

SUPPORTING STATEMENT
United States Patent and Trademark Office
Practitioner Conduct and Discipline
(Formerly Practitioner Records Maintenance, Disclosure and Discipline Before
the United States Patent and Trademark Office)
OMB CONTROL NUMBER 0651-0017
RIN 0651-AC81
(October 17, 2012)

A. JUSTIFICATION

1. Necessity of Information Collection

The Director of the United States Patent and Trademark Office (USPTO) has the authority to establish regulations governing the conduct and discipline of agents, attorneys, or other persons representing applicants and other parties before the USPTO (35 U.S.C. §§ 2 and 32-33). The current USPTO Code of Professional Responsibility (37 CFR 10.20-10.112) describes how practitioners should conduct themselves professionally and outlines their responsibilities for record keeping and reporting violations or complaints of misconduct to the USPTO, while current procedural rules governing disciplinary investigations and proceedings (37 CFR 11.19-11.61) dictate how the USPTO can discipline practitioners.

Through proposed rule RIN 0651-AC81, entitled “Changes to Representation of Others Before the United States Patent and Trademark Office,” the USPTO proposes to align the USPTO’s professional responsibility rules with those of most other U.S. jurisdictions by replacing the current Patent and Trademark Office Code of Professional Responsibility, adopted in 1985, based on the 1980 version of the Model Code of Professional Responsibility of the American Bar Association (“ABA”), with new USPTO Rules of Professional Conduct, which are based on the Model Rules of Professional Conduct of the ABA, which were published in 1983, substantially revised in 2003 and updated through 2011. Changes approved by the ABA House of Delegates in August 2012 have not been incorporated in these proposed rules. The Office also proposes to revise the existing procedural rules governing disciplinary investigations and proceedings.

Rule-related impacts:

First, the Office will require non-attorney practitioners to notify senders of documents relating to the representation of a client that were inadvertently sent. (Proposed 37 CFR 11.404(b)).

Second, the Office will require practitioners to comply with the proposed § 11.703(c) disclosure requirements relating to soliciting professional employment.

Non-rule Related Impacts:

Many of the USPTO Rules of Professional Conduct are exempt from the Paperwork Reduction Act.

Record Keeping & Disclosure

These rules will require that registered practitioners and attorneys who appear before the Office maintain complete records of clients, including all funds, securities and other properties of clients coming into his/her possession, and render appropriate accounts to the client regarding such records, as well as report violations of the rules to the Office. Practitioners are mandated by the rules to maintain proper documentation so that they can fully cooperate with an investigation in the event of a report of an alleged violation and that violations are prosecuted as appropriate. The Office has determined that the record keeping and maintenance of such records are excluded from any associated PRA burden as these activities are usual and customary for practitioners representing clients (5 CFR 1320.3(b)(2)). Additionally, in the case of most attorney practitioners, any requirements for collection of information are not presumed to impose a Federal burden as these requirements are also required by a unit of State or local government, namely State bar(s), and would be required even in the absence of any Federal requirement (5 CFR 1320.3(b)(3)). These rules also require, in certain instances, that written consents or certifications be provided. Such consents or certifications have been determined not to constitute information under 5 CFR 1320.3(h)(1).

Complaint/Violation Reporting

Section 11.803 would require reporting a violation of the Rules of Professional Conduct. This section corresponds to the ABA Model Rules of Professional Conduct 8.3 and continues the reporting requirement in Section 10.24.

The USPTO Rules of Professional Conduct require an attorney or agent to report knowledge of certain violations of the USPTO Rules of Professional Conduct to the USPTO. If the complaint is found to have merit, the USPTO will investigate and possibly prosecute violations of the Rules and provide the practitioner with the opportunity to respond to the complaint. The Director of the Office of Enrollment and Discipline (OED) may, after notice and opportunity for a hearing, suspend, exclude, or disqualify any practitioner from further practice before the USPTO based on noncompliance with the regulations. Practitioners who have been excluded or suspended from practice before the USPTO must keep and maintain records of their steps to comply with the suspension or exclusion order. These records serve as the practitioner's proof of compliance with the order.

If this information is not collected, the Director of OED would have no knowledge of alleged violations and would be unable to enforce the provisions of the Rules.

