

Disciplinary Case Summaries for Matters Resulting in Diversion and Private Admonition

Diversion is an alternative to discipline (see CRCP 251.13). Pursuant to the rule and depending on the stage of the proceeding, Attorney Regulation Counsel (Regulation Counsel), the Attorney Regulation Committee (ARC), the Presiding Disciplinary Judge (PDJ), the hearing board, or the Supreme Court may offer diversion as an alternative to discipline. For example, Regulation Counsel can offer a diversion agreement when the complaint is at the central intake level in the Office of Attorney Regulation Counsel (OARC). Thereafter, ARC or some other entity must approve the agreement.

From November 1, 2017 through January 31, 2018, at the intake stage, Regulation Counsel entered into 14 diversion agreements involving 14 separate requests for investigation. ARC approved three diversion agreements involving four separate requests for investigation during this time frame. There were no diversion agreements submitted to the PDJ for approval.

Determining if Diversion is Appropriate

Regulation Counsel reviews the following factors to determine whether diversion is appropriate:

1. the likelihood that the attorney will harm the public during the period of participation;
2. whether Regulation Counsel can adequately supervise the conditions of diversion; and
3. the likelihood of the attorney benefiting by participation in the program.

Regulation Counsel will consider diversion *only if the presumptive range of discipline in the particular matter is likely to result in a public*

censure or less. However, if the attorney has been publicly disciplined in the last three years, the matter generally will not be diverted under the rule (see CRCP 251.13(b)). Other factors may preclude Regulation Counsel from agreeing to diversion (see CRCP 251.13(b)).

Purpose of the Diversion Agreement

The purpose of a diversion agreement is to educate and rehabilitate the attorney so that he or she does not engage in such misconduct in the future. Furthermore, the diversion agreement may address some of the systemic problems an attorney may be having. For example, if an attorney engaged in minor misconduct (neglect), and the reason for such conduct was poor office management, one of the conditions of diversion may be a law office management audit and/or practice monitor. The time period for a diversion agreement generally is no less than one year and no greater than three years.

Conditions of the Diversion Agreement

The type of misconduct dictates the conditions of the diversion agreement. Although each diversion agreement is factually unique and different from other agreements, many times the requirements are similar. Generally, the attorney is required to attend ethics school and/or trust account school conducted by attorneys from OARC. An attorney may be required to fulfill any of the following conditions:

- law office audit
- practice monitor
- financial audit
- restitution
- payment of costs
- mental health evaluation and treatment

- continuing legal education (CLE) courses
- any other conditions that would be determined appropriate for the particular type of misconduct.

Note: The terms of a diversion agreement may not be detailed in this summary if the terms are generally included within diversion agreements.

After the attorney successfully completes the requirements of the diversion agreement, Regulation Counsel will close its file and the matter will be expunged pursuant to CRCP 251.33(d). If Regulation Counsel has reason to believe the attorney has breached the diversion agreement, then Regulation Counsel must follow the steps provided in CRCP 251.13 before an agreement can be revoked.

Types of Misconduct

The types of misconduct resulting in diversion from November 1, 2017 through January 31, 2018, generally involved the following:

- lack of competence, implicating Colo. RPC 1.1;
- scope of representation, implicating Colo. RPC 1.2;
- neglect of a matter and/or failure to communicate, implicating Colo. RPC 1.3 and 1.4;
- fees issue, implicating Colo. RPC 1.5;
- trust account issues, implicating Colo. RPC 1.15A through 1.15E;
- declining or terminating representation, implicating Colo. RPC 1.16;
- pursuing a claim or contention lacking merit, implicating Colo. RPC 3.1;
- failing to supervise non-lawyer staff, implicating Colo. RPC 5.3;
- committing a criminal act, implicating

Colo. RPC 8.4(b) and CRCP 251.5; and

- conduct prejudicial to the administration of justice, implicating Colo. RPC 8.4(d).

Some cases resulted from personal problems the attorney was experiencing at the time of the misconduct. In those situations, the diversion agreements may include a requirement for a mental health evaluation and, if necessary, counseling to address the underlying problems of depression, alcoholism, or other mental health issues that may be affecting the attorney's ability to practice law.

Diversion Agreements

Below are some diversion agreements that Regulation Counsel determined appropriate for specific types of misconduct from November 1, 2017 through January 31, 2018. The sample gives a general description of the misconduct, the Colorado Rule(s) of Professional Conduct implicated, and the corresponding conditions of the diversion agreement.

Competence, Failure to Supervise Non-lawyer Staff

► Respondent handled immigration cases despite not having the competence to do so. Respondent was aided by a non-lawyer assistant who handled many of the immigration issues on respondent's behalf. Respondent failed to adequately supervise the non-lawyer assistant.

Rules Implicated: Colo. RPC 1.1, Colo. RPC 5.1(a), and Colo. RPC 5.3(b).

