

capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the practitioner's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the practitioner may need to act as de facto guardian. Even if the person does have a legal representative, the practitioner should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the practitioner should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the practitioner should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the practitioner's part.

*Disclosure of the Client's Condition.* Rules of procedure in litigation generally provide that a guardian or next friend shall represent minors or persons suffering mental disability if they do not have a general guardian. Practitioners occasionally file patent applications for child inventors whose parents act as general guardians. However, disclosure of a client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The practitioner's position in such cases is an unavoidably difficult one. The practitioner may seek guidance from an appropriate diagnostician.

*Section 11.115* would continue the policies regarding the safeguarding of a client's property. A practitioner should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the practitioner's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts

may be warranted when administering estate monies or acting in similar fiduciary capacities.

*Paragraph (a) of § 11.115* would be substantially the same as current § 10.112(a). Separation of the funds of a client from those of the practitioner not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

*Paragraph (b) of § 11.115* would address situations wherein a practitioner has an arrangement with an invention promoter to be paid for legal services, and the promoter collects advanced legal fees from a client. In these situations, the practitioner would be responsible for safeguarding the funds advanced by inventor-clients to the promoter. The practitioner's involvement might provide the arrangement between the promoter and inventor-client with a genre of legitimacy and security for the funds. Thus, the arrangement enables the promoter to receive and have the funds for the practitioner's legal services. It would be appropriate for the practitioner to be expected to safeguard the client's funds advanced for the practitioner's legal services. Thus, if the promoter kept the funds advanced by the client and ceases doing business, the practitioner would be responsible for continuing to provide the legal services, even if he or she did not safeguard the advanced funds.

Some invention promoters eventually cease doing business. The Federal Trade Commission acted to freeze the assets of two invention promoters, and a District Court froze the assets. *See Federal Trade Commission v. American Inventors Corporation*, 37 USPQ2d 1154, 1995 U.S. Dist. LEXIS 18854 (D.Mass. 1995). The companies ceased doing business, and unsuccessfully sought protection in bankruptcy. *See Federal Trade Commission v. American Institute for Research and Development*, 219 B.R. 639, 1998 U.S. Dist. LEXIS 4391 (D.Mass. 1998) (dismissing involuntary bankruptcy proceedings by company to avoid risk of abuse of bankruptcy system and in support of the court's interest in vindicating its remedial orders). The matter remains pending, and what the clients will recover, if anything, is uncertain. Under § 11.115(b), a practitioner would be responsible for safeguarding the funds advanced by the client. For example, a practitioner could arrange to have the promoter return the funds to the client, who might then advance the funds to the practitioner.

*Paragraph (c) of § 11.115* would be substantially the same as current

§ 10.112(b)(2). In a variety of circumstances, practitioners receive funds from third parties from which the practitioner's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. A practitioner is not required to remit the portion from which the fee is to be paid. However, a practitioner may not hold funds to coerce a client into accepting the practitioner's contention. The disputed portion of the funds should be kept in trust and the practitioner should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a practitioner's custody. A practitioner may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a practitioner should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a practitioner under this section are independent of those arising from activity other than rendering legal services. For example, the applicable law relating to fiduciaries governs a practitioner who serves as an escrow agent even though the practitioner does not render legal services in the transaction.

*Paragraph (d) of § 11.115* would be substantially identical to current § 10.112(c).

*Paragraph (e) of § 11.115* would require funds, securities or other properties held by a practitioner as a fiduciary to be maintained in separate fiduciary accounts, and the practitioner would not be permitted to commingle the assets of such fiduciary accounts except as provided by state bar ethics rules.

*Paragraph (f) of § 11.115* would require a practitioner to maintain books and records that establish compliance with paragraphs (a) and (d) of § 11.115 for a period of five years after termination of the representation. A member of the bar in the District of Columbia is required to maintain records for a five-year period. Further, the five-year period is consistent with the statute of limitation period within which formal action must be taken to discipline a practitioner. *See Johnson v. SEC*, 87 F.3d, 484 (D.C.Cir. 1996); *3M Company v. Browner*, 17 F.3d 1453 (D.C.Cir. 1994).