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October 17, 2022

Hon. Glenn A. Grant
Administrative Director of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037
Via USPS and email to Comments.Mailbox@njcourts.gov

RE: *C.P., et al. v. N.J. Dep't of Edu., et al.*; Case No. 1:19-cv-12807-NLH-KMW

Dear Judge Grant:

I write to supplement my previous submission (dated January 5, 2022) on the subject of defendant demands for fee waivers in civil rights cases arising under statutes contain fee shifting provisions. I will not repeat comments made in that letter; but I attach a courtesy copy of it hereto (including its exhibits) as Exhibit 1.

On September 16, 2022, the Court issued a request for additional comments, specifically soliciting responses from defense counsel in special education cases (the undersigned does not meet that description), but generally framing its invitation broadly, seeking further input "from members of the bar and other interested persons." Moreover, unlike the initial 2021 request, the Court most recently focused specifically its query on special education (this firm's primary practice area), and on cases where plaintiff seeks a remedy of services without monetary compensation. The Court specifically asked about the potential consequences of relying on retainer agreements to address the implications of bundled settlement demands (resolving merits on a condition of a fee waiver), and retainer agreements that entirely foreclose a fee waiver in settlement. Because this query opens up additional areas of consideration of this important issue, the undersigned provides this supplemental comment.

Since my last submission, I co-authored an article in New Jersey Lawyer (with David Rubin, Esq., who represents defendants in special education disputes). *See* John Rue & David B. Rubin, New Jersey Lawyer, *Point/Counterpoint: The Ethics of Negotiating Settlements in Special Education Litigation* (April 2022) (attached for convenience hereto as Exhibit 2). The content of

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that article gave, I hope, a fair assessment of these questions from both sides of the education bar.

Additionally, on August 19, 2022, my firm was appointed Class Counsel, in the Federal Court for the District of New Jersey, for two certified classes in a statewide lawsuit against the New Jersey Department of Education for its failure to comply with the IDEA's regulatory requirement, *see* 34 C.F.R. 300.515(a), that due process hearing requests arising out of special education disputes must be fully resolved within forty five days. *C.P., et al. v. N.J. Dep't of Edu., et al.*; Case No. 1:19-cv-12807-NLH-KMW. Although this issue is not central in that case, defendant demands for fee waivers in special education disputes as a condition of settlement are endemic in New Jersey.[1] Where the state routinely fails to provide a timely hearing, and all parties know that a child alleged to be educationally underserved has no prospect of timely relief absent a settlement, parents with the most meritorious claims against their local school districts are frequently presented with a Hobson's Choice: (a) Accept some small merits settlement, but waive reimbursement of attorneys' fees, which is guaranteed by statute; or (b) fight on to the bitter end, at severe risk to the health, safety, and/or educational progress of the child during the pendency of the case and/or that the case has become moot by the time it is decided, nine months to a year later, by which time the child's needs likely have changed. Even if this "choice" might be appropriate in another fee shifting context (and I do not believe it is), it cannot be so in special education disputes in New Jersey, where the special education due process hearing system has been "profoundly broken" for decades. *C.P. v. NJDOE*, *id.* (DE #98 at page 43).

Because the Court's request for additional comments specifically focused on special education disputes, I commend the Court to 20 U.S.C. 1415(h) as well as 1415(i). Of course, the latter of these citations is to the fee shifting provision of the IDEA. But the former guarantees parents the right to be accompanied by counsel. It can be no accident that this pair of statutory provisions are sequential in the Code. The message from Congress is unequivocal: Not only do parents with the means to pay for counsel have a right to representation; but those without means, but with claims meritorious enough to attract competent counsel on the promise of prospective payment (available by virtue of the very next subsection in the statute) are assured that, if they prevail on the merits, their lawyer will be paid. This allows unmoneyed parents to prosecute the education rights of their children, exactly as Congress intended, where they otherwise could not – and this important civil right would be rendered illusory. There is no better example of the "private attorney general" doctrine, *see Pinto*, 200 N.J. at 593, at work in the law.

Moreover, nowhere is this mechanism more necessary than in special education in New Jersey, where the only alternative to settlement, i.e., to await one's "day in court," is so dysfunctional that it causes the vast majority of petitioners to abandon their claims, or settle them for a small benefit, before the first formal hearing (because, by then, they've learned of the endemic delays). Allowing defendants to leverage those delays to obtain an otherwise unwarranted fee waiver (a) denies the parents the ability to compensate their counsel in the instant case, and therefore (b) impairs the ability of future similarly situated plaintiffs to attract competent counsel in the first place. *Pinto*, 200 N.J. at 593. (describing the "cascading effect" of permitting merits offers conditional on fee waivers). Not merely is this outcome against the public policy in New Jersey

[1] In fact, this issue was specifically pled in at least one of the cases designated as "related" to the *C.P.* Class Action.

and that articulated by the U.S. Congress, the consequences of this practice are unconscionable, and so such offers should be forbidden in all cases involving statutory fee shifting.

In particular, the Court requested comments on "the potential consequences -- for both plaintiffs and defendants -- if retainer agreements foreclose settlement when the terms of the settlement waive the lawyers' fees or costs." As a threshold matter, I submit that such a provision would itself be *per se* unethical. *See* R.P.C. 1.2 ("A lawyer shall abide by a client's decision whether to settle a matter."). Because attorneys may not contract around their ethical obligations, this provision in a retainer agreement would be impermissible under the cited Rule.

Moreover, even assigning liability to clients (i.e., with the beneficiary of the assignment being the client's own lawyer) for fees waived in settlement does not address the problem that *Pinto* attempted to resolve: Clients who cannot afford counsel at the outset of a case, and who are pursuing non-monetary or otherwise indivisible relief in their lawsuit, will be no better able to afford to pay counsel at the end of the case, even if in exchange for the full benefit of the merits remedy sought in the case. So the assignment of the consequences of this sort of conditional offer to the client does no more than render the client unable, as a practical matter, to settle the merits of her claim, when a school board requires a fee waiver as a condition of settlement of the merits. And even this contractual approach itself pits lawyers against their own clients, forcing them to fight over the "proceeds" of a case which, more often than not (in special education) has no "proceeds" in the usual sense of that term. This attorney/client adversity is the very outcome expressly warned of by the *Pinto* Court. *Id.* at 599 ("[A] defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client.").

Notably, the ethical challenges caused by this settlement practice is not equally borne by plaintiff and defense counsel. Absent a broad application of the *Pinto* Rule, and absent any further guidance from the Court in its supervisory role over the practice of law in New Jersey, school districts are free (as they routinely do, in special education cases across New Jersey) to leverage the "profoundly broken" due process hearing system to extract concessions from parents on attorneys' fees that are unwarranted by the merits. A broad application of the *Pinto* Rule*,* e.g., in official commentary to the RPCs, would do no more than level the playing field.

Finally, if the Court is unpersuaded by the argument that merits offers of settlement conditional on fee waivers are *per se* improper in the civil rights / fee shifting context, I submit that the best way to separate the "sheep from the goats" is focused neither on the nature of the plaintiffs' law firm ("public interest" or "private"), nor on whether the remedy sought is the provision of services. Rather, at a <u>minimum</u> (but see below), where a plaintiff seeks *any* remedy under a statute with a fee-shifting provision, where that remedy is indivisible, such that a contingency arrangement (in which the attorney gets a share of the plaintiff's recovery) is infeasible, such conditional settlement offers should be categorically forbidden.

But even that rubric would be insufficient, without more, to protect the most vulnerable education plaintiffs. Fee shifting provisions should also ensure the availability of competent counsel in matters which may be monetary on the surface, but in which the cost of legal services would (without statutory fee shifting) quickly eclipse the monetary value of the settlement.

Take, for example, a parent who seeks reimbursement for education services in the amount of $5,000 (e.g., an educational evaluation by an independent clinician), a material sum for most working families in New Jersey. The lodestar in that case would almost immediately dwarf the monetary recovery. For comparison, in a dispute arising from an ordinary commercial transaction, it is not problematic to assume that the economies of the market will guide litigants to rational conduct, and that this incentive will safeguard both party and judicial resources in low-stakes disputes. Certainly, plaintiffs with monetary claims untethered to civil rights should be allowed (and perhaps even implicitly encouraged) to abandon the smallest of those claims, where the cost of litigating them does not justify the potential remedy.

But in the education context, a "small" monetary claim may not be small at all when viewed through the lens of the rights at stake, both the right of the child to a free and appropriate public education, *see generally* 20 U.S.C. 1400, *et seq.*, and the statutory and Constitutional right of the parent to participate in the education planning for the child. *See id.*; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 573 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). The right to an independent educational evaluation may be the key to empowering a parent to effectively advocate for her child. But many parents without money will be entirely unable to vindicate their rights (both their own and their child's) if denied access to prevailing party fees, which is the consequence of the practice in question, in many cases. So, if the Court is unwilling to adopt a *per se* rule forbidding settlement offers contingent on fee waivers, it should at least do so where the lawsuit seeks to vindicate a fundamental civil right, such as education. And at the very least, such conditional settlement offers should be categorically forbidden in the IDEA and Section 504 context in disputes between parents and public schools.

In closing, I apologize that this submission is much less detailed than my initial one.[2] Frankly, there is much more to be said on the issue. For example:

- But for the pressures of small firm practice (which may have prevented their direct response to the request for comment from the Court), dozens of additional New Jersey parent-side education attorneys would likely be willing to attest that they are routinely placed into ethically compromised positions by unwarranted fee waiver demands made by school boards (perhaps driven to do so by insurance carriers). In fact, if invited, many such attorneys would probably be willing to submit, for the Court's consideration, anonymous templates of their engagement agreements, which would show the complex contractual terms many of these public interest attorneys are forced to include in their retainer agreements with unsophisticated clients, to ensure that, should prevailing party fees become available, the attorney will have a right to obtain them.

- Moreover, many New Jersey non-profit organizations who serve these parents (eight of whom are admitted as *amici* in the *C.P.* Class Action) might also certify that, because this practice (combined with New Jersey's "profoundly broken" special education dispute resolution system) undermines parents' rights to statutory fees, **the vast majority of**

[2] The class action identified above is currently scheduled for trial on November 7, 2022. John Rue & Associates is assisted in that case by numerous cooperating firms. But JR&A itself currently employs only four lawyers full time.

parents who need counsel in special education disputes routinely go entirely unserved in New Jersey, and must proceed *pro se*. In other words, the incentives intended by IDEA's fee shifting provision are largely, if not entirely, inoperative in New Jersey. In fact, if invited, many of these non-profits could probably provide the court with fact-based certifications, or even statistics (compiled for purposes of providing information to funding sources) showing the extent to which parents of children with disabilities in New Jersey are denied the benefit of the IDEA's prevailing party fees provision (i.e., the ability to attract competent counsel to represent parents with meritorious claims, despite an inability to pay), by virtue of the magnitude of the unserved need in New Jersey.

Although I volunteered but was not selected to serve on the *Balducci* Committee, I stand ready to serve the Court and the Bar in any capacity on this issue that might be useful, including personally soliciting the additional comments and/or materials described above.

In sum, considering the importance of the right to education, the stakes on this issue could not be higher. So I urge the Court to act only after taking all time necessary to gather full comments from all quarters, to permit the Court to "measure twice, and cut once."

Respectfully submitted,

John Rue

John Rue

Exhibit 1

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January 5, 2022

Hon. Glenn A. Grant
Acting Administrative Director of the Courts
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Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037
Via USPS and email to Comments.Mailbox@njcourts.gov

RE: Comments on Report by *Balducci Committee*

Dear Director Grant:

INTRODUCTION

This comment on the Report of the *Balducci* Committee (respectively, the "Committee" and the "Report") is focused solely on Section 7 of the Report. The Committee misstates the holding of New Jersey Supreme Court precedent, *Pinto v. Spectrum Chems*., 200 N.J. 580 (2010), and, on the basis of that misrepresentation, proposes rulemaking that would eviscerate the policy purpose of statutory fee shifting provisions in civil rights cases brought by plaintiffs of limited means. The undersigned urges the Supreme Court to clarify *Pinto*, and to extend its protections to all civil rights plaintiffs, regardless of the nature of the law practice of their attorneys. In the alternative, the Court should broadly define "public interest law firm" (as that term is utilized in *Pinto*) to include private public interest law firms,[1] or (at least) any attorney who accepted the plaintiffs' case with compensation to be paid solely based on statutory fees.

