

were provided the free use of an automobile or free clerical services in return for soliciting clients on behalf of the practitioner, the obligations imposed by § 11.701(b)(4) would apply and impose the specified disclosure requirements.

Statements by an invention promoter in connection with the marketing of the patent applications and inventions, whether on the telephone, at a seminar, or oral or in writing, regarding a practitioner preparing the patent applications and the availability of that practitioner to respond to questions relating to the application, would be communications under § 11.701 since they concern the availability of a practitioner for professional employment, and are therefore subject to the requirements of § 11.701. Like the communications found violative in *Leoni v. State Bar*, *supra*, 39 Cal.3d 609 (Cal. 1985) and *People v. Morse*, 21 Cal.App.4th 259, fn. 13 (1993), *affd.* *In re Morse*, 11 Cal. 4th 184 (Cal. 1995) they have potential to mislead members of the public. In *Leoni v. State Bar*, the letters and brochures inaccurately suggested or intimated that all recipients needed a lawyer, that their property was subject to immediate attachment, that bankruptcy was appropriate for them, and the like. In *People v. Morse*, the advertisements made inaccurate suggestions and statements regarding the protections afforded recipients by the homestead laws. Statements which, by their generic, "one-size-fits-all" recommendation of patents for everyone, may similarly contain untrue statements, and omit facts—such as that patents may not be worth the cost or in the client's best interest in every case—necessary to make the communications not misleading.

Further, an invention promoter's statements on the telephone or at a meeting regarding the professional employment of the practitioner in connection with obtaining patent protection would constitute a prohibited in-person solicitation under §§ 11.703(a) and 11.703(b). Section 11.703(a) and (b) would proscribe a practitioner from seeking employment through an intermediary under circumstances involving false or misleading statements, undue influence, a potential client who is physically or mentally unable to exercise reasonable judgment, and the practitioner has not taken reasonable steps to ensure that the potential client is informed of the consideration paid to the intermediary as well as any possible effect the payment has on the total fee charged. These rules would apply because a

significant motivation for the promotion of the practitioner's services for the inventor is pecuniary gain (rather than communication of general information regarding patents). *See FTC v. AIRD*, 219 B.R. 639 (D Mass. 1998). For purposes of § 11.703, it makes no difference whether the invention promoter or the practitioner seeks or receives payment from the participant, since the rule regulates employment motivated by pecuniary gain, without regard to whether a practitioner or one acting on his behalf seeks or obtains that gain. Since the solicitation is directed at obtaining prospective clients with whom the practitioner has no prior professional relationship, it would be prohibited by § 11.703(a). The use of the invention promoter to communicate with the inventor would not insulate the practitioner from § 11.703, which prohibits improper solicitations made by "an intermediary for the practitioner." In both the advertising and the solicitations, the invention promoter cannot do on the practitioner's behalf what the practitioner cannot do. The invention promoter simply becomes the agent of the practitioner. A practitioner cannot avoid the prohibition against in-person solicitation by associating with a non-practitioner who engages in such prohibited conduct on the lawyer's behalf. *Accord* Formal Opinion 1997–148, Standing Committee on Professional Responsibility and Conduct (California).

Paragraph (b)(5) of § 11.701 would impose specific obligations on the practitioner who uses an invention promoter as an intermediary to ensure that the potential client who is the target of the solicitation is accurately informed in every contract between the client and intermediary of all legal fees and expenses included in the funds the client delivers to the intermediary. The practitioner would also have to ensure that every communication to the client by the intermediary requesting funds accurately reflect all legal fees and expenses included in the funds sought, and that the potential client is informed of the discount in legal fees the practitioner gives or will give in consideration for the promoter referring a client.

Paragraph (d) of § 11.701 is based on 35 U.S.C. 32, and prohibits advertising that is specifically precluded by statute.

Paragraph (e) of § 11.701 is based on 5 U.S.C. 501, which prohibits the use of the name of a Member of Congress or of an individual in the service of the United States in advertising the practitioner's practice before the Office.

Section 11.702 would provide for advertising by practitioners. Paragraph (a) of § 11.702 would continue the requirements of current § 10.32(a) that provide for practitioners advertising their services through public media. Paragraph (b) of § 11.702 would introduce a requirement of keeping a copy of advertisements or communications (whether in printed or electronic media) for a period for two years. Paragraph (e) of § 11.702, like current § 10.32(c), would require any communication made pursuant to this rule to include the name of at least one practitioner responsible for its content.

Section 11.703 would address the potential for abuse inherent in direct in-person or live telephone contact by a practitioner with a prospective client known to need legal services. These forms of contact between a practitioner and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the practitioner's presence and insistence upon being retained immediately. The situation is filled with the possibility of undue influence, intimidation, and overreaching, as was recognized in *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978) (disciplining attorney for soliciting clients for pecuniary gain under circumstances evidencing undue influence, intimidation, or overreaching).

Paragraph (a) of § 11.703, like current § 10.33, would provide a general prohibition against in-person or live telephone contact to solicit professional employment from a prospective client with whom the practitioner has no family or prior professional relationship when a significant motive for the practitioner's doing so is the practitioner's pecuniary gain and the solicitation occurs under circumstances evidencing undue influence, intimidation, or overreaching. This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since practitioner advertising and written and recorded communication permitted under § 11.702 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed