



The State Bar *of California*

Recommendations for Codifying a Formal Disciplinary Diversion Program

**Submitted Pursuant to
Business and Professions Code Section 6086.20(b)**

April 1, 2024

EXECUTIVE SUMMARY

Senate Bill 40 (Ch. 697, Stats. of 2023) enacted Business and Professions Code section 6086.20. Subdivision (a) of that section provides that, commencing January 1, 2025, the Chief Trial Counsel (CTC) shall not issue private reprimands to any attorney accused of misconduct. Subdivision (b) requires the State Bar Board of Trustees, in consultation with the CTC, by April 1, 2024, to “provide to the Assembly and Senate Judiciary Committees recommendations for codifying a formal disciplinary diversion program for attorneys accused of minor violations of the Rules of Professional Conduct.”

Diversion as part of an attorney discipline system is not a new concept. The *ABA Model Rules for Lawyer Disciplinary Enforcement* include a rule relating to diversion. As of 2023, approximately 35 U.S. jurisdictions have programs under which lawyer discipline complaints may be resolved through nondisciplinary diversion agreements. The State Bar of California’s Office of Chief Trial Counsel (OCTC) historically has implemented nondisciplinary closures equivalent to diversion using a variety of mechanisms, including resource, directional, warning, and admonition letters, as well as agreements in lieu of discipline.

Effective October 23, 2023, OCTC implemented a pilot of a formal diversion program. OCTC seeks to expand this pilot as one component of a State Bar diversion program that would include two other State Bar offices implementing additional program components to divert potential complainants to resources better suited than the disciplinary system to address their issues. The Office of Professional Support & Client Protection (OPSCP) seeks to add a mediation component to the Mandatory Fee Arbitration Program (MFA) to provide parties with an additional option for resolving fee disputes through a more quick and less formal mediation process, with the goal of decreasing the number of disciplinary complaints based on fee disputes. The Office of Public Trust Liaison (PTL) seeks to implement the Attorney-Client Bridge Program (ACBP), which would provide an informal mechanism for clients and attorneys to resolve return of file and communication issues, with the goal of each year diverting 300 to 500 such matters that might otherwise give rise to disciplinary complaints. If fully implemented, an expanded OCTC diversion program, the addition of a mediation component to MFA, and the ACBP are expected to result in an estimated 10–20 percent of disciplinary complaints being diverted, enabling more OCTC resources to be directed to investigating and charging more serious disciplinary matters. The State Bar’s request for funding for these diversion programs is set out in a separate report.

The *ABA Model Rules for Lawyer Disciplinary Enforcement* and the disciplinary rules of Illinois and the District of Columbia relating to their diversion programs provide three examples of rules establishing and governing a diversion program. All set baseline exclusions from diversion by defining narrow categories of serious violations that, absent extraordinary circumstances, should not be diverted. All define in very general terms how a diversion program should operate. Beyond this, recognizing the flexibility necessary to operate a diversion program, all leave to program administrators discretion to determine eligibility for and define the procedures that will be used to implement the program. This report recommends a similar approach to codifying a formal diversion program.

Part I of this report discusses in more detail the place of diversion as part of the attorney discipline system. Part II discusses the three planned, interrelated components of the State Bar's diversion program, including the pilot of a formal diversion program currently being implemented by OCTC. Part III discusses three examples of existing rules for establishing and governing a diversion program. Consistent with the examples discussed in Part III, Part IV of this report sets out recommendations for codifying in California a formal disciplinary diversion program for attorneys accused of minor violations of the Rules of Professional Conduct or the State Bar Act.

I. Diversion as Part of the Attorney Discipline System

Diversion as a part of the attorney discipline system is not a new concept, either in California or throughout the country. Business and Professions Code section 6231 requires the Board to establish and administer an Attorney Diversion and Assistance Program as a means of implementing the Legislature's intent (set forth in Business and Professions Code section 6230) that the State Bar "identify and rehabilitate attorneys with impairment due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety." The Lawyer Assistance Program implements the requirements of this article of the Business and Professions Code, providing resources to lawyers either on a voluntary basis or as required by the State Bar Court through its Alternative Discipline Program. (State Bar Rules of Procedure rules 5.380 to 5.389.)

