

being proposed. Nevertheless, an attorney who is both a practitioner before the Office and a criminal prosecutor would be subject to both the Office and State professional conduct rules. If, in the course of a criminal proceeding, 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 11.309 would introduce a practitioner's responsibility in a non-adjudicative role before an administrative agency, such as the Office. The proposed rule would provide conformity with Rule 3.9 of the Rules of Professional Conduct adopted by state bars. In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity (including the USPTO), practitioners present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A practitioner appearing before such a body should deal with it honestly and in conformity with applicable rules of procedure.

Practitioners have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of § 11.309, therefore, may subject practitioners to regulations inapplicable to advocates, such as non-practitioner lobbyists. However, legislatures and administrative agencies have a right to expect practitioners to deal with them as they deal with courts.

Section 11.309 does not apply to representation of a client in a negotiation or other bilateral transaction with a Government agency, such as the Office; representation in such a transaction is governed by §§ 11.401 through 11.404.

Section 11.309 is closely related to §§ 11.303 through 11.305, which deal with conduct regarding tribunals. The term "tribunal," as defined in the terminology section of the proposed Rules, refers to adjudicative or quasi-adjudicative bodies, including the Office.

Section 11.401 would require a practitioner to be truthful when dealing with others on a client's behalf where the client has immediate or prospective business before the Office. However, the practitioner generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the practitioner incorporates or affirms a statement of another person

that the practitioner knows is false. Misrepresentations can also occur by failure to act. The term "third person" as used in §§ 11.401(a) and (b) refers to any person or entity other than the practitioner's client.

Section 11.401(a)—*Statements of Material Fact or Law*. This Rule would refer to material statements of fact. Whether a particular statement should be regarded as material, and as one of fact, can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. There may be other analogous situations. In other circumstances, a particular factual statement may be material; for example, a statement to a client's potential licensor of an invention that an application for a patent on the invention is pending, when the practitioner knows the application has been abandoned for some time, and the client is unaware of its status.

Section 11.401(b) would recognize that substantive law may require a practitioner to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this section is, however, subject to the obligations created by § 11.106.

Section 11.402 would provide a standard for communicating with a party represented by counsel in connection with representing a client having immediate or prospective business before the Office. This rule would not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a practitioner for either organization from communicating with nonpractitioner representatives of the other organization regarding a separate matter. Also, parties to a matter may communicate directly with each other and a practitioner having independent justification for communicating with the other party is permitted to do so.

Section 11.402(b) would address the case of communicating with agents or employees of an organization that is a represented party concerning the subject of representation. Section 11.402(b) would prohibit communication by a practitioner for one party concerning the

subject of the representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this section.

Section 11.402(a) would cover any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Section 11.402(a) would not apply to the situation in which a practitioner contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a practitioner for a plaintiff who has filed suit against an organization represented by a practitioner may telephone the organization to request a copy of a press release regarding the representation, without disclosing the practitioner's identity, obtaining the consent of the organization's practitioner, or otherwise acting as paragraphs (a) and (b) of this Rule would require.

Section 11.402(c) would recognize that special considerations come into play when a practitioner is seeking to redress grievances involving the Government, including the Office. It would permit communications with those in Government having the authority to redress such grievances (but not with any other Government personnel) without the prior consent of the practitioner representing the Government in such cases. However, a practitioner making such a communication without the prior consent of the practitioner representing the Government must make the kinds of disclosures that are required by § 11.402(b) in the case of communications with non-party employees.

Section 11.402(d) would not prohibit a practitioner from bypassing counsel representing the Government on every issue that may arise in the course of disputes with the Government. It is intended to provide practitioners access to decision makers in Government with respect to genuine grievances, such as to present the view that the Government's basic policy position with respect to a dispute is faulty, or that Government personnel are conducting themselves