

accompanying comment to the limitation upon a "practitioner" must be read in light of the imputed disqualification provisions of § 11.110, which affect practitioners practicing in a firm.

In the Government-practitioner context, § 11.107(b) is not intended to apply to conflicts between agencies or components of Government (Federal, state, or local) where the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity.

*Businesses Affiliated with a Practitioner or Firm.* Practitioners, either alone or through firms, may have interests in enterprises that do not or would not be authorized to practice law but that, in some or all of their work, become involved with practitioners or their clients either by assisting the practitioner in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, invention promoters, and the like. The existence of such interests would raise several questions under § 11.107. First, a practitioner's recommendation, as part of legal advice, that the client obtain the services of an enterprise with which the practitioner is affiliated implicates § 11.107(b)(4). The practitioner should not make such a recommendation unless able to conclude that the practitioner's professional judgment on behalf of the client will not be adversely affected. Even then, the practitioner should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the practitioner's or the firm's interest in or relation with the enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services, and the client's relationship to the enterprise will not be that of client to attorney. Second, such an affiliated enterprise may refer a potential client to the practitioner; the practitioner should take steps to assure that the related enterprise will inform the practitioner of all such referrals. The practitioner should not accept such a referral without full disclosure of the nature and substance of the practitioner's interest in the related enterprise, including the number of clients annually referred. *See also* § 11.701(b). Third, the practitioner should be aware that the relationship of the enterprise to its own customer may create a significant interest in the practitioner in the continuation of that

relationship. The substantiality of such an interest may be enough to require the practitioner to decline a proffered client representation that would conflict with that interest; at least §§ 11.107(b)(4) and (c) may require the prospective client to be informed and to consent before the representation could be undertaken.

Fourth, a practitioner's interest in an affiliated enterprise that may also serve the practitioner's clients would create a situation in which the practitioner must take unusual care to fashion the relationship among practitioner, client, and enterprise to assure that confidences and secrets are properly preserved pursuant to § 11.106 to the maximum extent possible. *See* § 11.503.

*Section 11.108—Transactions Between Client and Practitioner.* As a general principle, all transactions between client and practitioner should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Section 11.108(a) does not, however, apply to standard commercial transactions between the practitioner and the client for products or services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the practitioner has no advantage in dealing with the client, and the restrictions in § 11.108(a) are unnecessary and impracticable.

A practitioner may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the practitioner to obtain the detached advice that another practitioner can provide. Section 11.108(c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Proposed § 11.108 does not prevent a practitioner from entering into a contingent fee arrangement with a client in a civil case, if the arrangement satisfies all the requirements of § 11.105(c).

*Literary Rights.* An agreement by which a practitioner acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the practitioner. Measures that might otherwise be taken in the representation of the client may detract from the publication value of an

account of the representation. Section 11.108(d) would not prohibit a practitioner representing a client in a transaction concerning literary property from agreeing that the practitioner's fee shall consist of a share in ownership in the property, if the arrangement conforms to § 11.105.

*Patent Rights.* An agreement whereby a practitioner acquires patent rights or an inventor assigns patent rights to an enterprise funded by the practitioner, but equally owned by the practitioner and the inventor, also creates a conflict between the interests of the client and the personal interests of the practitioner. A practitioner must do more than advise the client to seek the advice of independent counsel in the transaction. Full disclosure requires the practitioner to advise the client of all options or alternatives, including advising the client to consult with independent counsel, and potential conflicts between the practitioner and client. *See Monco v. Janus*, 583 N.E.2d 575 (Ill. 1991); *Rhodes v. Buechel*, 685 N.Y.S.2d 65, 1999 N.Y.App. Div. LEXIS 904 (1999), appeal denied, 711 N.E.2d 984, 689 N.Y.S.2d 708, 1999 N.Y. LEXIS 1206 (NY 1999). A practitioner should advise a client, before entering into an agreement, of the alternatives to assigning all patent rights to the enterprise. For example, one alternative is to lease the rights to the company. The conflict is evident when following a lack of success, the practitioner seeks to dissolve the enterprise due to a deadlock with client, and the client expects the practitioner to exercise professional judgment on the client's behalf.

*Paying Certain Administrative Proceeding or Litigation Costs and Client Expenses.* Historically, under the Code of Professional Responsibility, practitioners could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by the USPTO in 1985 by adoption of 37 CFR 10.64(b), that eliminated the requirement for the client to remain ultimately liable for all costs of patent prosecution by permitting the practitioner to advance any fee required to prevent or remedy abandonment by reason of an act or omission attributable to the practitioner. The provisions of § 11.108(e) would continue the provisions of current § 10.64(b), but go further by providing that a practitioner may also pay certain expenses of a client that are not patent prosecution or litigation expenses. Thus, under § 11.108(e), a practitioner may pay medical or living expenses of