Historically, the OCTC has implemented nondisciplinary closures equivalent to diversion in several different ways. In the intake stage, OCTC has closed cases with resource and directional letters (the former referring the attorney to resources to assist in addressing the conduct that led to the complaint, and the latter conditioning closure on attorney compliance with directions, primarily to return files or resume communications with clients) and with referrals to Mandatory Fee Arbitration for complainants whose allegations state only a simple fee dispute. In the investigation and charging stages, OCTC has closed cases with resource, directional, admonition, and warning letters, as well as referrals to Mandatory Fee Arbitration, and has also entered into agreements in lieu of discipline and issued conditional warning letters closing cases contingent on an attorney's compliance with specified conditions within a specified time period. OCTC's use of these nondisciplinary closures was the subject of a recommendation by the California State Auditor in its report 2022-030 issued April 14, 2022.¹ In response to this recommendation, effective October 31, 2022, OCTC revised its policies to provide detailed criteria for eligibility for such closures and guidance for exercising discretion in determining whether such closures should be used for otherwise eligible cases.

OCTC's use of these nondisciplinary closures is reported in Table SR-7B of the State Bar's [annual discipline report](#) (ADR), which shows that for fiscal year 2023 (July 1, 2022, to June 30, 2023), for all case types, OCTC used resource letters to close 320 cases against 254 attorneys, directional

¹ The California State Auditor recommended, "To ensure that it uses nonpublic measures to close complaints only when such use is consistent and appropriate, the State Bar should revise its policies by October 2022 to define specific criteria that describe which cases are eligible to be closed using nonpublic measures and which are not eligible."

letters to close 591 cases against 513 attorneys, warning letters to close 536 cases against 457 attorneys, admonition letters to close 3 cases against 3 attorneys, and agreements in lieu of discipline to close 15 cases against 10 attorneys. Table SR-2 of the ADR shows that in fiscal year 2023, for a more limited set of case types (excluding, for example, criminal conviction matters), closures with nondisciplinary action constituted approximately 9.7 percent (1,363/14,050) of OCTC's total closures.

A recent law review article states, "Today, in thirty-five U.S. jurisdictions, lawyer discipline complaints may result in diversion agreements that enable the respondent lawyer to avoid discipline sanctions even where some misconduct occurred." Leslie C. Levin and Susan Saab Fortney, *"They Don't Know What They Don't Know": A Study of Diversion in Lieu of Lawyer Discipline*, 36 Georgetown Journal of Legal Ethics 309, 313 (2023) [hereafter, "*Study of Diversion*"].² After a lengthy discussion of the limited data available regarding diversion for attorney discipline complaints, the article concludes:

Jurisdictions considering proactive initiatives should recognize the role that diversion alternatives can play in a comprehensive regulatory regime. Although diversion alternatives do not squarely qualify as proactive programs because some misconduct has already occurred, diversion conditions focus on dealing with the particular problem that precipitated the complaint. More generally, diversion can provide an important intervention opportunity to work with lawyers to examine their mistakes and improve their procedures, practices, and fitness when practicing law. Through these efforts, regulators may be able to better focus diversion to meet lawyers' needs and protect the public.

In the long run, well-conceived diversion programs may also positively affect regulators' relationships with lawyers. Some solo and small firm lawyers view regulators with suspicion or even bitterness, fueled in part by the observation that regulators disproportionately discipline this cohort. By implementing effective alternatives to discipline—and communicating that they genuinely want to help respondent lawyers—regulators may seem less like adversaries. Respondents who feel like they are being treated fairly and with dignity may feel more commitment to educational and rehabilitation efforts.

It is important, however, to be clear-eyed about the limits and costs of diversion. Even with the most well-designed educational program, diversion may not be appropriate for some lawyers and may be especially inappropriate for those who reoffend. Moreover, diversion, as currently employed, has a hidden cost for the regulatory system. Because information about diverted matters is generally treated as confidential, diversion sends no signal to the public that minor misconduct is being addressed or to the larger lawyer community about the types of conduct that lead to a regulatory response. Every time diversion or a private sanction is used in lieu of public discipline, regulators potentially lose an opportunity to educate and

² The article includes in this number California, Michigan, and New York, which it describes elsewhere as limiting diversion "to lawyers suffering from mental health problems or an impairment such as substance abuse." *Id.* at 317.

deter other lawyers. Research shows that enforcement action must be communicated effectively to have deterrent effects. One alternative to keeping all information on diversion confidential would be to regularly publish, even if in an aggregated form, information about the types of misconduct that gave rise to diversion. (*Id.* at 350.)

II. The State Bar's Planned Diversion Programs

Diversion programs to resolve minor offenses offer a number of benefits for the disciplinary system and the public. First, minor offenses may be unlikely to result in the imposition of substantial discipline even if pursued through charging and trial, so the availability of a diversion alternative may mean that such minor offenses are more frequently addressed rather than simply being closed. Second, the flexibility of the conditions that can be imposed through a diversionary resolution provides the ability to tailor those conditions to substantially address complainant concerns (through requiring such things as return of files, or participation in mediation or arbitration) and prevent future violations (through requirements for participation in educational or practice management programs). Third, a diversionary resolution may be more quickly arrived at, providing the complainant with resolution and potential relief in a shorter time frame—sometimes significantly shorter—than if discipline is pursued. Fourth, more quickly diverting some cases out of the disciplinary process will free up OCTC investigator and attorney resources to focus on more serious cases.