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school and a practice monitor.

Diligence

► Respondent represented the complaining witness in a divorce, a civil protection order case, and a criminal case. The criminal case involved an allegation of child abuse against the complaining witness related to his minor son. The Department of Human Services (DHS) also investigated the allegation of child abuse and found the allegation was founded even though the complaining witness was allegedly never contacted during their investigation. The deadline for filing an appeal of the DHS finding was within 90 days of the finding. Respondent

was aware that a request for hearing form needed to be sent to DHS within 90 days. However, respondent did not submit a request for hearing form to DHS to appeal the DHS finding. During the representation, respondent engaged in unprofessional conduct by using profanity and other inappropriate language with the complaining witness.

Rules Implicated: Colo. RPC 1.3.

Diversion Agreement: One-year diversion agreement with conditions, including refund or otherwise credit \$75 to the client's outstanding bill, ethics school, and payment of costs.

Communication

► In one matter, respondent was hired to consult with a client, charging \$500 for a three-hour consultation. The potential client received approximately one hour and a half in attorney time, at which point she decided

not to hire respondent and requested a refund of her fees. The potential client believed she would receive a full three hours of attorney time for her \$500, but respondent believed the agreement was a \$500 fee for up to three hours of attorney time.

In another matter, respondent failed to appear for a court hearing as scheduled, failed to timely withdraw from a case, and failed to timely provide an accounting of time spent on the case upon termination. At the time of the incident, respondent was also suffering from personal problems, including intense custody litigation related to respondent's children.

Rules Implicated: Colo. RPC 1.4, Colo. RPC 1.5, and Colo. RPC 1.16.

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school, completion of the OARC self-assessment, and a practice monitor.

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Scope of Representation

► Complainants retained respondent to represent them in three cases that stemmed from the same fact pattern involving construction of a personal residence on a lot they owned. In one of the cases, respondent signed a stipulated motion that resulted in the dismissal with prejudice of all claims against complainants. Respondent did not have complainants' express permission to sign and enter into the stipulated motion as written. Complainants did not expressly agree to or approve the filing of the stipulated motion without inclusion of all of the conditions set forth in an email sent to respondent. Respondent stated that respondent believed respondent had implied permission from complainants to enter into the stipulated motion, because it had the effect of dismissing the claims against them and preserved their abuse of process claim and their right to seek attorney fees and costs.

Rules Implicated: Colo. RPC 1.2(a).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school and payment of costs.

Fees/Trust Account

► Respondent represented a client in three criminal matters. Respondent did not provide the basis or rate of the fees. Respondent did not provide an accounting. According to respondent's statement of earnings, respondent earned all of the fees paid; however, respondent kept a \$500 cushion in the client's trust account even though those funds were earned.

Rules Implicated: Colo. RPC 1.5, Colo. RPC 1.15A, and Colo. RPC 1.15B.

Diversion Agreement: Two-year diversion agreement with conditions, including financial audit, financial monitoring, trust account school, and payment of costs.

► Respondent negotiated a settlement of a client's personal injury matter. Respondent stated that respondent received the settlement funds and deposited the settlement funds into respondent's trust account. Respondent's representation of the client in the personal injury matter thereafter terminated. Respondent then informed the client of respondent's legal obligation to retain the settlement funds until

all liens and claims against the settlement funds had been identified and satisfied or otherwise resolved. Respondent informed the client that respondent was willing to transfer the settlement funds from respondent's trust account to the trust account of a successor attorney of the client's choosing. Respondent also informed the client that, as an alternative to transferring the funds to a successor attorney, respondent may file an interpleader action. However, as of the date of the diversion agreement, respondent had effected no such transfer or interpleader of the settlement funds.

Rules Implicated: Colo. RPC 1.15A(b) and (c).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, payment of costs, and within 90 days of signing the diversion agreement respondent shall either: (a) file an interpleader action in an appropriate jurisdiction seeking leave to deposit all settlement funds with the Court's registry and deposit such funds upon the Court's approval; (b) transfer all settlement funds to the trust account of a successor attorney for the client upon the written request of such successor attorney; or (c) otherwise resolve the liens and claims against the settlement funds and distribute the settlement funds according to the law and the Rules of Professional Conduct.

► Respondent represented clients in an immigration matter. Respondent failed to clearly identify whether respondent's fee agreement was a flat fee arrangement or a fee cap matter. Clients made payments to respondent on a monthly basis. Respondent did not keep contemporaneous billing records and treated the funds as earned each month without verifying they were in fact earned. Client received little or no value for most of the case. Respondent refunded all fees to the client.

Rules Implicated: Colo. RPC 1.15A and Colo. RPC 3.1.

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school, a financial monitor, and a practice audit.

