

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, 2018 through January 31, 2019, at the intake stage, Regulation Counsel entered into 13 diversion agreements involving 13 separate requests for investigation. ARC approved 12 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 November 1, 2018 to January 31, 2019 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;
- trust account issues, implicating Colo. RPC 1.15A;
- communications with a person represented by counsel, implicating Colo. RPC 4.2;
- restrictions on the practice of law, implicating Colo. RPC 5.4; and
- committing a criminal act, implicating Colo. RPC 8.4(b) and CRCP 251.5.

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, 2018 to January 31, 2019. 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.

Lack of Competence

► Respondent accepted a client in an employment case, but failed to notice that the statute of limitations had already run. After respondent learned that the statute of limitations had run, respondent failed to clearly communicate this information to the client. Respondent then failed to respond to reasonable requests for information from the client in a timely manner.

Rules Implicated: Colo. RPC 1.1, 1.3, and 1.4(a).

Diversion Agreement: One-year diversion agreement with ethics school, seven hours of relevant CLEs, and payment of costs.

Scope of Representation

► Respondent represented a client in immigration proceedings and in defending criminal charges filed against the client. As part of a plea deal, the client pleaded guilty to a second degree misdemeanor for having a concealed weapon. Respondent researched the impact of the conviction on the client's immigration case and concluded that it would not make the client ineligible for cancellation of removal proceedings. Respondent did not communicate sufficiently to the client the potential problems with the conviction, however, and the immigration judge found the client ineligible for cancellation of removal. At the hearing on the immigration matter, as a result of the court's rulings, the client was given two options for voluntary departure: (1) with a waiver of the client's rights to appeal, or (2) without such a waiver. Without discussing the matter with the client, even after being given the opportunity to do so by the judge, respondent agreed to waive the client's appellate rights. Respondent also prepared an asylum application, but did not timely submit the criminal history, and as

a result the client's application was deemed abandoned.

Rules Implicated: Colo. RPC 1.2, 1.3, and 1.4.

Diversion Agreement: Two-year diversion agreement with conditions, including ethics school, seven hours of relevant CLEs, and payment of costs.

Diligence

► Respondent represented a client in a domestic case. Respondent failed to comply with the court's deadline to file the parties' agreement. Respondent failed to communicate with opposing counsel or respond to opposing counsel's communication for almost a month before the deadline to file the agreement. Respondent's billing did not provide a description to specifically convey what work was completed.

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

Diversion Agreement: Two-year diversion agreement with conditions, including establishing and utilizing a relationship with an approved mentor, completion of the lawyer self-assessment tool with a mentor, ethics school, seven hours of the family law basics CLE (or the equivalent), and payment of costs.

► Respondent was appointed to represent a client on a Crim. P. 35(c) motion the client filed pro se. During the course of the representation, respondent wrote to the client and visited the client. However, after the visit, respondent failed to communicate with the client, including failing to respond to the client's attempts to reach respondent. Although respondent requested and was granted a six-month extension of time to file an amended Rule 35(c) motion if necessary, respondent did not file an amended motion or request an additional extension

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of time. Ultimately, the client filed a motion asking that respondent be dismissed from the case. Respondent met with the client before the hearing on the client’s motion and did not contest the client’s motion. The court appointed alternate defense counsel to represent the client.

Rules Implicated: Colo. RPC 1.3 and 1.4(a).

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

▶ Respondent was retained to assist a client and his business partner with forming a limited liability company. Respondent provided the client with a “retainer agreement” that reflected a flat fee arrangement. The agreement lacked any benchmarks indicating how portions of the fee would be earned. It also provided for a “security retainer” that equaled the full amount of the flat fee. When the client paid, respondent passed the

processing fees charged by QuickBooks for each of these payments on to the client. Respondent stopped communicating with the client, and the client then terminated respondent’s services and asked for a retainer refund. Respondent did not respond. The client emailed respondent again about a week later, requesting that respondent confirm receipt of the prior email and refund the balance of his retainer. Two days later, respondent read the client’s two emails and then emailed the client a draft operating agreement, which the client claimed was incomplete. Shortly thereafter, respondent refunded half of the fee to the client. According to respondent’s accounting, respondent earned half of the fee for drafting the operating agreement. However, respondent did not transfer these earned funds out of the trust account for many months.

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

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, completion of the lawyer self-assessment tool with peer review, and payment of costs.

▶ Respondent represented a client in a domestic juvenile matter. Respondent failed to comply with the court’s deadline to file the parties’ agreement. Respondent failed to communicate with opposing counsel or respond to opposing counsel’s communications requesting respondent’s positions to comply with the court’s deadline. Respondent waited over three weeks to send the client a copy of the juvenile court’s order and did not otherwise communicate the findings to the client during that timeframe.

