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December 17, 2012

Via Electronic Mail
ethicsrules.comments@uspto.gov

The Honorable David Kappos
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office
U.S. Patent and Trademark Office
P.O Box 1450
Alexandria, VA 22313-1450

Attn.: William R. Covey, Deputy General Counsel for Enrollment and Discipline
and Director of the Office of Enrollment and Discipline

Re: Proposed Changes to Representation of Others Before the United States Patent and
Trademark Office, 77 Fed. Reg. 64190 (October 18, 2012)

Dear Director Kappos:

On behalf of the American Bar Association (ABA), which has nearly 400,000 members, enclosed are our comments regarding the above-referenced proposal by the U.S. Patent and Trademark Office (USPTO or Office) to align its professional responsibility rules with those of most other U.S. jurisdictions by replacing the current Patent and Trademark Office Code of Professional Responsibility (adopted in 1985 and based on the 1980 version of the ABA Model Code of Professional Responsibility) with new USPTO Rules of Professional Conduct. The new Rules are based on the ABA Model Rules of Professional Conduct, which were published in 1983, substantially revised in 2003, and updated through 2012. The Office also proposes to revise the existing procedural rules governing disciplinary investigations and proceedings.

We appreciate the opportunity to offer the appended comments on the rules proposed by the USPTO and look forward to assisting in any way possible to complete the process. If you have any questions about our comments or if you require additional information, please do not hesitate to contact Joseph M. Potenza, Chair of the ABA Section of Intellectual Property Law at jpotenza@bannerwitcoff.com, or me.

Very truly yours,



Laurel G. Bellows
President, American Bar Association

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cc: Jeanne P. Gray, Director, ABA Center for Professional Responsibility
 Joseph M. Potenza, Chair, ABA Section of Intellectual Property Law
 Thomas M. Susman, Director, ABA Governmental Affairs Office
 Michael G. Winkler, Director, ABA Section of Intellectual Property Law

**Comments of the American Bar Association on the
Proposed Changes to Representation of Others Before the U.S. Patent
and Trademark Office, 77 Fed. Reg. 64190 (October 18, 2012)**

**I. The Proposed New USPTO Code of Professional Responsibility Should
Include the Commission on Ethics 20/20 Policies Approved by the ABA
House of Delegates in August 2012**

In light of the USPTO's statement in its October 18, 2012 Federal Register notice that "it would be desirable" to bring the USPTO's Code of Professional Responsibility "into greater conformity" with the ABA Model Rules of Professional Conduct followed by a majority of the states, the American Bar Association strongly urges the USPTO to conform its Code, not to the outdated Model Rules of Professional Conduct as they were published in 1983, substantially revised in 2003, and updated through 2011, but to the current Model Rules as amended by the ABA House of Delegates in August 2012, which can be found at

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

On August 6, 2012, the ABA's policy-making House of Delegates voted to approve amendments to the Model Rules of Professional Conduct relating to technology and confidentiality, technology and client development, outsourcing, practice pending admission, admission by motion, and detection of conflicts of interest. These amendments were the culmination of three years of work by the Commission on Ethics 20/20. Thus, the Model Rules have been updated in light of advances in technology and global legal practice developments. The USPTO Notice states that "[t]hese revisions have not been incorporated into these proposed Rules since the states have not adopted those changes at this time."

It would be prudent, however, to provide greater guidance to the patent and trademark bar in these areas now rather than wait for state implementation, which most likely will occur in the near future. Indeed, the ABA implementation process is well under way. The ABA Center for Professional Responsibility Policy Implementation Committee (PIC) met in Chicago on November 3, 2012 to discuss the implementation process for the first set of Ethics 20/20 proposals adopted as Association policy. PIC members were sent implementation contact charts for their assigned jurisdictions. Letters were sent to each jurisdiction's Chief Justice urging them to establish a committee to study the Ethics 20/20 policies. Copies of the Chief Justices' letters also will be sent by electronic communication to the appropriate state bar association presidents, state bar association executive directors, state bar admissions director, and ABA state delegates. After December 1, 2012, PIC members will be contacting the Ethics 20/20 contacts in their assigned jurisdictions to determine if study committees have been established and what assistance, if any, the PIC Committee can provide. To date, Alaska, Pennsylvania, Idaho and Maine have begun studying the amendments. The territories of American

Samoa, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands have adopted the Ethics 20/20 recommendations.

