

1 Rule 14-533. Diversion.

2 (a) Referral to diversion. In a matter involving less serious misconduct as outlined in  
3 subsection (c), upon receipt of an informal complaint and before filing a formal  
4 complaint, the respondent may have the option of electing to have the matter referred to  
5 diversion, the appropriateness of which will be determined by the chair of the Diversion  
6 Committee after consultation with OPC. The option for diversion also may be initiated by  
7 OPC or the Ethics and Discipline Committee screening panel. Diversion may require the  
8 participation of the respondent in one or more of the following:

9 (a)(1) fee arbitration;

10 (a)(2) mediation;

11 (a)(3) law office management assistance;

12 (a)(4) lawyer assistance programs;

13 (a)(5) psychological and behavioral counseling;

14 (a)(6) monitoring;

15 (a)(7) restitution;

16 (a)(8) continuing legal education programs including, but not limited to, ethics  
17 school; or

18 (a)(9) any other program or corrective course of action to address the respondent's  
19 conduct.

20 (b) Authority and responsibility. The Diversion Committee may negotiate and  
21 execute diversion contracts, assign monitoring to a lawyers assistance program,  
22 determine compliance with the terms of diversion contracts, and determine fulfillment or  
23 any material breach of diversion contracts, subject to review under subsection (j)(3) of  
24 this rule. The Diversion Committee shall have authority to establish subcommittees of  
25 volunteer attorneys and other professionals for the specific purpose of monitoring the  
26 compliance of any attorney under diversion and reporting compliance to OPC and the  
27 Diversion Committee on a regular basis.

28 (c) Less serious misconduct. Conduct which would result in a suspension or  
29 disbarment is not considered to be less serious misconduct. Conduct is not ordinarily  
30 considered less serious misconduct if any of the following considerations apply:

31 (c)(1) the misconduct involves the misappropriation of client funds;

32 (c)(2) the misconduct results in or is likely to result in substantial prejudice to a client  
33 or other person, absent adequate provisions for restitution;

34 (c)(3) the respondent has been sanctioned in the last three years;

35 (c)(4) the misconduct is of the same nature as misconduct for which the respondent  
36 has been sanctioned in the last three years;

37 (c)(5) the misconduct involves dishonesty, deceit, fraud, or misrepresentation;

38 (c)(6) the misconduct constitutes a substantial threat of irreparable harm to the  
39 public; a felony; or a misdemeanor which reflects adversely on the respondent's  
40 honesty, trustworthiness or fitness as a lawyer; or

41 (c)(7) the misconduct is part of a pattern of similar misconduct.

42 (d) Factors for consideration. The Diversion Committee considers the following  
43 factors in negotiating and executing the diversion contract:

44 (d)(1) whether the presumptive sanction that would be imposed, in the opinion of  
45 OPC or the Diversion Committee is likely to be no more severe than a public reprimand  
46 or private admonition;

47 (d)(2) whether participation in diversion is likely to improve the respondent's future  
48 professional conduct and accomplish the goals of lawyer discipline;

49 (d)(3) whether aggravating or mitigating factors exist; and

50 (d)(4) whether diversion was already tried.

51 (e) Notice to complainant. The OPC will notify the complainant, if any, of the  
52 proposed decision to refer the respondent to diversion, and the complainant may submit  
53 written comments. The complainant will be notified when the complaint is diverted and  
54 when the complaint is dismissed. All notices will be sent to the complainant's address of  
55 record on file with the OPC. Such decision to divert or dismiss is not appealable.

56 (f) Diversion contract.

57 (f)(1) If the respondent agrees or elects to participate in diversion as provided by this  
58 rule, the terms of the diversion shall be set forth in a written contract. If the contract is  
59 entered prior to a hearing of a screening panel of the Ethics and Discipline Committee  
60 pursuant to Rule 14-510(b), the contract shall be between the respondent and OPC. If  
61 diversion is agreed to and entered after a screening panel of the Ethics and Discipline  
62 Committee has convened pursuant to Rule 14-510(b), the contract shall be made as

63 part of the decision of that screening panel. If diversion is agreed to and entered after a  
64 complaint has been filed pursuant to Rule 14-512, the diversion contract shall be made  
65 as part of the ruling and order of the Court. Except as otherwise part of an order of a  
66 court, the Diversion Committee shall monitor and supervise the conditions of diversion  
67 and the terms of the diversion contract. The contract shall specify the program(s) to  
68 which the attorney shall be diverted, the general purpose of the diversion, the manner in  
69 which compliance is to be monitored, and any requirement for payment of restitution or  
70 cost. The respondent attorney shall bear the burden of drafting and submitting the  
71 proposed diversion contract. Respondent may utilize counsel to assist in the negotiation  
72 phase of diversion. Respondent may also utilize Bar benefits programs provided by the  
73 Bar, such as a lawyer assistance program to assist in developing terms and conditions  
74 for the diversion contract appropriate to that respondent's particular situation. Use of a  
75 lawyers assistance program to assess appropriate conditions for diversion shall not  
76 conflict that entity from providing services under the contract. The terms of each  
77 contract shall be specifically tailored to the respondent's individual circumstances. The  
78 contract is confidential and its terms shall not be disclosed to other than the parties to  
79 the contract.