In all cases, demands for fee waivers as a condition of a merits settlement in a civil rights lawsuit undermine the very purpose of statutory fee shifting. While technically beyond the holding of *Pinto*, the inexorable logic of the opinion is that such conditional settlement offers should be banned in New Jersey, without regard to the nature of the practice of the lawyer representing the plaintiff, as they undermine the policy purpose of statutory fee shifting provisions. Indeed, the *Pinto* Court hinted at that conclusion in *dictum.*

Section 7 of the Report, however, misstates the *Pinto* holding, and states (wrongly citing to *Pinto*) that settlement offers conditioned on fee waivers are permissible when the plaintiff is

[1] John Rue & Associates, LLC ("JR&A") is a private public interest law firm. A description of JR&A's practice, and an explanation of the qualifications of the undersigned to opine on these issues, is attached hereto as Exhibit 1.

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represented by a "private lawyer." Not only does this mischaracterize *Pinto* (which expressly declined to reach the question) but, as the unanimous *Pinto* Court at least suggested in *dicta*, at footnote 8, the same logic supporting *Pinto's* more limited holding also leads to the conclusion that such offers should be forbidden in all cases, without regard to the type of law firm representing the plaintiff. Indeed, a federal court has held (twice) that settlement offers conditioned on fee waivers (as to claims arising under the Individuals with Disabilities Education Act ("IDEA")) is a denial of the statutory right to counsel.[2] This holding is a close cousin to the clearly reasoned *Pinto* opinion, and should inform the Court's reading of the *Pinto* Rule.

If "private lawyers" are to be distinguished from "public interest law firms," then these terms must be defined. A reasonable definition of this term in any specific case would focus on whether the firm or lawyer contracted for client-paid fees (even if contingent), or instead relied for compensation solely upon the prospect of prevailing party fees to be paid by the defendant (not out of the plaintiffs' recovery). In the latter cases, and especially where the relief sought by the plaintiff is non-monetary, conditional settlement offers should be forbidden. A separate rule for contingency lawyers, especially in damages cases, would not injure client interests.

Executive Summary

This submission urges the New Jersey Supreme Court to fully realize the legal purpose of the *Pinto* Rule, by extending it (via the New Jersey Rules of Professional Conduct ("RPCs")) to all civil rights cases, whether the plaintiff is represented by "public interest" counsel or a "private lawyer." No lesser outcome of the work of the Committee will avoid throwing the policy purpose of statutory fee shifting out the window. *Pinto* essentially says as much. In any event, *Pinto* provides no basis to encourage defendants in civil rights cases to make settlement offers conditioned on fee waivers, as the language of Section 7 expressly condones, with a cite to *Pinto*.

The Report pays no heed to the policy purposes of fee shifting, extensively discussed in *Pinto*, which raises the question of whether the perspective of civil rights plaintiffs represented by pro bono counsel (distinct from contingency lawyers, *see R*. 1:21-11(b)) was even considered in the drafting. Section 7 of the Report misstates the holding of *Pinto*, and on the basis of that misrepresentation, recommends an approach to conditional settlement offers that would eviscerate the policy purpose of fee shifting, which *Pinto* strongly supports.

The express limitation of *Pinto*'s holding notwithstanding (because the question was not presented to the Court as to private lawyers), a dichotomy between "public interest lawyers" and "private counsel" is not meaningful for these purposes, at least where the attorney anticipates compensation by prevailing party fees (not contingency fees), especially where the client lacks an ability to pay. The *Pinto* Court did not create two rules. Rather, the Court merely addressed the facts before it, and declined to carry the logic of its rule to facts not presented in that case, *i.e.*, nothing more than traditional judicial modesty requires. But in *dictum*, the Court expressly stated that the same logic may apply to private-practice counsel and their clients.

[2] *Davis v. D.C.*, CIV.A. 05-2176PLF/DA, 2006 WL 3917779, at *9 (D.D.C. Sept. 28, 2006), *report and recommendation adopted sub nom. D.D. ex rel. Davis v. D.C.*, 470 F. Supp. 2d 1 (D.D.C. 2007) (granting summary judgment to parent on denial of statutory right to counsel); *see also Johnson v. D.C.*, 190 F. Supp. 2d 34, 48 (D.D.C. 2002) (denying motion to dismiss claim based on denial of statutory right to counsel).

If a client cannot pay fees, and the right to fee shifting may be undermined by permitting merits settlement offers conditioned on a fee waiver, it is no answer to suggest that lawyers should "protect themselves" by contracting to impose liability on the client (who cannot pay) for waived fees. This just creates a Hobson's Choice, *i.e.*, no choice at all but to fight to the bitter end. And it causes the very "cascading effect" predicted by *Pinto*, making competent counsel reluctant to accept meritorious civil rights cases from plaintiffs who cannot pay. *Pinto*, 200 N.J. at 599.

The RPCs protect clients, not lawyers. But twice in a mere two paragraphs, Section 7 recites identical language reassuring lawyers that **their** interests can be protected by inclusion of contractual language shifting the effect of conditional settlement offers to their clients. This approach does not protect clients, and also fails to protect the real interests of their counsel, *i.e.*, to achieve a speedy and fair result for the client, and reasonable compensation for the lawyer.

Finally, Section 7 ignores the power disparity between state agency defendants and civil rights plaintiffs. School boards, for example, routinely have access to exponentially greater resources than parents. And districts in New Jersey are often insured for the cost of defense and any fee shifting (putting the carrier in the driver's seat), but not for liability (*i.e.*, the education services required). This creates a perverse incentive, *i.e.*, the "moral hazard of insurance," for defendants to endlessly delay until parents go away exhausted and financially depleted, as they often do.

I. Section 7 Mischaracterizes *Pinto*, Even as it Relies Upon It.

The second paragraph of Section 7 cites to *Pinto* for the proposition that "Defendants may not demand fee waivers as a condition of settlement in fee-shifting cases involving public interest law firms, *though such demands may be presented to plaintiffs represented by lawyers in private practice*." (emphasis added). This is **not** a fair summary of the holding of *Pinto*, which only addressed the first point (regarding "public interest lawyers"), and *expressly declined* to reach the question as to "plaintiffs represented by lawyers in private practice." It is intellectual dishonesty to represent a court's choice not to reach an issue as having decided it.

In fact, the *Pinto* decision was both (i) courageous (in rejecting unpersuasive and non-binding reasoning from the United States Supreme Court, *Evans v. Jeff D.*, 475 U.S. 717 (1986) ("*Jeff D.*")) and (ii) clearly reasoned. The reason for the *Pinto* Rule was clearly and exhaustively explained in the opinion, and expressly and extensively relied upon the *dissent* in *Jeff D.* (by Justice William Brennan, formally of the Supreme Court of New Jersey). As held by in *Pinto*, "a defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client." *Pinto*, 200 N.J. at 599.

Moreover, the *dicta* in footnote 8 suggests that the unanimous *Pinto* Court would disagree with Section 7. Footnote 8, anchored to the above quoted sentence about intrusion into the attorney client relationship, stated that "[t]he same logic may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm." So, without providing either valid authority or logic for the conclusion that the *Pinto* Rule should ***only*** apply to plaintiffs represented by public-interest firms, Section 7 falsely suggests that *Pinto* itself is the source of this bifurcated rule. It is not.

II. Section 7 Creates a False Dichotomy between "Private" and Public Interest Law Firms, without Defining Either.

The undersigned recently authored a two-part article on the issues addressed in Section 7, published in the New Jersey Law Journal. *See* John Rue, *The Impact of Private Public Interest Law Firms on NJ Civil Rights Litigation*, 226 N.J.L.J. 2134 (August 27, 2020); John Rue, *Think Twice Before Negotiating Settlement of Client's Claim and Your Fees at the Same Time*, 226 N.J.L.J. 2290 (Sept. 21, 2020), attached hereto as Exhibit 2. In most relevant part, that article urged counsel to act carefully when (of necessity) simultaneously negotiating fees with merits settlements in civil rights cases.

The lip service paid by Section 7 to this complex and vital issue ("The Committee acknowledges that settlement negotiations in fee[-]shifting cases present counsel with an ethical dilemma.") is entirely inadequate to the task. As fully discussed in the cited articles, and expressly addressed by *Pinto*, "Plaintiffs' attorneys who are compelled to forfeit their hard-earned fees as a condition of settlement will be less inclined to take on the next case." *Pinto v. Spectrum Chemicals & Lab. Products*, 200 N.J. 580, 599 (2010). And indeed, a serial defendant in such cases, acting strategically, might be well advised to create a disincentive for competent counsel to accept such cases without payment. Claims brought by unrepresented plaintiffs are far easier to defend. But that is the very problem that fee shifting statutes are crafted to address.

The 2-part article further examined the issue of "private public interest law firms," and cites to authority for a definition.[3] Private public interest law firms, as a category, are also recognized by the career counseling offices of Harvard Law School,[4] Columbia Law School,[5] Stanford Law School,[6] and University of California at Berkeley, Boalt Hall.[7] Whether or not the *Pinto* Rule is extended to all cases, regardless of the nature of the plaintiffs' lawyers' practice, the RPCs should recognize the existence of "private public interest law firms," and explain how they should be treated in application of a more limited reading of the *Pinto* Rule.

To the extent that application of the *Pinto* Rule remains limited to public interest law firms, a "private public interest law firm" should be recognized to stand in the same position as a public, or non-profit, law firm. The authorities cited define a "private public interest law firm" as one which, although profit-making, has a public interest goal, and accepts clients and cases on standards not entirely based on profit. For example, the undersigned's law firm, John Rue & Associates, LLC (a private public interest law firm) routinely accepts pro bono engagements (*i.e.*, without expectation of payment by the client) to enforce parent rights under the IDEA,

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[3] *See generally* Cummings, Scott L & Southworth, Ann, *Between Profit and Principle: The Private Public Interest Firm*, UCLA Public Law & Legal Theory Series, available at https://escholarship.org/uc/item/5jw41650 (Feb. 5, 2009).

[4] *Private Public Interest Law and Plaintiff's Firm Guide*, available at https://hls.harvard.edu/dept/opia/private-public-interest-law-and-plaintiffs-firm-guide/

[5] *Private Public Interest Law Firms Roundtable and Reception*, available at https://web.law.columbia.edu/pt-br/node/64286

[6] *Defining Public Interest Law Practice*, available at https://law.stanford.edu/levin-center/careers/#slsnav-overview-3

[7] *Private Public Interest & Plaintiffs' Firm Guide*, available at https://www.law.berkeley.edu/careers/for-students/public-interest/explore/public-interest-resources/private-public-interest-law-firms-with-berkeley-law-connections/

especially those in which no material facts are in dispute, and where the plaintiffs' right to relief is clear under the law – but their school board nonetheless refuses to comply with reasonable demands. In such a case, a private public interest law firm is in no different position than any other public interest law firm. In all such cases, a merits settlement conditioned on a fee waiver is nothing but "a thinly disguised ploy to put a plaintiff's attorney at war with her client." *Pinto*, 200 N.J. at 599. And as the unanimous *Pinto* Court hinted in *dicta*, such offers should be forbidden in all such cases, without regard to the type of law firm representing the plaintiff.

