

practice before the Office in the interim until the conviction becomes final. Practitioners would be disqualified from practicing before the Office if confined or committed to prison. Upon the conviction becoming final, the practitioner would be provided with a forty-day period to show cause why discipline should not be imposed. A practitioner convicted of a serious crime involving moral turpitude *per se*, or a crime wherein the underlying conduct involved moral turpitude, would be excluded. The practitioner may challenge imposition of discipline if material facts are in dispute.

Section 11.26 would provide a program for diversion from a disciplinary proceeding.

Paragraph (a) of § 11.26 would permit the OED Director to offer diversion to a practitioner under investigation, subject to limitations.

Paragraph (b) of § 11.26 would make diversion available in cases of alleged minor misconduct. However, diversion would not be available when the alleged misconduct resulted in, or is likely to result in, prejudice to a client or another person; discipline was previously imposed, a warning previously issued, or diversion was previously offered and accepted (unless exceptional circumstances justify waiver of this limitation); the alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or the alleged misconduct constitutes a criminal offense under applicable law.

Paragraph (c) of § 11.26 would set forth procedures for diversion.

Paragraph (d) of § 11.26 would provide a diversion program that is designed to remedy the alleged misconduct of the practitioner. It may include participation in formal courses of education sponsored by a voluntary bar organization, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the practitioner or other individual to practice in accordance with the Rules of Professional Conduct.

Paragraph (e) of § 11.26 would close an investigation if the practitioner completes the diversion program. If the practitioner does not successfully complete the diversion program, the OED Director would be able to take such other action as is authorized and prescribed under section 11.32.

Section 11.27 would provide for excluding a practitioner on consent.

This would be the sole manner for settling any disciplinary matter.

Paragraph (a) of § 11.27 would provide that a practitioner under investigation or the subject of a pending proceeding may consent to exclusion, but only by delivering to the OED Director an affidavit declaring the practitioner's consent to exclusion. The affidavit would state, *inter alia*, that the consent is freely and voluntarily rendered, that the practitioner is aware that there is currently pending an investigation into, or a proceeding involving, allegations of misconduct, the nature of which shall be specifically set forth in the affidavit; that the practitioner acknowledges that the material facts upon which the allegations of misconduct are predicated are true; and that the practitioner submits the consent because the practitioner knows that if disciplinary proceedings based on the alleged misconduct were brought, the practitioner could not successfully defend against them.

Paragraph (b) of § 11.27 would provide that the affidavit and any related papers are submitted to the USPTO Director for review and approval. The USPTO Director would enter an order excluding the practitioner on consent.

Paragraph (c) of § 11.27 would provide for informing the hearing officer of receipt of the required affidavit, and for transfer of the disciplinary proceeding to the USPTO Director.

Paragraph (d) of § 11.27 would proscribe a practitioner excluded by consent from petitioning for reinstatement for five years, require compliance with the provisions of § 11.58, and require reinstatement be sought in accordance with § 11.60.

Section 11.28 would provide procedures for addressing four broad groups of practitioners. The first are those judicially declared to be "mentally incompetent" or "involuntarily committed to a mental hospital." The second are disabled practitioners who are mentally or physically infirm. The third are practitioners addicted to any chemical or having a psychological dependency upon intoxicants or drugs. The fourth are incapacitated practitioners who suffer from a disability or addiction of such nature as to cause the practitioner to be unfit to be entrusted with professional matters.

Definitions of "mentally incompetent," "involuntarily committed to a mental hospital," "disability," "addiction," "incapacitated," "significant evidence

of rehabilitation," and "disability matter" would be found in § 11.1.

Paragraph (a) of § 11.28 would set forth the scope and purpose of disability proceedings. Such proceedings would determine whether a practitioner has been judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient; whether the hearing officer should apply to a court for an order requiring a practitioner to submit to an examination by qualified medical experts regarding an alleged disability or addiction; whether a practitioner is incapacitated from continuing to practice before the Office by reason of disability or addiction; whether the OED Director should hold in abeyance a disciplinary investigation, or a hearing officer should hold in abeyance a disciplinary proceeding, because of a practitioner's alleged disability or addiction; whether a practitioner (having previously been suspended solely on the basis of a judicial order declaring the practitioner to be mentally incompetent) has subsequently been judicially declared to be competent and is therefore entitled to have the prior suspension terminated; whether a practitioner (having previously been suspended solely on the basis of an involuntary commitment to a mental hospital as an inpatient) has subsequently been discharged from inpatient status and is therefore entitled to have the prior order of suspension terminated; and whether a practitioner (having previously acknowledged or having been found by the hearing officer or USPTO Director to have suffered from a prior disability or addiction sufficient to warrant suspension (whether or not any suspension has yet occurred)), has recovered to the extent, and for the period of time, sufficient to justify the conclusion that the practitioner is fit to resume or continue the practice before the Office and/or is fit to defend the alleged charges against the practitioner in a disciplinary investigation or disciplinary proceeding that has been held in abeyance pending such recovery.

Paragraph (b) of § 11.28 would provide that the hearing officer may authorize the OED Director to apply to a court of competent jurisdiction for an order appointing counsel to represent the practitioner whose disability or addiction is under consideration if it appears to the hearing officer's satisfaction, based on the practitioner's motion or notice of the OED Director, that otherwise the practitioner will appear *pro se* and may therefore be without adequate representation.