Thus, it is reasonable to assume that, within a short period of time, conformity with the Rules followed by a majority of the jurisdictions will require that the regulations track the most recent version of the ABA Model Rules of Professional Conduct.

II. The Proposed New USPTO Code of Professional Responsibility Should Include the Comments to the ABA Model Rules of Professional Conduct

In its Notice, the USPTO recognizes that “[a] practitioner also may refer to the Comments and Annotations to the ABA Model Rules of Professional Conduct for guidance as to how to interpret the equivalent USPTO Rules of Professional Conduct.”

In that the USPTO recognizes the value of the Comments to the ABA Rules, it should consider adopting explanatory and illustrative comment to the proposed regulations identical to the Comments contained in the ABA Model Rules. Of the fifty jurisdictions that have substantially adopted the ABA Model Rules, forty jurisdictions have adopted the ABA Model Rule Comments as guides to interpretation; four jurisdictions have adopted the Rules with their own unique Comments, and only six jurisdictions have adopted no Comments, *see* <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.pdf>.

The Comments that follow each Rule in the ABA Model Rules of Professional Conduct assure that the practitioner has access to the Rule with explanatory information that provides immediate and needed guidance in the interpretation and application of the Rule. Together, the Rule and Comment provide a comprehensive and educational presentation of the practitioner’s ethical obligations, which serves the purpose of ensuring the highest ethical compliance.

III. The Proposed New USPTO Code of Professional Responsibility Should Adopt the ABA Model Rules of Professional Conduct in Several Areas that it Proposes to “Reserve.”

Section 11.102(b) is reserved as the USPTO is declining to enact a specific rule regarding a practitioner’s endorsement of a client’s view or activities. However, the USPTO is not implying that a practitioner’s representation of a client constitutes an endorsement of the client’s political, economic, social, or moral views or activities.

The USPTO is declining to adopt the following language from ABA Model Rule 1.2(b): “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” It is important for the Office to adopt this language. The provision was added to the Model Rules in an effort to facilitate the representation of unpopular clients. The philosophy behind the Rule is that legal representation should not be denied to a person whose cause is controversial or the subject of popular disapproval. By the

same token, a lawyer's act of representing a client does not constitute approval of the client's views or activities.

Personal difficulties or animosity between a lawyer and his or her client do not constitute a reason for removing a lawyer from the matter unless the lawyer-client relationship has deteriorated to the point where the lawyer is incapable of effective communication with the defendant or the lawyer is incapable of objective decision-making about the matter. *See LaBrake v. State*, 152 P.3d 474, 482 (Alaska Ct. App. 2007) ("Lawyers are trained and expected to represent people whose conduct may be questionable, and whose views on social and moral matters may differ significantly from the lawyer's.") The professional obligation of the lawyer is to advocate the rights of the client, not the acts of the client. Thus, it is important to add the provision because it separates actor and principal and thereby enables the representation that makes the USPTO's procedures work fairly. *See Andre A. Borgeas, "Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation," 13 Geo. J. Legal Ethics 761 (Summer 2000).* Therefore, it is recommended that the proposed Rule include a provision stating that "a practitioner's representation of a client does not constitute an endorsement of the clients' political, economic, social, or moral views or activities."

Section 11.108(j) is reserved. The USPTO is declining to enact a rule that would specifically address sexual relations between practitioners and clients. Because of the fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest and impairment of the judgment of both practitioner and client. To the extent warranted, such conduct may be investigated under more general provisions (e.g., 37 CFR 11.804).