To the extent that the Court wishes to draw a bright line, the full import of the *Pinto* Rule would be protected merely by expressly extending it (via the RPCs) to those plaintiffs represented by counsel who took the case without expectation of payment by the client. This definition of "public interest" (which tracks R. 1:21-11(b)) would support the policy purposes of both (i) fee shifting, without giving a windfall benefit to attorneys representing plaintiffs with substantial damages prospects, and (ii) contingent payment, as incentives to attract competent counsel.

III. The Limit on Engagement Agreements Prohibiting Certain Settlements is Valid, But Misses the Obvious Public Policy Question Presented by Clients Who Cannot Pay.

The Report's admonition that engagement agreements may not prohibit a client from settling their case on any terms that may be deemed acceptable to the client is uncontroversial. But this is nothing more than the conclusion that the plain language of RPC 1.2(a) controls New Jersey attorney engagement agreements. On that, all should agree.

However, in the prefatory sentence to Section 7, the Committee missed the obvious point of its assignment. Clients without the means to pay counsel, who are represented by an attorney who has followed the guidance provided later in Section 7 (contractually shifting liability for waived fees to the client), will (upon receipt of a settlement offer conditioned upon a fee waiver) be practically precluded from settlement, even if their contract with counsel does not expressly prohibit it. And this is so, without regard to the nature of the practice of their attorney, whether "private counsel" or "public interest lawyer." Moreover, the remainder of Section 7 appears to actually encourage "private counsel" (without defining that term) to create contract terms that put their neediest clients in a Hobson's Choice position, *i.e.*, a "choice" that is no choice at all (if the client cannot pay), upon receipt of such conditional offers.

Twice in Section 7, the report suggests that "private counsel" can contractually "protect themselves," presumably from non-payment. To put flesh on that vague recommendation, this suggests that attorneys who do not work for (undefined) "public interest law firms" should include provisions in their engagement agreements that require clients to pay any accrued fees that the client may choose to waive as part of a settlement.[8] But this recommendation relies upon an obviously false assumption: That such clients have an ability to pay their lawyers in order to settle their cases. Implicitly, this suggests that "private" lawyers should either (i) blithely accept the consequences *Pinto* expressly intended to avoid, i.e., lawyers being forced to choose between compensation for their legal services or a satisfactory result for a client, or (ii) only take cases from clients who could pay, when the inevitable conditional settlement offer (requiring a fee

[8] Of course, this may be the only feasible course for a private public interest law firm. JR&A (of necessity) uses just such contractual language. But it fails to protect client interests as fully as would an expansive reading of *Pinto*.

waiver) arrives. But that limited menu, as held in *Pinto*, would vitiate the very policy purpose of prevailing party fee provisions. *See Pinto*, 200 N.J. at 599. So *Pinto* must be read more broadly.

At least as to education cases, the Report ignores the routine gamesmanship of defendant school boards, which almost universally refuse to settle meritorious cases without a fee waiver, in part because school boards know that the New Jersey Department of Education ("NJDOE") fails to provide due process hearings within the federally mandated 45-day timeline, taking on average nine months to a year to resolve such cases.[9] During this delay, parents often become desperate to obtain needed education services for their child. And school boards will often leverage that desperation by offering (i) only a small fraction of the value of the merits and, even so, conditioned on acceptance of (ii) a demand for a full and unwarranted waiver of attorneys' fees.

Take, for example, as an illustration: a parent of a child classified as eligible for special education services, requests an independent evaluation at public expense. Such an evaluation would ordinarily cost only a few thousand dollars. But in <u>numerous</u> cases brought by the undersigned's law firm (not including many more known to the undersigned in which parents were represented by other firms), school boards refuse to compromise at the outset of the case (even where the parent's right to relief is clear), unless the parent waives attorneys' fees.

In one such case (that of the first named plaintiff in the *C.P.* class action described in footnote 8 above), the school board offered to provide the Independent Educational Evaluation within weeks of filing, but only on condition of a fee waiver. At the time, the fees accrued were less than $3,000; and the Firm unsuccessfully urged the school board to simply pay that small amount to resolve the case. Because JR&A employs the very sort of "protective" contractual language urged by Section 7, the client could not – in practical terms – accept the settlement without incurring more in liability to the Firm than the value of the settlement itself. That case never settled, and continues to this day (over four years later), even after intervening conditional settlement offers, and despite the school board's lawyer's concession of the district's liability on the record. If JR&A was entitled to file a fee application today, its demand would exceed $250,000. But, to date, the client has received no relief. This case is one of many of its type.

IV. <u>Section 7 Elevates Lawyers' "Rights" Over Those of Clients.</u>

Twice, the Report repeats the same language, urging that "private lawyers may **<u>protect themselves</u>** by including alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees." Section 7 at ¶1 & 2 (emphasis added). Whether intentionally or inadvertently, this comment both (i) misses the point, and (ii) is actually wrong.

First and foremost, the primary concern of the RPCs is, as it should be, the protection of clients, not lawyers. Section 7 pays no attention to the prejudice to plaintiffs themselves, as opposed to

[9] JR&A is lead counsel (and seeking appointment as class counsel) in a statewide class action against NJDOE arising out of NJDOE's systemic failure to resolve due process hearing requests within the federally mandated 45-day timeline. *C.P. et al.*, v. *N.J. Dep't of Edu., et al.* (D.N.J. No. 1:19-cv-12807) (May 22, 2020). In denying a motion to dismiss, the Hon. Judge Noel Hillman, U.S.D.J., held that "Plaintiffs have made out plausible claims that the system for the adjudication of IDEA disputes by the administrative state in New Jersey is profoundly broken and routinely violates the federal laws designed to insure that our most vulnerable children remain the priority we all should agree they are." A full trial on the merits of the claims is scheduled to commence on February 22, 2022.

their lawyers, imposed by settlement offers conditioned on fee waiver demands. In civil rights cases, the value of the merits is often small in dollars, but of enormous value to a plaintiff. Consider a parent of a child with a disability who is seeking a small but crucial accommodation in the child's education plan. The cost of providing that accommodation might be quite small, only a few thousand dollars. But school boards routinely stonewall in such cases, knowing that parents cannot obtain a hearing in the New Jersey Office of Administrative Law in less than nine months to a year. *See* n.8, *supra.* Even when the parents' right to relief is unassailable, a school board has a perverse incentive to circle the wagons, as many districts are insured against the cost of defense (and even prevailing party fees, but only upon a fee award ordered by a court, which is years off in the context of a federal IDEA case just filed in New Jersey), but ***not*** against liability (*i.e.*, the cost of the merits settlement). So public policy aside, a school board is best served by delay for its own sake. Its alternative, absent presentation of a Hobson's Choice to the parent, is (i) immediate liability for the disputed education services, or (ii) reliance on insurance for the cost of defense (with the risk of prevailing party fees mitigated by insurance as well), assured in the knowledge that the case will not be resolved for many months or years to come, and so any substantive liability is at least one budget year away (if not more). Small wonder that many districts engage in the tactics of conditional settlement offers. This is nothing more than a response to legal incentives, and zealous advocacy by their counsel.

A plaintiff with a good case but of limited financial means (the focus of fee shifting statutes), may have no viable alternative to accepting pro bono representation from an attorney intent upon obtaining prevailing party fees (as is expressly intended by both prevailing party fee statutes, and Rule 1:21-11(b), to avoid such plaintiffs having no viable alternatives at all). Such a plaintiff may sign an engagement agreement containing the very "protective" contractual language urged by the Report, *i.e.*, imposing liability on the client for payment of any fees waived in settlement. But in reality, that provision will simply render it practically infeasible for such plaintiffs to accept a settlement conditioned on a fee waiver which, if defendants follow their incentives and their counsel advocate zealously, may be the only type of settlement offered. So while purporting to protect attorneys, the Committee throws the interests of their clients under the bus.

Moreover, even such contractual provisions do not really "protect" the true interests of counsel. Rather, in the face of foreseeable tactics by public entity defendants, they create circumstances in which the public interest lawyer (whether at a private public interest law firm or a public one) is often unable to obtain a timely and just result for her client, while being forced to pursue an endless stream of litigation to the final conclusion. Only after years of forced litigation, can the attorney file a fee application. And in opposition, the school board lawyer will frequently howl about the greed of the plaintiffs' lawyer, and the limited means of the public entity defendant.

Indeed, the perverse incentive on defendants described is not merely foreseeable, it was actually foreseen by the *Pinto* Court:

> [O]nce fee waivers are permitted, defendants will seek them as a matter of course, since this is a logical way to minimize liability. Indeed, defense counsel would be remiss not to demand that the plaintiff waive statutory attorney's fees. A lawyer who proposes to have his client pay more than is necessary to end litigation has failed to fulfill his fundamental duty zealously to represent the best interests of his client.

Pinto, 200 N.J. at 599-600. The best protection for clients (and coincidentally, their counsel as well) is to unambiguously extend the *Pinto* Rule to all civil rights cases arising out of statutes providing prevailing party fees, without regard to the nature of the plaintiffs' lawyer's practice.

V. Section 7 Ignores the Power Disparity between the Parties in Civil Rights Cases.

Government defendants (such as school boards) have enormous resources to deploy in disputes with civil rights plaintiffs. In addition to institutional advantages (information, resources, staff, and so on), school boards in New Jersey (and likely other government defendants) routinely have insurance for the cost of defense, and often also for prevailing party fees awarded (but not in settlement). But, as described above, *see* n.8, *supra*, New Jersey's due process system is so broken that it can take months or years for a parent to obtain an initial merits decision, despite the 45-day timeline imposed by law, and another year or more to obtain a fee award in federal court. School boards routinely leverage these delays, and their access to insurance to cover the cost of defense and mitigate the risk of prevailing party fees, to force parents to settle for far less than the merits justify. Moreover, school boards routinely refuse to make any settlement offer at all without an attached waiver of attorneys' fees, sometimes demanding a preliminary concession to a fee waiver even before commencing negotiation of the merits.

In such circumstances, many parents without the means to fight are forced to take crumbs, even though they may have a legal right to the entire pie. And even parents with means to pay counsel are routinely forced to waive reimbursement of those fees, as provided by federal law, in order to obtain even a reasonable burden-sharing agreement with a school district.

VI. Authorship of the *Balducci* Committee Report Should be Public.

Finally, Section 7's fundamental misreading of *Pinto* strongly suggests the Committee did not benefit from the perspective of civil rights plaintiffs and their public interest counsel in the drafting of its Report, or worse, that this perspective was offered but not seriously considered. New Jersey counsel whose practice relies on prevailing party fees would have pointed out all of the concerns stated in this submission, while the Report was in the drafting phase.

Considering the public importance of the issues addressed in the Report, its authorship should not be shrouded from public view. In light of the facts that (i) the Judiciary is not subject to OPRA, and (ii) the Report is unsigned (unlike this comment, and all other comments to be submitted, by order of the Court), I urge the Supreme Court, when deciding what parts of the Report to accept or reject, to also disclose the identity of the members of the Committee.

Respectfully submitted,

John Rue, Esq.
Principal
John Rue & Associates, LLC

EXHIBIT 1

The following submission was provided with the application of the undersigned to serve on the *Balducci* Committee. It explains in detail the basis upon which I respectfully request full consideration of the above stated opinions.

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Krista L. Haley
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Kenneth R. Walk
—
Jonathan S. Corchnoy*
Carolina T. Curbelo*
Lynne D. Feldman*
Wayne Pollock*

January 30, 2020

Honorable Stuart Rabner
Chief Justice, New Jersey Supreme Court
R. J. Hughes Justice Complex, P.O. 970
Trenton, NJ 08625

RE: Volunteer for Ad Hoc Committee and certain standing committees

Dear Justice Rabner:

I followed with interest the developments in *Balducci v. Cige* (A-54-18), and noted the decision this morning. A copy of the slip op is attached hereto as Exhibit A. I especially noted the creation by that decision of an ad hoc committee to study the issues raised in the case (the "*Balducci* Ad Hoc Committee"). I am writing to volunteer for any of the three committees identified by the Court's opinion (Civil Practice, Professional Responsibility Rules, and Advisory Committee on Professional Ethics), or alternatively (for reasons explained below) the Committee on Attorney Advertising, and also (separately, and without condition of my appointment to a standing committee) to serve on the *Balducci* Ad Hoc Committee as one of the "other representative members of the Bar and Bench with experience in these matters" referred to by the Court. *Id.* at 41. I have separately submitted these materials on the website of the Supreme Court Committee Management System.

