

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 August 1, 2019 through October 31, 2019, at the intake stage, Regulation Counsel entered into 11 diversion agreements involving 11 separate requests for investigation. ARC approved five diversion agreements involving six 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 August 1, 2019 through October 31, 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 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;
- trust account record retention requirements, implicating Colo. RPC 1.15D;
- 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);
- 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

- 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 August 1, 2019 through October 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.

Competence

► Respondent represented a client in a personal injury matter but did not obtain all necessary medical records before sending a demand letter. Respondent failed to work diligently on the matter; failed to communicate reasonably with the client; failed to provide information, including an accounting, promptly upon the client's request; and held some funds in trust for several months without either disbursing the funds to the client or paying a medical services provider.

Rules Implicated: Colo. RPC 1.1, 1.3, 1.4(a) and (b), 1.15A(b), and 1.16(d).

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

Diligence

► Respondent represented a client in a criminal case. The allegations underlying the client's charges involved the client's spouse, who filed for divorce shortly after the incident. In support of the client's defense, respondent sought to obtain some of the spouse's medical records regarding a preexisting condition.

Respondent issued two subpoenas to produce to the wife's healthcare providers. Both subpoenas were inadvertently drafted using the CRCP 45 form, rather than the form required by the applicable rule of criminal procedure, Crim. P. 17(c). Further, the second subpoena failed to list the People of the State of Colorado as a party and the name of its counsel. Respondent also failed to serve copies of both subpoenas on the District Attorney's Office. However, the prosecutor on the client's case became aware of the second subpoena when the entity contacted him with questions about producing the medical records Respondent requested.

Rules Implicated: Colo. RPC 1.3, 3.4(c), and 5.3.

Diversion Agreement: One-year diversion agreement with conditions, including four hours of continuing legal education in criminal procedure and payment of costs.

► Respondent is a retired lawyer whose license to practice law is on inactive status. In one client matter, prior to respondent's retirement, respondent failed to timely return the client's file and failed to adequately supervise a non-lawyer who was working on the client's matter. In a second client matter, respondent failed to diligently and reasonably communicate with a client about an adverse ruling in a Crim. P. 35(c) proceeding.

Rules Implicated: Colo. RPC 1.3, 1.4, 1.16(d), 5.3, and 5.5.

Diversion Agreement: One-year diversion agreement with completion of ethics school if respondent returns to the active practice of law and payment of costs.

Fee Issues

► Respondent represented a client in a criminal matter. Respondent's fee agreement called

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for a minimum fee and retainer. Respondent failed to deposit the retainer in respondent's trust account. Rather, the entirety of the retainer was deposited into and held in respondent's operating account until the fees were earned.

Rules Implicated: Colo. RPC 1.5(g) and 1.15B.

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

Trust Account Issues

► Respondent represented a client in a personal injury matter. The client was receiving care and treatment from a chiropractor who sent respondent written notice of a claim for payment for chiropractic treatment from the client's anticipated settlement proceeds. Respondent acknowledges receiving notice of this claim.

Respondent received settlement proceeds on behalf of this client. Prior to disbursement, respondent investigated the status of payments made by the insurance company directly to the chiropractor and reached the conclusion that the chiropractor had been paid all he was owed. Respondent wrote to the chiropractor advising him of this conclusion. Without receiving acknowledgement or consent from the chiropractor, respondent disbursed all of the settlement proceeds without retaining any funds to address the chiropractor's claim. The chiropractor then sent the claimed debt to a collection agency.

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

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

► Respondent deposited earned fees, including from an attorney fee award, into respondent's trust account over an extended period of time. During that time, there were no client funds in the trust account. Respondent also withdrew funds from the trust account using a debit card. Finally, in late 2018, respondent received notice that the trust account had been overdrawn.

Rules Implicated: Colo. RPC 1.15B and 1.15C.

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

Failure to Comply with a Court Order

► Respondent represented a client in a breach of contract matter. Respondent engaged in three communications with a member of the opposing party's board despite the fact that the opposing party was represented by counsel. One of these communications occurred after a court order barred further communication with the board member unless and until the member was no longer part of the board.

Rules Implicated: Colo. RPC 3.4(c) and 4.2.

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

Criminal Act

► Following a disagreement at a social event, the police were called and, during respondent's interaction with the police, the situation escalated and respondent was arrested. Respondent was originally charged with resisting arrest, disorderly conduct, obstructing a police officer, and indecent exposure. Respondent pleaded guilty to third degree criminal trespass and disorderly conduct. Respondent was sentenced to two months of probation, with conditions. Respondent timely self-reported the conviction.

Rules Implicated: Colo. RPC 8.4(b).

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

► In early 2019, respondent was arrested following a traffic stop after an officer ob-



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served respondent unable to maintain the lane and crossing the center line numerous times. Respondent refused all chemical testing. Respondent eventually pleaded guilty to driving under the influence. Respondent received a 12-month supervised probation. This was respondent's first alcohol-related conviction.

Rules Implicated: Colo. RPC 8.4(b).

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

► Respondent was contacted by law enforcement after respondent drove a vehicle off the road and hit a fence. Respondent was arrested and when tested had a blood alcohol concentration of .194. Respondent pleaded guilty to driving under the influence—second offense. Respondent timely reported the conviction.

Rules Implicated: Colo. RPC 8.4(b).

Diversion Agreement: Fifteen-month diversion agreement with conditions, including specific alcohol treatment and monitoring, compliance with respondent's criminal sentence, cannabis monitoring, group and individual therapy, and payment of costs.

**Conduct Prejudicial
to the Administration of Justice**

► Respondent represented the client in a criminal matter. Representation ended before the case was resolved, and respondent returned a portion of the retainer paid. The client was not satisfied with the refund and insisted that more money should be refunded. Several months later, the client emailed respondent, insisting on a refund and threatening to sue respondent. Respondent responded via email, threatening to disclose confidential client information in

response to the lawsuit, including to client's employer. Respondent never actually disclosed confidential client information.

Rules Implicated: Colo. RPC 8.4(d) and 8.4(a).

Diversion Agreement: One-year diversion agreement with conditions, including completion of seven hours of continuing legal education related to professionalism 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.

COLORADO LAWYER ASSISTANCE PROGRAM



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