Table 1 provides the specific rules and statutes that require the USPTO to collect the information discussed above:

Table 1: Information Requirements for Practitioner Conduct and Discipline

Requirement	Statute	Rule
Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents)	35 U.S.C. §§ 2(b)(2)(D) and 32	37 CFR 11.404(b) (new) 37 CFR 11.703(c) (new)
Record Keeping Maintenance Under Suspension or Exclusion from the USPTO	35 U.S.C. §§ 2(b)(2)(D) and 32	37 CFR 11.58 (new)
Complaint/Violation Reporting (including Grievances)	35 U.S.C. §§ 2(b)(2)(D) and 32	37 CFR 11.801(d) and 11.803 (new)

2. Needs and Uses

There are no forms associated with this collection of information.

The Information Quality Guidelines from Section 515 of Public Law 106-554, Treasury and General Government Appropriations Act for fiscal year 2001, apply to this information collection, and this information collection and its supporting statement comply with all applicable information quality guidelines, *i.e.*, OMB and specific operating unit guidelines.

Table 2 outlines how this information is used by the public and by the USPTO:

Table 2: Needs and Uses for Practitioner Conduct and Discipline

Form and Function	Form #	Needs and Uses
Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents)	No Form Associated	<ul style="list-style-type: none"> Used by the public to maintain client integrity in the day-to-day operation of their practice. Used by the USPTO to comply with Federal regulations. Used by the USPTO to impose regulations governing the conduct of attorneys, agents, and other persons representing applicants and other parties before the USPTO.
Record Keeping Maintenance Under Suspension or Exclusion from the USPTO	No Form Associated	<ul style="list-style-type: none"> Used by practitioners seeking reinstatement after a disciplinary removal to provide increased record keeping requirements in order to show compliance with the terms required for reinstatement. Used by the public to provide evidence that a practitioner has or has not complied with the rules during suspension or exclusion. Used by the USPTO to determine whether a practitioner qualifies for reinstatement. Used by the USPTO to monitor record keeping requirements of practitioners seeking reinstatement after a disciplinary removal to ensure that compliance with the terms required for reinstatement are being met.
Complaint/Violation Reporting (including Grievances)	No Form Associated	<ul style="list-style-type: none"> Used by the public to report knowledge of certain violations of the USPTO Rules of Professional Conduct. Used by the public to maintain proper documentation in order to fully cooperate with the USPTO in an investigation. Used by the USPTO to investigate and, where appropriate, to prosecute for violations of the USPTO Rules of Professional Conduct.

3. Use of Information Technology

Each report of an alleged violation of the USPTO Rules of Professional Conduct is unique. Accordingly, the use of information technology is not likely to reduce the burden in reporting a given violation.

Due to the sensitive nature of this information, the USPTO does not use automated, electronic, mechanical, or other technological collection techniques for the collection of this information.

4. Efforts to Identify Duplication

The data in this collection is not routinely collected or maintained elsewhere. Inasmuch as a report by an attorney or agent of an alleged violation of the USPTO Rules of Professional Conduct is made uniquely to the OED Director, there is no duplication of effort.

5. Minimizing Burden to Small Entities

The reporting and record keeping requirements are essentially the same for all attorneys and agents. The collection of this information does not pose a significant economic impact on small entities or small businesses.

6. Consequences of Less Frequent Collection

This information is collected on an event-by-event basis; it is not time-driven. Therefore, this information could not be collected less frequently. An attorney, agent, or other person representing applicants and other parties before the USPTO is obligated to make a report when a violation is discovered. The USPTO has no control over when an alleged violation of the Rules of Professional Conduct is likely to occur.

7. Special Circumstances in the Conduct of Information Collection

There are no special circumstances associated with this collection of information.

8. Consultations Outside the Agency

The USPTO has long-standing relationships with groups from which patent application data is collected, such as the American Intellectual Property Law Association (AIPLA), as well as patent bar associations, inventor groups, and users of our public facilities. Their views are expressed in regularly scheduled meetings and considered in developing proposals for information collection requirements. There have been no comments or concerns expressed by these or similar organizations concerning the time required to provide the information required under this program.

9. Payment or Gifts to Respondents

This information collection does not involve a payment or gift to any respondent. Response to this information collection is necessary to enforce the Rules, to register a report of knowledge of certain violations of the Rules to the USPTO, and to investigate and possibly prosecute violations of the Rules.