Recognizing the potential benefits, the State Bar has sought to implement a formal diversion program with three planned components. Two, to be provided through the State Bar's Office of Professional Support & Client Protection and the Public Trust Liaison, seek to provide potential complainants with an alternative to submitting a disciplinary complaint, diverting them instead to programs more likely to quickly address relatively common attorney-client issues (fee disputes and requests for return of files or resumed communication) unlikely to result in discipline. The third, provided through OCTC, is a post-complaint diversion program for minor violations.

A. OPSCP's Fee Dispute Program (Pre-Complaint)

OCTC receives significant numbers of disciplinary complaints asserting what are actually disputes over attorney fees rather than alleging conduct warranting discipline. Examples include complaints that allege agreements for excessive (but not unconscionable) fees, disputes over the effectiveness of attorney work being charged, and attorney refusals to disburse from their client trust accounts settlement funds the attorney asserts they are entitled to as earned fees. If a review of such complaints or further investigation reveals no potential violation of the State Bar Act or the Rules of Professional Conduct warranting discipline, OCTC typically closes these complaints with a letter that advises the client of the opportunity to pursue relief through Mandatory Fee Arbitration (MFA). This process (review of the complaint and drafting and issuance of a closing letter with a referral to a fee arbitration program) requires OCTC resources that could otherwise be used to handle complaints more likely to result in discipline. In fiscal year 2023, OCTC closed approximately 158 cases (130 in intake and 28 after investigation)

based on its determination that they involved primarily a fee dispute that should be handled through fee arbitration.

Early diversion of more of these types of complaints into MFA could save significant OCTC resources and provide an alternative that may result in a more satisfactory outcome for the client.

MFA provides an informal, confidential, and relatively low cost forum for resolving fee disputes between lawyers and their clients. Some local bar associations administer their own fee arbitration programs; the State Bar provides fee arbitration when there is no local bar program. Arbitration of a fee dispute is voluntary for a client but in most instances, mandatory for a lawyer if a client requests it. (See Business and Professions Code section 6200(c).) If an attorney claims a client owes an outstanding balance for fees or costs, they must provide the client with a notice of their right to arbitrate before or at the same time as filing a lawsuit or other proceeding to collect the amount. The State Bar program can also enforce a final, binding arbitration award in favor of a client in State Bar Court by seeking administrative remedies, such as suspension, to enforce compliance with the award.

Arbitrators are volunteers. Depending on the amount in dispute, either a sole attorney arbitrator or panel of three arbitrators which includes one lay arbitrator, will hear the dispute. After a hearing where evidence and testimony are taken, a written decision is issued by the arbitrator. The findings may include a refund of fees or costs to the client, a determination that the client owes outstanding fees, or a determination that no money is owed by either party. Parties can agree to be bound by the award; if they do not agree, the award will become binding 30 days after service unless a party requests a trial de novo.

While the program has historically offered arbitration only, the statute directing the Board to establish a program for arbitration of fee disputes allows the Board to include a voluntary mediation component. See Business and Professions Code section 6200(a), (c) (Board “may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by licensees of the State Bar”; “[m]ediation under this article shall be voluntary for an attorney and a client”).

In 2023, the State Bar, for the first time in 10 years, overhauled the rules governing MFA. The changes were designed to improve efficiencies and deliver results more quickly. The changes favor electronic service of documents, provide that hearings will take place via a remote communications platform rather than in person, and tighten the timelines around when a hearing will be held. Remaining challenges include the fact that local fee arbitration programs operate largely independently, and that some local bar associations struggle to find volunteer arbitrators, are understaffed, or still employ inefficient practices such as requiring paper copies of documents.

In addition to the rule changes implemented last year, the State Bar also initiated a first-of-its kind “mystery shopper” effort to assess responsiveness of local fee arbitration programs after State Bar staff’s own efforts to reach some local programs were repeatedly unsuccessful. The

mystery shopper revealed significant differences in customer service among local fee arbitration programs with some *never* responding to inquiries for assistance.

In 2023, the MFA programs administered by the State Bar and by local bar associations collectively opened just 735 cases. Given the size of California's licensee population, this likely reflects an underutilization of MFA; this inference is bolstered by the mystery shopper efforts that evidenced delayed responses on the part of many local bar association programs.

