

matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both practitioners is clear and they would be equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under § 11.107, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

*Section 11.503* would set forth a practitioner's responsibilities regarding nonpractitioner assistants. Practitioners generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the practitioner in rendition of the practitioner's professional services. A practitioner should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonpractitioners should take account of the fact that they do not have legal training and are not subject to professional discipline.

Just as practitioners in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other Government practitioners may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other Government practitioners have a responsibility for police or investigative personnel, whose conduct they effectively direct, equivalent to that of private practitioners with respect to investigators hired by private practitioners. *See also* the comments to § 11.501, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm.

Comments to § 11.501 apply as well to § 11.503.

*Section 11.504* would provide for the professional independence of a practitioner. The provisions of § 11.504 would express traditional limitations on sharing fees with nonpractitioners. (On sharing fees among practitioners not in the same firm, *see* § 11.105(e).) These limitations would be to protect the practitioner's professional independence of judgment. Where someone other than the client pays the practitioner's fee or salary, or recommends employment of the practitioner, that arrangement does not modify the practitioner's obligation to the client. As stated in § 11.504(d), such arrangements should not interfere with the practitioner's professional judgment.

Giving anything of value in exchange for recommending or securing employment for the practitioner would be specifically barred. Thus, for example, under proposed § 11.504(a), a practitioner would not be able to receive payment from an inventor for legal services and then pay an invention promoter a share for finding the inventor-client and referring the inventor-client to the practitioner. Likewise, the prohibition against a practitioner splitting fees with a non-practitioner is directed at the risk posed by the possibility of control of legal matters by a non-practitioner interested more in personal profit than the client's welfare. *See In the Matter of Jones*, 2 Cal. State Bar Ct.Rptr. 411 (Review Dept. 1993). To the extent this policy is implicated, a practitioner should not be able to "sanitize" such impermissible fee-splitting by the simple expedient of having an invention promoter receive the funds, make the division, and distribute them to the practitioner. *Accord* Formal Opinion 1997-148, Standing Committee on Professional Responsibility and Conduct (California); Formal Opinion 87, Ethics Committee of the Colorado State Bar (1991). Under proposed § 11.504(b), such practices would be specifically proscribed in cases involving an invention promoter. Ethics opinions and court decisions in those jurisdictions finding violations of rules barring fee-splitting between lawyers and non-lawyers in the estate planning and living trust contexts do not turn upon whether the lawyer receives payment for the trust and divides it with the marketer, or vice versa.

*Section 11.505* would proscribe engaging in or aiding the unauthorized practice of law. The definition of the practice of law is established by law and might vary from one jurisdiction to another. Whatever the definition,

limiting the practice of patent law before the Office to those recognized to practice protects the public against rendition of legal services by unqualified persons or organizations. A patent application is recognized as being a legal document. *See Sperry v. Florida*, 373 U.S. 379, 137 USPQ 578 (1963). Thus, a corporation that is not authorized to practice law renders legal services, as opposed to clerical services where, upon request from a general practice attorney and for a fee, it causes a patent application to be prepared by a registered practitioner. *See Lefkowitz v. Napatco*, 415 N.E.2d 916, 212 USPQ 617 (NY 1980). There are numerous cases and ethics opinions wherein attorneys have been found to have aided lay organizations in the unauthorized practice of law by agreeing to accept referrals from a non-lawyer engaged in unauthorized practice of law. Some involve non-lawyers marketing estate planning packages. A registered practitioner accepting referrals from a non-lawyer engaged in unauthorized practice of law paralleling such marketing packages might be aiding the unauthorized practice of law. An attorney was found to have aided the unauthorized practice of law by permitting a non-attorney operating as a business to gather data from estate planning clients for preparation of legal documents, and forward the data to the attorney who thereafter prepared the documents (including a will, living trust, living will, and powers of attorney). The attorney, without having personally met or corresponded with the client, forwarded the documents to the non-attorney for the client to execute. *See Wayne County Bar Ass'n v. Naumoff*, 660 N.E.2d 1177 (Ohio 1996). In another case, an attorney agreed to accept referrals from non-attorneys who marketed, through free seminars, living trusts as estate planning devices to avoid probate. At the conclusion of the seminars, the marketers gathered personal and asset information on a form from clients desiring consultations with the marketers. The marketers then discussed the living trust with the clients, and what could and could not be done. The marketers recommended the attorney, who accepted 100 referrals in a two year period. The information gathered by the marketers would then be forwarded to the attorney, either by the marketers or the clients, and the attorney then spoke with the clients by telephone to answer their questions. The attorney then prepared trust documents for the clients' review, and later met with the clients in person,