

whether there are actual or potential conflicts of interest.

If such a conflict arises after representation has been undertaken, the practitioner should withdraw from the representation. *See* proposed § 11.116. Where more than one client is involved and the practitioner withdraws because a conflict arises after representation, whether the practitioner may continue to represent any of the clients is determined by proposed § 11.109. *See also* proposed § 11.202(c). As to whether a client-lawyer or client-agent relationship exists or, having once been established, is continuing, see the comments to proposed § 11.103.

Paragraph (a) of § 11.107 would express the general rule that loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Thus, a practitioner ordinarily may not act as advocate against a person the practitioner represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

The prohibition of paragraph (a) of § 11.107 would relate only to actual conflicts of positions, not to mere formalities. For example, a practitioner would not be absolutely forbidden to provide joint or simultaneous representation if the clients' positions are only nominally but not actually adverse. Joint representation is commonly provided to joint inventors, to incorporators of a business, to parties to a contract, in formulating estate plans for family members, and in other circumstances where the clients might be nominally adverse in some respect but have retained a practitioner to accomplish a common purpose. If no actual conflict of positions exists with respect to a matter, the absolute prohibition of paragraph (a) does not come into play.

Paragraph (b) of 11.107 would address situations where loyalty to a client can be impaired when a practitioner cannot consider, recommend or carry out an appropriate course of action for the client because of the practitioner's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical

questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the practitioner's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given as to whether the client wishes to accommodate the other interest involved.

*Full disclosure and consent.* A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested practitioner would conclude that the client should not agree to the representation under the circumstances, the practitioner involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict would have to be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the practitioner represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the practitioner cannot properly ask the latter to consent.

*Full Disclosure.* Disclosure and consent are not mere formalities. Full disclosure is defined in § 11.1(n). As defined therein, full disclosure requires a clear explanation of the differing interests involved in a transaction, the advantages of seeking independent legal advice, and a detailed explanation of the risks and disadvantages to the client entailed in any agreement or arrangement, including not only any financial losses that will or may foreseeably occur to the client, but also any liabilities that will or may foreseeably accrue to the client.

Proposed § 11.107 would not require that disclosure be in writing or in any other particular form in all cases. Nevertheless, it should be recognized that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. Moreover, it would be prudent for the practitioner to provide potential joint clients with at least a written summary of the considerations disclosed, and to request and receive a written consent. This can

reduce the opportunity for dispute regarding the scope and content of the disclosure.

*Consent.* The term "consent" is defined in § 11.1(e). As indicated there, a client's consent must not be coerced either by the practitioner or by any other person. In particular, the practitioner should not use the client's investment in previous representation by the practitioner as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a practitioner has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the practitioner should not undertake the representation.

When a practitioner has two clients, the clients might have potential conflicts. In circumstances having potential conflicts, the circumstances would trigger § 11.107(a) and (b). Potential conflicts between an inventor and invention promoter may arise from a contract between them providing for the promoter to obtain a practitioner to represent the inventor in obtaining a patent. The practitioner engaged by the promoter may have a lawyer-client or agent-client relationship with both the inventor and promoter. For example, if the contract provides for the promoter to pay the practitioner, the practitioner may regard the promoter as a client, while the practitioner obtains a power of attorney from the inventor to prosecute the latter's patent application. Another potential conflict may arise regarding funds advanced by the inventor for the practitioner's legal services. Normally, when a client advances legal fees, the funds are received by a practitioner, who places the funds in an escrow account. *See* § 11.115(a). In such circumstances, the client is entitled to a refund of unearned fees. *See* proposed §§ 11.115(d)(4), and 11.116(d). If, however, in accordance with the contract between the promoter and inventor, the inventor delivers the funds to the promoter, the promoter may place the funds in its own account(s). The funds are then subject to the promoter's control. The inventor may expect the practitioner to deliver legal services inasmuch as the funds have been advanced. There is a potential for the promoter going out of business, or the inventor being dissatisfied with the services from the promoter and practitioner. The client may desire to discharge the practitioner. In such circumstances, the inventor might be unable to recover the unearned advanced legal fees held by the promoter, and there is a potential conflict between the inventor and promoter regarding the advanced legal