It is recommended that the USPTO adopt a rule specifically addressing sexual relations between practitioners and clients. Such a rule was added to the ABA Model Rules as Rule 1.8(j) as part of the 2002 amendment process. A specific rule was considered preferable to addressing such conduct under rules dealing with misconduct or conflicts of interest. "Although recognizing that most egregious behavior of lawyers can be addressed through other Rules[,] ... having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct." American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 209 (2006). Ethically impermissible lawyer-client sexual relationships can and do occur in other contexts, e.g., *Attorney Grievance Comm'n v. Hall*, 969 A.2d 953 (Md. Ct. Spec. App. 2009) (employment discrimination); *In re Anonymous*, 699 S.E.2d 693 (S.C. 2010) (lawyer represented client on a variety of matters, a per se violation of S. C. Rule of Prof'l Conduct 1.7, which governs lawyer conflicts of interest with current clients).

Section 11.111 would address former or current Federal Government employees. This Rule deals with practitioners who leave public office and enter other

employment. It applies to judges and their law clerks as well as to practitioners who act in other capacities. The USPTO is declining to enact ABA Model Rule of Professional Conduct 1.11 and is instead enacting its own Rule regarding successive government and private employment, namely, that a practitioner who is a former or current Federal Government employee shall not engage in any conduct which is contrary to applicable Federal ethics laws, including conflict of interest statutes and regulations of the department, agency or commission formerly or currently employing said practitioner. See, e.g., 18 U.S.C. 207.

The USPTO has announced that instead of adopting Model Rule 1.11, it is enacting its own rule regarding successive government and private employment. Model Rule 1.11 and its Comment embody the substance of the Office’s proposed regulation regarding government lawyers being subject to applicable government regulations. For example, Model Rule 1.11(a) uses the same “personal and substantial participation” as defined in the Ethics in Government Act of 1978, 18 U.S.C. § 207 (2010): participation “through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise.”

Although it might be rare for a current government employee to appear before the USPTO as contemplated by Model Rule 1.11, the Rule provides additional guidance should this occur. The Model Rule applies, “not only to lawyers moving from government service to private practice (and vice versa) but also to lawyers moving from one government agency to another.” American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 273 (2006). Codifying the holding of ABA Formal Ethics Op. 97-409 (1997), Model Rule 1.11 makes the personal and substantial participation in the same matter standard the touchstone of disqualification from any subsequent representation, adverse or not. American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, at 273. Unlike Model Rule 1.9, the general-purpose rule on former-client conflicts, which comes into play only if there is adversity of interests and only if there has been a lawyer-client relationship, Rule 1.11 applies to lawyers who have served as public officers or employees of any kind, whether or not in a “lawyer” capacity. The Rule also provides that a conflict of interest that results from an individually disqualified lawyer’s service as a public officer or employee will not be imputed to his or her firm colleagues if the lawyer is timely screened and the appropriate government agency is notified in writing.

Accordingly, it is important to adopt Model Rule 1.11 to enable lawyers to utilize their talent in the public sector without fear that their service will unduly burden their future careers in the private sector. The USPTO is urged to adopt Model Rule 1.11 to bring it more into conformity with the parallel rules as they have been adopted by a majority of jurisdictions.

Section 11.201 would provide a Rule addressing the practitioner’s role in providing advice to a client and corresponds to the ABA Model Rule of Professional Conduct 2.1. However, the USPTO is declining to enact the substance of the last sentence of

ABA Model Rule of Professional Conduct 2.1, which provides that in representing a client, a practitioner may refer to not only legal considerations, but also other factors. However, by not enacting the last sentence of Rule 2.1, the USPTO is not implying that a practitioner may not refer to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Model Rule 2.1, Comment [2] provides the best rationale for adopting the Rule in its entirety: "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." The Comment makes clear that the underlying purpose of the omitted sentence is to ensure that lawyers are counselors and advisors in the finest sense of those words, not mere scriveners. The practice of law is dynamic; different situations require different approaches. It is a lawyer's job to honor all the client's concerns, economic, social, and emotional in addition to legal, in developing a strategy that yields the best solution to the problem under the existing circumstances. The inability to take into account all factors having an impact on the client is unreasonable and counterintuitive. Practitioners should not be concerned that they can be disciplined for offering advice not legal in nature as long as the advice is competent and separate from lawyer's personal views.