OPSCP proposes to increase the number of potential complainants diverted to mandatory fee arbitration by increasing outreach and education and by introducing a first-step mediation component. The availability of a mediation component would enable parties to resolve fee disputes more quickly and less formally and potentially with more input into how the disputes resolve. To the extent a mediation component serves to attract more parties and resolve their fee disputes without them submitting disciplinary complaints, it would reduce the resources OCTC currently expends on reviewing disciplinary complaints that allege only fee disputes; at this time, we estimate this number to be approximately 130 cases annually.

The State Bar's request for funding to support the introduction of a mediation component, as well as an overview of how the existing Mandatory Fee Arbitration Program is funded, is set out in a separate report.

B. PTL's Attorney-Client Bridge Program (Pre-Complaint)

The State Bar's Public Trust Liaison (PTL) proposes a new Attorney-Client Bridge Program (ACBP) with a new approach aimed at resolving potential allegations of violations of Rule of Professional Conduct 1.16(e)(1) (return of file issues) and Business and Professions Code section 6068(m) and Rule 1.14 (communication issues). The ACBP would provide clients who have communication and file return issues with the option of submitting a service request to the ACBP rather than a disciplinary complaint to OCTC. The ACBP would then work with clients and lawyers proactively to attempt to resolve the issues without the need to file a disciplinary complaint. By providing an alternative to the formal State Bar complaint process, the program seeks to foster a more harmonious attorney-client relationship while at the same time providing a potentially quicker method for resolving issues that may be the result in many instances of simple difficulties in communication. The ACBP design is modeled after a parallel Texas State Bar program that has operated successfully for years. The goal for the ACBP is to divert between 300 and 500 matters annually that might otherwise result in the filing of disciplinary complaints.

The PTL does not currently have the staff to implement the ACBP. OCTC has temporarily loaned a staff member to PTL to begin a soft launch of the program. The State Bar's request for funding to support the PTL's implementation of the ACBP is set out in a separate report. With the requested funding, the ACBP will be able to serve an estimated 300 to 500 clients per year who choose to access the ACBP for redress of communication and return of file issues in lieu of submitting a formal disciplinary complaint.

C. OCTC's Diversion Program (Post-Complaint)

In October 2023, OCTC implemented a pilot of a formal diversion program, establishing eligibility criteria and procedures and tasking two paralegals to serve, on a part-time basis while continuing to perform other duties, as diversion monitors to track compliance with conditions established in diversion agreements or diversion warning letters.³ The program authorizes diversion at the intake, investigation, and charging stages, with differing criteria depending on at which stage of the discipline process OCTC offers the diversion option.

The targets of OCTC's diversion program are respondents (a) whose disciplinary and complaint histories demonstrate that they do not pose a significant risk of future harm to their clients or the public and (b) whose current alleged misconduct is relatively minor and stems from issues potentially subject to correction through education or other rehabilitative measures. As a result, the majority of respondents participating in the diversion are those who have not been the subject of prior discipline, who do not have a history including 15 or more complaints within the last five years, and who are the subjects of complaints alleging that they engaged in isolated misconduct with a low risk to public protection.

With current resources, the scope of the pilot program is limited. With additional resources, the program would be expanded. Based on a review of historical case data, the expectation is that approximately 10–20 percent of disciplinary complaints will involve respondents for whom diversion—through Mandatory Fee Arbitration/mediation, the ACBP, or OCTC's expanded diversion program—is a potentially appropriate resolution.

For eligible respondents, diversion serves many of the purposes of discipline. It furthers public protection by providing specific deterrence of similar misconduct by the same attorney, through education, direction, warning, or the imposition of conditions on the attorney's action for a specified period of time. In these same ways, it assists in maintaining the professional standards of the profession and rehabilitating the particular attorney receiving diversion.

To maximize the benefits of diversion to OCTC's overall case processing, the goal is to resolve cases by diverting them at the earliest appropriate stage. Thus, subject to specified criteria, diversion may be available in intake (pre-investigation) or investigation or charging. OCTC's diversion guidelines for its pilot program define the criteria for eligibility based on the stage of the case (which takes into account the extent to which the conduct has been investigated and is more fully known), the nature of the current alleged misconduct, and the respondent's prior complaint and discipline history. If a matter is eligible for diversion, a discretionary determination is made whether diversion will sufficiently serve the purposes of discipline and is appropriate based on consideration of all circumstances. Putting aside prior complaint and discipline histories that may render diversion unavailable, examples of conduct generally eligible for diversion absent significant harm to a client, the public, or the administration of justice include:

³ Participation in the program will be capped once monitoring responsibilities approach the available capacity of the two part-time paralegals.