As indicated in my C.V. (attached as Exhibit B), I began my career at White & Case, LLP, a large New York law firm. During my eight years as an associate there, I performed an extraordinary volume of pro bono hours (on average, I estimate that number to be 400 hours per year, or close to twenty times the minimum required by *Madden*), virtually all on behalf of New Jersey parents of children with disabilities in disputes with their schools. As I became more senior, about half of this time (or more) was devoted to recruiting, training, and supervising junior attorneys on these cases, thus leveraging the impact of my pro bono work exponentially.

Beginning in 2008, while still employed at White & Case, I served as lead counsel for a pro bono class action filed against Dumont Public Schools. When I left White & Case in 2012, I took that case with me. Although we did not prevail on the merits, because of the prevailing party fees provision of the Individuals with Disabilities Education Act (the "IDEA"), we were able to negotiate a substantial payment of attorneys' fees. A substantial portion (in six figures) of these moneys was donated by White & Case as a start-up grant to the Innisfree Foundation, a 501(c)(3)

* Of-Counsel to the Firm

non-profit, which I co-founded and continue to lead as its President and General Counsel. Innisfree was subsequently certified as a pro bono entity by the Supreme Court of New Jersey, pursuant to Rule 1:12-11(b)). Innisfree's mission is to advocate for the education rights of New Jersey children and their families. Its website is available at www.innisfree-foundation.org.

In 2014, I founded my own firm, John Rue & Associates, LLC (JR&A) (www.johnruelaw.com). JR&A's business model relies heavily on statutory fees. We bring cases on behalf of parents (and also on behalf of the Innisfree Foundation) under the IDEA, Section 504 of the Rehabilitation Act, NJ-LAD, OPRA, and other civil rights statutes. Like the agreement in *Balducci*, JR&A's engagement agreements provide alternative fee arrangements that take into account the prospect of statutory fee shifting. In 2019, more than 60% of the Firm's revenue was received from adverse parties.

Over the last five years, we have represented close to two hundred clients, and been adverse to school boards in fourteen of New Jersey's twenty one counties. In January 2019, I appeared before the Supreme Court on behalf of Innisfree in *L.R. v. Camden*, the OPRA cases regarding third party access to student records, since remanded to the trial courts and consolidated (with over three dozen similar cases) in Camden Superior Court.

As a result of JR&A's business model, I have thought long and hard about the ethical, legal, and practical implications of engagement agreements where fee shifting is anticipated. For example, in March 2020, I will be presenting at the national conference for the Council of Attorneys, Parents and Advocates ("COPAA") entitled "How Much Justice Can You Afford? Reliance on Statutory Fee Shifting when Representing Families of Low- to Moderate Means as Private Counsel." A copy of the White Paper submitted to COPAA (not yet accepted for publication) is attached hereto as Exhibit C. As indicated by that white paper, ethical considerations will take a prominent role in the presentation. *Id.* at Part IV.

In special education cases, in particular, New Jersey has a specific problem, not experienced (to my knowledge) in other states. Because New Jersey has a "home rule" public school system, boasting no fewer than 690 legally cognizable public school districts (including charter schools), each school district tends to be represented by outside counsel, due to the limitations on economies of scale that would otherwise permit the hiring of in-house lawyers to handle these disputes. As a result, the majority of the school districts we face have insurance that pays for the cost of defense, and also for prevailing party fees where they are imposed.

The other New Jersey-specific fact that materially affects the *Balducci* issues in special education cases is that New Jersey's special education dispute resolution mechanism is broken, and has been broken for at least a decade. Federal regulations, 34 C.F.R. 300.515, require resolution of special education disputes within forty five days of transmittal to the hearing officer (in New Jersey, the Office of Administrative Law). State implementing regulations agree. N.J.A.C. 6A:14-2.7(j). As a factual matter, however, in New Jersey, the average time to disposition is 310 days. In May 2019, the US-Department of Education issued a non-compliance letter to the New Jersey Department of Education ("NJDOE"), *inter alia*, for violation of the 45-day rule. And later that month, my firm (leading a group of six firms that focus on parent-side

education disputes) filed a class action against NJDOE for the delays. All appearing counsel in that class action are appearing pro bono, reserving only the right to prevailing party fees.[1]

The combination of the (a) insurance system in New Jersey, indemnifying for the cost of defense and prevailing party fees, and (b) systemic delays in resolving special education disputes, creates perverse incentives for New Jersey school districts in special education cases. Almost always, unless the child is in crisis, an insured school district suffers no prejudice by the initiation of a lawsuit, nor by allowing it to fester for months without any attempt to settle. It will be insured for the cost of defense, and risks only a court order requiring the provision of additional services (which would be necessary to settle most cases in any event). And even if the district loses, in most cases, it will be insured for prevailing party fees.

So the incentive for school boards in these cases is to ignore them until the eve of the hearing (often close to a year after filing), and then to offer to settle, but conditioned on a waiver of prevailing party fees (which carriers are loathe to pay before a final order has been entered). In fact, in my experience and in the experience of most of my colleagues who take such cases without guarantee of full payment by the client, New Jersey school boards routinely and uniformly refuse to settle special education cases with parents without a fee waiver.

We have taken the position that this conduct violates the spirit (if not the letter) of the rule stated by the Supreme Court in *Pinto v. Spectrum Chems.*, 200 N.J. 580 (2010). In *Pinto*, the Supreme Court addressed the propriety of a demand by a state agency for a waiver of attorneys' fees as a condition of settlement of the merits of a claim brought under a statute that provides fee shifting for a prevailing plaintiff. The *Pinto* Court forbade such conditional settlement offers, but only where the plaintiff is represented by a "public interest law firm." However, *Pinto* expressly left open the question where the plaintiff is represented by private counsel. *Id.* at 599 n.8.

In 2019, my firm filed a case on behalf of a pro bono client, seeking to extend *Pinto* rule to private law firms. Before that case was resolved, however, it was settled. (We anticipate an opportunity to make a similar argument on behalf of another client at some point in the future.) However, the filing of the case and preparation for initial motion practice rendered JR&A especially familiar with the ethical implications of fee waivers.

The above referenced statewide class action against NJDOE, as well, has provided and continues to provide additional experience to me and my firm on the question of prevailing party fees, and the legal and ethical implications of the same. Because of the systemic delays in resolving due process hearings, parents routinely waive prevailing party fees, even where their claims are strong, because they know that they cannot actually get a decision for close to a year (which can be a lifetime in the education of a child). Accordingly, this issue of addressing prevailing party fees in engagement agreements remains front and center in that matter, as well.

In light of the very specific issues addressed in *Balducci*, this Firm has found it necessary to pay exacting attention to how fee waivers are addressed in contracts with our clients. These issues include who bears the risk and burden of paying attorneys' fees -- win, lose or settle, the ethical implications those issues raise with respect to a client's right to settle, informed consent as the

[1] The other five firms have also joined JR&A's request that JR&A be appointed as class counsel.

terms in our engagement agreement, and the practical reality that we need to keep the lights on and pay the support staff. Our agreements also directly address the means by which the client will be reimbursed out of any fee award, assuming the client has paid the firm some fees.

Also, with regard to JR&A's engagement agreements, we do at times take on matters for clients who are seeking more than a mere modification of their child's education program (in which case our fees are limited to our hourly rates, or some portion thereof, as dictated by the specific terms of our engagement). On occasion, we represent parents who are seeking money damages for the treatment their child has suffered at school, either under NJ-LAD, Section 1983, or some other statute or common law rule that permits recovery of money damages. In those instances, separate and apart from compensation at our hourly rates, our engagement agreement may include a contingency fee based on the amount of the recovery. Thus, our engagement agreements, like the agreement in *Balducci*, may provide for alternative fee arrangements based on the amount of a recovery. We have put a great deal of thought into our engagement agreements to avoid, among other things, the concerns raised in *Balducci*..

Finally, the routine demand for fee waivers, necessitating complex terms in our engagement agreements, results in another ethical quandary. JR&A's willingness to accept clients without full payment of the value of legal services is far from universal in the very small subpart of the New Jersey Bar that focuses their practice on representing parents in education disputes. Many such attorneys and firms work only on an hourly basis; and this is precisely because school boards' universal demands for fee waivers is widely known. Both JR&A and its prospective clients would benefit from the dissemination of accurate information about our fee structure, by advertising or otherwise. However, despite our best efforts, we have been unable to formulate the wording of an advertisement that emphasizes our willingness to take on cases at far less than ordinary hourly rates. RPC 7.1(a) prohibits any statement that is "misleading," and (a)(4) defines as "misleading" any statement that relates to legal fees, with certain narrow exceptions. Accordingly, in addition to the issues expressly raised in the *Balducci* opinion, and whether or not I am appointed to the *Balducci* Ad Hoc Committee, I urge the Ad Hoc Committee to consider amendment of RPC 7.1 to permit language in advertising that addresses how the attorney or law firm will deal with prevailing party fees in its engagements, including how any client-paid fees will be reimbursed upon award of prevailing party fees.

In light of the above, I respectfully submit that I am an excellent candidate to serve on the *Balducci* Ad Hoc Committee. I attach supporting materials hereto for your further consideration. I would welcome an opportunity for an in person meeting to discuss the content of this letter, if such would be convenient to the decision maker.

Sincerely,

John Rue

John Rue
NJ Bar # 047032005
cc: Honorable Glenn A. Grant, Acting Administrative Director of the New Jersey Courts

Exhibit A

[omitted]

Exhibit B

JOHN D. RUE

john@johnruelaw.com

LEGAL EMPLOYMENT

JOHN RUE & ASSOCIATES, *Principal* (2014 - present), *previously* The Law Offices of John Rue

- Education law boutique, including public records cases against schools. Although staffing is fluid, currently comprised of six lawyers and one paralegal.
- For more information about the firm, and examples of decisions obtained in court, see my bio on www.johnruelaw.com.

WHITE & CASE LLP, *Consulting Attorney* (2015 - 2016) (half-time)

- "Deep-dive" antitrust research and analysis, drafted detailed memoranda of law for internal use.

KIM & BAE, PC, *Member* (2013-14)

- Lead counsel for plaintiff in securities action litigated in the S.D.N.Y.
- Other litigation work, as requested by the firm and its clients.

NOVARTIS PHARMACEUTICALS CORP., *Discovery Counsel* (2012 - 2013)

- Primary attorney responsible for overseeing U.S. discovery, document preservation and litigation readiness.
- Responsible for at least $10MM in cost avoidance during first year of employment.
- Managed relationship with vendor that employed ten on-site dedicated contractors.

WHITE & CASE LLP, *Litigation Associate* (2004-12); *Law Clerk* (2003-04).

- Multiple representations of defendants in federal class actions.
- Antitrust (predominant focus), securities, bankruptcy, and general litigation experience.
- Developed a substantial pro bono education practice within the firm.
- Lead plaintiffs' counsel in pro bono education class action in New Jersey federal court, obtaining $150,000 cash settlement in lieu of attorneys' fees, donated to charity.
- Specific litigation practice experience included:
  - Lead counsel for putative class in *J.T. o/b/o A.T. v. Dumont Public Schools*, managing over twenty attorneys through intensive federal discovery practice, mediations, and briefing.
  - Extensive deposition experience.
  - Briefed and argued multiple dispositive motions and two appeals.

EDUCATION

J.D. (2004), FORDHAM UNIVERSITY SCHOOL OF LAW, GPA: 3.7

- Honors: ***Magna cum laude*** (top 2%), Order of the Coif, Benjamin Finkel Prize (bankruptcy).
- **FORDHAM LAW REVIEW**: Notes and Articles Editor, Vol. 72; *Note, Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 Fordham L. Rev. 2679 (2003) (cited in Restatement Reporter's Notes).