Section 11.306 is reserved as the USPTO is declining to enact a specific rule regarding trial publicity. Nonetheless, a practitioner who engages in improper conduct relating to trial publicity is subject to the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. See 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (e.g., § 11.804).

The USPTO is urged to adopt ABA Model Rule 3.6 with regard to trial publicity, so that it conforms with the parallel rules adopted by a majority of jurisdictions. Rule 3.6, which emanates from ABA-drafted fair trial and free press standards, has been carefully framed to protect the right to a fair trial and to prevent prejudice. This may be especially important given the possible parallel proceedings in the USPTO, United States District Courts, and the International Trade Commission. The lack of a USPTO Rule aimed at protecting the right to a fair trial and safeguarding the right of free expression is a glaring omission. The failure to have a USPTO Rule deprives practitioners of the necessary guidance in Office proceedings. The failure to have a USPTO Rule also creates inconsistencies where non-lawyer practitioners are not subject to state ethics rules regarding trial publicity and lawyer-practitioners would be. It also creates a potential inconsistency where attorneys representing the same or different clients engage in the same conduct, but that conduct results in different disciplinary action based on the

respective states in which the practitioner is admitted to practice. The USPTO should adopt its own rule that would apply uniformly to avoid confusion and inequitable results.

IV. Proposed Sections 11.106 (Confidentiality of Information) and 11.303 (Candor Toward the Tribunal)

Proposed Section 11.106 regarding Confidentiality of Information adds the phrase “inequitable conduct before the office” to 11.106(b)(2) and (3) and adds new subsection (c).

Proposed Section 11.106(c) provides:

“(c) A practitioner shall disclose to the Office information necessary to comply with applicable duty of disclosure provisions.”

The proposed addition of “inequitable conduct before the Office” is understood to be limited to the proposition that a practitioner must disclose to the PTO information necessary to comply with the practitioner’s duty of disclosure as defined by 37 C.F.R. § 1.56 (“Rule 56”).

The Proposed Section requires clarification in several respects. Proposed subsection (c) should refer specifically to Rule 56 rather than referring to “applicable duty of disclosure provisions.” The duty to disclose set out in Section 11.106(c) is identical to that set out in Proposed Section 11.303(e) regarding Candor toward the tribunal. Since Section 11.303 relates to “Candor toward the tribunal,” Section 11.303 is the better place to include the duty to disclose. Section 11.106(c) could then be deleted and the proposed addition to Section 11.106(a) shown on the PTO’s redline modified as follows: “, or the disclosure is required by ~~paragraph (c) of this section~~ Section 11.303(e).”

Most important, it is recommended that the USPTO make clear that a practitioner’s duty to disclose as set forth in Proposed Sections 11.106(c) and 11.303(e) terminates upon the practitioner’s withdrawal. That is necessary to deal with the situation in which the practitioner learns information from one client that is material to patentability for a second client. The Federal Circuit struggled with this situation in *Molins PLC v. Textron, Inc.*, 48 F.3d 1172 (Fed. Cir. 1995), a case in which the three judges on the panel could not agree whether the lawyer in this situation must disclose the information to the PTO or withdraw from representing both clients without making a disclosure. It has now become accepted practice within the Patent Bar for a lawyer in this situation to withdraw from representing both clients so that the confidentiality of the first client is respected, and the duty of disclosure the lawyer owes in representing the second client is not violated. The discretionary disclosure provisions of Proposed Sections 11.106(b)(2) and (b)(3) appropriately allow disclosure in situations in which a client is improperly withholding information from the PTO.

