

## Chapter 31

# DAMAGES FOR INJURIES OR LOSSES CAUSED BY LEGAL MALPRACTICE

**Elizabeth J. Hyatt, Esq.\***

*Starrs Mihm & Pulkrabek LLP*

**Michael T. Mihm, Esq.\***

*Starrs Mihm & Pulkrabek LLP*

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#### **§ 31.1 INTRODUCTION**

A plaintiff in a legal malpractice case must prove that he or she was injured or suffered a loss caused by the lawyer's malpractice in order to recover damages.<sup>1</sup> This

principle is true regardless of the legal theory on which the plaintiff sues. In short, compensable damages are an essential element of any legal malpractice claim.<sup>2</sup> The exception to this rule may be where the plaintiff proves a breach of contract, but is entitled only to nominal damages. Generally, the damages in a legal malpractice case fall into three broad categories: (1) economic damages; (2) non-economic damages; and (3) exemplary or punitive damages. This Chapter discusses these broad categories of damages and addresses some categories of damages unique to particular claims for relief.

## **§ 31.2 ECONOMIC DAMAGES**

A plaintiff in a legal malpractice case is generally entitled to recover economic losses caused by the defendant lawyer's malpractice. These economic damages can arise from a number of sources: lost profits, a judgment or other liability that the client incurs, loss of a judgment, a right or asset that the client should have recovered, or, sometimes, attorney fees, among other economic losses. For the most part, if the lawyer's malpractice caused the client a harm that could be quantified monetarily in the underlying representation, that harm is recoverable as economic damages in the legal malpractice case. This section discusses economic damages recoverable in a legal malpractice case.

### **§ 31.2.1—Failure To Obtain An Adequate Judgment Or Settlement In The Underlying Case**

Lawyers may be held liable for the value of a judgment or settlement that the client should have recovered, but did not, because of the lawyer's malpractice.

A lawyer may be held liable for failure to obtain a judgment or an adequate settlement in the underlying case.<sup>3</sup> If the plaintiff client proves liability, the plaintiff may recover the difference between the amount the plaintiff would have received but for the lawyer's malpractice and the amount, if any, the plaintiff did receive.<sup>4</sup>

*McCafferty v. Musaf* is a good example of such damages. In *McCafferty*, the plaintiff client hired the defendant lawyer to represent him in a products liability case against a manufacturer. The lawyer associated with experienced products liability counsel. After filing the case and informing the client that he had a strong case and "would probably end up settling [the case] for \$60,000 a year for the rest of [his] life," the lawyer actively sought employment with the law firm representing the manufacturer. Prior to the completion of a substantial amount of discovery, and before the lawyer informed the client of his conflict of interest, the manufacturer's law firm offered the lawyer a job. The lawyer then notified the client of the job offer and of the conflict of interest. Despite his prior statements concerning the strength of the action, the lawyer now informed the client that, in his opinion, the client had no case and that the client would lose at trial. The lawyer then conveyed a \$5,000 settlement offer to the client and advised him to accept.

Shortly thereafter, the lawyer received the manufacturer's answers to interrogatories, which provided a potential link between the manufacturer's negligence and the client's injury. The lawyer next provided the client with a Disclosure Agreement noting

the conflict of interest, stating the client did not have a reasonable likelihood of success, and indicating that the client would accept a \$5,000 settlement. The client signed the Agreement, and received the proceeds. After subtracting costs and attorney fees, the client was left with \$1,176. Four days later, the lawyer began employment with the opposing law firm.