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

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, completion of the lawyer self-assessment tool with peer review, and payment of costs.

▶ Due to a calendaring error, respondent failed to timely notify a client in an immigration case of an upcoming individual hearing. When respondent tried to call the client the day before the hearing, the client was unavailable. As a result, the client was ordered removed in absentia. Respondent then charged the client \$1,000 to file a motion to reopen the case.

Rules Implicated: Colo. RPC 1.3, 1.4, and 1.7.

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


▶ Respondent represented a client in personal injury and workers’ compensation matters after the client was injured in an accident. A third-party entered agreements to provide two loans to the client, with repayment to be made from recovery in the pending matters. Respondent was aware of the agreements. After settlement in one of the client’s matters, respondent disbursed funds for one of the loans, but inadvertently overlooked the other and distributed those funds to his client.

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MEDIATION SERVICES

FOR

PERSONAL INJURY BAD FAITH LITIGATION
CONTRACT CLAIMS CIVIL ACTIONS



DIVERSIFIED EXPERIENCE:

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Rules Implicated: Colo. RPC 1.3 and 1.15A.

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

Failure to Communicate

▶ Respondent represented a client in a criminal case. Respondent's fee agreement was ambiguous and unclear about whether client's initial payment was a flat fee for all services to be rendered in the client's case pretrial or if these funds were a retainer to be billed against services rendered to the client on an hourly basis. Respondent placed the client's initial payment directly into respondent's operating account and treated these funds as earned, despite the fact that respondent had not yet completed the work for which this payment was intended. The client terminated respondent's services before the resolution of the criminal case and asked respondent to provide an accounting. Although respondent promised an accounting, respondent failed to provide one until after the client filed a request for investigation with the OARC.

Rules Implicated: Colo. RPC 1.4, 1.5(f), and 1.15A(b).

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

▶ A client hired respondent to assist him with the filing of an application for asylum and withholding of removal and securing employment authorization. The parties signed a written fee agreement for a \$4,000 flat fee. The client paid \$1,000 down, and the parties agreed that the client would pay \$500 monthly payments toward the remaining balance. Respondent deposited all payments from the client, including the initial payment, directly into respondent's operating account. Respondent's fee agreement erroneously described all payments made by the client as nonrefundable and earned upon receipt. Respondent filed the client's asylum petition and an interview date was scheduled with immigration authorities. Respondent postponed the interview date despite being told by the client that he did not agree to the post-

ponement. The client terminated respondent's representation and requested the return of his client file. Respondent did not return the client's file or provide the client with an accounting until after this investigation commenced.

Rules Implicated: Colo. RPC 1.4, 1.5, 1.15A, and 1.16(d).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, trust account school, completion of the lawyer self-assessment tool with peer review, participation in a CBA fee arbitration proceeding to resolve the current client's fee dispute, and payment of costs.

▶ Respondent represented client in a variety of legal matters. Though respondent performed a significant amount of work on behalf of the client, respondent failed to provide the client with billing statements for several years and

failed to timely respond to multiple requests for an accounting by the client. Respondent also kept fees that had arguably been earned in respondent's trust account for a period of several years. The amounts respondent ultimately charged were not unreasonable.

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

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, trust account school, completion of the lawyer self-assessment tool with peer review, and payment of costs.

▶ Respondent was retained to represent a client in a post-divorce decree matter. Respondent and the client entered into an hourly fee agreement that contained a nonrefundable fee to set up the file and a nonrefundable monthly file maintenance fee of \$20. Opposing counsel

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was awarded attorney fees that were to be paid by respondent's client. Respondent did not promptly inform the client about the court order awarding attorney fees or the client's obligation to pay them.

Rules Implicated: Colo. RPC 1.4 and 1.5.

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

Fees Issues

▶ A client first consulted with respondent about filing for bankruptcy protection in 2015. The client did not contact respondent again until 2016, at which time the client expressed a desire to proceed with respondent's representation. Respondent failed to deposit the client's unearned funds into a trust account. Despite respondent's characterization of the fee as a flat fee, respondent's bankruptcy retainer agreement

required a retainer, which the agreement stated would not be refunded even if the client decided not to file the bankruptcy petition. Respondent performed some work, but the client did not proceed with the bankruptcy. When the client requested that respondent refund the entire fee, respondent agreed to refund \$500 of the fee as long as the client provided proof that the client had withdrawn the complaint to OARC. Respondent later refunded the \$500 to the client.

Rules Implicated: Colo. RPC 1.5(g), 1.15A(a), and 8.4(d).

Diversion Agreement: One-year diversion agreement with conditions, including ethics school, certification of the Trust Account Manual review, and payment of costs.