Indeed, Proposed Section 11.303(b) states that a practitioner “shall take reasonable remedial measures,” but that language does not appear in new Proposed Section 303(e). Accordingly, it is unclear whether a practitioner may take “reasonable remedial measures,” such as withdrawal, in regards to paragraph 9e). Proposed Section 11.303(c) also states that the duties described in paragraphs (a) and (b) “apply even if compliance requires disclosure of information otherwise protected by 11.106.” However, paragraph (e) does not offer any guidance regarding the relationship between the confidentiality rule in section 11.106 and the candor rule in section 303. Finally, Proposed Section 11.303(c) states that the duties of paragraphs (a) and (b) “continue to the conclusion of the proceeding”; it does not provide that withdrawal discharges the practitioner’s duties. Accordingly, if the USPTO determines to include a version of paragraph (e), it is urged to clarify the rule by changing paragraph (c) as follows:

(c) The duties stated in paragraphs (a), (b), and (e) of this section continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by section 11.106. A practitioner’s withdrawal or attempted withdrawal from a proceeding before the USPTO discharges the practitioner’s duties as set forth in this section.

V. Proposed Section 11.108 Conflict of Interest: Current Clients: Specific Rules

Proposed Section 11.108 proposes to add to 11.108(i)(3) that “A practitioner shall not acquire a property interest . . . except that the practitioner may . . . (3) in a patent case or a proceeding before the Office, take an interest in the patent as part or all of his or her fee.” It is recommended that the USPTO refer to section 11.108(a) to require a client’s informed consent to the practitioner’s acquiring a property interest in a patent application or patent. This could be accomplished by adding the following to Section 11.108(3): “provided the requirements of section 11.108(a) are met.” It is recommended that subsection (3) refer to “patent application” in addition to patent.

VI. Proposed Section 11.203 Evaluation for Use by Third Persons

Proposed Section 11.203(c) provides:

“(c) Except as disclosure is authorized or required in connection with a report of an evaluation regarding a patent, trademark or other non-patent law matter before the Office, information relating to the evaluation is otherwise protected by § 11.106.”

Section 11.203 does not specifically refer to practice before the USPTO but rather to an evaluation provided to a third party. Disclosure of the client’s confidential information is never required under this situation but may be permitted in certain situations in which the client has used the lawyer’s services to perpetrate a crime or fraud. *See* Proposed Section 11.106(b)(2), (3). For that reason, it is recommended that the USPTO adopt 11.203 as set forth in ABA Model Rule 2.3(c) rather than the proposed version of Section 11.203 that diverges from ABA Model Rule 2.3.

VII. Proposed Section 11.307 Practitioner as Witness

The ABA is concerned about Proposed Section 11.307 regarding a lawyer's dual role as advocate and witness. ABA Model Rule 3.7 prohibits such a dual role by an individual lawyer except in certain situations. One exception is when disqualification of the practitioner would "work substantial hardship on the client." ABA Model Rule 3.7(a)(3). The Proposed Section 11.307 would eliminate that restriction whenever the "testimony relates to a duty of disclosure." Such testimony would be permitted by a practitioner acting as both advocate and witness regardless of whether the dual role could be avoided without substantial hardship to the client. The Notice of Proposed Rulemaking does not identify reasons for relaxing the standard. Testimony relating to a duty of disclosure might sometimes, and perhaps frequently, involve a situation of adversity between lawyer and client in which the lawyer's dual role would be problematic. We recommend against adoption of Proposed Section 11.307(a)(4).

VIII. Proposed Section 11.504(a)(4) Professional Independence of a Practitioner

Proposed Rule 11.504(a)(4) provides:

(4) A practitioner may share legal fees, whether awarded by a tribunal or received in settlement of a matter, **with a nonprofit organization** that employed, retained or recommended employment of the practitioner in the matter and **that qualifies under Section 501(c)(3) of the Internal Revenue Code.**

By requiring that the non-profit qualify under Section 501(c)(3) of the Internal Revenue Code (IRC), the Proposed Section 11.504(a)(4) is narrower than ABA Model Rule 504(a)(4) but drawn so broadly as to possibly have unintended outcomes. For instance, on its face Proposed Section 11.504(a)(4) would allow fee sharing with universities (which typically qualify for as a tax exempt entity pursuant to IRC § 501(c)(3)). Universities frequently license their patents to for-profit entities that would not fall within IRC § 501(c)(3). As such, this may provide a loophole which may be unfairly exploited. At the very least, the USPTO should provide clarification regarding the scope of the term "nonprofit organization" as recited in Proposed Section 11.504(a)(4).

