

testify, in attending a proceeding, or in testifying in that proceeding.

Section 11.305 would proscribe forms of improper influence upon a tribunal. Such forms of improper influence are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A practitioner is required to avoid contributing to a violation of such provisions. The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A practitioner may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Section 11.306 is reserved. Rule 3.6 of the Model Rules of Professional Conduct contain "[g]uidance on trial publicity." It would be a conflict of interest for the Office to attempt to control communications to the public by attorneys representing a party in a suit against the Office. Accordingly, the provisions of Rule 3.6 are not being proposed. Nevertheless, an attorney in a civil action brought against the Office would be subject to the professional conduct rules of the state where the attorney is licensed to practice law. If, in the course of the trial, the attorney violates the state's professional conduct rules and is disciplined by the state authorities, the attorney could be subject to discipline under the proposed rules. See §§ 11.24 and 11.803(f)(5).

Section 11.307 would generally proscribe a practitioner from acting as advocate in a proceeding before the Office in which the practitioner is likely to be a necessary witness. Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the practitioner and client. The opposing party has a right to object where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

A registered practitioner could normally testify in an interference

proceeding when his or her diligence is an issue in the interference. The Office would continue to assess on a case-by-case basis the weight to be given testimony by a registered practitioner who also represents a party in the proceeding in which the registered practitioner gives testimony. See *Wilder v. Snyder*, 201 USPQ 927, 934 (Bd. Pat. Int. 1979).

Paragraph (a)(1) of § 11.307 would recognize that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical.

Paragraph (a)(2) of § 11.307 would recognize that permitting the practitioners to testify concerning the extent and value of legal services rendered in the action in which the testimony is offered on the subject, avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation, the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Paragraph (a)(3) of § 11.307 would recognize that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the practitioner's testimony, and the probability that the practitioner's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the practitioner should be disqualified, due regard must be given to the effect of disqualification on the practitioner's client. It is relevant that one or both parties could reasonably foresee that the practitioner would probably be a witness.

If the only reason for not permitting a practitioner to combine the roles of advocate and witness is possible prejudice to the opposing party, there is no reason to disqualify other practitioners in the testifying practitioner's firm from acting as advocates in that trial. In short, there is no general rule of imputed disqualification applicable to § 11.307. However, the combination of roles of advocate and witness might involve an improper conflict of interest between the practitioner and the client in addition to or apart from possible prejudice to the opposing party. Whether there is such a client conflict is determined by §§ 11.107 or 11.109. For example, if there is likely to be a significant conflict between the testimony of the client and that of the practitioner, the representation would be improper under the standard set forth

in § 11.107(b) without regard to § 11.307(a). The problem could arise whether the practitioner is called as a witness on behalf of the client, or is called by the opposing party. Determining whether such a conflict exists is, in the first instance, the responsibility of the practitioner involved. See Comment to § 11.107. Section 11.307(b) would state that other practitioners in the testifying practitioner's firm are disqualified only when there is such a client conflict and the testifying practitioner therefore could not represent the client under §§ 11.107 or 11.109. The principles of client consent, embodied in §§ 11.107 and 11.109, also would apply to § 11.307(b). Thus, the reference to §§ 11.107 and 11.109 incorporates the client consent aspects of those Rules. Section 11.307(b) as proposed would provide the protection for the client, not rights of disqualification to the adversary. Subject to the disclosure and consultation requirements of §§ 11.107 and 11.109, the client may consent to the firm's continuing representation, despite the potential problems created by the nature of the testimony to be provided by a practitioner in the firm.

Even where a practitioner's testimony would not involve a conflict with the client's interests under §§ 11.107 or 11.109 and would not be precluded under § 11.307, the client's interests might nevertheless be harmed by the appearance as a witness of a practitioner in the firm that represents the client. For example, the practitioner's testimony would be vulnerable to impeachment on the grounds that the practitioner-witness is testifying to support the position of the practitioner's own firm. Similarly, a practitioner whose firm's colleague is testifying in the case should recognize the possibility that the practitioner might not scrutinize the testimony of the colleague carefully enough and that this could prejudice the client's interests, whether the colleague is testifying for or against the client. In such instances, the practitioner should inform the client of any possible adverse effects on the client's interests that might result from the practitioner's relationship with the colleague-witness, so that the client may make a meaningful choice whether to retain the practitioner for the representation in question.

Section 11.308 is reserved. Rule 3.8 of the Model Rules of Professional Conduct addresses the "Special Responsibilities of a Prosecutor" in the context of criminal proceedings. Inasmuch as practice before the Office does not involve criminal proceedings, the content of Model Rule 3.8 is not