The client sued for legal malpractice, claiming the defendant lawyer inadequately pursued discovery, violated the retainer agreement, and had been negligent. At the legal malpractice trial, the jury awarded the client \$801,600. The Colorado Court of Appeals affirmed, finding substantial evidence that the defendant manufacturer had breached a duty of care and that the plaintiff client would have prevailed on the underlying products liability case. Accordingly, the court let the jury verdict stand.<sup>6</sup>

The defendant lawyer is not entitled to have the legal malpractice judgment reduced by the amount the client would contractually have been obligated to pay the lawyer for a contingency fee had the lawyer recovered an adequate judgment for the client.<sup>7</sup>

For example, the *McCafferty* court refused to allow the defendant lawyer a deduction for the contingent fee the client would have had to pay the lawyer had the lawyer successfully prosecuted the case.<sup>8</sup> The court reasoned that since the client was required to pay his lawyer in the legal malpractice case a contingency fee, the client would have to pay twice for the same service if the defendant lawyer were allowed a deduction for a contingency fee.<sup>9</sup> More fundamentally, the court reasoned, a negligent lawyer may not recover his fee, and therefore the plaintiff client was entitled to recover the total amount of the award.<sup>10</sup>

When the issue is whether or by how much the settlement value of a lawsuit was diminished by a lawyer's malpractice, evidence that may not be admissible in the underlying case because it concerns a collateral source may be admissible in the malpractice case. For example, in *Myers v. Beem*,<sup>11</sup> the court of appeals upheld the trial court's admission of evidence of the plaintiff's salary.

In *Myers*, the defendant lawyer agreed to represent the plaintiff in a claim against St. Anthony's Hospital and an orderly. The lawyer filed the complaint after the statute of limitations had run, and the hospital and orderly were dismissed from the lawsuit. The court of appeals reinstated the claims against the orderly, and the plaintiff settled with the orderly for \$9,000. The plaintiff sued the lawyer for legal malpractice, and the jury returned a verdict for the lawyer. On appeal, the plaintiff claimed that the trial court had erred by allowing testimony about the salary he received while disabled; the plaintiff claimed that the evidence should have been inadmissible because it concerned a collateral source.

The court of appeals disagreed, reasoning that while the evidence of the plaintiff's salary was not relevant as a collateral source, it was relevant on the issue of damages, because the hospital's counsel knew about the payments and considered them in making a settlement offer to the plaintiff in the underlying case. Because the sole issue on damages in the legal malpractice case was by how much the settlement value of the lawsuit was

diminished because of the lawyer's failure to file the complaint on time, the evidence of salary was relevant to the issue of damages.<sup>12</sup>

Defendant lawyers sometimes raise the defense of "collectibility" of the underlying judgment, had one been recovered. An early Colorado case, *Lawson v. Sigfrid*,<sup>13</sup> suggested that a client could not recover from a lawyer for negligence in failing to recover a judgment in the underlying case if the judgment would have been uncollectible. The plaintiff filed suit against the debtor, Bessie Kennedy, on an account stated. Subsequently, he hired the defendant lawyer to prosecute the claim. Unbeknownst to the plaintiff and the lawyer, the case lawsuit had been dismissed for failure to prosecute. The plaintiff later sued the lawyer to recover the amount he should have recovered against Ms. Kennedy. The theory of liability against the defendant lawyer was unclear: either breach of contract or negligence. The trial court dismissed the malpractice lawsuit. With virtually no discussion or analysis, the Colorado Supreme Court affirmed the dismissal because the debtor in the underlying case was insolvent and the plaintiff could not prove damages caused by the lawyer.<sup>14</sup> In the over 80 years since the decision, *Lawson* has never been cited by any published decision of a Colorado appellate court for the proposition that "collectibility" is an element of a legal malpractice case arising from underlying litigation.<sup>14a</sup>

Numerous courts in other states have discussed the "collectibility" issue. For many years, courts tended to hold that the plaintiff has the burden of proving that the judgment that the plaintiff should have recovered in the underlying litigation would have been collectible but for the negligence of the defendant lawyer.<sup>15</sup> In recent years, however, the clear trend has shifted the other way. A growing minority of courts have held that the defendant lawyer bears the burden of raising and proving the "collectibility" defense.<sup>16</sup> Some courts are beginning to overrule long-standing precedent.<sup>17</sup> Other courts have held that the burden of proof of collectibility shifts if the defendant lawyer's actions made proof of collectibility difficult or impossible.<sup>18</sup>