Conflict of Interest

▶ Respondent continued to represent respondent's brother after respondent was

accused of misconduct, and the only way respondent could honestly respond to the allegations of misconduct would have been to implicate respondent's client in the misconduct.

Rules Implicated: Colo. RPC 1.7(a)(2).

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

Trust Account Issues

▶ Respondent failed to return a client's original documents, despite several requests from the client, for about nine months after the conclusion of the client's domestic relations case.

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

Diversion Agreement: One-year diversion agreement, including ethics school, completion of the lawyer self-assessment tool, and payment of costs.

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

▶ Respondent failed to comply with court orders requiring her to file certain financial reports.

Rules Implicated: Colo. RPC 3.4(c).

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

Restrictions on the Practice of Law

▶ Respondent and a non-lawyer owned a company that provided services to financial advisors and brokers. Respondent's company was not a law firm and was not permitted to engage in the practice of law. Respondent's company offered to provide services to financial advisors that are the practice of law and engaged in activities that constitute the practice of law in Colorado. Respondent changed the company advertising and soliciting practices, and made numerous changes to the company website. Respondent stopped offering and engaging in legal services previously offered to the public.

Rules Implicated: Colo. RPC 5.4(a), 5.4(d)(1), 5.5(a)(3), 7.1(e), and 7.3(a).

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



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Criminal Act

▶ Respondent pleaded guilty to DUI (3rd). Respondent's two prior DUI convictions were more than 10 years old.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Three-year diversion agreement with conditions, including alcohol monitoring, continued treatment, compliance with the terms of criminal probation, and payment of costs.

▶ Respondent pleaded guilty to misdemeanor driving while ability impaired. There were no injuries during the incident, and this was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Two-year diversion agreement with conditions, including continued mental health therapy, monitored sobriety, ethics school, and payment of costs.

▶ For approximately 30 years, respondent shared office space with six to seven attorneys. In 2015, a woman began working part time for one of the other attorneys. In 2017, respondent and two attorneys moved to a new building, including the attorney for whom the woman worked. Respondent and the woman did not get along. In 2017, an incident occurred as respondent was descending and the woman was ascending a stairway in the office. The woman met respondent at approximately the halfway point on the staircase, at which time a third party observed that, as the woman passed respondent, respondent turned, placed a hand on the woman's shoulder, and pushed her as she continued up the stairs. The third party did not observe the woman to be injured.

Rules Implicated: Colo. RPC 8.4(b).

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

▶ Respondent entered a plea of guilty to driving while ability impaired. This was respondent's second alcohol-related conviction. Respondent timely reported the conviction to OARC and underwent a psychological/substance abuse evaluation.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion with conditions, including compliance with the terms and conditions of the sentence imposed in the criminal matter, monitored abstinence from alcohol, ethics school, and payment of costs.

▶ Respondent was stopped for weaving in 2017 after the police responded to a report from a witness of a possibly intoxicated driver. Chemical testing revealed that respondent had a blood alcohol level of 0.271 shortly after respondent's arrest. Respondent pleaded guilty to driving under the influence of alcohol with a BAC in excess of 0.20. Respondent was sentenced to 15 days of jail time (all suspended), 12 months of probation, alcohol evaluation and treatment as recommended, monitored sobriety, 48 hours of useful community service and fines of \$600, and abstinence from alcohol while on probation.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Two-year diversion agreement with conditions, including compliance with the terms of respondent's criminal sentence, monitored abstinence from alcohol, weekly attendance at a support group for alcohol abstinence, ethics school, no further violations, and payment of costs.

▶ Respondent pleaded guilty to misdemeanor harassment in municipal court after being involved in a road rage incident. Respondent was sentenced to a six-month deferred judgment and ordered to comply with various terms and conditions of a criminal diversion agreement, including participation in anger management classes. Respondent timely self-reported the conviction to the OARC.

Rules Implicated: Colo. RPC 8.4(b).

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

▶ Respondent consumed alcohol at an industry event. On the way home from the event, respondent's vehicle hit a car from behind that was stopped at an intersection. Respondent was arrested and charged with driving under the influence. Respondent submitted to a breath

test nearly two hours after the accident, which produced a result of 0.142 grams of ethyl alcohol per 210 liters of breath. Respondent pleaded guilty to driving under the influence and was sentenced to 10 days in jail, suspended; one year of supervised probation, including monitored sobriety; a \$1,000 fine; 96 hours of community service; attendance at a victim impact panel; submission to an alcohol evaluation; abstinence from alcohol and other drugs; and payment of fees and costs. Respondent timely self-reported the conviction to the OARC. This was respondent's second alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Two-year diversion agreement with conditions, including compliance with the terms of the sentence in respondent's criminal case, continued psychotherapy, contact with COLAP, ethics school, and payment of costs. **CI**

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.