M.F.A. (1993)**, THEATER, SARAH LAWRENCE COLLEGE**, GPA: 3.7

B.A. (HONS) (1990)**, CREATIVE ARTS, NOTTINGHAM TRENT UNIVERSITY**, GPA: 3.7

JOHN D. RUE

PUBLICATIONS

- **Legal Journals and Magazines**
  - *E-discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage a Document Review and Production*, 2010 N.Y. Bus. L.J. 66 (Winter 2010) (with Jack E. Pace III).
  - *E-discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage a Litigation Hold*, 13:2 N.Y. Bus. L.J. 48 (Winter 2009) (with Jack E. Pace III).
  - *Early Reflections on e-Discovery in Antitrust Litigation: Ten Months into the New Regime*, Antitrust Magazine, Vol. 22, No. 1 (Fall 2007) (with Jack E. Pace III).
- **Newsletters and Other Publications**
  - *Well, I Sure Don't "Like" That! Litigation Holds, Social Media, and Employees' Online Data*, 20 Pretrial Practice & Discovery No. 1 (2011) (with Patricia Eastwood, Caterpillar Financial Services).
  - *The United States Supreme Court Rejects "Price-Squeezing" Theory of Liability In Unanimous Decision*, White & Case Client Alert (March 2, 2009) (with Joseph Angland, White & Case).
- **Substantively Quoted**
  - Lisa R. Hasday, *Attorney's Lien Extends to E-Discovery Database*, Litigation News (Apr. 22, 2015).
  - Brian A. Zemil, *Party Relieved from Estimated 95-Million-Page Review*, Litigation News (Jan. 27, 2012).

SPEAKING ENGAGEMENTS

- Moderator, *In-House Counsel Colloquy on the Allocation of E-Discovery Resources* ABA National Institute on E-Discovery (New York, May 18, 2012)
- Moderator, *Attorney Client Privilege and ESI: How to Maintain Privilege "In the Cloud,"*
- *Complex Litigation and Practitioners' Update,* ALI-ABA Third Electronic Discovery and Digital Evidence Practitioners' Workshop, (New York City, Aug. 2011)
- *International discovery: EU, U.S. and Latin America privacy and discovery update*, Strategies for Spanning the E-Discovery Divide, Masters' Series for Legal Professionals (Houston, Aug. 2011)

AWARDS AND RECOGNITION

- 2010 White & Case Pro Bono Award
- 2008 New Jersey Bar Association Service to the Community Award
- 2007 Volunteer Lawyers for Justice Pro Bono Attorney of the Year

BAR ASSOCIATIONS AND PUBLIC INTEREST

- Volunteer Lawyers for Justice: Trustee (2008-2015)
- Innisfree Foundation: President and General Counsel (2011-present)
- NJ-SPAN: Trustee (2015-present), President (2016-present)
- ABA Litigation Section: Co-chair E-Discovery Subcommittee (2011-2015)

ADMISSIONS: N.Y. & N.J.; 2d, 3d, & 5th Circuits; S.D.N.Y., E.D.N.Y., and D.N.J.

PRE-LAW EMPLOYMENT

- Directed stage plays in New York City, 1993-2001
- Investment Banking presentation center experience at CSFB, ING Barings, and Bear Stearns

Exhibit C

White Paper Submission For 2020 COPAA Annual Conference

How Much Justice Can You Afford?

Reliance on Statutory Fee Shifting when Representing Families of Low- to Moderate-Means as Private Counsel.

John Rue

Principal

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INTRODUCTION

Low to moderate-income families of children with disabilities are a notoriously underserved demographic. These vulnerable clients are frequently victimized by school districts, and often suffer egregiously as a result of the absence of the requisite resources, knowledge, and (at times) sophistication necessary to appropriately advocate for their children. So, a common result is that their children are denied substantive education rights. Thus, this presentation will highlight the importance of creativity and flexibility in structuring engagement terms, identifying appropriate cases for reliance upon fee shifting without assuming undue financial risk, and careful attention to the ethical rules governing the practice of law.

A clear understanding of the client's resources is essential. For instance, a person entirely unable to pay for any fees associated with your representation would likely need entirely to rely on statutory prevailing party fees. Therefore, this session will discuss the significance of fee-shifting provisions, their importance to case assessments, the careful drafting and explanation of the engagement agreement that is necessary when fee-shifting will be the sole source of payment for legal services, and other ethical implications of all of the above. Even for clients of moderate means, a realistic assessment of the full cost of representation may place your firm's legal services (if provided at ordinary hourly rates) out of the client's reach. Consequently, the session will also cover alternative fee agreements, such as "fee caps," and hybrid approaches to payment, e.g., where the client pays up to a certain maximum amount, with the remainder deferred by the firm and obtained only upon success on the merits and a fee application. In such circumstances,

the engagement agreement must also address the client's right to reimbursement, in whole or in part, in the event of prevailing on the merits.

Moreover, as to either group of clients (i.e., those who cannot pay at all, and those who can pay part but not all of your firm's fees), close attention must be paid to the prospect of settlement, and a defendant demand for a waiver of attorneys' fees as a condition thereof. So, the presentation will discuss the ethical implications of this circumstance, and how effectively to provide for it in the engagement agreement, protecting the interests of the firm and client alike.

1. Significance Of Statutory Fee-Shifting Provisions

Fee-shifting provisions are designed to incentivize competent counsel to represent litigants with meritorious claims without payment (by the client), or at least without full payment of fees for legal services. Courts have long recognized that the "specific purpose [of statutory fee shifting is] to enable potential plaintiffs to obtain assistance of competent counsel in vindicating their rights." *Kay v. Ehrler*, 499 U.S. 432 (1991).

Many families of children with disabilities have difficulty accessing the IDEA's dispute resolution mechanisms (and the judicial system, as to appeals), because of the costs of engaging counsel. Statutory fee shifting can make it possible for such families to advocate effectively for their children's education rights.

Just as fee-shifting can also provide access to law firms to a large pool of clients with meritorious cases, prevailing party fees provisions provide plaintiffs with access to the civil justice system (and the administrative process, in IDEA disputes), fulfill an urgent need in underrepresented communities, and (in the IDEA context) help ensure that children receive a free appropriate public education (a "FAPE"), regardless of their family's economic status.

However, the challenge to a firm is appropriately managing the risk of taking such cases without guaranteed payment from any source. Firms taking such cases regularly must also think carefully about the ethical issues that arise from such representations.

2. Case Assessment: Primary Variables To Consider During Intake

A. Client's ability to pay some or part of the cost of legal services.

In order effectively to manage financial risk for the firm, different intake standards must apply to those who can pay a part of the ordinary cost of legal services, and those who cannot pay at all.

Strength of the Legal Claims. First, if it intends to rely in whole or in part on prevailing party fees as compensation for legal services to be provided, the firm must carefully consider the strength of the legal claims. This is the single most important variable if the firm is to rely upon

prevailing party fees, the right to which will only accrue (if at all) upon success on the merits. For example, if the IEP clearly states that certain services must be provided, and they clearly have not been provided, then the claims are very strong. But if the claims rely upon a holding that might require a judge to extend the law (e.g., that a child was denied a FAPE by bullying on the bus), that would weigh against a decision that the legal claims are strong.

Potential for Factual Disputes. The existence (or absence) of factual disputes is a substantial risk factor in circumstances where the firm will rely, in whole or in part, on prevailing party fees. For example, a challenge to whether a program or placement is sufficient to provide a FAPE can rarely be resolved without consideration of expert testimony. And the hearing officer's factual findings, including judgments about the credibility of witnesses, can be both unpredictable (especially before even knowing who will be the hearing officer) and difficult to challenge on appeal. On the other hand, if the case will be brought (for example) solely on the basis that the school district (the "LEA") failed to comply with a timeline (e.g., in New Jersey, the LEA must respond to a request for an IEE within twenty days), then factual disputes would be less likely to control the outcome of the case, and therefore the firm's ability to be paid for its work.

Client's Ability to Pay for an Expert, and Other Expenses. The firm should estimate what it would cost to support the client's case financially (evaluation costs, expert witness costs, copying, filing, process service, mileage, etc.), including the cost of the firm's non-attorney staff. If a client cannot pay anything, that should be taken into account. On the other hand, if expert testimony can be obtained without expense to the Firm (either paid for the by the client, or provided without charge by a current clinical care provider), that may be a factor to weigh in favor of accepting the case without client payment for attorneys' fees.

Intangibles – What Makes a "Good Client?" First and foremost, the firm should consider the client's "reasonableness," and beware of the client who "doesn't know how to say yes to a good deal." Furthermore, the firm should consider whether the client previously retained counsel/engaged in prior litigation involving the same issue(s). If so, inquire as to the outcome, and ascertain why the client seeks new counsel. Remember that signing an engagement agreement, even a pro bono one (or perhaps especially a pro bono engagement) is like getting married. Divorce is possible, but it is often difficult and expensive. Is this client one that your firm is willing to "marry" for the duration of the case?

3. Structuring The Engagement Agreement.

The engagement agreement should be structured to protect both the firm's interests and the client's interests, while conforming with the governing ethical rules. Specifically, the engagement agreement should contain evidence of the client's informed consent to the fee structure, including the implications thereto.

A fee structure that defers payment, in whole or in part, until prevailing on the merits may have substantial implications to the client's ability to waive attorneys' fees in settlement. Hence, the client **must** be apprised of those implications, and the attorney **must** be sure the client understands them. In furtherance of a properly drafted engagement, you should reserve

substantial time during the intake interview to discuss this issue with the client, and to obtain initials on the relevant portions of the engagement agreement (which must be clear and understandable to non-lawyers).

Following is a non-exhaustive list of topics to discuss during the initial meeting, before accepting an engagement which relies in whole or in part on prevailing party fees for compensation for legal services.

a. Reliance. You should discuss the firm's reliance, in whole or in part, on fee-shifting. If you will not charge the client at all, make that clear. If there are circumstances where you will charge the client, make that clear.

b. The potential implications of that reliance on settlement negotiations. That is, if the firm is relying on prevailing party fees, what terms does your engagement agreement provide if the client waives the right to reimbursement?

c. The client's right to reimbursement, in whole or in part, of any fees paid to the firm out of prevailing party fees. For example, if the client pays part of your fees, but not all; and then you make a fee application and obtain the full value of your fees, how much is the client entitled to reimbursement? And will reimbursement be made (i) "off the top," (ii) after the firm has been fully compensated, or (iii) proportionally divided between the firm and the client?

d. The client's sole discretion at all times to decide whether to settle. This is important. Although an attorney may ask a client contractually to assign the right to prevailing party fees, it appears at least unlikely that such a provision would be enforced by a court later over a client's objection. Accordingly, you should think carefully before even including a term that might be unenforceable, as doing so might be misleading, in violation of the ethics rules.

e. The client's obligation for fees in the event of a settlement, if the settlement contains a fee waiver. For example, if the client wishes to settle the case, and the LEA inisists upon a fee waiver (but will pay no fees itself), your agreement must allocate responsibility for those fees, if any is to be assigned to the client in such circumstances.

f. Other issues to be discussed at the preliminary meeting, and/or in the written engagement agreement:

- The scope of the engagement, and the limits of the legal services rendered.
- The client's recourse in the event of a dispute over fees (e.g., fee arbitration).
- Conditions that would warrant the firm's withdrawal, and liability for accrued fees in that case.
- The importance of sending regular "bills," even to clients who are not obliged to pay.