The American Law Institute recently weighed in on the issue in the *Restatement (Third) of the Law Governing Lawyers* with a compromise position. In the comment to § 53 of the *Restatement*, the Reporters discuss the collectibility doctrine in the context of proving the proximate cause element of legal malpractice claims, and place the burden of coming forward with evidence that the defendant in the underlying case was insolvent and the judgment uncollectible on the defendant lawyer.<sup>19</sup> Once the defendant lawyer produces such evidence, the plaintiff then bears the burden of proving that the judgment was collectible.<sup>20</sup>

### **§ 31.2.2—Failure To Avoid A Judgment In The Underlying Case**

"As a general rule, the 'worth' of an underlying case in a subsequent legal malpractice action is established by the judgment entered [against the client] in the underlying action."<sup>21</sup> Thus, if the defendant lawyer's negligence results in entry of judgment against the client when there otherwise would have been no judgment, "the proper measure of damages is the entirety of the prior judgment regardless of the theory upon which the prior judgment was entered or the nature of the damages assessed thereunder."<sup>22</sup>

In *Scognamillo v. Olsen*,<sup>23</sup> the lawyer was accused of professional negligence in his representation of the owners of a company that sold machine tool distributorships. The underlying lawsuit, filed by a number of investors, involved claims of fraud, breach of contract, and civil conspiracy. During the course of the trial to the court, the plaintiffs in the underlying case offered to settle for \$54,000. Both of the plaintiffs in the malpractice case, Scognamillo and Faircloth, agreed to the offer, but another defendant in the underlying case, Volger, refused and the offer was rejected. After the trial but before the verdict, the lawyer, Olsen, withdrew from representing the company's owners. Subsequently, the trial court in the underlying case entered judgment against the owners of the company for \$214,830 in actual damages and \$849,020 in punitive damages, jointly and severally. Scognamillo and Faircloth subsequently hired another lawyer to prosecute an appeal, but the appeal was dismissed as untimely. Scognamillo then settled with the investors for \$200,000. Scognamillo and Faircloth filed a malpractice case against Olsen, claiming that Olsen had failed to properly evaluate and advise them of their potential liability and that Olsen had improperly represented all of the defendants, notwithstanding their personal animosities, divergent interests in the company, and conflicting views on settlement.

At the trial of the legal malpractice case, the jury found in favor of Faircloth in the sum of \$1,133,735, and charged 59 percent negligence to Olsen and 41 percent to Faircloth; the jury found for Scognamillo in the amount of \$275,948, with 74 percent negligence charged to Olsen and 26 percent charged to Scognamillo. The trial court ordered a reduction of each plaintiff's award by \$27,000, representing half of the \$54,000 for which the case could have been settled but for the lawyer's negligence.

On appeal of the legal malpractice verdict, Olsen argued that the trial court erred in instructing the jury on the amount of damages to be awarded the plaintiff. The court of appeals disagreed. The court held that in a legal malpractice action, the amount of damages is generally the amount of the judgment entered against the plaintiff in the underlying case.<sup>24</sup> The court stated that unless the defendant lawyer introduced evidence to show that the general rule was inapplicable, the amount of damages was fixed upon execution of the judgment or, as in Scognamillo's case, upon entry of a settlement agreement that satisfied the judgment.<sup>25</sup> The court held that the amount of damages in a legal malpractice case is generally a question of fact, but "if the amount of damages is subject to mathematical computation, the trial court may properly compute and instruct the jurors as to the amount of damages they are to award."<sup>26</sup> Additionally, the court upheld the inclusion of the punitive damages assessed in the underlying case as a component of actual and compensatory damages in the malpractice case.<sup>27</sup>

