

of alleged minor misconduct, but shall not be available where:

(1) The alleged misconduct resulted in, or is likely to result in, prejudice to a client or another person; or

(2) Discipline previously has been imposed, diversion previously has been offered and accepted, or a warning was previously issued, unless the OED Director finds the presence of exceptional circumstances justifying a waiver of this limitation; or

(3) The alleged misconduct involves fraud, dishonesty, deceit, misappropriation or conversion of client funds or other things of value, or misrepresentation; or

(4) The alleged misconduct constitutes a criminal offense under applicable law.

(c) *Procedures for diversion.* At the conclusion of an investigation, the OED Director, at his or her sole discretion, may offer to a practitioner being investigated for misconduct the option of entering a diversion program in lieu of other procedures available to the OED Director. The OED Director shall be free to accept or reject a request by the practitioner for diversion. If the practitioner accepts diversion, a written diversion agreement shall be entered into by both parties including, *inter alia*, the time of commencement and completion of the diversion program, the content of the program, and the criteria by which successful completion of the program will be measured. The diversion agreement shall state that it is subject to review by the USPTO Director, to whom it shall be submitted for review and approval after execution by the OED Director and the practitioner.

(d) *Content of diversion program.* The diversion program shall be designed to rehabilitate the practitioner's practices or procedures leading to 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 to practice in accordance with the Rules of Professional Conduct.

(e) *Proceedings after completion or termination of diversion program.* Except as provided in paragraph (b)(2) of this section, if the practitioner successfully completes a diversion program, the OED Director's investigation shall be closed. The practitioner shall have a record of the

misconduct that was investigated, and the record may be considered in determining the discipline, if any, to be imposed based on other charges of misconduct brought against the practitioner in the future. If the practitioner does not successfully complete the diversion program, the OED Director shall take such other action as is authorized and prescribed under § 11.32.

§ 11.27 Exclusion by consent.

(a) *Required affidavit.* The OED Director may confer with a practitioner concerning possible violations by the practitioner of the Rules of Professional Conduct whether or not a disciplinary proceeding has been instituted. A practitioner who is the subject of an investigation or a pending disciplinary proceeding based on allegations of misconduct, and who desires to resign or settle the matter may only do so by consenting to exclusion and delivering to the OED Director an affidavit declaring the consent of the practitioner to exclusion and stating:

(1) That the consent is freely and voluntarily rendered, that the practitioner is not being subjected to coercion or duress, and that the practitioner is fully aware of the implication of consenting to exclusion;

(2) 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;

(3) 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; and

(4) That it may be conclusively presumed, for the purpose of determining any request for reinstatement under § 11.60, that the alleged facts on which the complaint was based are true and that the practitioner violated one or more Rules of Professional Conduct.

(b) *Action by the USPTO Director.* Upon receipt of the required affidavit, the OED Director shall file the affidavit and any related papers with the USPTO Director for review and approval. Upon such approval, the USPTO Director will enter an order excluding the practitioner on consent.

(c) When an affidavit under paragraph (a) of this section is received after a complaint under § 11.34 has been filed, the OED Director shall notify the hearing officer. The hearing officer shall enter an order transferring the disciplinary proceeding to the USPTO

Director, who may enter an order excluding the practitioner on consent.

(d) *Reinstatement.* Any practitioner excluded by consent under this section cannot petition for reinstatement for five years. A practitioner excluded on consent who intends to reapply for admission to practice before the Office must comply with the provisions of § 11.58, and apply for reinstatement in accordance with § 11.60. Willful failure to comply with the provisions of § 11.58 constitutes grounds for denying an application for reinstatement.

§ 11.28 Incompetent and incapacitated practitioners.

(a) *Scope of disability proceedings.* This section applies to all disability matters, specifically including those to determine:

(1) Whether a practitioner has been judicially declared to be mentally incompetent or involuntarily committed to a mental hospital as an inpatient;

(2) 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;

(3) Whether a practitioner is incapacitated from continuing to practice before the Office by reason of disability or addiction;

(4) 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;

(5) 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;

(6) 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

(7) 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