

### *Section 11.202 and Withdrawal.*

Common representation does not diminish the rights of each client in the client-practitioner relationship. Each has the right to loyal and diligent representation, the right to discharge the practitioner as stated in § 11.116, and the protection of § 11.109 concerning obligations to a former client.

*Section 11.203* would articulate ethical standards for circumstances where a practitioner provides an evaluation of a matter affecting a client for the use of someone other than the client. An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. *Section 11.203* would not authorize conduct that otherwise would constitute aiding the unauthorized practice of law. Thus, providing a nonlawyer, who offers legal services to potential customers, with legal advice to pass on to the nonlawyer's customer(s) would continue to be viewed as aiding the unauthorized practice of law. *See* Formal Opinion 87, Ethics Committee of the Colorado Bar Association (1991).

A legal evaluation should be distinguished from an investigation of a person with whom the practitioner does not have a client-practitioner relationship. For example, a practitioner retained by a purchaser to analyze a vendor's title to property does not have a client-practitioner relationship with the vendor. Likewise, an investigation into a person's affairs by a Government practitioner, or by special counsel employed by the Government, is not an evaluation as that term is used in this section. The question is whether the practitioner is retained by the person whose affairs are being examined. When the practitioner is retained by that person, the general Rule of Professional Conduct concerning loyalty to client and preservation of confidences would apply, which is not the case if the practitioner is retained by someone else. For this reason, it is essential to identify the person by whom the practitioner is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

*Section 11.203 and Duty to Third Person.* When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of § 11.203. However,

because such an evaluation involves a departure from the normal client-practitioner relationship, careful analysis of the situation is required. The practitioner must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the practitioner is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the practitioner to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the practitioner should advise the client of the implications of the evaluation, particularly the practitioner's responsibilities to third persons and the duty to disseminate the findings.

*Section 11.203 and Access to and Disclosure of Information.* The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a practitioner should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in a report giving the results of the investigation. If, after a practitioner has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the practitioner's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

*Section 11.203 and Financial Auditors' Requests for Information.* When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the practitioner, the practitioner's response prudently might be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Practitioners' Responses to Auditors' Requests for Information, adopted in 1975.

*Section 11.301* would continue the requirement that a practitioner present well-grounded claims. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but

also a duty not to abuse legal procedure. The law, both procedurally and substantively, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the practitioner expects to develop vital evidence only by discovery. Such action is not frivolous even though the practitioner believes that the client's position ultimately will not prevail. The action is frivolous if the practitioner is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

*Section 11.302* would continue the requirement that practitioners diligently pursue litigation and Office proceedings. Dilatory practices bring the administration of justice into disrepute and may be contrary to the client's interest in patent prosecution. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent practitioner acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

*Section 11.303* would continue the duty of candor to a tribunal while specifying its application under different situations. *Section 11.303* would define the duty of candor to the tribunal. In dealing with a tribunal, including the Office, the practitioner is also required to comply with the general requirements of § 11.102 (e) and (f). The advocate's responsibility is to endeavor to present the client's case with persuasive force. Performance of that duty, while maintaining confidences of the client, is qualified by the advocate's duty of candor to the tribunal. *See Lipman v. Dickinson*, 174 F.3d 1363, 50 USPQ2d 1490 (Fed. Cir. 1999).

While an advocate normally does not vouch for the evidence submitted in a cause—the tribunal is responsible for assessing its probative value—the same may not apply in practice before the