

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, 2019 through April 30, 2019, at the intake stage, Regulation Counsel entered into six diversion agreements involving six separate requests for investigation. ARC approved 13 diversion agreements involving 14 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 during February 1, 2019 through April 30, 2019 generally involved the following:

- lack of competence, implicating Colo. RPC 1.1;
- lack of diligence, implicating Colo. RPC 1.3;
- neglect of a matter and/or failure to communicate, implicating Colo. RPC 1.3 and Colo. RPC 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;
- committing a criminal act, implicating Colo. RPC 8.4(b); 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, 2019 through April 30, 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's office represented a client in seeking to reopen proceedings after the denial of the client's claim for social security disability benefits following an accident. After these efforts were unsuccessful, the client asked respondent to represent him in a legal malpractice action against the attorneys who represented the client in an earlier personal injury action against the party responsible for the accident. Respondent initially declined, but later agreed, for a fee, to assist the client in preparing a complaint to be filed by the client pro se. Respondent received an advance payment from the client and then drafted the complaint as agreed. Respondent did not indicate on the complaint that respondent had assisted in preparing the complaint, nor did respondent advise the client of the obligation to note respondent's assistance in preparing the complaint, pursuant to the provisions of CRCP 11(b).

Rules Implicated: Colo. RPC 1.1.

Diversion Agreement: One-year diversion agreement with conditions, including successful

completion of ethics school, completion of a minimum of two CLE hours focused on unbundled legal services, and payment of costs.

Diligence

► Respondent was appointed to represent a client regarding certain post-conviction motions. In February 2018, the court issued an order denying one motion and indicating it would issue a second order on the remaining motion. Respondent forwarded this to the client a week later asking the client if he wished to appeal. The client did not respond. The court issued its second order two weeks later denying the second motion. The client wrote to respondent in July 2018 asking about the status of the second motion since he had not heard from respondent. Respondent did not respond to this letter. The client wrote a subsequent letter to respondent's managing attorney in August 2018. A little over a month later, respondent replied to the client forwarding a copy of the second order.

Rules Implicated: Colo. RPC 1.3 and 1.4.

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

► Respondent failed to file a client's bankruptcy petition as respondent had agreed to do. Respondent's neglect was caused in part by health issues and inpatient treatment. Respondent refunded the client's retainer, and the client was able to hire new counsel.

Rules Implicated: Colo. RPC 1.3.

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

Failure to Communicate

► A client hired respondent to represent her in connection with a civil forfeiture action. The parties executed a written fee agreement for a flat fee. The parties' fee agreement set forth three benchmarks denoting when fees would be earned and contained a provision that if respondent was terminated prior to the completion of any benchmark, respondent

would be entitled to payment for the work performed toward that benchmark at an hourly rate. The client terminated respondent prior to the resolution of the civil forfeiture case. After the termination, respondent presented the client with an accounting showing the hours respondent claimed to have worked. This accounting reflects total attorney fees (computed at respondent's hourly rate) in excess of the total flat fee agreed upon in the parties' contract. Respondent did not complete all of the work contemplated in the parties' written fee agreement, yet respondent failed to refund any portion of the flat fee paid by the client.

Rules Implicated: Colo. RPC 1.4, and 1.5(a) and (g).

Diversion Agreement: One-year diversion agreement with conditions, including successful completion of ethics school, mandatory referral to CBA legal fee arbitration, and payment of costs.

► In representing a trust, respondent failed to communicate with the client, and failed to provide any billing statements for the first 14 months of the representation. When a fee dispute arose between respondent and the client, respondent kept the disputed funds in a COLTAF account for more than 18 months while the dispute remained unresolved.

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

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

Fees Issues

► Respondent represented a client in an employment matter. He issued her a confusing fee agreement, which included both a contingency fee agreement and an hourly fee agreement, and failed to comply with CRCP Ch. 23.3, which governs contingency fees. He also failed to protect her interests upon termination when he threatened to object to her settlement with the defendant in the event his attorney's lien was not satisfied.

Rules Implicated: Colo. RPC 1.5(c) and 1.16(d).

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

▶ Respondent, then an attorney licensed in another state but practicing immigration law in Colorado, agreed to represent a child in removal proceedings for a flat fee of approximately \$7,000, including a \$3,500 retainer deposit and monthly payments of approximately \$700. Almost immediately, respondent treated the retainer deposit as earned, prior to having completed any work. Respondent eventually completed work, but when respondent's strategy to seek Special Immigrant Juvenile Status was unsuccessful, respondent withdrew from the case and retained the full \$7,000, despite the child still being in removal proceedings.

