

(1949) (sustaining disbarment of attorney for deceiving Office as to real author of article presented in support of pending application, and misrepresenting that the article was the work of a "reluctant witness"). Similarly, a practitioner has a duty under proposed § 11.303(a)(4) not to use false evidence. See proposed §§ 11.303(a)(4) and (b). This duty is essentially a special instance of the duty prescribed in proposed § 11.102(d) to avoid assisting a client in criminal or fraudulent conduct.

Further, the practitioner may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the practitioner has not violated proposed § 11.102(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Still further, the practitioner may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the practitioner has professional discretion to reveal information in order to prevent such consequences. The practitioner may make a disclosure in order to prevent homicide or serious bodily injury, which the practitioner reasonably believes is intended by a client.

It is very difficult for a practitioner to be certain when such a heinous purpose will actually be carried out, for the client may have a change of mind. The practitioner's exercise of discretion requires consideration of such factors as the nature of the practitioner's relationship with the client and with those who might be injured by the client, the practitioner's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the practitioner should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the practitioner reasonably believes necessary to the purpose. A practitioner's decision not to take preventive action permitted by paragraph (b)(1) would not violate this Rule.

Withdrawal. If the practitioner's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the practitioner must withdraw, as stated in proposed § 11.116(a)(1).

After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise provided in §§ 11.106(c) and (d).

Neither §§ 11.106(c) and (d), nor § 11.108(b), nor § 11.116(d) prevent the practitioner from giving notice of the fact of withdrawal, and the practitioner may also withdraw or disaffirm any opinion, document, affirmation, or the like. Giving notice of withdrawal, without elaboration, is not a disclosure of a client's confidences. Furthermore, a practitioner's statement to the Office that withdrawal is based upon "irreconcilable differences between the practitioner and the client" is not elaboration. Similarly, after withdrawal under either proposed § 11.116(a)(1) or proposed §§ 11.116(b)(1) or (2), the practitioner may retract or disaffirm any opinion, document, affirmation, or the like that contains a material misrepresentation by the practitioner that the practitioner reasonably believes will be relied upon by others to their detriment.

Where the client is an organization, the practitioner may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with § 11.106, the practitioner may make inquiry within the organization as indicated in proposed § 11.113(b).

Dispute Concerning Lawyer's Conduct. Where a legal claim or disciplinary charge alleges complicity of the practitioner in a client's conduct or other misconduct of the practitioner involving representation of the client, the practitioner may respond to the extent the practitioner reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The practitioner's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) of § 11.106 does not require the practitioner to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the practitioner's ability to establish the defense, the practitioner should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the practitioner reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate

protective orders or other arrangements should be sought by the practitioner to the fullest extent practicable.

If the practitioner is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the practitioner from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the practitioner against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the practitioner and client acting together. A practitioner entitled to a fee is permitted by paragraph (b)(2) of § 11.106 to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the practitioner must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Paragraphs (c) and (d) of § 11.106—Disclosures otherwise required or authorized. The attorney-client or agent-client privilege is differently defined in various jurisdictions. If a practitioner is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) of § 11.106 requires the practitioner to invoke the privilege when it is applicable. The practitioner must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the practitioner to give information about the client.

The proposed Office Rules of Professional Conduct in various circumstances permit or require a practitioner to disclose information relating to the representation. See proposed §§ 11.202, 11.203, 11.303, and 11.401.

In addition to these provisions, a practitioner may be obligated or permitted by other provisions of law to give information provided in confidence by the client. Paragraph (c) of § 11.106 would require disclosure necessary to comply with 37 CFR 1.56 requiring a practitioner to disclose information material to patentability of pending claims. The practitioner may learn that a client intends to engage in conduct or is involved in conduct constituting fraud on the Office. As stated in proposed § 11.106(d), the practitioner has professional duty to comply with