

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 February 1, 2018 through April 30, 2018, at the intake stage, Regulation Counsel entered into eight diversion agreements involving eight separate requests for investigation. ARC approved 11 diversion agreements involving 21 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 February 1, 2018 through April 30, 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;
- conflict of interest, implicating Colo. RPC 1.7;
- duties to former clients, implicating Colo. RPC 1.9;
- trust account issues, implicating Colo. RPC 1.15A;
- declining or terminating representation, implicating Colo. RPC 1.16;
- failure to comply with a court order or the rules of a tribunal, implicating Colo. RPC 3.4(c);
- 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 February 1, 2018 through April 30, 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

▶ Respondent represented clients in two separate matters. At the start of respondent's practice, respondent opened a bank account but failed to ensure that the bank account was a COLTAF account or trust account. Respondent failed to adequately communicate with clients regarding the status of their cases. Respondent deposited funds into respondent's operating account before earning the fees and classified fees as nonrefundable. Respondent failed to maintain an adequate case file and was dilatory in returning materials to the clients upon termination.

Rules Implicated: Colo. RPC 1.1, 1.2(a), 1.3, 1.4(a)(2) and (3), 1.5(f) and (g), 1.15A(a), 1.15B(a)(1), and 1.16(d).

Diversion Agreement: Three-year diversion agreement with CLE requirements for starting a solo practice, ethics school, trust account school, a practice audit and monitor, and payment of costs.

▶ Respondent was retained to represent a client in an immigration matter. Respondent charged the client a flat fee to file an application for adjustment of status. Respondent's flat fee agreement lacked benchmarks. Respondent charged the client to process an application for work authorization, but then failed to file the application. In addition, respondent failed to place filing fees in his trust account. Respondent lacked any electronic method for calendaring, data entry, or accounting, and therefore his recordkeeping lacked accuracy.

Rules Implicated: Colo. RPC 1.1, 1.3, 1.4, 1.5, and 1.15A.

Diversion Agreement: Two-year diversion agreement with conditions, including trust account school, an audit, a practice monitor, and payment of costs.

▶ During the course of representing a client, respondent engaged in tactics that included: responding to part of a summary judgment motion by verifying facts based on the lawyer's own personal knowledge, rather than securing an affidavit from a witness with personal knowledge; seeking relief from depositions at the last minute; and attempting to substitute a witness for a deposition who could not testify to points consistent with respondent's representations. The client also disputed how respondent handled certain fees.

Rules Implicated: Colo. RPC 1.1, 1.3, 3.1, and 8.4(d).

Diversion Agreement: Two-year diversion agreement with the following conditions: completion of ethics school; completion of a minimum of 16 CLE credits within one year of the date of the agreement in law practice management, civil practice, and/or real estate law; submission of fee dispute to the CBA Fee Arbitration Committee; and payment of costs.

Scope of Representation

▶ Respondent represented the wife in a dissolution case. When respondent took the case, a petition for dissolution had already been filed and a protection order had been entered against the husband for alleged domestic violence. Respondent first met with the wife with her husband present. The husband and wife requested that respondent help them dismiss the dissolution and the protection order. Respondent did not consult privately with the wife to confirm her wishes until later in the representation. Finally, respondent did not obtain the wife's informed consent when the husband paid respondent's fee.

Rules Implicated: Colo. RPC 1.2(a), 1.4(a)(2), and 1.8(f).

Diversion Agreement: One-year diversion agreement with completion of ethics school.

Diligence

▶ Respondent was local counsel for a corporation in a Colorado court action. After trial,

the court issued an order that required the corporation to answer certain Post-Judgment Interrogatories and set a hearing for approximately six weeks later that could be vacated by the opposing party. Respondent attempted to communicate with out-of-state counsel regarding a response, but did not receive specific instructions on how to proceed. The hearing was not vacated, and neither respondent nor any other counsel for the corporation appeared at the hearing. The court entered an order on finding the corporation in contempt and awarding sanctions.

