

client or by terms under which the practitioner's services are made available to the client. For example, a retainer may be for a specifically defined purpose, such as a utility patent application for an article of manufacture. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the practitioner regards as repugnant or imprudent, or which the practitioner is not competent to handle. For example, a patent agent who is not an attorney should exclude services beyond the scope authorized by registration as a patent agent, such as preparing and prosecuting trademark and copyright registrations, patent validity or infringement opinions, or drafting or selecting contracts, including assignments. Practitioners taking referrals from invention promoters must assure that the promoter has not limited or attempted to limit by agreement with the inventor-client the scope of services the practitioner provides, and that the agreement is in compliance with § 11.504(c). See § 11.804(a).

Paragraph (g) of § 11.102, like current § 10.85(b)(1), would require that a practitioner reveal to the Office a fraud that the client has perpetrated on the Office after calling upon the client to rectify the same, and the client refuses or is unable to do so.

Section 11.103 would require a practitioner to act with diligence and zeal. Paragraphs (a), (b), and (c) of § 11.103 would continue the policy in current § 10.84(a).

Paragraph (a) of § 11.103 would continue to recognize that a practitioner has a duty, to both the client and to the legal system, to represent the client before the Office zealously within the bounds of the law, including the proposed Office Rules of Professional Conduct and other enforceable professional regulations. This duty requires the practitioner to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the practitioner, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A practitioner should act with commitment and dedication to the interests of the client. However, a practitioner is not bound to press for every advantage that might be realized for a client. A practitioner has professional discretion in determining the means by which a matter should be pursued. See proposed § 11.102. A practitioner's workload should be controlled so that each matter can be handled adequately.

This duty derives from the practitioner's recognition to practice in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of individuals, each member of our society is entitled to have such member's conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

Where the bounds of law are uncertain, the action of a practitioner may depend on whether the practitioner is serving as advocate or adviser. A practitioner may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as the advocate finds them. By contrast, a practitioner serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a practitioner should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a practitioner may not institute or defend a proceeding unless the positions taken are not frivolous. See proposed § 11.301. In serving a client as adviser, a practitioner, in appropriate circumstances, should give a practitioner's professional opinion as to what the ultimate decisions of the Office and courts would likely be as to the applicable law.

In the exercise of professional judgment, a practitioner should always act in a manner consistent with the best interests of the client. However, when an action in the best interests of the client seems to be unjust, a practitioner may ask the client for permission to forgo such action. If the practitioner knows that the client expects assistance that is not in accord with the proposed Rules of Professional Conduct or other law, the practitioner must inform the client of the pertinent limitations on the practitioner's conduct. See proposed §§ 11.102(e) and (f). This is believed to be entirely consistent with *Link v. Wabash R.R.*, 370 U.S. 626, 633–34 (1962); *Johnson v. Department of the Treasury*, 721 F.2d 361 (Fed Cir. 1983). Similarly, the practitioner's obligation not to prejudice the interests of the client is subject to the duty of candor toward the tribunal under proposed § 11.303 and the duty to expedite litigation under proposed § 11.302.

The duty of a practitioner to represent the client before the Office with zeal

does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the practitioner's duty to pursue a client's lawful objectives zealously does not prevent the practitioner from acceding to reasonable requests of opposing counsel, e.g., in an interference or reexamination, that do not prejudice the client's rights, from being punctual in fulfilling all professional commitments, from avoiding offensive tactics, or from treating all persons involved in the legal process with courtesy and consideration.

Perhaps no professional shortcoming is more widely resented by clients than procrastination. A client's interests, including patent rights, often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a practitioner overlooks a statute of limitations under 35 U.S.C. 102(b), the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the practitioner's trustworthiness. Neglect of client matters is a serious violation of the obligation of diligence.

Unless the relationship is terminated as provided in proposed § 11.116, a practitioner should carry through to conclusion all matters undertaken for a client. If a practitioner's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a practitioner has served a client over a substantial period in a variety of matters, the client sometimes may assume that the practitioner will continue to serve on a continuing basis unless the practitioner gives notice of withdrawal. Doubt about whether a client-practitioner relationship still exists should be eliminated by the practitioner, preferably in writing, so that the client will not mistakenly suppose the practitioner is looking after the client's affairs when the practitioner has ceased to do so. For example, if a practitioner has prosecuted a patent application that has become abandoned for failure to respond to an Office action having a final rejection, but the practitioner has not been specifically instructed concerning pursuit of an appeal, the practitioner should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Paragraph (c) of § 11.103 would define some, but not all, acts that would constitute violations of paragraphs (a) or