- Performance violations;
- Communication violations (including communication issues with clients and improper communications with represented parties);
- Failures to sufficiently disclose potential conflicts of interest (if the result is the development of an actual conflict or client harm, diversion would not be appropriate);
- Minor failures to obey court orders (assuming the failure did not cause significant harm to a litigant or the administration of justice);
- Failures to return files to clients after termination of representation;
- Failure to report events to the State Bar as required by Business and Professions Code section 6068(o);
- Failures to supervise (assuming the failure did not result in significant harm to a client, litigant, or the administration of justice); and
- Threats of civil, disciplinary, or administrative charges to secure an advantage in a civil dispute (assuming the threat does not result in harm to a litigant or the administration of justice).

In most instances, respondents determined to be eligible for diversion are sent a letter specifying the conditions of diversion and explaining what will happen if the respondent (a) declines diversion, (b) accepts diversion and satisfies its conditions, or (c) accepts diversion and fails to satisfy its conditions. In general terms, diversion results in a closing of the complaint conditioned on completion of the specified diversion conditions, with the understanding that failure to complete the conditions will result in the complaint being reopened to allow further investigation and charging of the alleged disciplinary violations.

Diversion conditions vary depending on the nature of the alleged misconduct, but generally, as applicable, include requirements that the respondent address and resolve any duty breaches (e.g., restore performance or address any potential conflicts of interest), refund any acknowledged unearned fees, complete mandatory fee arbitration and satisfy any resulting order, complete an instructional course (e.g., a continuing legal education course) that will address issues underlying the alleged misconduct (e.g., a primer on conflicts and required informed consents), or complete a general instructional course on attorney ethical obligations to clients and courts (e.g., Ethics School and/or Client Trust Accounting School). To accept diversion, the respondent attorney is required to sign the diversion letter, creating an agreement to comply with the specified conditions of diversion within specified time frames. The attorney is not required to admit misconduct as a condition of diversion.

In limited instances, the pilot program implements diversion through a diversion warning letter that does not require the respondent attorney's agreement and imposes only a single condition on closure, that, in the time period specified, OCTC does not receive any additional complaints against the attorney that proceed to the charging phase.

The diversion program requires that OCTC staff monitor the matter to confirm that the respondent complies with the diversion conditions and reporting requirements within the time specified in the diversion letter.

The State Bar has gathered aggregate data on the operation of OCTC's pilot diversion program for the four months from its commencement through the end of February 2024. The pilot program has been in effect for too short a time to generate meaningful data regarding any effects on recidivism, but as the program continues to operate, we will conduct further evaluation. The aggregate data we do have relates simply to the number of attorneys who have been offered and accepted diversion and their demographic information. Over the four months of the pilot programs' operation, 213 unique cases involving 194 attorneys were identified for participation in and moved to some stage in the diversion pilot. Of these 213 cases, diversion was accepted in all but 36 cases. The cases spanned a number of different case types. See Table 1.

Table 1. Case Types in the Diversion Pilot (October 23, 2023, to February 29, 2024)

Case Type	Percent	Frequency
Conviction Matter	3.8	8
Discipline in Other Jurisdiction	0.9	2
Original Matter	78.4	167
Reportable Action-Insufficient Funds	11.7	25
Reportable Action-Sanction Order	5.2	11
Total	100	213

Table 2 shows the prior discipline history of attorneys selected for diversion, demonstrating that the attorneys so selected have no to minimal discipline histories, with the overwhelming majority having neither a prior warning letter nor prior discipline. Of the seven attorneys with prior discipline who were in the diversion pilot, for each of them the prior discipline was handed down more than nine years ago.

Table 2: Attorneys Offered Diversion: Prior Discipline History

Discipline Type	Freq.	Percent	Cum.
Warning Letter	41	21.1	21.1
Discipline	7	3.6	24.7
Neither	146	75.3	100
Total	194	100	

Demographic information for the individual attorneys involved in the diversion pilot through the end of February 2024 is shown in table 3 (gender) and table 4 (race/ethnicity). For

comparison, demographic information for all complaints pending in OCTC during the same period is shown in table 5 (gender) and table 6 (race/ethnicity). The comparison demonstrates relatively minor differences. For gender, the greatest difference is among male attorneys, who make up 69.6 percent of those involved in the diversion pilot but 65.4 percent of those who have complaints pending during the pilot period. With the greater percentage of attorneys who have complaints pending for whom there is no information on gender, however, this differential may be reduced or eliminated. For race/ethnicity, the greatest difference is among multiracial attorneys, who make up 9.3 percent of those involved in the diversion pilot but 5.8 percent of those who have complaints pending during the pilot period. As with gender, however, with the greater percentage of attorneys with complaints pending for whom there is no information on race/ethnicity, this differential may be reduced or eliminated.

