

Availability Of Diversion Expanded

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Diversion is a mechanism which may be offered to a lawyer to eradicate the possibility of having an ethical record. It must be offered to any lawyer who has committed minor ethical misconduct and the lawyer has had no determination of misconduct in the prior five years.



This administrative mechanism is known as Pretrial Intervention Program (PTI) for ethics where if, after entering an “Agreement in Lieu of Discipline” the respondent meets certain conditions within six months, conditions which usually are meant to remediate the cause of unethical conduct, the potential charge of unethical conduct is dismissed. The conditions may be: reimbursement of fees and costs to a client, completion of legal work, participation in a drug or alcohol program, psychological counseling or the satisfactory completion of a course of study. The New Jersey State Bar Association offers a 3½ hour course for those admitted to diversion twice per year which many times is a requirement of any Agreement in Lieu of Discipline.

Prior to the Supreme Court receiving the Putting Lawyers First (PLF) Report on the Disciplinary System from the New Jersey State Bar Association, diversion could not be offered to a lawyer if the ethics investigator had already filed a complaint. This restriction resulted in lawyers who may have committed minor ethical misconduct having a disciplinary record.

The PLF Committee Report recommended that diversion be available at any time in the disciplinary process if the infraction alleged was one of minor misconduct.

Understanding that facts are everything in every disciplinary matter, and the definition of minor misconduct can vary as applied to each matter, minor misconduct is defined as conduct, which, if proved, would not warrant a sanction greater than an admonition—the lowest form of sanction in the disciplinary system such as negligent record keeping errors, failure to communicate with a client, failure to have a signed retainer agreement or failure to turn over a file.

Minor misconduct is not: conduct which involves the knowing misappropriation of funds; conduct which might result in substantial prejudice or harm to a client; the respondent has been disciplined in the prior five years; the conduct involves dishonesty, fraud or deceit; or, the unethical conduct constitutes a crime.

Previously the *Rule* which addressed diversion, *Rule* 1:20-3(B)(i) provided that the Ethics Committee Chair *may* request that the Director of the OAE divert the matter and approve an Agreement in Lieu of Discipline. It further provided that diversion would *not* be available after a complaint had been filed.

Within weeks of receiving the PLF Committee recommendations, which were approved by the NJSBA Board of Trustees, the Supreme Court issued a Notice to the Bar on May 12, 2023, expanding the accessibility of lawyers for diversion for all cases involving minor misconduct. The *Rule*, as now amended, provides that an ethics chair *must* request the director divert a matter and “every effort must be made to consider diversion before the filing of a complaint, however, in appropriate circumstances diversion may be available subsequent to the filing of a complaint.” The discretion to reject a proposed Agreement in Lieu of Discipline rests with the director of the Office of Attorney Ethics from which there is no appeal.

If an attorney fails to comply with the terms of the agreement, then the lawyer will be subject to discipline and the matter will proceed to conclusion via a complaint.

Practice Tip: Hire an attorney to represent you and immediately assess if the conduct alleged, if proved, could be defined as minor misconduct in order that your attorney can begin to immediately advocate for diversion on your behalf. ■