

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 May 1, 2018 through July 31, 2018, at the intake stage, Regulation Counsel entered into 10 diversion agreements involving 10 separate requests for investigation. ARC approved five diversion agreements involving seven 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 May 1, 2018 through July 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;
- 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;
- supervisory responsibilities regarding non-lawyer assistants, 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 May 1, 2018 through July 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.

Lack of Competence

► Respondent agreed to provide limited representation to a client in extending, modifying, and/or making permanent a temporary civil protection order (TPO). After securing an extension of the TRO, respondent filed a defective

Notice of Withdrawal, which the court denied. The client requested that respondent reschedule the date of the permanent protection order (PPO) hearing because both the client and the restrained party were required to be in another court on that same date and time. Respondent failed to make any efforts to reschedule the PPO hearing. Although respondent appeared at the PPO hearing, neither respondent's client nor the opposing party appeared. Respondent failed to advise the court of the client's desire to reset the date for the PPO hearing, failed to advise the court that the parties were not present because they were in a different court on that date and time, and failed to advise the judge that respondent's client still desired the court to issue a PPO. The temporary restraining order was allowed to expire.

Rules Implicated: Colo. RPC 1.1, 1.2(a) and (c), 1.4, 1.16(d), 3.3(d), and 3.4(c).

Diversion Agreement: One-year diversion with conditions, including successful completion of ethics school, seven CLE credits in family law and/or civil protection orders, and payment of costs.

Diligence

► Respondent was appointed to represent a former client in filing a Crim. P. 35(b) motion requesting sentence reconsideration. Rather than requesting a six-month extension of time to file the motion, which is respondent's usual course of conduct, respondent inadvertently requested and was granted only a 60-day extension of time. Although respondent did some work on the motion, respondent failed to file it before the deadline. After respondent discovered the mistake, respondent failed to inform the client of the missed deadline or to discuss the client's options going forward until

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after being contacted by OARC. Respondent ultimately filed the client's Rule 35(b) motion after being contacted by OARC, and the court accepted respondent's late filing.

Rules Implicated: Colo. RPC 1.3 and 1.4(a) (1) and (3).

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

▶ Respondent treated unearned fees as earned on flat fee matters prior to earning those fees. Respondent failed to adequately communicate the basis and rate of the attorney fees to clients. Respondent failed to communicate with an incarcerated client to timely update the client on the status of their case. Respondent failed to maintain appropriate financial records

and failed to properly withdraw from another matter when the representation was terminated.

Rules Implicated: Colo. RPC 1.3, 1.4(a) (3) and (b), 1.5(b), 1.5(f), 1.15A(a), 1.15D, and 1.16(d).

Diversion Agreement: Two-year diversion with conditions, including ethics school, trust account school, a practice audit, 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 for 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 prior to 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 OARC.

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

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

Fees Issues

▶ Respondent's trust account was overdrawn related to a refund made to a client. Respondent had treated unearned fees as earned,

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and then accidentally refunded those fees from respondent's trust account. Respondent also admitted to failing to regularly reconcile Respondent's trust account. During the course of the investigation, respondent attended trust account school and sought education to correct respondent's business practices.

Rules Implicated: Colo. RPC 1.5(f), 1.15A(a), and 1.15C(c).

Diversion Agreement: Two-year diversion with ethics school and a financial audit and monitor.

Trust Account Issues

▶ Respondent's bank notified OARC that a check was presented for payment, which caused an overdraft in respondent's trust account. Respondent's bank returned the check and charged \$34 in overdraft fees. During the course of investigation, it was discovered that respondent did not have a business account. Respondent left excess funds in the trust account to pay personal expenses and failed to properly handle credit card deposits. Respondent failed to properly reconcile the account. During the course of investigation, respondent rectified these issues.

Rules Implicated: Colo. RPC 1.15A(a), 1.15B(a)(2), and 1.15C(c).

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

Restrictions on the Practice of Law

▶ Respondent worked at a tax resolution company. While taking direction from a non-lawyer, respondent used legal judgment, performed legal services, and provided legal analysis for an individual who hired the firm. Respondent held out as an attorney, including by designating "A" for attorney on a tax form 2848 and by cosigning a letter to the client with the designation "managing attorney." The company's employees (including both lawyers and non-lawyers) were paid a salary.

Rules Implicated: Colo. RPC 5.4(a) and 5.4(d)(2).

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

Criminal Act

▶ Respondent pleaded guilty to misdemeanor or stalking and received a deferred judgment with probation. The conviction was based on an incident where respondent was seen observing respondent's ex-spouse's place of work from respondent's car nearby.

Rules Implicated: Colo. RPC 8.4(b).

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

▶ Respondent was arrested after trying to sell candies that contained LSD to an undercover law enforcement officer outside a concert venue. Respondent was charged with Distribution of a Controlled Substance—Schedule 1 or 2 (a class 3 drug felony); and Possession of a Controlled Substance—Schedule 1 or 2 (a class 4 drug felony). Respondent entered a guilty plea to Count 3, Distribution of a Controlled Substance—Contemporaneous Consumption (a class 4 drug felony). Respondent successfully completed probation early and the charge was converted, by operation of law, to a misdemeanor.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion with conditions, including attendance and successful completion of ethics school, continued participation in the Colorado Lawyers Helping Lawyers Program, and payment of costs.

▶ Respondent was stopped for failing to use lighted head lamps and was investigated for driving under the influence. Respondent had a blood alcohol content of 0.212. Respondent was arrested and subsequently pleaded guilty to driving under the influence of alcohol and was sentenced to 48 hours of useful public service, alcohol education and therapy, and two years of monitored probation.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Two-year diversion with conditions, including successful completion of ethics school, required attendance at meetings with a duly qualified professional, certifications that respondent has not engaged in problematic drinking, and payment of costs.

▶ Respondent was arrested on suspicion of DUI after being apprehended after fleeing an accident. Respondent's blood alcohol tested at .194. Respondent later pleaded guilty to DUI—Second Offense and was sentenced to 60 days' jail (45 days of in-home detention) and two years of supervised probation, with conditions. Respondent timely self-reported his conviction. This was respondent's second alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Two-year diversion with conditions, including compliance with the terms of respondent's criminal sentence, 18 months of monitored sobriety on SOBERLINK, six months of certified abstinence, individual therapy and group support as recommended, successful completion of ethics school, no further violations, 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.