Table 3: Gender of Attorneys in the Diversion Pilot

Gender	Freq.	Percent	Cum.
Female	53	27.3	27.3
Male	135	69.6	96.9
Other	2	1.0	97.9
No information	4	2.1	100
Total	194	100	

Table 4: Race/Ethnicity of Attorneys in the Diversion Pilot

Race/Ethnicity	Freq.	Percent	Cum.
White	119	61.3	61.3
Hispanic/Latino	17	8.8	70.1
Asian	16	8.3	78.4
Black/African American	9	4.6	83.0
Multiracial	18	9.3	92.3
Other race, ethnicity, or origin	10	5.2	97.4
No information	5	2.6	100
Total	194	100	

Table 5: Gender of Attorneys for all Complaints Pending in OCTC During Period

Gender	Freq.	Percent	Cum.
Female	2,678	25.1	25.1
Male	6,973	65.4	90.5
Other	106	1.0	91.5
No information	907	8.5	100
Total	10,664	100	

Table 6: Race/Ethnicity of Attorneys for all Complaints Pending in OCTC during Period

Race/Ethnicity	Freq.	Percent	Cum.
White	6,512	61.1	61.1
Hispanic/Latino	814	7.6	68.7
Asian	804	7.5	76.2
Black/African American	434	4.1	80.3
Multiracial	621	5.8	86.1
Other race, ethnicity, or origin	416	3.9	90.0
No information	1,063	10.0	100
Total	10,664	100	

Based on information learned during the pilot program, OCTC has identified the additional staffing needed to expand the program to all attorneys who would be eligible. The State Bar’s request for funding to support this expansion is set out in a separate report. In sum, to more broadly implement the diversion program currently being piloted in OCTC, the following four positions are needed: one attorney, one investigator, and two paralegals. These resources would allow staff to be dedicated to support expedited investigation and resolution of cases identified as potentially eligible for diversion as well as to monitor compliance with diversion conditions in a greater number of diverted cases. With these additional positions, and with the funding of the ACP and the new mediation component of the Mandatory Fee Arbitration Program, the State Bar hopes to reach the target of identifying and diverting from the disciplinary process at an earlier time 10–20 percent of disciplinary complaints. This will enable OCTC investigators and attorneys to focus on more serious cases likely to warrant significant discipline.

III. Codifying a Diversion Program: Three Examples

In considering recommendations to codify a formal diversion program, it is useful to look at rules in other jurisdictions establishing and defining the contours of diversion programs. We discuss below the ABA Model Rules for Lawyer Disciplinary Enforcement and the rules in place in Illinois and the District of Columbia relating to their diversion programs.

The [*ABA Model Rules for Lawyer Disciplinary Enforcement*](#) outline model eligibility criteria and procedures for a diversion program (referred to as an “Alternatives to Discipline Program”). See Model Rule 11(G). The model rule notes that such a program “may include fee arbitration, arbitration, mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs, ethics school or any other program authorized by the court.”

With respect to eligibility, the model rules suggest limiting diversion to matters involving “lesser misconduct,” which the model rules define as “conduct that does not warrant a sanction

restricting the respondent's license to practice law." (Model Rule 9(B).) The model rules further state that conduct shall not be considered lesser misconduct if any of the following apply:

1. the misconduct involves the misappropriation of funds;
2. the misconduct results in or is likely to result in substantial prejudice to a client or other person;
3. the respondent has been publicly disciplined in the last three years;
4. the misconduct is of the same nature as misconduct for which the respondent has been disciplined in the last five years;
5. the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
6. the misconduct constitutes a "serious crime" as defined in rule 19(C); or
7. the misconduct is part of a pattern of similar misconduct.

Id. Comments to the model rule state that the "existence of prior disciplinary offenses would not necessarily make a respondent ineligible for referral" to the program, and that instead "consideration should be given to whether the respondent's prior offenses are of the same or similar nature, whether the respondent has previously been placed in the [program] for similar conduct and whether it is reasonably foreseeable that the respondent's participation in the program will be successful." (Model Rule 11(G), comments.) Similarly, the comments state that "the existence of 'a pattern of misconduct' and/or 'multiple offenses' should not make a respondent ineligible for the program. A pattern of lesser misconduct may be a strong indication that office management is the real problem and that this program is the best way to address that underlying problem." (*Id.*)

With respect to procedures, the model rule states that, for eligible respondents, the following factors "shall be considered in determining whether to refer a respondent to the program":

1. whether the presumptive sanction under the applicable standards for the violations listed in the complaint is likely to be no more severe than a reprimand or admonition;
2. whether participation in the program is likely to benefit the respondent and accomplish the goals set forth by the program;
3. whether aggravating or mitigating factors exist; and
4. whether diversion was already tried.