4. Ethical Concerns

The ethical rules require attorneys always put clients' interests first. Consequently, the only way for a firm to protect its right to payment of prevailing party fees is to structure the engagement agreement to create appropriate incentives for the client, who must *always* be the final decision-maker on settlement. Additional ethical concerns include, but are not limited to, the following:

a. Client's right to manage the litigation, even if prevailing party fees are implicated.

b. Transparency in the terms of the engagement.

c. Obligation to treat "prevailing party fee" client the same as hourly clients. Duty of diligence and zealous advocacy is unaltered by the nature of the fee structure.

d. "Assignment" of the right to prevailing party fees to the firm may be unenforceable.

e. Where the client has paid nothing for legal services, the firm may wish, with client consent, to take the position that it will not negotiate fees concurrently with the merits, i.e., that if the defendant wishes to settle, it must first resolve the merits of the case with the plaintiff, and then negotiate with the firm on the fees.

f. Negotiations are more complex when the client has part of the cost of the legal services, and is therefore entitled to reimbursement.

g. Advertising and marketing. The ethical rules governing attorney advertising create substantial obstacles to a marketing strategy trumpeting a firm's willingness to rely on prevailing party fees. Any summary of the firm's fee structures must be clear, understandable, and not "misleading" in any way.

EXHIBIT 2

PUBLIC INTEREST LAW

The Impact of Private Public Interest Law Firms on NJ Civil Rights Litigation

By John D. Rue

A decade ago, the New Jersey Supreme Court decided *Pinto v. Spectrum Chems. and Lab Prods.*, 985 A.2d 1239 (2010). In *Pinto*, the Supreme Court adopted a general rule—reversing its previous holding in *Coleman v. Fiore Bros.*, 552 A.2d 141 (N.J. 1989)—that defendants may make "bundled" settlement offers, i.e., conditioning a merits settlement on a compromise or waiver of statutory prevailing party fees. But the *Pinto* court carved out an exception to the rule, holding that defendants could not pursue this tactic in lawsuits where the plaintiff is represented by a "public interest law firm." *Pinto*, 985 A.2d 1250-51.

So for example, under *Pinto*, if a plaintiff-employee is discharged from a large corporation, and sues under New Jersey's Law Against Discrimination (LAD) or its Conscientious Employee Protection Act (CEPA), and is represented by private counsel, the corporate defendant may condition an offer of settlement of the merits (e.g., back pay, front pay, etc.) on a specific compromise amount for attorney fees, or even on no attorney fees at all. But, if that same exact case were brought by a plaintiff represented by a "public interest law firm"—as William Pinto and Alvaro Vasquez were represented in *Pinto* by Legal Services of New Jersey (LSNJ)—the defendant would be precluded by New Jersey law from making such an offer.

The *Pinto* court explained this bifurcation as necessary to ensure that public interest law firms are not forced to choose between abandoning their fees and favorably resolving a client's legal dispute. Speaking about such a forced waiver of statutory fees, the court noted that "a defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client." *Pinto*, 985 A.2d at 1250. Although the U.S. Supreme Court held 34 years ago, in *Evans v. Jeff D.*, 475 U.S. 717 (1986), that such settlement offers from defendants to plaintiffs represented by public interest law firms did not violate fee-shifting provisions of 42 U.S.C. §1988 "in circumstances where the equitable relief provided in the settlement equaled or exceeded the probable outcome at trial," the *Pinto* court rejected the reasoning of the *Jeff D.* majority, exercising its supervisory authority over the practice of law in New Jersey (which explains why a lower court, in this instance, was able to reject a U.S. Supreme Court opinion), and instead expressly adopted the reasoning of and the rule advocated by Justice Brennan's dissent in *Jeff D. Id.* at 1245 (citing *Evans v. Jeff D.*).

Although *Pinto* makes clear that conditional settlement offers such as those described above are improper in New Jersey when made by defense counsel to a plaintiff represented by a public interest law firm, it left open a number of questions—one of which is: What exactly is a "public interest law firm"?

Defining 'Public Interest Law Firm'

Although *Pinto* relies upon the characterization of LSNJ as a "public interest law firm," there is no generally accepted definition of such an entity. When analyzing the term's constituent parts, it is not hard to see why.

PHOTO BY: VECTORMINE/SHUTTERSTOCK.COM

Black's Law Dictionary defines a "law firm" as "an association of lawyers who practice law together, usually sharing clients and profits, in a business organized traditionally as a partnership but often today as either a professional corporation or a limited-liability company." It defines "public-interest law" as a "legal practice that advances social justice or other causes for the public good." Thus, it would seem that the only two requirements for a "public interest law firm" are that (i) a group of associated lawyers practice together as a formal corporate entity and (ii) do so in a way that advances social justice or other causes for the public good.

There is little doubt that LSNJ, which represented the plaintiffs in *Pinto*, qualifies as a public interest law firm. LSNJ is a formal corporate entity (a nonprofit corporation) through which lawyers provide legal services, under a mission that serves the public interest, to wit: "seek[ing] to secure equal substantive and procedural justice for all economically disadvantaged people."

This is not to say that revenue does not matter to LSNJ; of course it does, especially in these challenging times. But with LSNJ, as with any nonprofit, no natural person affiliated with the organization (whether an employee or owner) receives any more or less compensation for their own private use as a result of LSNJ's greater or lesser revenues in any specific case.

The Rise of the 'Private Public Interest Law Firm'

Public interest law firms have been traditionally conceived of as nonprofit entities, such as LSNJ. Other prominent examples include the American Civil Liberties Union, the National Association for the Advancement of Colored People's legal arm, the NAACP Legal Defense Fund, and, here in New Jersey, the Education Law Center. But a consensus is growing that the conventional wisdom on this appears to be too narrow-minded for contemporary reality. Many legal industry observers, including UCLA School of Law Professor Scott Cummings and UC Irvine School of Law Professor Ann Southworth have recognized the rise of the *private* public interest law firm.

Professors Cummings and Southworth explain that the term "private public interest law firm" actually refers to a range on a continuum including firms pursuing various mixes of legal work and divergent visions of the "public interest." In their article, mentioned above, they examine the history of public interest law, various theories of public service, its role in the legal profession, and recent developments. The authors suggest that private public interest firms often pursue a political mission beyond client service. Their definition of private public interest firms is:

> a range of "hybrid" entities that fuse "private" and "public" goals … for-profit legal practices structured around service to some vision of the public interest. They are organized as for-profit entities, but advancing the public interest is one of their primary purposes—a core mission rather than a secondary concern.

Private public interest law firms are also recognized—and in some instances identified by name—by the career counseling offices of Columbia Law School (at a 2014 Private Public Interest Law Firms Roundtable and Reception), Harvard Law School (in its Private Public Interest Law and Plaintiff's Firm Guide), Stanford Law School (on its Careers in Public Interest and Government web page), and UC Berkeley School of Law (on its Private Public Interest Law Firms with Berkeley Law Connections web page). It seems that these elite law schools consider private public interest law firms to be not only a distinct category of law firm, but a growing area that must be considered by their graduates.

In full transparency, the Lake Hopatcong law firm of which I am the principal, John Rue & Associates, LLC, considers itself a private public interest law firm. The firm serves the public interest by assisting parents with all aspects of their children's education law issues, often considering issues other than profit in deciding what cases to accept, and where to allocate firm resources.

Will Private Public Interest Law Firms Change the Civil Rights Litigation Game?

Remember, thanks to *Pinto*, the classification of a law firm as a "public interest law firm" is more than just an academic endeavor or a marketing exercise. Under *Pinto*, when a New Jersey plaintiff is represented by a public interest law firm in a legal dispute arising under a statute containing a fee-shifting provision, defense counsel cannot condition a merits settlement of that matter on a compromise or waiver of statutory prevailing party fees. This can have significant implications for the overall litigation strategy in such a case, let alone the settlement strategy.

The rise of private public interest law firms is even more noteworthy given the fact that the *Pinto* court expressly declined to rule on whether its prohibition on conditional settlement offers should apply to private-practice lawyers in the way it does to public interest law firms. That is, the *Pinto* court left open the question of extending the rule articulated therein to private counsel at firms that cannot be characterized as public interest law firms. *Pinto*, 985 A.2d at 1250 n.8 ("The same logic may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm.").

The same reasoning for the prohibition applies in equal measure to any firm relying, in whole or in part, on prevailing party fees. The *Pinto* court forbid such offers as little more than "a thinly disguised ploy to put a plaintiff's attorney at war with her client" and noted that the practice results in undermining the incentives intentionally created by the "private attorney general" provisions in fee-shifting statutes. *Pinto*, 985 A.2d at 1247, 1250. But these wars can break out between clients and their private-practice lawyers as easily as they can between clients and their pro bono public interest lawyers.

Accordingly, if and when the New Jersey Supreme Court is ever presented with these questions, it seems quite likely—if it adheres to the guiding principles it laid out in *Pinto*—that it will hold that (a) private public interest law firms are afforded the same protections as their nonprofit counterparts under *Pinto*, and (b) such conditional offers should not be made by New Jersey defense lawyers, even where the plaintiff is represented by private counsel, unless that counsel does not rely upon contingent fee shifting, in whole or in part, as compensation. It also seems quite likely that the court will define "public interest law firm" or "public interest lawyer" broadly, to accomplish the remedial purposes of fee shifting statutes.

The incentives for and conflicts created by bundled settlement offers identified by the *Pinto* court are the same for any attorney relying on fee shifting for payment. Considering that no natural person (or lawyer) is directly benefited by the revenues of a traditional nonprofit public interest law firm, it may be that private counsel or private public interest lawyers are placed even more at risk than their public agency counterparts by being forced to participate in settlement offers that bundle a merits resolution with a compromise or waiver of statutory prevailing party fees.

If more private practice lawyers embrace the private public interest law firm model, both they and society are likely to benefit. More lawyers will do good (by serving the public interest) while also likely doing well (by not being put in a position by defense counsel to risk some or all of the fees they earned in order for their client to satisfactorily resolve their case). These are the statutory incentives of the "private attorney general" that the *Pinto* court expressly sought to protect. *Pinto*, 200 N.J. at 593. ■

John D. Rue is the principal at John Rue & Associates in Lake Hopatcong. His firm is a private public interest law firm assisting parents with all aspects of education law issues.

Next Week...

Employment Law

LEGAL ETHICS

Think Twice Before Negotiating Settlement of Client's Claim and Your Fees at the Same Time

By John D. Rue

I recently addressed how the New Jersey Supreme Court's decision in *Pinto v. Spectrum Chems. and Laboratory Prods.*, 985 A.2d 1239 (2010), both (i) left open the question of what a public interest law firm is, and (ii) provides an opportunity for private public interest law firms to do well by doing good. In *Pinto*, a unanimous court held that public interest lawyers and defendants may simultaneously negotiate a case's merits and attorney fees when attempting to settle claims under fee-shifting statutes. However, the court held that when such cases involve a public interest law firm, defendants *may not insist on* a fee waiver.

A second open question after *Pinto*—one which to date has not been formally addressed by a New Jersey court—is whether plaintiffs' counsel must avoid such "bundled" settlement offers as an ethical matter because they result in a conflict between the lawyer's interests and the client's, in violation of New Jersey Rule of Professional Conduct 1.7.

As an education lawyer who frequently receives such bundled offers, I believe plaintiffs' counsel, whether at a private firm or a public interest law firm, must, as a matter of ethics, avoid such simultaneous negotiations where the lawyer or firm anticipates compensation, in whole or in part, from defendant-paid attorney fees. As I read RPC 1.7, my firm generally has no choice but to decline to engage in such simultaneous negotiations.

The Conflict of Interest Created by Settlement Negotiations in Fee-Shifting Cases

NJ RPC 1.7 states that:

> (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 …
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer.

Regardless of who first suggests simultaneous negotiation, plaintiffs' counsel would be wise to uniformly decline to participate in such negotiations. Failing to do so puts counsel at great risk of a nonwaivable conflict between their own interests and their clients'.

