

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

► In one matter, respondent did not competently or diligently represent a client in an immigration matter. In a separate matter, respondent failed to comply with various rules of professional conduct while serving as the "managing attorney" of a suspended lawyer's law practice. In a third matter, respondent failed to comply with obligations related to the respondent's and a suspended lawyer's firm's handling of unearned fees.

Rules Implicated: Colo. RPC 1.1, 1.3, 1.4, 5.1(c), and 5.5(b)(6).

Diversion Agreement: Three-year diversion with conditions, including successful completion of ethics school, successful completion of trust account school, a mentor attorney who practices in family law, completion of the online lawyer self-assessment, payment of costs, and a practice monitor if respondent enters solo practice during the period of the diversion.

Scope of Representation

► Over a two-year period, respondent represented a client in a workers' compensation matter. After the client decided to no longer pursue any further action in the matter, respondent filed a Request for Lump Sum Payment on behalf of the client for the remaining balance of the workers' compensation award. Respondent failed to obtain the client's express consent to file the Request for Lump Sum Payment prior to doing so.

Rules Implicated: Colo. RPC 1.2 and 1.4.

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

Diligence

► Respondent failed to comply with multiple provisions of CRCP 45 when issuing a subpoena duces tecum in a post-decree matter. Respondent also caused a less complete draft subpoena duces tecum to be served when respondent did not intend to do so.

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

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

► Respondent and client entered into a fee agreement whereby respondent represented client in a criminal matter for a flat fee of \$5,000. The agreement also called for respondent to assist with a separate matter for \$1,000. Respondent did not deposit client funds into an appropriate

COLTAF trust account for a significant period of time. The criminal matter was enhanced from a misdemeanor to a felony. Respondent requested an additional fee when the matter was enhanced to a felony. Respondent did not memorialize to writing this modification of the terms and amounts in the fee agreement. Respondent was not diligent in his communication about the plea agreement and did not engage in appropriate communication with the client about the status of the matter. Finally, respondent did not appropriately return unearned fees at the conclusion of the representation.

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

Diversion Agreement: Two-year diversion agreement with conditions, including successful completion of ethics school; successful completion of trust account school; a practice audit by an experienced practitioner agreed to by OARC,

Financial Assistance for Colorado Lawyers

WATERMAN FUND

Provides financial assistance for "aged, infirm, or otherwise incapacitated lawyers who have practiced in Colorado for a minimum of ten years."

denbar.org/members/waterman-fund

Waterman Fund

1900 Grant St., Ste. 900

Denver, CO 80203

PHONE 303-824-5319 | FAX 303-861-5274



completion of the lawyer self-assessment, and review of the lawyer self-assessment with the practitioner; and payment of unearned fees.

Failure to Communicate

▶ Respondent represented a client who was facing deportation. Respondent agreed to represent client in exchange for a flat fee. The agreement as to the fee was not reduced to writing. Respondent did not communicate with the client during the time period between the first and second court hearings, which spanned several months, and did not appropriately communicate with client about the date of the second hearing. Respondent also did not maintain file materials in a manner consistent with respondent’s obligations under the rules.

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

Diversion Agreement: One-year diversion

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

Conflict of Interest

▶ Respondent represented husband and wife, both friends of respondent for several years, regarding the preparation and filing of the necessary documents for a legal separation, including a petition, separation agreement, and parenting plan. After filing, the judge presiding over the matter issued an order noting the conflict of interest. Respondent thereafter recommended that both parties find separate counsel to complete the process and moved to withdraw.

Rules Implicated: Colo. RPC 1.7.

Diversion Agreement: One-year diversion with ethics school, self-assessment review, and payment of costs.

Trust Account Issues

▶ Respondent has a license to practice law from another state. Respondent lives in Colorado and offers legal services in the area of immigration law. Respondent’s letterhead provided addresses in Colorado and another state but did not identify where respondent is licensed. Respondent was hired by a client in September 2015 to prepare a U-Visa certification for a fixed fee of \$1,150. There were no benchmarks in the agreement. The client made payments toward the fixed fee from September 2015 until June 2016. Respondent was unfamiliar with Colorado Rules of Professional Conduct and deposited the payments directly into respondent’s operating account. Respondent eventually performed the work pursuant to the agreement.

Rules Implicated: Colo. RPC 1.15A and 7.5(b).

Diversion Agreement: One-year diversion

CJI Announces 2018 Judicial Excellence Awards Honorees



District Court Judge Morris B. Hoffman, County Court Judge Thomas E. Vance, and Magistrate Lisa M. Gomez are the honorees for the Colorado Judicial Institute’s 2018 Judicial Excellence Awards. The annual awards honor innovation and effectiveness in Colorado’s state courts.