(Model Rule 11(G)(3).) For respondents referred to the program, the model rule calls for negotiation and execution of "a contract, the terms of which shall be tailored to the individual circumstances" and which shall:

1. Set forth the terms and conditions of the plan for the respondent;
2. Identify the use of a practice monitor and/or a recovery monitor and the responsibilities of the monitors;
3. Provide for oversight of fulfillment of the contract terms, including reporting any alleged breach to the disciplinary counsel;
4. Provide that the respondent will pay all costs incurred in connection with the contract;

5. Include an acknowledgment that a material violation of a term of the contract renders voidable the respondent's participation in the program; and
6. Include any waivers needed to enable disclosures necessary for monitors to fulfill their monitoring duties.

(Model Rule 11(G)(4).) The model rule specifies that successful completion of the conditions of the contract end participation in the program and serves as a bar to any further disciplinary proceedings based on the same allegations. (Model Rule 11(G)(7)(a).) The model rule also specifies that a material breach of the contract will be cause for termination, after which disciplinary proceedings may be resumed or reinstituted. (Model Rule 11(G)(7)(b).)

As noted in the recent law review article referenced above, "jurisdictions do not uniformly follow the [Model Rules] approach." (*Study of Diversion* at 316.) Many, however, apply similar eligibility criteria and procedures. Illinois, for example, defines eligibility for diversion as follows:

The Administrator and respondent may agree to a diversion of the respondent to a program designed to afford the respondent an opportunity to address concerns identified in the investigation if the Administrator concludes that diversion would benefit and not harm the public, profession and the courts, and the conduct under investigation does not involve any of the following:

- (1) misappropriation of funds or property of a client or third party;
- (2) a criminal act that reflects adversely on the attorney's honesty;
- (3) actual loss to a client or other person, and the Court's rules or precedent would allow for a restitution order for that type of loss in a disciplinary case, reinstatement case or Client Protection Program award, unless restitution is made a condition of diversion; or
- (4) dishonesty, fraud, deceit, or misrepresentation.

Rules of the Attorney Registration and Disciplinary Commission (ARDC), Rule 56(a), Diversion (Jan. 2023).

Similarly, the District of Columbia's rules provide:

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

- (1) the alleged misconduct resulted in prejudice to a client or another person;
- (2) discipline previously has been imposed or diversion previously has been offered and accepted, unless Disciplinary Counsel finds the presence of exceptional circumstances justifying a waiver of this limitation;
- (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, except for the offenses of driving under the influence and operating a motor vehicle while impaired (or a similar conviction in another jurisdiction).

DC Bar Disciplinary Rules, Section 8.1(b), Diversion.

With respect to procedures, Illinois specifies that the terms of diversion “shall be set forth in a written agreement between the Administrator and respondent” which shall specify “the general purpose of the diversion, the investigations involved in the diversion, the requirements of the diversion, the length of time in which the requirements shall be completed, and any requirement for payment of restitution or costs.” (Rules of the ARDC, Rule 56(c).) Illinois provides that the requirements of diversion may include any of the following:

1. a mentoring program eligible for MCLE professional responsibility credit;
2. a law office management program;
3. a continuing legal education program;
4. testing, evaluation and/or treatment by the Lawyers’ Assistance Program, medical or psychological provider;
5. arbitration or mediation;
6. audit of respondent’s financial accounts; and/or
7. any other requirement agreeable to the Administrator and the respondent.

(Rules of the ARDC, Rule 56(b).) Illinois requires the respondent to pay all costs incurred in connection with participation in the diversion agreement. (Rules of the ARDC, Rule 56(d).) Illinois makes clear that diversion does not constitute a form of discipline, and specifies that on entry into the diversion agreement the underlying investigation shall be closed by the Administrator; if the respondent fails to comply with the requirements of the diversion agreement, the Administrator retains discretion to modify the requirements of the diversion agreement or terminate diversion and reopen the disciplinary investigation. (Rules of the ARDC, Rule 56(e), (f).)

