

*Paragraph (c) of § 11.28* would provide that all proceedings addressing disability matters before the hearing officer be initiated by motion. The motion would contain a brief statement of all material facts, a proposed petition and/or recommendation to be filed with the USPTO Director if the movant's request is granted by the hearing officer, and affidavits, medical reports, official records, or other documents setting forth or establishing any of the material facts on which the movant is relying. The non-moving party's reply would set forth all objections, an admission, denial or lack of knowledge with respect to each of the material facts in the movant's papers, and affidavits, medical reports, official records, or other documents setting forth facts on which the non-moving party intends to rely for purposes of disputing or denying any material fact set forth in the movant's papers.

*Paragraph (d) of § 11.28* would provide a procedure addressing a practitioner judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient. The procedure would include action by the OED Director (paragraph (1)).

*Paragraph (e) of § 11.28* would provide a procedure to address circumstances in which a practitioner is incapacitated from continuing to practice before the Office because of disability or addiction, but is nonetheless likely to offer or attempt to perform legal services while so incapacitated. The procedure would include action by the OED Director (paragraph (1)), and the required evidence (paragraph (2)).

*Paragraph (f) of § 11.28* would locate in one paragraph the provision for further proceedings for paragraphs (d) and (e). The procedure would include action by the Committee on Discipline Panel (paragraph (1)), action by OED Director (paragraph (2)), response by Practitioner (paragraph (3)), initial decision by the hearing officer (paragraph (4)), appeal to the USPTO Director (paragraph (5)), and action by USPTO Director (paragraph (6)).

*Paragraph (g) of § 11.28* would provide a procedure for the circumstance in which a practitioner files a motion requesting the hearing officer to enter an order holding a disciplinary proceeding in abeyance based on the contention that the practitioner is suffering from a disability or addiction that makes it impossible for the practitioner to adequately defend the charges in the disciplinary proceeding. The procedure would include the practitioner's motion

(paragraph (1)), and disposition of the practitioner's motion (paragraph (2)).

*Paragraph (h) of § 11.28* would provide a procedure for deciding allegations that a practitioner has recovered from a prior disability. This paragraph would apply to proceedings for reactivation as well as for resumption of disciplinary matters held in abeyance. Paragraphs (2) and (3) would pertain to reactivation, whereas paragraph (4) would apply to resumption of disciplinary proceedings held in abeyance. The regulation would limit an incapacitated practitioner suspended under this section to applying for reinstatement once a year, unless the USPTO Director orders shorter intervals. The practitioner may be required to undergo examination by a qualified medical expert, selected by the OED Director, at the practitioner's expense. The practitioner also may be required to establish his or her competence and learning in the law.

Paragraph (i) of § 11.28 would provide that a hearing officer may order resumption of a disciplinary proceeding against a practitioner upon determining that the practitioner is not incapacitated from defending himself or herself, or not incapacitated from practicing before the Office.

*Section 11.32*, like current § 10.132, would provide a procedure for initiating a disciplinary proceeding and for referring the proceeding to a hearing officer. Under paragraph (2) of § 11.32, when the OED Director is of the opinion that there is probable cause to believe that an imperative rule of the USPTO Rules of Professional Conduct has been violated, the OED Director would determine whether a practitioner should be given notice under 5 U.S.C. 558(c). Section 558(c) provides, in part, "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." The provisions of 5 U.S.C. 558(c) would apply to a registered patent practitioner who is investigated for possible misconduct occurring in connection with either a patent or a trademark matter. However, the provisions of 5 U.S.C. 558(c) do not apply to disciplinary proceedings in the Office involving practitioners who are not registered inasmuch as the Office does not issue a license to such practitioners. Nevertheless, OED

customarily provides unregistered practitioners with the opportunity to demonstrate or achieve compliance with all lawful requirements. Where a practitioner willfully violates an imperative rule of the USPTO Rules of Professional Conduct, notice and opportunity to demonstrate compliance would not be required. In certain cases, the public interest may require suspension of an incompetent practitioner or a practitioner who has been found guilty of a crime and committed to the custody of the Attorney General or has otherwise been incarcerated.

After giving notice under 5 U.S.C. 558(c), or if no notice is needed, the OED Director would call a meeting of a panel of the Committee on Discipline. The Committee panel consisting of three USPTO employees, would determine by a majority vote whether there is probable cause to believe that a practitioner has violated an Office Rule of Professional Conduct. If the Committee determines that a violation has occurred, the OED Director would institute a disciplinary proceeding by filing a "complaint" under § 11.34. Upon the filing of a complaint, an attorney under the Office of General Counsel designated to represent the OED Director would prosecute the disciplinary proceeding on behalf of the OED Director. Upon the filing of the complaint, the disciplinary proceedings will be referred to a hearing officer.

A hearing officer would be used in disciplinary proceedings brought under 35 U.S.C. 32. The hearing officer may be an employee of the Office appointed by the USPTO Director, or an Administrative Law Judge (ALJ). The use of a hearing officer is not required to suspend or exclude a practitioner in trademark or other non-patent matters. See *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1958). Nevertheless, a hearing officer is qualified to handle disciplinary proceedings. Accordingly, as a matter of policy the Office is and will continue to use ALJ's, and take the opportunity to use Office employees as hearing officers.

*Section 11.34*, like current § 10.134, would set out the requirements of a complaint. A complaint would be deemed sufficient if it fairly informs the respondent of any violation of an imperative rule of the USPTO Rules of Professional Conduct which form the basis of the disciplinary proceeding so that the respondent is able to answer. See *In re Ruffalo*, 390 U.S. 540 (1968).

*Section 11.35*, like current § 10.135, would provide alternative methods for serving a complaint. Service of complaints by certified or registered