In *Miller v. Byrne*,<sup>28</sup> the defendants established an exception to the general rule that the prior judgment is the measure of damages. The plaintiffs in the underlying case stipulated to entry of judgment in the sum of \$1.2 million. The defendants in the underlying case then sued their lawyers and claimed that the stipulated judgment was the appropriate measure of damages. The court of appeals disagreed. The court noted that (1) the trial court had not heard any evidence concerning the stipulated judgment but had simply entered judgment at the request of the parties; (2) there was no impartial finder of fact, but that the terms of the judgment were essentially dictated by the plaintiff's lawyers; and (3) that courts

must be on guard to ensure that there are “circumstantial guarantees of trustworthiness concerning the genuineness of underlying judgments . . . .”<sup>29</sup> The court of appeals, quoting from a Florida case, stated:

The real concern in this type of case is that the settlement between the claimant and the insured may not actually represent an arm’s length determination of the worth of the plaintiff’s claim. In a situation where the insured actually pays for the settlement of the claim against him or where the case is fully litigated at trial before entry of a judgment, the amount of the settlement or judgment can be assumed to be realistic.

. . .

However, in [a] case . . . involving a consent judgment with a covenant not to execute, the settlement figure is more suspect.<sup>30</sup>

The Colorado Court of Appeals held that because the circumstantial guarantees of trustworthiness were not present, the stipulated judgment from the underlying case was *not* the measure of damages in the legal malpractice case.<sup>31</sup>

The court of appeals has permitted a deduction from the judgment in the amount of the client’s comparative negligence and for the amount for which the clients could have settled the underlying case had they taken the lawyers’ advice.<sup>32</sup>

### **§ 31.2.3—Economic Damages In Cases Where The Underlying Matter Was Not Litigated**

General damages principles apply to lawyer malpractice actions that arise out of non-litigated matters.<sup>33</sup>

#### **Lost Profits**

“[A] claim for lost net profits may be properly raised in a suit alleging legal malpractice.”<sup>34</sup> A plaintiff in a legal malpractice case may not recover damages for future profits when it is impossible to ascertain the evidence of the lost profits, or the evidence is speculative, remote, or imaginary.<sup>35</sup> To support a claim for damages based on lost profits in a legal malpractice case, a plaintiff must establish the fact of damages by a preponderance of the evidence.<sup>36</sup> A plaintiff is not barred from recovering lost profits because the amount of damages cannot be established with mathematical certainty once the fact of damage has been established.<sup>37</sup> The damages for lost net profits must be traceable to and the direct result of the defendant lawyer’s negligent act.<sup>38</sup> When the plaintiff seeks as damages the lost net profits of a new business venture, the plaintiff may recover such damages provided there is more than mere anticipation of starting a business, and there is evidence that the plaintiff took steps to start this business, such as investing time or money.<sup>39</sup> Courts prefer documentary evidence of profit loss when practical.<sup>40</sup> Courts may award lost profit damages based on undocumented testimony by the plaintiff or other witnesses.<sup>41</sup> Still, damages cannot be based upon only the speculation, guesses, or estimates of witnesses.<sup>42</sup>

#### **Tax Liability Damages**

A client may recover for an increased tax liability incurred because of the lawyer's professional negligence.<sup>43</sup> A client may not, however, recover damages for a tax liability that was merely deferred and that the client would eventually have been required to pay anyway, although the client may be able to recover for the time-value of the deferral.<sup>44</sup> A client may be able to recover as damages tax penalties incurred because of the lawyer's negligence.<sup>45</sup> However, a client may not be entitled to recover as damages the interest that the client must pay to the taxing authorities because the client is merely reimbursing the taxing authority for the client's use of the money.<sup>46</sup>

A lawyer may be liable for negligent misrepresentation for giving a tax opinion upon which the lawyer knew that third parties would rely.<sup>47</sup>