IX. Proposed Section 11.505 Unauthorized Practice of Law

Certain portions of Proposed Section 11.505(d) and (e) are unclear.

Section 11.505(d) provides:

(d) [A practitioner shall not] [a]id a suspended, disbarred or **excluded** practitioner in the unauthorized practice of patent, trademark, or other non-patent law before the Office;

Section 11.505(e) provides:

(e) [A practitioner shall not] [a]id a suspended, disbarred or ***excluded*** attorney in the unauthorized practice of law in any other jurisdiction;

Notably, use of the term “excluded” in sections (d) and (e) makes these sections unclear. Neither the USPTO’s proposed or current rules provide a definition of this term. The USPTO should define the term “excluded”.

Additionally, the USPTO’s failure to adopt ABA Model Rule 5.5(b)(2) excludes certain unethical conduct that will have unintended consequences. The USPTO did not adopt ABA Model Rule 5.5(b)(2) despite its clear relevance to practice before the USPTO.

ABA Model Rule 5.5(b)(2) provides:

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Proposed Section 11.505 is based in part on ABA Model Rule 5.5. The USPTO for the most part adopted the sections of ABA Model Rule 5.5 that are pertinent to the practice before the USPTO. However, by neglecting to adopt the ABA Model Rule 5.5(b)(2), the USPTO’s Proposed Section 11.505 falls short and does not address certain unethical conduct. For instance, the proposed Rules would not deter the following unethical conduct: (1) a suspended or disbarred practitioner holds out to the public or otherwise represents that the practitioner is admitted to practice before the Office; or (2) a trademark attorney holds out to the public or otherwise represents that the practitioner is admitted to practice patent law before the office. The USPTO should rectify this loophole.

X. Proposed Section 11.801(d) Registration, recognition and disciplinary matters.

Proposed Section 11.801(d) provides:

An applicant for registration or recognition to practice before the Office, or a practitioner in connection with an application for registration or recognition, or a practitioner in connection with a disciplinary or reinstatement matter, shall not . . . (d) Fail to cooperate with the Office of Enrollment and Discipline in an investigation of any matter before it.

This is a provision not included in ABA Model Rule 11.801. The Proposed Section does not define “fail to cooperate.” As proposed, the language is so broad that it is unknown if a practitioner’s assertion of constitutional or other privileges might be considered a failure “to cooperate” with the Office of Enrollment and Discipline. The ABA urges the USPTO to clarify that the exercise of privilege or other statutory rights cannot be used against the practitioner. An example of such language appears in the California Business and Professions Code 6068 which includes a provision similar to Proposed Section 11.801(d). That language includes:

“This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney’s practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.”

California Business and Professions Code 6068(i). The ABA recommends that if the USPTO retains Proposed Section 11.801(d), that it includes this or similar language.

XI. Proposed Section 11.804(i) Misconduct

Proposed Section 11.804(i) provides:

(i) Engage in other conduct that adversely reflects on the practitioner’s fitness to practice before the Office.

As set forth above, the ABA recommends the USPTO consider adopting explanatory and illustrative comment to the proposed regulations identical to the Comments contained in the ABA Model Rules. In the case of Model Rule 804, the comments provide guidance regarding the types of “illegal conduct that reflect adversely on fitness to practice law” but draws distinction from those offenses that have no specific connection to fitness for the practice of law. This approach is preferred to that of Proposed Section 11.804(i) which provides practitioners with no specific guidance about what “conduct . . . adversely reflects” on the “fitness to practice.” Therefore, in the absence of adoption of the explanatory comment, we recommend that Proposed Section 11.804(i) not be adopted.