10. Assurance of Confidentiality

Confidentiality is governed by statute 35 U.S.C. § 122 and regulations 37 CFR 1.11 and 1.14. This collection contains information of a confidential (personal) nature, which is subject to the Privacy Act. A System of Records Notice was published in the *Federal Register* on November 16, 2005 (70 Fed. Reg. 69522). Administrative controls are used to safeguard this information as appropriate. Reports of alleged violations of the Rules of Professional Conduct are maintained in confidence until such time as an attorney, agent, or other person representing an applicant or other party before the USPTO is publicly disciplined. Violation reporting activities may result in notices published in the *Official Gazette of the United States Patent and Trademark Office* and/or the agency's FOIA reading room. These may include notices of public reprimand, censure, suspension, exclusion, or exclusion on consent. The USPTO has been successful in declining to make available investigatory material in response to a request under the Freedom of Information Act based on 5 U.S.C. §§ 552(b)(7)(C) (investigatory records) and 552(b)(6) (unwarranted invasion of personal privacy).

11. Justification for Sensitive Questions

None of the information collected is considered to be of a sensitive nature.

12. Estimate of Hour and Cost Burden to Respondents

Table 3 calculates the burden hours and costs of this information collection to the public, based on the following factors:

- **Respondent Calculation Factors**

The USPTO estimates that:

- Approximately 10,526 individuals will be subject to the item for Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents);
- The USPTO will receive approximately 40 submissions associated with Record Keeping Maintenance Under Suspension or Exclusion from the USPTO; and
- The USPTO will receive approximately 200 grievances (reports/violations).

These estimates are based on the Agency's long-standing institutional knowledge of and experience with the type of information collected by these items.

- **Burden Hour Calculation Factors**

The USPTO estimates that it will take the public between 1 and 20 hours, depending upon the complexity of the situation, to gather, prepare and/or submit the necessary information.

These estimates are based on the Agency's long-standing institutional knowledge of and experience with the type of information collected and the length of time necessary to complete responses containing similar or like information.

- **Cost Burden Calculation Factors**

The USPTO estimates that the respondent rates will be blended rates.

Based on the Agency's long-standing institutional knowledge of and experience with the type of information collected, the Agency believes that \$228, \$262 and \$371 are accurate estimates of the cost per hour to collect this information.

The Agency has factored the following:

Table 3: Burden Hour/Burden Cost to Respondents for Practitioner Conduct and Discipline

Item	Hours (a)	Responses (yr) (b)	New Burden (hrs/yr) (c) (a) x (b)	New Rate (\$/hr) (d)	Total Cost (\$/hr) (e) (c) x (d)	Status
Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents)	1 hour (was 26.0) Decrease of 26 hours due to program change Increase of 1 hour due to program change (rule impact)	10,526 (was 445) Decrease of 445 due to program change Increase of 10,526 due to program change (rule impact)	10,526	\$262.00 Agent Rate (Program change in rate category)	\$2,757,812.00	Adjusted existed inventory (decrease) Adjusted existed inventory (increase)
Record Keeping Maintenance Under Suspension or Exclusion from the USPTO	20 hours (was 40.0) Decrease of 20 hours due to administrative adjustment	40 (was 10)	800	\$371.00 Practitioner Rate (Administrative adjustment in rate category)	\$296,800.00	Adjusted Existing Inventory
Complaints/Violation Reporting (including Grievances)	3 hours (was 2.0) Increase of 1 hour due to Administrative adjustment	200 (was 180)	600	\$228.00 Blended rate (Administrative adjustment in rate category)	\$136,800.00	Adjusted Existing Inventory
TOTALS		10,766	11,926		\$3,191,412.00	

Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents): 10,526 responses

- Of the almost 42,000 practitioners, there are 10,526 agents. It is estimated that non-attorney practitioners may incur 30 minutes of burden to notify senders of documents relating to the representation of a client that were inadvertently sent (proposed 37 CFR 11.404(b)), and 30 minutes to comply with the new disclosure requirements relating to soliciting professional employment (§ 11.703(c)), for a combined total of 1 hour. The number is reduced from 26 hours in the pre-rule inventory since the record keeping is usual and customary and no longer calculated as burden.
- The estimated hourly rate for these respondents is the Agent Rate of \$262. (See pages I-5 in the AIPLA Report of the Economic Survey 2011)

Record Keeping Maintenance Under Suspension or Exclusion from USPTO: 40 responses