The CJI Awards Committee Chair Justice Michael Bender (retired) thanks the many nominators who took the time to submit a nominee. “CJI wouldn’t hear about the dedicated, talented judges across our state without their participation in the awards process,” said Bender.

A graduate of the University of Colorado, District Court Judge Morris B. Hoffman, has served in the 2nd judicial district since 1990. County Court Judge Thomas E. Vance graduated from the University of Denver and served as a Jefferson County magistrate for ten years before becoming a Jefferson County judge in 2004. Magistrate Lisa M. Gomez was a guardian ad litem in the Denver courts before taking the bench in the Denver Juvenile Court three years ago.

In addition to the Judicial Excellence Awards, CJI will recognize outgoing judicial officers Colorado Supreme Court Chief Justice Nancy E. Rice and Colorado Court of Appeals Chief Judge Alan M. Loeb with Judicial Leadership Awards. All five of this year’s honorees will be recognized at the Judicial Excellence for Colorado Dinner on October 18, 2018, at the Hilton Denver City Center Hotel, 1701 California Street. Information on sponsoring a table at the event is on the CJI website at www.coloradojudicialinstitute.org/dinner-sponsorship-information. Individual seats for this event can be purchased at www.coloradojudicialinstitute.org/dinner-seat-reservation-information.

agreement with attendance at trust account school, ethics school, revisions to letterhead, and payment of costs.

Communications with a Person Represented by Counsel

▶ Respondent represented the wife in a dissolution case. Respondent contacted the husband by telephone and discussed the substance of the case despite knowing the husband was represented by counsel. Respondent's conduct was mitigated by inexperience in the practice of law, among other factors.

Rules Implicated: Colo. RPC 4.2.

Diversion Agreement: Two-year diversion with ethics school, CLE course, practice monitor, and payment of costs.

Supervisory Responsibilities Regarding Non-Lawyer Assistants

▶ Respondent provided legal documents to an elderly client without first communicating with her personally and failed to communicate with the client outside the presence of third parties who could have improperly influenced the client. Respondent's assistant later attended the signing of the legal documents, and respondent was not present at the signing to explain the legal significance of the documents. Instead, respondent's assistant (a non-lawyer) explained the documents to the client.

Rules Implicated: Colo. RPC 5.3, 1.14, and 5.5.

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

Criminal Act

▶ Respondent was arrested for driving under the influence (DUI) after being involved in an automobile accident. Respondent's blood alcohol concentration was 0.205g/100ml. Respondent later pleaded guilty to DUI and was sentenced to 12 months' probation, with conditions. 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 with conditions, including compliance with the terms of respondent's criminal sentence,

successful completion of ethics school, a meeting with COLAP, and payment of costs.

▶ Respondent was arrested on suspicion of DUI after being stopped for failing to stop at a stop sign. Respondent's blood alcohol tested at .142. Respondent later pleaded guilty to driving while ability impaired (DWAI) and was sentenced to one year 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: 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.

▶ Respondent was arrested and charged with driving under the influence of alcohol after a traffic stop. Respondent refused chemical testing. Respondent pleaded guilty to DWAI and was sentenced to nine months of supervised probation, required to perform 24 hours of community service, required to complete the MADD victim impact panel and Level II alcohol therapy, and ordered to pay specified fines and costs. Respondent timely self-reported the conviction to the OARC and underwent an independent medical evaluation that resulted in a determination that respondent did not meet the diagnostic criteria for any substance use disorder.

Rules Implicated: Colo. RPC 8.4(b) and CRCP 251.5(b).

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

Conduct Prejudicial to the Administration of Justice

▶ Respondent and client participated in a settlement conference in connection with a

civil case and incurred related costs. Prior to the conference, the service provider's office sent a notice of setting to both counsel that stated "professional services are provided to attorneys" at a specified hourly rate. Although respondent's fee agreement with the client required the client to pay third-party costs, respondent did not advise the settlement conference provider before these services were provided that respondent believed that the related charges would be the sole responsibility of respondent's client. The provider invoiced respondent for these services on multiple occasions over a six-month period before receiving any response from respondent. When respondent did respond to the provider's requests for payment, respondent advised the provider that respondent felt respondent's client was solely responsible. Respondent failed to pay for these professional services until after a request for investigation was lodged with the OARC.

Rules Implicated: Colo. RPC 8.4(d).

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