► Respondent represented the client to review and analyze documents to advise the

client regarding possible actions with the parole board. Respondent entered into a contract with the client's wife for the payment of services. Respondent failed to obtain informed consent from the client for this arrangement. The contract referred to an "engagement retainer," although it did not comply with the requirements under the rule. Respondent deposited the fee directly into respondent's operating account and did not deposit any amount in the trust account. Respondent completed the work respondent was hired to perform.

Rules Implicated: Colo. RPC 1.5, Colo. RPC 1.8(f), and Colo. RPC 1.15A.

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, trust account school, and payment of costs.

Criminal Act

► Respondent was arrested following an observation by a police officer that respondent failed to stay within the traffic lane. Respondent refused to submit to a blood test to determine blood alcohol level. Respondent pleaded guilty to driving while ability impaired (DWAI). This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5.

Diversion Agreement: One-year diversion agreement with conditions, including continued mental health treatment, ethics school, and payment of costs.

► Respondent was pulled over for failing to maintain respondent's lane while driving. Pursuant to a blood test, respondent's BAC was 0.161. Respondent later pleaded guilty to DWAI and was sentenced to one year unsupervised probation, with conditions. Respondent timely self-reported respondent's conviction. This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5.

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the term of respondent's criminal sentence, successful completion of ethics school, and payment of costs.

► Respondent was arrested on suspicion

of DUI after being stopped for driving too slowly with respondent's vehicle stopped in the middle of a lane of traffic. Respondent's blood alcohol tested at .127. Respondent later pleaded guilty to DWAI and was sentenced to one year probation, with conditions. Respondent timely self-reported the conviction. This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the term of respondent's criminal sentence, successful completion of ethics school, and payment of costs.

► Respondent was stopped after hitting another vehicle and driving away. Respondent failed the voluntary roadside maneuvers. Respondent chose a blood test, which respondent ultimately refused. Respondent later pleaded guilty to DUI and was sentenced to two years' deferred unsupervised sentence, with conditions. Respondent timely self-reported the conviction. This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: Two-year diversion with conditions, including compliance with the term of respondent's criminal sentence, confidential meeting with COLAP, successful completion of ethics school, and payment of costs.

► Respondent was involved in an automobile accident in December 2015 and had a blood alcohol level of 0.257 following respondent's arrest. Respondent was charged with reckless driving, driving under the influence of alcohol, and DUI per se. Respondent pleaded guilty to driving under the influence of alcohol in 2016. This was respondent's second alcohol-related conviction and fourth alcohol-related arrest.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: Three-year diversion agreement with conditions, including two years of monitored sobriety, completion of an intensive out-patient alcohol treatment

program, a medical evaluation for mental health issues, compliance with all treatment and therapy recommendations, compliance with the terms of respondent's criminal sentence, successful completion of ethics school, and the payment of costs

► Respondent was arrested on suspicion of DUI after being stopped for rolling through a stop sign and making an abrupt turn onto the C-470 ramp across the solid white line. Respondent's BAC was 0.186. Respondent later pleaded guilty to DWAI and was sentenced to one year of probation, with conditions. Respondent timely self-reported the conviction. This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: One-year diversion agreement with conditions, including compliance with the term of respondent's criminal sentence, successful completion of ethics school, and payment of costs.

► Respondent was involved in a traffic accident while driving. The responding police officer reported smelling alcohol when speaking with respondent. Respondent voluntarily submitted to a horizontal gaze nystagmus test, the result of which the officer believed provided probable cause to arrest respondent for driving under the influence of alcohol. Respondent's breath alcohol content was 0.14. Respondent pleaded guilty to DWAI. Respondent timely self-reported respondent's conviction; this was respondent's second alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: Two-year diversion with conditions, including compliance with the terms of respondent's criminal sentence, alcohol treatment and monitoring, continued psychotherapy, successful completion of ethics school, and payment of costs.

► Respondent was pulled over after not staying in respondent's lane. Respondent failed roadside maneuvers. The portable breath test device result was .106. Respondent agreed to a blood test, and the result of the blood

test was .107. Respondent pleaded guilty to a charge of DWAI. Respondent was sentenced to two years of probation, with conditions. Respondent underwent an alcohol evaluation. The evaluator opined that respondent did not meet the criteria for any psychiatric disorders nor any substance use disorders. Respondent had two prior alcohol-related convictions. One of the prior convictions was over 20 years ago and occurred before respondent was admitted to the practice of law in Colorado. Respondent did not report the other prior conviction to the Office of Attorney Regulation Counsel because of misunderstanding of the Colorado Rules of Civil Procedure regarding the need to still report a conviction to a deferred sentence.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school, compliance with terms and conditions of criminal sentence, and payment of costs. **CL**

Summaries of diversion agreements and private admonitions are published on a quarterly basis. They are supplied by the Colorado Supreme Court Office of Attorney Regulation Counsel.

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