- It is estimated that there are approximately 40 suspended or excluded practitioners annually. The burden hour calculation still stands as it has prior to the proposed rule.
- The estimated hourly rate for these respondents is the Practitioner Rate of \$371. (See pages I-5 in the AIPLA Report of the Economic Survey 2011)

Complaint/Violation Reporting, including Grievances: 200

- The agency receives an average of 200 per year. The most likely populations to submit reports of violations of the Rules to the USPTO are small entity inventors, large entity inventors, assignees and other interested parties of patent prosecutions, other offices in the USPTO (Examining Corps, Office of Petitions), patent agents or attorneys reporting on peers, patent agents or attorneys reporting themselves, referrals from assorted courts (mostly state), and referrals from assorted consumer protection organizations (Federal, state and private). For violation reporting, practitioners are *required* to report knowledge of certain violations as dictated by the Rules of Professional Conduct. Fifty per cent (50%) of the complaints of violations received by the USPTO originate from practitioners. For everyone else, violation reporting is *voluntary*. The agency has updated estimates for the burden hours, not due to the rule impact, but due to a review of the time.
- The estimated hourly rate for these respondents is a blended rate of \$228. This is based on the following:

- o 50% Practitioner Rate of \$371 (see pages I-5 in the AIPLA Report of the Economic Survey 2011)
- o 25% Paralegal/Paraprofessional Rate of \$122 (see table 3.2 in the National Utilization and Compensation Survey Report published by the National Association of Legal Assistants (NALA), October 2010)
- o 25% Scientists and Engineers rate of \$44.36 (see U.S. Bureau of Labor Statistics, May 2011 National Occupational Employment and Wage Estimates charts)

13. Total Annualized (Non-hour) Cost Burden

There are associated postage costs for two items in this collection.

- Record Keeping Maintenance Under Suspension or Exclusion from the USPTO: The public may submit affidavits with attachments through the mail in association with the requirements for this item.
- Complaint/Violation Reporting (including Grievances): The public may submit these complaints, grievances and other violation reports through the mail.

The USPTO estimates that the average size of a mailing will be 8 ounces. The current cost of mailing an 8 ounce first class document is \$2.30 (Source: U.S. Postal Service).

Table 4: Non-hour Cost Burden for Practitioner Conduct and Discipline (Postage)

Item	Responses (a)	Postage Cost (\$) (b)	Total (Non-hour) Cost Burden (c) (a) x (b)
Record Keeping Maintenance and Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents)	10,526	\$0.00	\$0.00
Record Keeping Maintenance Under Suspension or Exclusion from the USPTO	40	\$2.30	\$92.00
Grievance alleging and supporting a violation of professional conduct	200	\$2.30	\$460.00
TOTAL	10,766	-----	\$552.00

14. Annual Cost to the Federal Government

There are no government costs associated with registered practitioners maintaining their record keeping systems.

Various levels of pay grades reflect the different actions involved in reaching the assumptions behind the time and burden to the government for collecting the information in this collection. The Director of the OED and a combination of staff attorneys (GS 11, 13 and 15) provide the professional effort to review the

complaints/violations, generate inquiries as needed, review responses, and perform other follow-up activities. The clerical staff establishes and maintains the files and associated updates. Paralegals primarily track all case status and docket information. Administrator and analyst efforts generally represent coordination with other functional areas; this type of coordination would primarily track against the unit of work from which all other disciplinary efforts spring; i.e., the complaint/violation reports.

The USPTO estimates that items in this collection will be processed by OED staff in the GS-9, 11, 12, 13, 15 and SES grades. The agency added an additional 30% to the current OPM hourly wage rates of the Metro D.C. area, to account for a fully loaded hourly rate.

Table 5 calculates the processing hours and costs to the Federal Government:

Table 5: Burden Hour/Burden Cost to the Federal Government for Practitioner Conduct and Discipline

Item	Hours Current Inventory	Responses (yr) (b)	Burden (hrs/yr) (c) (a) x (b)	Rate (\$/hr) (d)	Total Cost (\$/hr) (e) (c) x (d)
Record Keeping Maintenance & Disclosure (includes advertisements, disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents)	0	10,526	0	\$0.00	\$0.00
Record Keeping Maintenance Under Suspension or Exclusion from the USPTO	0	40	0	\$0.00	\$0.00
Complaint/Violation Reporting (including Grievances)		200			
Director	6		1,200	\$97.19	\$116,628.00
Staff Attorneys	16		3,200	\$97.19	\$311,008.00
Paralegal	7		1,400	\$51.30	\$71,820.00
Administrator	2		400	\$97.19	\$38,876.00
Analyst	3		600	\$66.55	\$39,930.00
Clerk	6		1,200	\$35.37	\$42,444.00
TOTAL	- - - -	10,766		\$444.79	\$620,706.00

The USPTO is updating the blended rate for the Complaint/Violation Reporting (including Grievances) which is an administrative adjustment not associated with the rule.

