

OED DIVERSION PROGRAM¹

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The United States Patent and Trademark Office's (USPTO) Office of Enrollment and Discipline (OED) proposes a Diversion Program for practitioners whose physical or mental health issues (including issues tied to substance/alcohol abuse) or law practice management issues (including inadequate client communication or docket management) resulted in minor misconduct.

A practitioner's participation in the Diversion Program will protect the public by providing the practitioner with an opportunity to address the underlying cause of the practitioner's misconduct, thus reducing the chance that the misconduct will recur or escalate.²

I. CRITERIA FOR ENTRY

Not all practitioners and not all types of conduct will qualify for the Diversion Program. OED seeks to add 37 CFR § 11.30 to set forth criteria to participate in the Diversion Program.³ Under the proposed regulation, a practitioner cannot have been disciplined by the USPTO or another jurisdiction within the past three years, except that discipline by another jurisdiction is not disqualifying if that discipline in another jurisdiction was based on the conduct that forms the basis for the current investigation.

In addition, proposed 37 CFR § 11.30(b) reads as follows:

For a practitioner to be eligible for diversion, the conduct at issue must not involve:

- (1) the misappropriation of funds or dishonesty, deceit, fraud, or misrepresentation;
- (2) substantial prejudice to a client or other person as a result of the conduct;
- (3) a serious crime as defined in 37 CFR § 11.1; or
- (4) a pattern of similar misconduct unless the misconduct at issue is minor and related to a chronic physical or mental health condition or disease.

The OED Director may consider all relevant factors when determining whether a practitioner meets the criteria. *See generally*, Model Rules of Lawyer Disciplinary Enforcement Rule 11 cmt. (American Bar Association, 2002) ("Both mitigating and aggravating factors should also be

¹ The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

² Diversion is intended to be an action that the OED Director may take to dispose of a disciplinary investigation. The program is not typically available to a practitioner after the filing of a disciplinary complaint. However, in extraordinary circumstances, the OED Director may enter into a diversion agreement with an eligible practitioner after a complaint under 37 CFR § 11.34 has been filed. If diversion is requested after a complaint has been filed, the matter will be referred to the OED Director. The terms of any diversion agreement will be determined by the OED Director and the practitioner.

³ See <https://www.federalregister.gov/d/2022-18215>.

considered. The presence of one or more mitigating factors may qualify an otherwise ineligible respondent for the program.”).

Once it has been determined that the practitioner’s conduct is not disqualifying, the OED Director may consider: (1) whether participation is likely to benefit the practitioner and accomplish the goals of the program, (2) any aggravating or mitigating factors, and (3) whether diversion was already attempted.

II. CONTENT OF DIVERSION AGREEMENTS

A Diversion Agreement may be drafted to the practitioner’s specific circumstances. There will necessarily be some variation in the content of each Diversion Agreement. The practitioner may work with experts, such as counselors or practice management professionals, to help formulate an appropriate program and present a plan to OED. In addition, OED staff attorneys and practitioners may work with state bar lawyer assistance programs or other similar organizations in developing an appropriate plan for monitoring, training, and/or treatment.

The type of monitoring, training, and/or treatment set forth in the Diversion Agreement may include, but is not limited to:

- Mandatory completion of continuing legal education;
- Passing of the Multistate Professional Responsibility Examination;
- Law practice and docket management consultation and training;
- Contingency planning;
- Technological improvements;
- Analysis of office needs;
- Arbitration or mediation;
- Fee arbitration;
- Psychological counseling;
- Mental health or life coaching services;
- Substance abuse recovery meetings, counseling, or treatment;
- Mentoring opportunities; and/or
- Restitution.

The Diversion Agreement will address important aspects of the practitioner’s participation in diversion, such as the agreement term (e.g., 12 months, 24 months, etc.). In addition, the Diversion Agreement may address the obligations of the parties in such matters as reporting compliance, oversight of participation, payment of costs, and disclosure of relevant incidents. Furthermore, the Diversion Agreement will outline a procedure for determining whether the practitioner has materially breached the terms of the agreement.

III. COMPLETION OF DIVERSION

If it appears that the practitioner materially breached the terms of the Diversion Agreement, OED will follow the procedures set forth in the Diversion Agreement to determine whether a material breach occurred. Proposed 37 CFR § 11.30(d) states that “[u]pon material breach of the diversion

agreement, the OED Director may pursue discipline based on the conduct set forth in the diversion agreement.”

If the practitioner successfully completes the requirements of the Diversion Agreement, OED will send a letter to the practitioner regarding the successful completion of diversion and closure of the file. Proposed 37 CFR § 11.30(c) provides that “successful completion of the diversion agreement bars the OED Director from pursuing discipline based on the conduct set forth in the diversion agreement.”