### **Additional or Unnecessary Attorney Fees and Costs**

A client may recover as damages the value of additional or unnecessary attorney fees incurred as a result of a lawyer's malpractice.<sup>48</sup> In *Temple Hoyne Buell Foundation v. Holland & Hart*,<sup>49</sup> the client sued defendant lawyers for negligently drafting an option contract concerning a right to a distribution of mineral rights to shareholders of a corporation owning California real estate. The corporation refused to distribute the mineral rights to the client, claiming the option contract violated the rule against perpetuities. After litigating with the corporation, the client settled for 50 percent of the mineral rights that it claimed. The client then sued the law firm for negligently drafting the option contract so that the contract violated the rule against perpetuities. The trial court found that the contract did violate the rule against perpetuities, and the jury entered a verdict in favor of the client.

On appeal, the Colorado Court of Appeals determined that the option contract did *not* violate the rule against perpetuities, but that defendants may *still* be liable for malpractice. The court of appeals held that although the option contract did not violate the rule against perpetuities, the issue existed of whether defendants, as reasonably prudent lawyers, should have *foreseen* that the option, as drafted, was likely to result in litigation and whether other lawyers, in similar circumstances, would have taken steps to prevent such a result, such as to put a "savings" clause in the option contract to be certain that there was no question about the rule against perpetuities.<sup>50</sup>

### **Loss of an Asset or Right**

The client may recover as damages the economic value of an asset or right lost as the result of a lawyer's malpractice.<sup>51</sup> Where the lawyer's negligence resulted in the client compromising a right of collection on a purchase of money notes, the measure of damages is the difference in the amount that was owed and the amount that was collected.<sup>52</sup> If the client accepts payment of a lesser amount on the note because of the lawyer's negligence and files a satisfaction of judgment, the client is not barred from suing the lawyer for the unpaid balance.<sup>53</sup>

### **§ 31.2.4—Economic Damages For A Breach Of Fiduciary Duty**

A plaintiff who proves that the defendant lawyer breached his or her fiduciary duties may recover his or her economic losses, which may include:

- 1) Disgorgement of property or profit that the defendant received as a result of the breach of fiduciary duty;<sup>54</sup>
- 2) Loss of the plaintiff's principal assets caused by the breach;<sup>55</sup>
- 3) Loss of profits or income that the plaintiff could reasonably have expected to have earned but for the breach;<sup>56</sup>
- 4) Loss or damage incurred as a result of the plaintiff being subjected to liability to a third person because of the defendant's breach of fiduciary duty;<sup>57</sup> and
- 5) Other economic loss that a jury might reasonably find was caused by the defendant's breach.<sup>58</sup>

### **§ 31.2.5—Forfeiture Or Disgorgement Of Attorney Fees**

As discussed in the *McCafferty* case, a lawyer is not entitled to a deduction from the client's damages in a legal malpractice case for a contingency fee that the client would have had to pay the lawyer had the lawyer not been negligent and had the lawyer recovered a larger judgment or settlement for the client in the underlying case.<sup>59</sup>

However, a breach of fiduciary duty or a conflict of interest does not mandate that a lawyer be denied all compensation for work performed.<sup>60</sup> In a probate case in which a lawyer for a trust was alleged to have had conflicts of interest, the court of appeals held that the lawyer was entitled to partial compensation where the probate court carefully reviewed the lawyer's fee requests and separated out the charges that did not benefit the trust or the beneficiaries.<sup>61</sup> The court stated, ". . . a conflict of interest is only one of many factors to be considered in determining the award of fees; it does not mandate a denial of all compensation."<sup>62</sup>

A lawyer who has been suspended from the practice of law or disbarred is entitled to be paid for work satisfactorily performed and for a share of a contingency fee earned prior to suspension or disbarment.<sup>63</sup>

## **§ 31.3 NON-ECONOMIC DAMAGES**

"Non-economic loss or injury" is defined as "nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life."<sup>64</sup>

According to the *Restatement (Third) of the Law Governing Lawyers*, "[g]eneral principles applicable to the recovery of damages for emotional distress apply to legal malpractice actions."<sup>65</sup> However, recent decisions from Colorado and other jurisdictions appear to apply unique rules to claims against lawyers.

