

# Disciplinary Case Summaries for Matters Resulting in Diversion and Private Admonition

**D**iversion 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, 2019 through July 31, 2019, at the intake stage, Regulation Counsel entered into four diversion agreements involving four separate requests for investigation. ARC approved nine diversion agreements involving 13 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:

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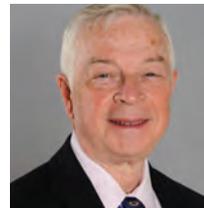
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- law office audit
- practice monitor
- financial audit
- restitution
- payment of costs
- mental health evaluation and treatment
- continuing legal education (CLE) courses
- any other conditions that would be determined appropriate for the particular 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 May 1, 2019 through July 31, 2019 generally involved the following:

- 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;
- dealing with unrepresented persons, implicating Colo. RPC 4.3;
- 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 May 1, 2019 through July 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.

#### Diligence

▶ Respondent represented two clients who were defendants in criminal and subsequent civil matters. Various issues arose during the civil litigation. Specifically, respondent did not provide CRCP 26 disclosures and/or responses to requests for written discovery. Ultimately, plaintiff's counsel filed a motion to compel. Respondent did not respond to the motion and filed a motion to withdraw. Respondent also failed to appear with the clients for a deposition while the motion to withdraw was pending.

**Rules Implicated:** Colo. RPC 1.3, 1.4, 1.16, and 8.4(d).

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

▶ Respondent missed a deadline for filing a motion, but the failure did not cause harm to the client. Respondent did not provide the client



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with a statement regarding the basis or rate of respondent's fee and did not keep adequate financial records regarding the client's funds.

**Rules Implicated:** Colo. RPC 1.3, 1.5(b), and 1.15A.

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

**Failure to Communicate**

▶ Respondent sent unclear and inconsistent emails to the client regarding the status of a temporary protection order against the client and the client's ability to retrieve personal items from the client's former residence. As a result, the client was arrested for violating the protective order.

**Rules Implicated:** Colo. RPC 1.4(a) and (b).

**Diversion Agreement:** One-year diversion

agreement with conditions, including successful completion of ethics school, practice mentorship, and payment of costs.

**Conflict of Interest**

▶ Respondent represented the sellers in a real estate transaction. Respondent also assisted one of the buyers in forming an LLC related to the transaction, and advised another buyer regarding whether to become a member of the LLC.

**Rules Implicated:** Colo. RPC 1.7(a) and 4.3.

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

**Trust Account Issues**

▶ Respondent failed to maintain sufficient financial records to attribute transfers from respondent's trust account to respondent's operating account to any particular client or fee

agreement benchmarks. What respondent believed to be a COLTAF account was, in actuality, a business checking account. Respondent's firm also continued to represent a client against a former client after the parties became adverse.

**Rules Implicated:** Colo. RPC 1.15A, 1.15D, and 1.9(b).

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

▶ Respondent's bookkeeper departed from respondent's practice, locked respondent and respondent's accountant out of the bookkeeping software, and refused to deliver respondent's accounting information to respondent. Respondent was subsequently unable to produce to the OARC documents required to be maintained under Colo. RPC 1.15D.

**Rules Implicated:** Colo. RPC 1.15A(a) and 1.15D.

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

▶ Respondent overdrew respondent's COLTAF account on two occasions within a short timeframe. Respondent issued refunds of earned fees to clients from the COLTAF account, rather than respondent's operating account. Respondent subsequently could not produce accurate client ledgers due to issues with the bookkeeping system. No client funds were converted.

**Rules Implicated:** Colo. RPC 1.15D.

**Diversion Agreement:** Two-year diversion agreement with conditions, including successful completion of ethics school, financial review and monitoring, and payment of costs.

**Criminal Act**

▶ Respondent was arrested following an accident where respondent's vehicle struck three parked cars. Respondent submitted to a blood test to determine blood alcohol content (BAC), with a test result of 0.207 BAC. Respondent pleaded guilty to driving under the influence. This was respondent's first alcohol-related



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offense. An independent medical examination determined that respondent did not have a diagnosis of alcohol use disorder.

**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.

► Police contacted respondent after someone reported that respondent was driving under the influence based on observations of respondent in the parking lot of a liquor store. One of the responding officers reported smelling a strong odor of an unknown alcoholic beverage while speaking with respondent. Respondent voluntarily submitted to a horizontal gaze nystagmus test, during which respondent swayed side to side and had difficulty standing. At that time, the officer arrested respondent for suspicion of driving under the influence. Respondent submitted to a blood test, which showed a BAC of 0.298. Respondent pleaded guilty to driving under the influence over .200 and was sentenced to 30 days of electronic monitoring and one year in jail, suspended pending successful completion of one year of probation with conditions. Respondent timely self-reported the conviction to the OARC. This was respondent's first alcohol-related offense. Respondent was diagnosed with alcohol use disorder with moderate severity.

**Rules Implicated:** Colo. RPC 8.4(b).

**Diversion Agreement:** Two-year diversion agreement with conditions, including compliance with the terms of the criminal sentence, alcohol monitoring, continued psychotherapy, continued participation in a recovery support group, successful completion of ethics school, and payment of costs.

► Respondent pleaded guilty to operating a vehicle with a BAC of .17 or more in connection with an out-of-state criminal case. Respondent timely self-reported the conviction and is currently in compliance with all terms and conditions of the sentence imposed in that case. At the request of OARC, respondent participated in an independent medical evaluation (IME) and was diagnosed with severe alcohol use

disorder. The IME provider recommended that respondent maintain sobriety with regular monitoring, continue intensive outpatient treatment, continued involvement with AA, and participate in psychotherapy on a weekly basis for a minimum of one year.

**Rules Implicated:** Colo. RPC 8.4(b).

**Diversion Agreement:** Two-year diversion agreement with conditions, including monitored abstinence from alcohol, continued intensive out-patient treatment, continued involvement with an abstinence support group, participation in psychotherapy on a weekly basis for a minimum of one year, successful completion of ethics school, and payment of costs.

### **Conduct Prejudicial to the Administration of Justice**

► Respondent directed respondent's paralegal to notarize the electronic copy of the client's

signature on a motion even though respondent's client did not approve of the final version of the motion. Respondent also failed to adequately communicate with the client regarding the procedure respondent was asking the court to follow in the motion.

**Rules Implicated:** Colo. RPC 8.4(d), 1.14(a)(2), and 8.4(a).

**Diversion Agreement:** One-year diversion agreement with conditions, including completion of the online lawyer's self-assessment tool 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.

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