Rules Implicated: Colo. RPC 1.5(f), 1.5(g), 1.15A(a), and 1.16(d).

Diversion Agreement: One-year diversion agreement, including successful completion of ethics school and trust account school, participation in fee arbitration, completion of the lawyer self-assessment tool, and mentorship.

▶ Respondent entered into a written fee agreement with a client that provided for what was initially described as a reoccurring monthly "flat fee," but had elements of an engagement

or general retainer. Respondent understood the agreement to create an expectation that respondent would be available for any legal issues that arose. At the beginning of each month, respondent treated money that was paid by the client as earned and moved the money to respondent's operating account, even though respondent had yet to perform the work for the month. Respondent, however, did not properly clarify whether the payment was a "lump sum" payment or a retainer for services and had language that could be interpreted as creating a nonrefundable fee. Respondent also did not perform reconciliations of individual client ledgers with the general ledger within respondent's trust account.

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

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

Conflict of Interest

▶ Respondent represented a startup corporation as outside counsel and then became its CEO without terminating the attorney-client relationship with the company. Respondent then engaged in business transactions with the company and advised the company regarding issues that impacted respondent's own equity

holdings in the company.

Rules Implicated: Colo. RPC 1.7(a)(2) and 1.8(a).

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

▶ Respondent failed to perform a proper conflicts check when respondent agreed to represent a client on a misdemeanor criminal matter. Respondent did not recall respondent had previously represented one of the other involved parties nine years earlier. After discovery began, respondent realized the potential conflict, but believed respondent's duty of confidentiality to the former client prevented respondent from discussing the prior representation with the current client. Without telling respondent's current client about the potential conflict, respondent discussed a potential plea deal with the current client. Before any plea offer was accepted, the current client fired respondent.

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

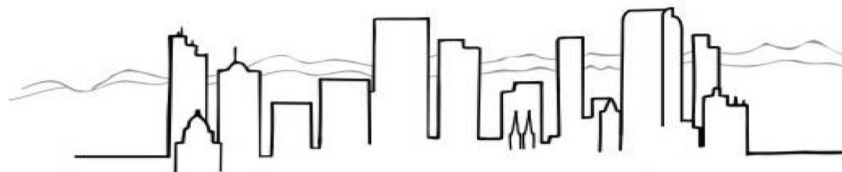
Diversion Agreement: One-year diversion agreement with conditions, including successful completion of ethics school, payment of costs, and completion of the portion of the lawyer self-assessment tool regarding conflicts checks.

▶ Respondent represented a married couple and their two sons regarding applications

KELLY & WALKER LLC

PROFESSIONAL LIABILITY LITIGATION

• WILLIAM J. KELLY III • JULIE M. WALKER • SHANNON M. BELL • LISA M. LILLY •
CHANDA M. FELDKAMP • JOHN A. WHARTON • TREY N. ECKLOFF • STEPHEN J. WOOLSEY



WWW.KELLYWALKERLAW.COM

for permanent residency. Respondent filed joint applications for the couple based on an understanding that they had a common law marriage. After filing the application, U.S. Citizenship and Immigration Services requested additional documentation in support of the marriage. Respondent discussed this request with the couple jointly and the wife decided to withdraw her application and allow her husband's application to proceed. Respondent did not discuss any conflict of interest with the wife or her husband regarding the advice to withdraw the wife's application. Respondent did not obtain the wife's or husband's informed consent, confirmed in writing, for the continued representation.

Rules Implicated: Colo. RPC 1.7.

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

Duties to Former Clients

▶ Respondent represented co-defendants in a RICO case in the absence of informed consent. When their interests differed, respondent withdrew from representing one co-defendant and continued to represent the other.

Rules Implicated: Colo. RPC 1.9.

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

Criminal Act

▶ Respondent was convicted of DWAI (prescription drugs) in Colorado and DUI (alcohol) in a separate case out of state.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Three-year diversion agreement with conditions, including compliance with the terms of criminal probation, compliance with the therapist's recommendations, and monitored sobriety.

▶ While driving, respondent hit a metal pole at a gas station, hit a curb (which caused a tire blowout), and then drove away. Respondent ultimately stopped at a nearby business, where

respondent was contacted by police officers and eventually charged with DUI. Respondent's breath alcohol level was .220. Respondent pleaded guilty to DUI and was sentenced to one year of jail, all suspended upon successful completion of two years of probation. Although respondent has prior disciplinary history, including for criminal conduct involving an alcohol-related driving offense, substantial mitigation existed at the time of the conduct.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Respondent was under administrative suspension from the practice of law at the time of this agreement. Should respondent be reinstated, respondent must comply with a three-year diversion agreement with conditions, including monitoring for alcohol and substances, participation in Alcoholics Anonymous, therapy for loss and grief and alcoholism, successful completion of ethics school, and compliance with all orders in the underlying criminal case.