Rules Implicated: Colo. RPC 1.3.

Diversion Agreement: One-year diversion agreement with completion of ethics school, completion of the Colorado Lawyer Self-Assessment program, and payment of costs.

▶ In June 2016, respondent agreed to review documentation provided by the client for possible legal malpractice claims against the client's previous attorneys. Respondent later agreed to vet the client's possible claims against a third attorney. Despite agreeing to do so, respondent never reviewed, researched, or discussed the client's possible claims against the third attorney with the client before the client terminated respondent's representation in August 2017. Respondent also failed to ensure that respondent's paralegal returned the client's original documents to the client as directed in September 2016; the documents were not returned to the client until August 2017.

Rules Implicated: Colo. RPC 1.3.

Diversion Agreement: One-year diversion agreement with conditions, including completion of the Colorado Lawyer Self-Assessment program, completion of ethics school, and payment of costs.

▶ In a probate matter, respondent failed to notify the court of respondent's change in firm and email address. As a result, respondent did not receive an email notification of service of a pleading in the case that affected the distribution to respondent's client. Respondent also failed to communicate with the client.

Rules Implicated: Colo. RPC 1.3 and 1.4.

Diversion Agreement: One-year diversion

with conditions, including completion of ethics school and payment of costs.

► Respondent is bipolar. Respondent suffered from a manic episode that manifested itself through impulsive behavior, increased irritability, increased alcohol consumption, grandiose ideation, and racing thoughts. Respondent's manic episode caused respondent to engage in a number of rule violations. Respondent ultimately returned to mental health treatment and respondent's treating physicians adjusted respondent's medications. The treatment effectively ended the manic episode, which ended the pattern of rule violations.

Rules Implicated: Colo. RPC 1.3, 1.4, 4.2, and 1.5.

Diversion Agreement: Three-year diversion agreement with ethics school, monitored sobriety, continued mental health treatment and monitoring, and payment of costs.

► In one case, respondent represented a client on a contingency fee in a medical malpractice case. Respondent did not adequately communicate with the client during the investigation of the case and told the client there was insufficient evidence to proceed shortly before the statute of limitations ran.

In another case, respondent negligently contacted a represented opposing party on multiple occasions despite having been put on notice that the party was represented.

Rules Implicated: Colo. RPC 1.3, 1.4, 1.16, and 4.2.

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

► Respondent represented a mother in an action for allocation of parental responsibilities between September 2016 and March 2017, when the client terminated services. At a hearing on permanent orders related to respondent's client's case, the court directed respondent to file a new child support order within 14 days. Respondent failed to do so and neglected to address respondent's client's request that the child support be paid through the Family Support Registry. After respondent's termination, respondent failed

to promptly provide respondent's client with a final bill, a requested accounting, or refund unearned fees. When respondent wrote a check to this client for the unearned fees in June 2017, respondent erroneously paid this refund out of respondent's personal funds, rather than respondent's trust account.

Rules Implicated: Colo. RPC 1.3, 1.4, 1.15A, and 3.4(c).

Diversion Agreement: One-year diversion agreement with completion of ethics school, completion of the Colorado Lawyer Self-Assessment program with an attorney approved by OARC, and payment of costs.

Neglect of a Matter and/or Failure to Communicate

► Respondent was retained in a domestic relations matter and failed to place the retainer in a trust account. Thereafter, respondent's client filed for dissolution pro se and requested a refund of respondent's unused retainer from respondent. Although respondent refunded the unused portion of the retainer, he did not do so promptly.

Rules Implicated: Colo. RPC 1.4, 1.15A, and 1.16(d).

Diversion Agreement: One-year diversion agreement with completion of trust account school and payment of costs.

