA's special education director. Their letters "included numerous suggestions to ensure appropriate planning for Nate's educational needs after his first year in kindergarten." Because the parents believed the LEA had been nonresponsive to their concerns, they sought an attorney to represent them who had experience in special education matters. According to the court opinion:

A group called 'Families Together,' referred the [parents] to [Dow] [Dow] has a child with autism and both [he] and his wife, a non-lawyer, are active in matters involving children with autism.

Dow practiced in Eureka, which is roughly 120 miles from Lawrence.

Questions? Comments? Concerns?

Chapter 2: The Initial Meeting

The parents and Dow met at Dow's home in April 1993. The parents "had an opportunity to observe [Dow's] son and be introduced to his wife." The parents told Dow "that they had been successful in the home training of their son, but that they sought" his "representation at an [IEP] meeting with a member or members of the Lawrence public education system."

Questions? Comments? Concerns?

Chapter 3: Exchange of Documents

One month later, Dow asked the parents to provide him "with a list of documents concerning their son's condition and copies of letters previously sent to the" LEAD, which they did. Dow "promised to review this material and begin within a few days to assist [the parents] with obtaining an appropriate educational program for Nate."

According to the court opinion,

The [parents] did not hear from [Dow] for some period of time and began calling his office and home telephone numbers. They were unable to reach him. They were told that [Dow] was not in or they left messages on [Dow's] answering machine, but the messages were unanswered. The [parents] finally reached [Dow] in early June 1993, at his office. [Dow] at that time told the [parents] that his wife had received special training in working with children with autism using a model promoted by 'TEACCH.' The TEACCH model meets the child at his or her functional level and adapts the environment to the child.

Questions? Comments? Concerns?

Chapter 4: The Retainer

In June 1993, Dow came to Lawrence to meet with the parents and observe Nate. Dow received a \$2,000.00 retainer. According to the court opinion, "The [parents] requested that [Dow] discuss certain needs of their child, but were informed by [Dow] that this was unnecessary because his wife would soon be in touch to prepare an appropriate [IEP] for Nate."

They agreed to an hourly rate of \$40.00, and the parents requested a written fee agreement. According to the court opinion, "[Dow] told them a written agreement was not necessary and did not put the fee agreement in writing."

Questions? Comments? Concerns?

Chapter 5: Meeting with Mrs. Dow

The parents telephoned Dow to arrange a meeting to write the IEP with Mrs. Dow. Between June and August of 1993, she canceled two appointments with the parents. In August, they met for ten minutes at a restaurant in Lawrence. Mrs. Dow gave the mother a questionnaire to complete. According to the court opinion, "Mrs. Dow promised to conduct a follow-up meeting to discuss the preparation of the IEP, but no such meeting occurred."

Questions? Comments? Concerns?

Chapter 6: No Communication

The parents did not hear from Dow for five weeks. When they finally reached him, he told them he "would write to the school district to schedule an IEP meeting." Dow sent two letters to the LEA's special education director. According to the court opinion, "The first letter asked for a meeting to discuss the educational program of [Nate] and the second letter requested a formal IEP meeting to be scheduled."

Questions? Comments? Concerns?

Chapter 7: Before the August 30, 1993, Preliminary Meeting

The parents and Dow scheduled a meeting for August 30, 1993, with a school administrator.

According to the court opinion, the parents "received no information from [Dow] about the meeting and were upset because of this lack of communication." Dow "assured the Complainants in a telephone call that he would be ready for the August 30, 1993, meeting with the school administrator."

Dow arrived at the meeting only a few minutes before it was scheduled to start. He gave the parents a meeting agenda, which they had not previously seen or discussed. According to the court opinion, "The agenda specifically recommended the TEACCH model for Nate despite the fact the [parents] had advised [Dow] they opposed the TEACCH model for their son." They believed Dow "would address their concerns in the information they had previously provided to him."

They decided to proceed with the meeting.

Questions? Comments? Concerns?

Chapter 8: During the August 30, 1993, Preliminary Meeting

During this meeting, Dow presented the 'TEACCH' model. The court opinion describes the TEACCH model as "placing ... children with autism primarily in self-contained classrooms." The parents, from the outset, informed Dow of their opposition "to placing children with autism in a classroom together without interaction of other students." Their objections "were outlined ... in their letters to the school administration previously supplied to" Dow. The parents were placed in the uncomfortable position of telling school representatives "that they disagreed with their attorney's presentation."

Questions? Comments? Concerns?