These negotiations may seem unremarkable. After all, such negotiations are often over a single number. To the defendant, that number should be "all-in" because, to the defendant, a dollar is a dollar. What is it to defense counsel, for example, where $100,000 is to be paid, whether it is characterized as $90,000 for the plaintiff, and $10,000 as attorney fees, or $50,000 for each? Not much.

But often, the same cannot be said for plaintiffs' counsel. Under most engagement agreements utilized by plaintiffs' counsel in fee-shifting cases, the difference is highly significant to the lawyer's pecuniary interests. At a 90-10 split, this hypothetical civil rights case may not be profitable. In fact, the lawyer may lose money. At a 50-50 split, it could be a different story. So how can the lawyer negotiate this issue when every dollar in fees is a dollar less in net recovery to the client?

PHOTO BY: NATALIA MERZLYAKOVA - FOTOLIA

As an education lawyer who frequently receives such bundled offers, I believe plaintiffs' counsel, must, as a matter of ethics, avoid such simultaneous negotiations.

Many of us still believe that the law is a "noble" profession. But can we really expect members of the bar to overcome our implicit bias, and reasonably negotiate bundled settlement offers on both our own behalf and on behalf of our clients, without being unfair to the clients? For even if we *believe* we can, the ethical question is whether that belief is reasonable. And, for that matter, neither should civil rights lawyers be expected to routinely sacrifice their own interests in such negotiations.

Some lawyers might argue that RPC 1.7(b) provides plaintiffs' counsel with an escape route. That provision, expressly carved out by RPC 1.7(a)(2), would allow such a conflict so long as (i) the client gives informed consent, in writing, including "an explanation of the common representation and the advantages and risks involved"; and (ii) the lawyer "reasonably believes that [they] will be able to provide competent and diligent representation to" both the client and to the lawyer's own (or the lawyer's firm's) interest.

This is a steep hill to climb. For example, where a case has dragged on, and the accrued fees are substantial, a lawyer's subjective belief that she could put her own interests aside and negotiate fairly on behalf of the client may not be objectively reasonable, which is the ethical standard. Where a lawyer negotiates for a single pot of money to be shared by their client and themselves, I submit that any belief that the lawyer could be unaffected by the conflict would be objectively unreasonable.

The Simple Solution: 'Just Say No'

This is a complex problem with, thankfully, a straightforward solution.

Where plaintiffs' counsel is to be compensated to any degree by prevailing party fees, she should refuse to negotiate fees simultaneously with the merits of the client's case. Any other position risks creating a conflict and prejudicing the client, either by (i) a failure to address a real conflict or (ii) the client's need to obtain new counsel. Only after the client's merits claims are resolved, can plaintiffs' counsel negotiate and compromise their fees without risk of conflict or client prejudice. (Of course, if the lawyer has been fully compensated by the client, no conflict is presented.)

Notably, nothing in *Pinto* or any applicable case law *requires* plaintiffs' counsel to engage in simultaneous negotiations. And because the practice is not (and cannot be) required, and is also likely to cause an ethical conflict, plaintiffs' counsel should consider themselves forbidden by RPC 1.7(a) from such simultaneous negotiations where any part of their fee is contingent and to be paid by the defendant.

The conflict described here can be avoided entirely by refusing to enter into engagement agreements in which prevailing party fees provide any portion of the compensation for legal services. But doing so, or creating a rule or engaging in practices incentivizing this approach, runs counter to the public policy considerations behind fee-shifting statutes. As the *Pinto* court noted, "fee-shifting provisions are designed to attract competent counsel to advance the public interest through private enforcement of statutory rights that the government alone cannot enforce," by serving as "private attorneys general." *Pinto*, 985 A.2d at 1247. If lawyers routinely decline engagements which rely on payment by prevailing party fees, and especially if courts and defense counsel (by insisting on simultaneous negotiation of fees with the merits) disincentivize lawyers from accepting such compensation, the mechanism designed to provide access to our civil justice system to those who cannot afford a lawyer will be short-circuited. This cannot be the solution.

The Risk of Saying 'No'

To be clear, the "Just Say No" approach poses some risk to plaintiffs' counsel. But nobody ever promised that strict compliance with the ethical rules would always be easy, risk-free, or comfortable. Saying no, especially to a judge, is often uncomfortable. And unilaterally refusing to negotiate fees simultaneously with the merits of a client's case, unfortunately, will frequently result in plaintiffs' counsel invoking the ire of presiding judges who often urgently wish to see a settlement.

For example, in the New Jersey education law context, defendants frequently (almost uniformly) categorically refuse to negotiate settlement of the merits without coupling such negotiations to a waiver of prevailing party fees—usually a complete waiver. In settlement conferences, defense lawyers plausibly deny that they are leveraging the plaintiff-parent's desperation for a quick resolution of the merits before too much of the school year passes (and where the administrative system in the state is so broken that cases are often not resolved for years despite a federally mandated 45-day timeline) to save their clients' money on statutory attorney fees. Instead, defense counsel assert simply that their client wants complete certainty, and that even carving out fees for a later negotiation and compromise or, failing successful efforts to agree, a judicial decision (either of which would ensure the substantive rights of all parties and the ethical position of plaintiffs' counsel) does not provide enough finality.

When plaintiffs' counsel rejects that approach, and settlement is ultimately placed out of reach, arguably as a result (although the defendants' insistence on the fee waiver as a condition of settlement is just as much a cause), courts will sometimes take a "pox on both your houses" approach to the eventual fee application. But this risk to the lawyer's own interests (not to their clients') is one that plaintiffs' counsel is required to take by the ethical rules.

A Small Price to Pay

Plaintiffs' counsel—just like their counterparts on the defense side—are obligated to comply with the Rules of Professional Conduct. When simultaneously negotiating both the resolution of the merits of a fee-shifting case and an award of attorney fees, there is no reliable means by which plaintiffs' counsel can accomplish both goals with minimal risk of conflict or prejudice.

Rule 1.7(a)(2) is categorical—if there is "a significant risk" that a conflict will arise between a lawyer's personal interests and a client's interests, then the conflict is impermissible and must be either entirely avoided (by refusal to engage in simultaneous negotiations) or eliminated (by withdrawal). In my view, simultaneous negotiation of fees and the merits, where the lawyer relies in whole or in part on prevailing party fees for compensation, always creates a significant risk of a conflict.

If, in some cases, that approach costs plaintiffs' counsel the goodwill of the bench, so be it. That is a small price to pay for ethically practicing law by avoiding a potential conflict between a lawyer's pecuniary interests and their client's interests. ■

John D. Rue is the principal at John Rue & Associates in Lake Hopatcong. His firm is a private public interest law firm assisting parents with all aspects of education law issues.

Next Week...

Medical Malpractice

Exhibit 2

Point/Counterpoint

The Ethics of Negotiating Settlements in Special Education Litigation

By John D. Rue and David B. Rubin

JOHN D. RUE *is principal at John Rue & Associates, LLC, a private public interest law firm, which represents parents in legal disputes with schools.*

DAVID B. RUBIN *is a solo practitioner in Metuchen, also of counsel to The Busch Law Group LLC, and represents public school districts and private schools throughout New Jersey.*

There is a split of opinion within the special education bar concerning the ethical ground rules for negotiating settlement of litigation under the Individuals with Disabilities Education Act (IDEA). Two attorneys with opposing views—one on behalf of school districts, the other on behalf of families—identify the issues and share their perspectives on the proper rules of engagement to resolve these disputes fairly and expeditiously.

Mr. Rubin

Parents' entitlement to prevailing-party counsel fees under the IDEA is often the biggest challenge in settling special education cases. There is an unresolved debate within the special education bar over the ethicality of school district counsel demanding a waiver of fee claims as a condition of negotiating settlements. Some family-side counsel, like my colleague, Mr. Rue, have argued it gives districts an unfair advantage by improperly driving a wedge between lawyer and client. I disagree.

The New Jersey courts haven't squarely addressed the issue in the context of special education litigation, but two Supreme Court decisions involving other fee-shifting statutes have provided guidance. In *Coleman v. Fiore Bros., Inc.*,[1] a Consumer Fraud Act (CFA) case, the Court considered the ground rules for negotiating settlement of fee claims by "public interest" law firms. After surveying state and federal law, the Court held that such firms may not negotiate fee claims until the merits of the case have been settled, and barred defense counsel from insisting on a waiver of fees as a condition of settlement.

In doing so, the Court noted the differences between public interest firms and the private bar. Public interest firms, such as Legal Services of New Jersey, are not permitted to accept fees from clients. Private for-profit firms, on the other hand, have the freedom to structure their fee arrangements (*e.g.*, upfront retainer, hourly billing, pure or partial contingency) based on their own chosen business model.

Subsequently, in *Pinto v. Spectrum Chem. and Lab. Prod.*,[2] a Conscientious Employee Protection Act (CEPA) case, the Court abandoned *Coleman*'s prohibition on simultaneous negotiation of merits and fees by public interest counsel but reaffirmed *Coleman*'s ban on defendants conditioning settlement on fee waivers in cases involving public interest firms.

Most firms representing families in special education cases are private practices operated for profit. Some contend that they and their clients also should enjoy protection from an insistence on fee waivers on the ground that such demands create a conflict of interest for them as well, and in the long run would discourage competent counsel from accepting cases from families of limited means. Some have even advanced the argument that they are, in fact, public interest firms because their representation of these clients serves the public interest.

A fair reading of *Coleman* and *Pinto* compels the conclusion that the "public interest" firms the Court had in mind there are non-profit, legal services-type organizations that cannot accept fees from their clients. They may not be able to take on these cases at all if they routinely face the prospect of no compensation when clients feel compelled to accept offers without at least some fees included. On the other hand, private firms operated for profit are free to structure their fee arrangements to reflect whatever risk of non-payment they're prepared to assume.

The supposed potential for conflicts in special education cases is no different than in any other case where the attorney's fee is contingent on the outcome. Parties of limited means often bring personal injury cases, or actions under the Law Against Discrimination, CEPA or CFA, where a global settlement offer on the table may not fully compensate the attorney for all effort expended in the matter. Plaintiffs and their counsel both have an incentive to maximize the recovery, but ultimately it's the client's decision whether an offer is too good to pass up.[3]

Naturally, the client's settlement decision will account for any obligations to the attorney under the terms of their engagement, but there is nothing about special education litigation *per se*, or the attorneys representing families in those matters, that calls for a different rule than applies in civil rights, employment discrimination or any of the other types of cases involving claims that may be just as important to the lives of the clients involved.

I've also seen no evidence that such a special rule is necessary to attract competent representation for families in special education cases. IDEA's fee-shifting provision has attracted numerous capable attorneys to the field. The public record is replete with six-figure fee awards at private sector hourly rates to counsel who are successful on behalf of their clients. For families unable to retain private counsel with fee arrangements they can afford, the Rutgers Law School Special Education Clinic, Education Law Center and other non-profit organizations regularly make low- or no-cost counsel available to those families. There is also a growing number of able, lower-cost non-attorney advocates permitted to practice special education law by permission of the Supreme Court and the Committee on Unauthorized Practice of Law.[4]

In sum, there's no cogent reason for prohibiting demands for counsel fee waivers and one compelling reason not to: The simple truth is that many cases won't settle if districts are required to agree to a counsel fee award in cases they feel don't warrant it, or be exposed to another round of negotiation over fees after they've bound themselves to a settlement on the merits.

That's why many family-side attorneys oppose such a rule as well. Parents and their attorneys are under no obligation to accept a fee waiver demand if they feel the strength of their case warrants payment of fees. Negotiations can, and should, take place on a level playing field. The prospect of a fee award if the case goes to a hearing is already a valuable bargaining chip motivating districts to increase settlement proposals to buy off that risk. But if districts are unable to negotiate for closure with a bottom line result that's acceptable, many more cases would be forced to trial instead of allowing for prompt settlements that are agreeable to both sides. In the long run, it will be the families of special needs children and their families who will suf-

fer from the delay and risks they will face if early settlements are harder to reach.