Fee Issues

► Respondent was retained by respondent's client to investigate a potential restraining order case and criminal case for the client as a victim, with the possibility of a civil lawsuit. Ultimately, the client terminated respondent's representation and respondent sent a refund check for the remainder of the retainer. However, respondent's fee agreement contained a provision that set forth a \$3,500 non-refundable fee. Respondent's fee agreement also included language that any bounced check would be charged a \$250 fee, regardless of the actual fee incurred.

Rules Implicated: Colo. RPC 1.5(a) and (g).

Diversion Agreement: One-year diversion agreement with completion of ethics school, completion of the Colorado Lawyer Self-Assessment program, certification of modification of fee agreement, and payment of costs.

Conflict of Interest

► Respondent represented two quasi-municipal corporations. While they originally comprised the same board members and had basically the same interests, as the composition of the boards changed over time, the entities' interests diverged. Respondent's representation involved a negligent conflict of interest. Respondent also disclosed information about one client to the other, though the information was public. He also was slow to return his client's file upon termination of the attorney-client relationship.

Rules Implicated: Colo. RPC 1.7(a), 1.6, and 1.16.

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

Duties to Former Clients

► Respondent disclosed a former client's confidences when respondent copied counsel for the government on a letter to the client's new attorney in an immigration case, including information the client had provided about his entry and exit dates to and from the United States.

Rules Implicated: Colo. RPC 1.9(c).

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

Failure to Comply with a Court Order or the Rules of a Tribunal

► Respondent entered respondent's general appearance on behalf of the wife in a domestic relations matter and represented her in various post-decree matters. Several months after the resolution of the issues that were pending at the time respondent entered the case, the husband filed additional post-decree motions. Respondent did not immediately seek to withdraw from the case, but rather prepared and/or assisted the wife in the preparation, electronic filing, and service of various pleadings in the case without noting respondent's involvement in submission of these documents as required by CRCP 11. Respondent also refused to confer with the husband on the new matters as required by CRCP 121, § 1-15(8), stating that respondent was "not representing" the wife on these matters despite the entry of appearance on record with the court.

Rules Implicated: Colo. RPC 3.4(c) and 4.1.

Diversion Agreement: One-year diversion agreement with completion of ethics school, completion of the Colorado Lawyer Self-Assessment program, certification of modification of fee agreement, and payment of costs.

Criminal Act

▶ Respondent took respondent's daughter and some of the daughter's friends to a concert at a club. While there, respondent gave respondent's daughter an alcoholic drink, which she sipped and passed along to her friends. Respondent's daughter and her friends were under the age of 21. Respondent pleaded guilty to one count of Providing Alcohol to a Minor, a class 1 misdemeanor, and was sentenced to nine months' supervised probation, payment of fees and costs, and 30 hours of useful public service. Respondent timely self-reported respondent's conviction to OARC.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.20.

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

▶ Respondent attempted to purchase a controlled substance from a client. Unbeknownst to respondent, the client was acting as a confidential informant for law enforcement. Respondent entered a guilty plea to Possession of a Schedule III/IV substance (DM-1), a class 1 misdemeanor. Respondent initially failed to report the conviction to OARC. Significant mitigation existed, including respondent's personal and health issues.

Rules Implicated: Colo. RPC 8.4(b) and 3.4(c).

Diversion Agreement: Three-year diversion agreement with the following conditions: completion of ethics school, compliance with the sentence in the criminal case, participation in monthly testing for substances through fingernail clippings, participation in individual therapy, contact with the Colorado Lawyer Assistance Program (COLAP), and completion of the Colorado Lawyer Self-Assessment program.

▶ Respondent was arrested on suspicion of DUI after being stopped for speeding. Respondent's blood alcohol tested at .157. 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 compliance with the term of respondent's criminal sentence, completion of ethics school, and payment of costs.

Conduct Prejudicial to the Administration of Justice

▶ A number of attorneys and a judge reported that respondent was appearing at meetings and court while intoxicated.

Rules Implicated: Colo. RPC 8.4(d).

Diversion Agreement: Three-year diversion agreement with monitored sobriety, therapy, and payment of costs. 

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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