▶ Respondent was observed driving erratically and weaving. Respondent stopped abruptly, almost causing a law enforcement officer to slam into the back of respondent's vehicle. Respondent was arrested and subsequently charged with DUI. Respondent's blood alcohol level was .122. Respondent pleaded guilty to DWAI and was sentenced to 12 months' probation with conditions.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with compliance with conditions in the underlying criminal case. Respondent had already successfully completed ethics school.

▶ Respondent was arrested on suspicion of DUI after respondent was involved in a car accident. Respondent refused to submit to a breathalyzer. Respondent later pleaded guilty to DUI and was sentenced to an alcohol driver education program, and respondent's license was suspended for 45 days. Respondent did not timely self-report the conviction. This was respondent's first alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: One-year diversion agreement with conditions, including successful

completion of ethics school and payment of costs.

▶ Respondent was arrested for DUI after being observed swerving on the highway. Respondent's BAC was 0.264g/100ml. Respondent later pleaded guilty to DUI and was sentenced to 15 days in jail with work release and two years' supervised probation, with conditions. This was respondent's second alcohol-related offense, but the first since respondent was admitted to the Colorado bar.

Rules Implicated: Colo. RPC 8.4(b).

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

▶ Respondent was arrested after a physical altercation. Respondent later pleaded guilty to disturbing the peace, assault, and threat to person/property. Respondent was sentenced to a one-year deferred judgment with probation, alcohol evaluation, and anger management classes.

Rules Implicated: Colo. RPC 8.4(b).

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

▶ A sheriff's deputy approached respondent's car while it was parked on the side of a road. After the deputy knocked several times on respondent's window to get respondent's attention, respondent admitted to drinking before driving and was unable to successfully complete a roadside test. Respondent was arrested and charged with DUI. Respondent submitted to a blood test, which produced a result of 0.203 grams of ethanol per 100 mL of blood. Respondent pleaded guilty to DUI and received a two-year deferred judgment and sentence with probation, conditions of which include submission to an alcohol evaluation; completion of an alcohol program recommended by the probation department; abstinence

from alcohol; 48 hours of community service; and payment of fees and costs. Respondent timely self-reported the conviction to the OARC. This was respondent's only alcohol-related offense.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Eighteen-month diversion agreement with conditions, including compliance with the terms of the sentence in respondent's criminal case, continued active engagement with respondent's addictions therapist, successful completion of ethics school, and payment of costs.

Conduct Prejudicial to the Administration of Justice

► In the course of representing a client, respondent retained the services of a process server to locate and serve several defendants in a civil action, knowing that the client did

not have the ability to pay for these costs and that respondent was responsible for paying the process server. Respondent did not pay invoices for the services totaling over \$4,000 for more than a year, and then filed a personal bankruptcy through which creditors, including the process server, would have received only a small fraction of the compensation owed.

Rules Implicated: Colo. RPC 8.4(d).

Diversion Agreement: One-year diversion agreement with conditions, including payment of the full amount owed to the process server outside the bankruptcy proceeding, in a manner permitted under the terms of the approved Chapter 13 plan.

► Starting in June 2017, respondent engaged the services of a court reporter for certain transcript services on behalf of respondent's client. Despite numerous invoices over several

months, as of April 2018, the invoices remained unpaid.

Rules Implicated: Colo. RPC 8.4(d).

Diversion Agreement: One-year diversion agreement with payment of court reporter services within 90 days and payment of costs. Ethics school was waived as a condition because respondent had attended the class due to a different investigation resolution. **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.

COLORADO LAWYER

Wants Your Articles on Juvenile Law

Do you practice juvenile law?

If so, consider writing for your colleagues about

- protection orders in dependency and neglect after HB 17-1111
- education stability and Every Student Succeeds Act compliance
- the Child and Youth Mental Health Treatment Act and the child welfare system
- parentage determinations after *People in the Interest of D.C.C.*

Or write on bills from the current legislative session related to juvenile law:

- HB 19-1308—Foster care prevention services
- HB 19-1232—Aligning with federal ICWA regulations
- HB 19-1219—Permanency planning
- SB 19-185—Protections for minor victims of human trafficking
- SB 19-108—Juvenile justice reform
- SB 19-178—Adoption subsidies

Have another idea?

Contact coordinating editors Jennifer Collins, jennifer.collins@denvergov.org, and Sheri Danz, sherdanz@coloradochildrep.org, to get started now!