Mr. Rue

Clarence Darrow once famously (perhaps apocryphally) said he would argue either side of any case, if only he could frame the question presented. My difference with Mr. Rubin's position starts with his question. He starts from the premise that "Parents' entitlement to prevailing-party counsel fees under the (IDEA) is often the biggest challenge in settling special education cases."

I disagree that the law itself, which includes a fee shifting provision for powerful public policy reasons, is itself the problem. The problem, as I see it, is that New Jersey school boards, driven by insurance carriers who indemnify their illegal conduct, routinely demand a waiver of this statutory right as the price of any settlement at all.

I would reframe Mr. Rubin's initial statement. We can agree that special education legal disputes face unusual, if not unique, challenges in reaching settlement. But the "biggest challenge" to such settlements is not (as Mr. Rubin posits) in the law itself. I submit that there are three such challenges, which vie for the title of the "biggest."

1. New Jersey's "Profoundly Broken" Due Process Hearing System.

When an IDEA special education dispute arises between a parent and a school district, the parent has the right to a due process hearing, and to a final, written decision within 45 days. But in New Jersey, such proceedings routinely take nine months to a year. This problem is neither new, nor subject to any serious debate.

The problem has existed for decades. In 2014, then-Chief Judge of the Office of Administrative Law (OAL) Laura Sanders published a white paper explaining the extremity of the problem. In 2016, the New Jersey Department of Education (NJDOE) resolved an investigation into delays by finding itself out of compliance with the 45-day rule. In 2018, a federal class action was filed against NJDOE seeking relief for violations of the 45-day rule. In 2019, the U.S. Department of Education, after an on-site investigation of NJDOE, found New Jersey to be out of compliance with federal law. And weeks later, a consortium of parent-side special education attorneys (led by this author) filed a second class action, styled *C.P. v. N.J. Dep't of Educ.*[5] In denying NJDOE's motion to dismiss in *C.P.*, Judge Noel Hillman found that "Plaintiffs have made out plausible claims that the system for the adjudication of IDEA disputes by the administrative state in New Jersey is profoundly broken and routinely violates the federal laws designed to insure that our most vulnerable children remain the priority we all should agree they are." A trial in federal court on the merits was scheduled, at this writing, in February.

So how does the "profoundly broken" due process hearing system in New Jersey interfere with settlements? First, the endemic delays undermine the ability of parents to obtain pro bono counsel, because even in light of the prevailing party fee provisions of the IDEA (undercut by insurance carriers and school boards, as discussed below), competent attorneys are reluctant to accept even the most meritorious cases, knowing that resolution will likely take nine months to a year. Both ELC and the Rutgers Clinic would surely take issue with Mr. Rubin's suggestion that anyone qualified for pro bono counsel can get one; the lines are long, and most qualified clients go unserved. And second, the delays place enormous, sometimes hydraulic, pressure on the party seeking a change (usually, but not always, the parents) to make substantive concessions unwarranted by the merits. Both of these create an obstacle to consensual resolution of cases that, by ordinary metrics, absolutely should settle.

2. School Board Insurance Coverage.

School boards have enormous institutional advantages (information, resources, staff, and so on) over parents in litigation. The additional fact that school boards in New Jersey routinely have insurance indemnifying them for the cost of defense, and often also for prevailing party fees awarded (but not in settlement), worsens the power imbalance.

When insurance was first developed, in the early twentieth century, a theory called "moral hazard" arose, cautioning that, if an actor knows it is indemnified from consequences, it will feel free to engage in activities that meet with societal disapprobation. So a restaurant generally cannot insure against fines from the Health Department. And a driver generally cannot purchase insurance against drunk driving penalties. But in New Jersey, a school board that voluntarily accepts federal funding conditioned on compliance with the IDEA is permitted to purchase insurance that covers both the cost of defense in litigation asserting a violation of that law, and also prevailing party fees, if the parent actually *proves* the violation. This creates a perverse incentive for a school board sued by a parent, to the great detriment of children with disabilities.

At the outset of any litigation, a defendant is faced with a choice. Should it seriously try to settle, or just hunker down and fight? Where insurance has not perverted the incentives, defendants behave rationally. They seriously consider settlement at the outset – weighing the cost of litigation (paying their own lawyers) and the risks of losing (liability for the merits plus, in some cases, prevailing party fees), against the benefit of proceeding. On that

basis, most defendants proceed rationally, based on informed self-interest.

But insurance skews the incentive in school law. When an insured school board is sued, it is must compare, on one hand, a potential settlement (in which the cost of education services will be borne by the district) or, on the other hand, litigation, in which an insurance company will indemnify both the district's legal fees and the risk of prevailing party fees, if it is found to have violated the law. Providing the services required by federal law requires (sometimes significant) expenditures; but fighting tooth and nail to avoid those expenditures comes at no cost to insured districts. Even if the district is eventually found liable (and even if it is obvious from the start that it will be), the cost of compliance can be pushed into a future budget year. This, far more than federal law itself, disincentivizes early agreement in special education disputes. Moreover, because of the endemic systemic delays, even parents with good cases frequently give up and go away before getting relief. And of course, this fact further perverts the incentives.

3. A Tacit but Improper Agreement by School Board and Carriers to Leverage the Broken System to Avoid Liability for Prevailing Party Fees.

School boards routinely leverage systemic delays, and access to insurance, to force parents (usually the ones who are seeking relief in these cases) to settle for far less than the merits justify, including but not limited to an unwarranted waiver of statutory fees. Moreover, insured school boards routinely demand a fee waiver as a preliminary concession before even commencing negotiation of the merits. This forces parents without the means for all-out war to accept crumbs, even if legally entitled to the entire pie. And even parents able to pay counsel are routinely forced to waive the right to reimbursement of legal fees, as the price of a "compromise." All of this, if not caused, is certainly aggravated by the availability of insurance that indemnifies prevailing party fees.

Independent Educational Evaluation (IEE) disputes provide a perfect example of the distortion of incentives caused by insurance. When a parent requests an IEE, if the school board does not commence an administrative proceeding within 20 days, it must pay for the evaluation.[6] There are policy reasons for this. For a parent who needs an IEE, justice delayed actually is justice denied. Absent indemnification, any rational school board, having missed the 20-day deadline, would agree to fund the evaluation (usually costing from $2,000 to $5,000), and even pay a few thousand dollars in attorneys' fees (if they had accrued). But the insured school board assumes neither cost nor risk by a scorched earth litigation strategy. At worst, it will have to pay for an evaluation, months or years later, that it should have funded initially. Meantime, insurance will cover the cost of its attorney, as well as prevailing party fees if it is found to have broken the law. And so, insured school boards often demand an agreement, in advance of any substantive exchange, to a fee waiver, as a condition even of negotiation. And the parent's alternative is to wait nine to 12 months for a hearing. This is nothing more, pure and simple, than school boards and insurance carriers tacitly agreeing to leverage the broken due process system, by forcing parents to choose between equally valid federal statutory rights.

Fee shifting, also called "private attorney general," provisions are enacted to promote private enforcement of government policy, in this case, the policy in favor of the enforcement of parent and student rights under the IDEA. Nothing argued by Mr. Rubin warrants undermining this policy in cases brought by "private lawyers," as opposed to "public interest lawyers." Attorneys willing to take on representation with the expectation of statutory fee shifting play a necessary role, expressly contemplated by the IDEA. The argument that "private lawyers" can contract with their clients to protect *their own* interests ignores the fact that many clients lack the means to guarantee payment to the lawyer if (when) the district and its insurance carrier insist on a waiver of the statutory right to fee shifting. These clients have no choice but to rely on meaningful fee-shifting provisions to secure competent counsel. But the tacit agreement to demand fee waivers renders that statutory right illusory. And when the IDEA statutory right to fee shifting is undermined, the harm inflicted is on children with disabilities and their parents, not on their lawyers. As Mr. Rubin rightly points out, the lawyers can take care of themselves.

Mr. Rubin

Mr. Rue is correct. As one distinguished jurist once put it, "[i]n the law, as in other professions, it is often how the question is framed that determines the answer that is received."[7] But his reframing of the question presumes the deck is so stacked against students and their families that they require advantages at the bargaining table unheard of in any other type of civil rights litigation. Again, I respectfully disagree.

I take no issue with IDEA's fee-shifting provision, but the fact remains that fee claims are often the most formidable stumbling block in reaching settlements. Mr. Rue doubles down on his opposition to fee waivers, arguing that districts also should be denied access to insurance coverage. The measures are necessary, he claims, to level the playing field for stu-

dents and their families routinely victimized by school districts and their insurance carriers nefariously leveraging delays in the hearing process for tactical advantage. Having litigated special education cases since the 1970s when the original version of IDEA was enacted, including the one resulting in the reassignment of due process hearings from the Department of Education to OAL 40 years ago,[8] I have a different perspective.

There are delays in the hearing process, to be sure, for reasons that are beyond the scope of this article. The federal courts will decide in due course whether those delays violate IDEA's timelines, but I dispute Mr. Rue's premise that they invariably work to school districts' advantage. In many cases, families benefit from those delays as well. That's because under IDEA's "stay put" clause, districts are required to continue the "current educational placement" until the dispute is resolved.

For example, let's say a district agreed to an out-of-district placement initially, because it did not have an appropriate program in-district, but later creates one that meets the student's needs. Under the Third Circuit's version of "stay put" all a family need do to delay that transition for years is request a due process hearing. Even if they're unsuccessful at OAL, "stay put" remains in effect at least until appeals to the U.S. District Court and the Third Circuit are exhausted, even if they lose there too. School districts don't get the benefit of the same rule, by the way. If the family prevails before OAL, the administrative law judge's decision automatically becomes the "stay put" placement.[9] This built-in double standard is yet another bargaining chip families have in negotiating settlements.

Stripping districts of insurance coverage isn't warranted either. Special education cases should be decided, or settled, on their merits without either side having an unfair advantage in the process. Districts without insurance are often financially unable to withstand even the remote chance of a six-figure counsel fee award and forced to succumb to families' demands for that reason alone. Mr. Rue suggests that's as it should be since the parents are the only parties who care about the student's welfare. Again, I disagree. From personal experience, I can attest that some districts will fight to spend *more* money to provide students with what they feel is the proper education. That doesn't make their position correct, but the vast majority of disputes involve honest disagreements over what's sufficient, not attempts by districts to deprive students of vital services.

Bottom line, most special education practitioners who actively litigate these cases, including many parent-side attorneys, agree that forbidding demands for fee waivers will only cause further delays in the disposition of cases and, in the end, hurt the families Mr. Rue seeks to protect. ■

Endnotes

1. 113 *N.J.* 594 (1989).
2. 200 N.J. 580 (2010).
3. *See* RPC 1.2(a).
4. *See* Court Rule 1:21-1(f); Committee on the Unauthorized Practice of Law Op. 57 (April 9. 2021).
5. (D.N.J. No. 19:12807).
6. *K.K. v. Parsippany Troy Hills,* 21 LRP 35472 (D.N.J. 2021) (Arleo, J.).
7. *Taxman v. Board of Educ. of Tp. Of Piscataway*, 91 F.3d 1547, 1567 (3d Cir. 1996)(Sloviter, C.J., dissenting).
8. *East Brunswick Board of Educ. v. New Jersey State Board of Educ.*, 554 IDELR 122 (D.N.J. 1982).
9. *See N.J.A.C.* 6A:14-2.6(u)(1).

President's Message

Continued from page 5

issues specific to young attorneys at a meeting we held recently with the managing partners of New Jersey firms. We also have a host of reference materials designed specifically to address the needs of new attorneys. The information covers everything from what they need to do to fulfil mandatory continuing legal education and *pro bono* requirements, to how to tackle student loans, to driving directions to courthouses and where to find discounts on clothes, technology and other tools necessary for launching into the profession.

Just as we jumped into action without hesitation to help the new attorney who showed up late to the swearing-in ceremony, the NJSBA stands ready to be a partner to the next generation of attorneys. ■