### **§ 31.3.1—Non-Economic Damages For Negligence Or Breach Of Contract**

#### **Non-Economic Damages for Negligence**

The Colorado Supreme Court has not answered the question of whether emotional distress damages are available in a legal malpractice case based on negligence. As noted by the Colorado Court of Appeals in *Gavend v. Malman*,<sup>66</sup> “a majority of jurisdictions . . . have concluded that emotional distress or other noneconomic damages resulting solely from pecuniary losses are not recoverable in a legal malpractice action based on negligence.”<sup>67</sup> Colorado appellate courts have followed this rule.<sup>68</sup> As the leading treatise on legal malpractice notes, “with some jurisdictional exceptions, the rule is that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney’s negligence.”<sup>69</sup>

In *Boatright v. Derr*,<sup>70</sup> the Colorado Supreme Court let stand an award of emotional distress damages in a legal malpractice claim based on both negligence and breach of fiduciary duty because the issue had not been preserved at trial; therefore the court refused to consider the issue on certiorari; however, the supreme court specifically *declined* to address the general question of “whether and, if so, under what circumstances noneconomic damages are available as a remedy for persons alleging legal malpractice.”<sup>71</sup>

Moreover, in Colorado, non-economic losses, such as losses for grief, pain, suffering, and emotional distress, are typically limited by C.R.S. § 13-21-102.5 to \$366,250 per plaintiff.<sup>72</sup> The supreme court has interpreted the statute to mean the limitations apply to the *pro rata* liability share of each individual defendant and that it does not act as a cap on the total amount a plaintiff may recover.<sup>73</sup> It is unclear, though, whether the court would treat individual defendant lawyers and their law firms as separate defendants for purposes of the limitations.

### **Non-Economic Damages for Breach of Contract**

Traditionally, emotional distress arising from pecuniary loss resulting from a breach of contract is not recoverable.<sup>74</sup> However, non-economic damages are available in breach of contract actions where the breach is accompanied by willful and wanton conduct.<sup>75</sup>

### **§ 31.3.2—Non-Economic Damages For Breach Of Fiduciary Duty**

Colorado appellate courts have yet to answer the question of whether a plaintiff in a legal malpractice action may recover non-economic losses or injuries for breach of fiduciary duty. However, to the extent they are available, those non-economic losses are subject to the statutory caps found in C.R.S. § 13-21-102.5.<sup>76</sup> A breach of fiduciary duty claim will be dismissed if it is merely duplicative of the negligence claim.<sup>77</sup> Presumably, however, if a plaintiff proves pecuniary damages in a legal malpractice lawsuit caused by the lawyer’s breach of a fiduciary duty, as opposed to the lawyer’s professional negligence, the plaintiff may recover non-economic damages arising from the breach of fiduciary duty, whether the non-economic damages were caused by the emotional distress arising from the pecuniary loss or injury or caused by other actions by the lawyer.

Recently, in *Aller v. Law Office of Carole C. Shriefer, P.C.*,<sup>78</sup> the Colorado Court of Appeals had the opportunity to address the issue of whether emotional distress damages are available for breaches of fiduciary duties by lawyers. However, in a perplexing opinion, the court of appeals found that the case at hand involved a negligence claim and not a breach of

fiduciary duty claim, and concluded that emotional distress and non-economic damages are “not available in a legal malpractice action which is essentially based on negligence.”<sup>79</sup> Nevertheless, the *Aller* court adopted the same rationale set forth to justify the denial of emotional distress damages to lawyer breach of fiduciary duty plaintiffs. The court remarked that allowing emotional distress damages in a lawyer breach of fiduciary duty case “would escalate the cost of practicing law.”<sup>80</sup> The court distinguished other Colorado breach of fiduciary duty cases where non-economic damages were recoverable by simply remarking that they were unpersuasive because they did not involve a *lawyer’s* breach of fiduciary duty.<sup>81</sup>