80 (f)(2) All diversion contracts must contain at least all the following:

81 (f)(2)(A) the signatures of respondent, his counsel if any, and the chair of the  
82 Diversion Committee;

83 (f)(2)(B) the terms and conditions of the plan for respondent and, the identity, if  
84 appropriate, of any service provider, mentor, monitor and/or supervisor and that  
85 individual's specific responsibilities. If a mental health professional is utilized,  
86 respondent must sign a limited conditional waiver of confidentiality permitting the  
87 professional to make the necessary disclosures in order for the respondent to fulfill his  
88 duties under the contract;

89 (f)(2)(C) the necessary terms providing for oversight of fulfillment of the contract  
90 terms, including provisions for those involved to report any alleged breach of the  
91 contract to OPC;

92 (f)(2)(D) the necessary terms providing that respondent will pay all costs incurred in  
93 connection with the contract and those costs further specified pursuant to subsection (k)  
94 and any costs associated with the complaints to be deferred; and

95 (f)(2)(F) a specific acknowledgement that a material violation of a contract term  
96 renders the respondent's participation in diversion voidable by the chair of the Diversion  
97 Committee or his designee;

98 (f)(3) The contract may be amended on subsequent agreement of respondent and  
99 OPC.

100 (f)(4) The chair of the Ethics and Discipline Committee and OPC shall be given  
101 copies of every diversion contract entered and signed by the respondent and the  
102 Diversion Committee chair.

103 (g) Affidavit supporting diversion. A diversion contract must be supported by the  
104 respondent's or the respondent's lawyer's affidavit or declaration as approved by the  
105 Diversion Committee setting forth the purpose for diversion and how the specific terms  
106 of the diversion contract will address the allegations raised by the complaint. The  
107 respondent is not required to admit to the allegations in the complaint upon entering  
108 diversion. However, an admission and/or acknowledgement may be relevant and  
109 necessary as part of treatment in diversion. Such an admission shall be confidential for  
110 treatment purposes, shall not be released to any third party, and shall not be treated as  
111 an admission against interest nor used for future prosecution should diversion fail.

112 (h) Status of complaint. After a diversion contract is executed by the respondent, the  
113 disciplinary complaint is deferred pending successful completion of the contract.

114 (i) Effect of non-participation in diversion. The respondent has the right to decline to  
115 participate in diversion. If the respondent chooses not to participate in diversion, the  
116 matter proceeds pursuant to the Rules of Lawyer Discipline and Disability.

117 (j) Termination of diversion.

118 (j)(1) Fulfillment of the contract. The contract terminates when the respondent has  
119 fulfilled the terms of the contract and gives the Diversion Committee and OPC an  
120 affidavit or declaration demonstrating fulfillment. Upon receipt of this affidavit or  
121 declaration, the Diversion Committee and OPC must acknowledge receipt and request  
122 that the chair of the Ethics and Discipline Committee or his designee dismiss any

123 complaint(s) deferred pending successful completion of the contract or notify the  
124 respondent that fulfillment of the contract is disputed based on an OPC claim of material  
125 breach. The complainant cannot appeal the dismissal. Successful completion of the  
126 contract is a bar to any further disciplinary proceedings based on the same allegations  
127 and successful completion of diversion shall not constitute a form of discipline.

128 (j)(2) Material breach. A material breach of the contract is cause for termination of  
129 the contract. After a material breach, OPC must notify the respondent of the alleged  
130 breach and intent to terminate the diversion. Thereafter, disciplinary proceedings may  
131 be instituted, resumed or reinstated.

132 (j)(3) Review by the chair. The Diversion Committee may review disputes regarding  
133 the alleged material breach of any term of the contract on the request of the respondent  
134 or OPC. The request must be filed with the Diversion Committee chair within 15 days of  
135 notice to the respondent of the determination for which review is sought. The  
136 respondent is entitled to a hearing before the Diversion Committee on any alleged  
137 breach to the diversion contract. Determinations under this section are not subject to  
138 further review and are not reviewable in any proceeding.

139 (k) Costs. Upon entering diversion, respondent shall pay an initial fee of \$250.  
140 During diversion, respondent shall pay a fee of \$50 per month. All such fees are  
141 payable to the Bar's general fund. These fees may be waived upon a hardship request,  
142 the validity or appropriateness of which shall be determined by the chair of the Diversion  
143 Committee or his designee.

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