Chapter 9: After the Meeting

After the meeting, the parents learned that Dow used the TEACCH method with his child. According to the court opinion, the parents felt Dow "was advocating his own position rather than their position in front of" LEA representatives. "This was the first time [Dow] made the [parents] aware that he did not agree with their educational plan for Nate."

Questions? Comments? Concerns?

Chapter 10: Before the IEP Meeting

The parents told Dow that they expected him "to represent them and to follow their wishes as to their child's educational program." Dow "for the first time refused to represent them unless he was allowed to advocate the TEACCH model."

He told the parents "that the method of teaching they had adopted for their son was 'ineffective and piecemeal' and TEACCH was the only effective method of dealing with autism." After discussing their disagreement about TEACCH, Dow terminated his representation of the parents only two days before the IEP meeting.

Dow told the parents he would send them a bill for his legal services, which the parents requested be itemized. Dow had no response when the parents asked why he would not present their position to the LEA. According to the court opinion, "He did indicate his wife was upset and could not work with a particular school staff member who had been hired by the school board for a position which Mrs. Dow had applied."

Questions? Comments? Concerns?

Chapter 11: After Withdrawal

Dow withdrew before the IEP meeting. The parents “canceled the meeting and began searching for a new attorney. A whole year passed before they could find another attorney who felt qualified to handle their case.” Nate’s mother left her work “in order to direct Nate's home schooling program.”

According to the court opinion, “Appropriate educational programming was not developed for Nate until August, 1995. Nate spent his 1st grade year with home schooling.”

Questions? Comments? Concerns?

Chapter 12: Initial Stages of the Complaint

The parents filed a complaint against Dow. Attorney Michael Crow was appointed as an investigator. Crow wrote Dow three letters and telephoned him twice in February and March 1994.

Crow and Dow finally met on March 30, 1994. According to the court opinion,

At that meeting, Mr. Crow requested [Dow’s] time slips. They were never provided. Mr. Crow described [Dow’s] level of cooperation in the investigation as ‘begrudging.’ [Dow] told Mr. Crow [that he] had more knowledge than [the parents] about what was appropriate for their son and refused to consider alternatives to the TEACCH model.

The disciplinary authorities wrote Dow in October 1994, informing him that the “review committee” had “found probable cause to believe that the [Dow] had violated the standards of professional conduct and responsibility and that the discipline of informal admonition was to be imposed for violation of MRPC 1.2 and Supreme Court Rule 207.”

The authorities directed Dow to appear in November 1994 at their office “for imposition of the sanction of informal admonition.”

Questions? Comments? Concerns?

Chapter 13: Dow Responds (Kind Of...)

Dow appeared and disagreed with the allegations. Dow was granted until December 1, 1994, to file additional information. He did not do so.

The authorities wrote Dow a letter on December 12, 1994, asking him why he had not provided the additional information. Dow failed to respond to this and a subsequent letter.

Questions? Comments? Concerns?

Chapter 14: The Carrot is Replaced with the Stick

The authorities told Dow “he could accept an informal admonition or a formal complaint would be filed on the [parents’] allegations, as well as [his] failure to cooperate.” Dow had until February 20, 1995, to respond. He signed for this certified letter on February 21, 1995.

Dow did not respond.

Questions? Comments? Concerns?

Chapter 15: Findings

The court opinion states,

Based upon the above findings of fact, the panel concluded that clear and convincing evidence established that respondent's actions and behavior amount to violations of MRPC 1.2, 1.4, 1.7, 1.16, and 8.4, and Supreme Court Rule 207.

Chapter 16: Discipline

Because of the McG complaint and two other complaints, the Dow was temporarily suspended by the Kansas Supreme Court.

After this temporary suspension, Dow voluntarily surrendered his license.

Chapter 17: Rules Cited by the Kansas Supreme Court

Model Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Model Rule 1.4	Communications
Model Rule 1.7	Conflict of Interest: Current Clients
Model Rule 1.16	Declining or Terminating Representation
Model Rule 8.4	Misconduct
Kansas Court Rule 207	Rules Relating to Discipline of Attorneys

Questions? Comments? Concerns?

Chapter 18: Final Thoughts

Are there other potential lines in the Model Rules that Mr. Dow crossed?

Is there anything in Dow's case that is specific to special education conflict and litigation? Did the Kansas court know enough about special education law to make its decision? Was such knowledge necessary?

Is there anything about special education conflict and litigation that make attorneys more vulnerable to crossing bright or not-so-bright lines in the Model Rules? What should special education attorneys do to avoid those vulnerabilities?