15. Reason for Change in Burden

Summary of Changes Since the Previous Renewal

OMB previously approved the renewal of this information collection in September of 2010 with 635 responses, 12,330 burden hours, and \$487 in annual (non-hour) costs.

For this proposed addition due to a notice of proposed rulemaking, the USPTO estimates that the total annual responses will be 10,766 and the total annual burden hours will be 11,926. This decrease of 404 in burden hours is due to administrative adjustments and program changes.

The currently approved annual (non-hour) cost burden for this collection is \$487. For this renewal, the USPTO estimates that the total annual (non-hour) costs will be \$552. This increase of \$65 is due to administrative adjustments.

Change in Respondent Cost Burden

The total respondent cost burden for this collection has increased by \$1,916,292, from \$1,275,120 to \$3,191,412, from the previous renewal of this collection in September of 2010 due to:

- **Increase in estimated hourly rate.** The 2010 renewal used an estimated rate of \$100 per hour for agents and \$217 per hour for a combination of attorneys, paralegals/paraprofessionals, and scientists/engineers to prepare the items in this collection. For this rulemaking submission, the USPTO is using the updated rate of \$262 per hour for agents, \$371 for all practitioners, and \$228 for a combination of attorneys, paralegals/paraprofessionals, and scientists/engineers to prepare the items in this collection.
- **Decrease in estimated burden hours.** The total estimated burden hours have decreased from 12,330 in the 2010 renewal to 11,926 for the current rulemaking submission due to a decrease in the estimated time to complete the annual filings even though there was an increase in responses.

Changes in Responses and Burden Hours

For this renewal, the USPTO estimates that the total annual responses will increase by 10,131 (from 635 to 10,766) and the total burden hours will decrease by 404 (from 12,330 to 11,926) from the currently approved burden for this collection. These changes are due to the following program changes and administrative adjustments:

- **Decrease of 445 estimated annual responses.** The USPTO is removing the information collection item for Record Keeping Maintenance; **a burden decrease of 11,570 hours as a program change.**
- **Increase of 10,526 estimated annual responses.** The USPTO is adding in the information collection item, Record Keeping Maintenance and Disclosure, which adds in the disclosure requirements relating to soliciting professional employment and notifications by non-attorney Practitioner of inadvertently sent documents; **a burden increase of 10,526 hours as a program change.**

- **Increase of 30 estimated annual responses** for Record Keeping Maintenance Under Suspension or Exclusion from the USPTO, from 10 to 40; **a burden increase of 400 hours as an administrative adjustment.**
- **Increase of 20 estimated annual responses** for Complaint/Violation Reporting (including Grievances), from 180 to 200; **a burden increase of 240 hours as an administrative adjustment.**

A total of 1,044 burden hours have been deleted from this collection as a result of program changes, along with an increase of 640 burden hours due to administrative adjustments. This results in a total net burden hour decrease of 404 hours.

Changes in Annual (Non-Hour) Costs

For this rulemaking submission, the USPTO estimates that the annual (non-hour) costs will increase by \$65, from \$487 to \$552, due to an administrative adjustment, as follows:

- **Increase of \$65.** This collection is currently approved with a total of \$487 in postage costs. For this renewal, the USPTO estimates that postage costs will increase to \$552 as an administrative adjustment. This increase is due to an increase in the estimated number of responses, an increase in postage rates, and a recalculation of the weight of the responses.

16. Project Schedule

There is no plan to publish this information for statistical use.

17. Display of Expiration Date of OMB Approval

There are no forms in this information collection. Therefore, the display of the OMB Control Number and the expiration date is not applicable.

18. Exception to the Certificate Statement

No exceptions to the certificate statement are included in this collection of information.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection of information does not employ statistical methods.