Similarly, the District of Columbia rules provide that if an attorney 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.” (DC Bar Disciplinary Rules, Section 8.1(c).) The DC rules provide that the diversion program “shall be designed to remedy the alleged misconduct of the attorney” and may include “participation in formal courses of education sponsored by the Bar, a law school, or another organization; completion of an individualized program of instruction specified in the agreement or supervised by another Bar entity; or any other arrangement agreed to by the parties which is designed to improve the ability of the attorney to practice in accordance with the Rules of Professional Conduct.” (DC Bar Disciplinary Rules, Section 8.1(d).) The DC rules provide that if the attorney successfully completes diversion, the Disciplinary Counsel’s “investigation shall be closed, and the attorney shall have no record of misconduct resulting therefrom”; on the other hand, if the attorney does not successfully complete the program, Disciplinary Counsel may proceed with the investigation. (DC Bar Disciplinary Rules, Section 8.1(e).)

IV. Recommendations for Codifying a Diversion Program

The examples of diversion rules discussed in Part III above share certain common characteristics. All set baseline exclusions from diversion by defining narrow categories of serious violations that, absent extraordinary circumstances, should not be diverted. All define in very general terms how a diversion program should operate. All specify the effect of termination of diversion, either after successful completion or otherwise. And, recognizing the flexibility necessary to operate a diversion program, all leave to the administrator of the program discretion to determine eligibility for and define the procedures that will be used to implement the program.

Following this same general approach makes sense as it will allow the Chief Trial Counsel discretion to determine and adjust more specific criteria for eligibility and more specific procedures for the program based on a variety of factors, including available staffing, overall caseloads, and any general patterns of lawyer misconduct that may counsel for or against using diversion for specific types of cases at specific times.

In line with this general approach, recommended language for codifying a diversion program for lawyers accused of minor violations of the Rules of Professional Conduct or the State Bar Act is as follows:

- (a) **Diversion Program.** The State Bar shall establish a formal disciplinary diversion program for lawyers accused of minor violations of the Rules of Professional Conduct or the State Bar Act.
- (b) **Eligibility.** Subject to the limitations set forth below, the Office of Chief Trial Counsel and a lawyer may agree to diversion if the Office of Chief Trial Counsel concludes based on all the circumstances, including consideration of the attorney's history of prior discipline, prior complaints, and prior participation in a diversion program, that diversion would benefit and not harm the public, the profession, or the administration of justice. Diversion shall not be available where an attorney's alleged misconduct involved any of the following:
 - (1) significant prejudice to a client or another person;
 - (2) intentional misappropriation of funds or property of a client or third party;
 - (3) a criminal act that reflects adversely on the attorney's honesty;
 - (4) actual loss to a client or other person, and applicable rules and case law would allow a restitution order for that type of loss in a disciplinary proceeding or Client Security Fund proceeding, unless restitution is made a condition of diversion; or
 - (5) dishonesty, fraud, deceit, or intentional misrepresentation.

The Chief Trial Counsel shall have discretion to determine other eligibility criteria for identifying cases where diversion would benefit and not harm the public.

- (c) **Conditions.** Conditions of diversion shall be designed to remedy and prevent lawyer misconduct. The Office of Chief Trial Counsel may require completion of any of the following as a condition of diversion:
 - (1) a law office practice management program;
 - (2) a formal course of education sponsored by the Bar, a law school, or another organization;
 - (3) testing, evaluation, and treatment by the Lawyer Assistance Program, or a medical or psychological provider;
 - (4) arbitration or mediation;
 - (5) audit of the lawyer's financial accounts; and
 - (6) any other condition agreed to by the Office of Chief Trial Counsel and the lawyer.
- (d) **Procedures.** The Office of Chief Trial Counsel shall have discretion to establish procedures for diversion, subject to the following requirements:
 - (1) acceptance of an offer of a diversion agreement is voluntary;
 - (2) a lawyer shall not be required to formally admit misconduct as a condition of receiving an offer of diversion; and
 - (3) a diversion agreement shall be in writing and shall clearly specify the conditions of diversion and the time period within which the lawyer must complete the conditions of diversion.
- (e) **Costs.** The lawyer shall be solely responsible for and shall pay all costs associated with completion of the conditions of diversion.
- (f) **Termination.** If the lawyer rejects an offer of a diversion agreement, the Office of Chief Trial Counsel shall proceed with its disciplinary investigation as if no offer of a diversion agreement had been made. If the lawyer accepts an offer of a diversion agreement and fails to complete the conditions of diversion within the time period specified in the diversion agreement, the Office of Chief Trial Counsel, in its sole discretion, may enter an agreement with the lawyer to modify the diversion agreement or may terminate the diversion agreement and reopen and proceed with its disciplinary investigation. If the lawyer accepts an offer of a diversion agreement and successfully completes the conditions of diversion within the time period specified in the diversion agreement, the Office of Chief Trial Counsel shall close the underlying disciplinary matter and the lawyer shall have no record of discipline resulting therefrom.