But the Colorado Supreme Court has shown a willingness to award emotional distress damages in other circumstances involving breaches of fiduciary duty. The court has upheld the award of emotional distress damages on a claim of bad faith breach of an insurance contract, even though the plaintiff had not proven substantial property or economic loss.<sup>82</sup> In *Goodson v. American Standard Ins. Co. of Wisconsin*,<sup>83</sup> the court of appeals held that the trial court erred in refusing to instruct the jury it could only award damages for emotional distress if the plaintiff showed substantial property loss or economic damages caused by the defendant’s breach. The supreme court reversed, holding that “emotional distress is a likely and foreseeable consequence of a bad faith denial of the benefits afforded under the contract.”<sup>84</sup> The bad faith action of the insurer “contravenes a fundamental benefit of obtaining insurance so as not to suffer such anxiety, fear, stress, and uncertainty [that may be caused by an unreasonable denial of insurance benefits]. The fact that an insurer finally pays in full does not erase the distress caused by the bad faith conduct.”<sup>85</sup> Although it recognized that there may be difficulties in quantifying and determining the credibility of non-economic injuries, the supreme court found that the numerous safeguards already present in the legal system (such as statutory caps on non-economic damages, *remittitur*, and the jury system itself) mitigate the difficulties and protect against fictitious claims.<sup>86</sup>

There is a strong analogy between the principles of *Goodson* in the insurance bad faith context and a lawyer’s breach of his or her fiduciary duties of loyalty to a client. A client-lawyer relationship is not the “quasi-fiduciary relationship” recognized in *Goodson* in the first-party insurance context, but is an actual fiduciary relationship.<sup>87</sup> A client-lawyer relationship is one consisting of loyalty and trust,<sup>88</sup> and a breach of fiduciary duties owed to a client contravenes a fundamental benefit of obtaining counsel: to receive advice from a loyal advisor who will maintain any confidences disclosed during the advisement. (See generally Chapter 5 of this handbook.) Clients rely upon their lawyer’s loyalty so that they will not suffer the “anxiety, fear, stress, and uncertainty” discussed in *Goodson*.<sup>89</sup> Emotional distress is a likely and foreseeable consequence of a lawyer’s betrayal and breach of the fiduciary duty of loyalty. As such, the reasoning of the supreme court in *Goodson* argues for a rule that clients who prove that their lawyer breached a fiduciary duty of loyalty should be entitled to recover non-economic damages arising from that breach. The safeguards against fictitious claims discussed in *Goodson* are no less present in a breach of fiduciary duty claim against a lawyer than in a bad faith claim. At least one commentator has opined that the traditional prohibition of awarding non-economic damages against lawyers in malpractice

cases is simply a rule without a rational basis and that the rule has no real purpose other than to protect the economic interests of lawyers.<sup>90</sup>

### **§ 31.3.3—Emotional Distress Damages For Outrageous Conduct**

There have been no reported Colorado decisions concerning whether clients may recover damages for severe emotional distress arising from their lawyer's outrageous conduct. The elements of an outrageous conduct claim are (1) the defendant engaged in extreme and outrageous conduct; (2) the defendant engaged in the conduct recklessly or with the intent of causing the plaintiff severe emotional distress; and (3) the plaintiff incurred severe emotional distress that was caused by the defendant's conduct.<sup>91</sup>

"Outrageous conduct" is defined as conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>92</sup>

While there are no Colorado cases discussing damages for a client's severe emotional distress in the context of an outrageous conduct claim, there seems to be no analytical or policy reason why a client or other person who pleads and proves severe emotional distress arising from a lawyer's outrageous conduct should not be allowed to recover from the defendant simply because the defendant is a lawyer.<sup>93</sup> For example, in *Meiter v. Cavanaugh*,<sup>94</sup> Mr. Cavanaugh, a lawyer, sold his house to Mrs. Meiter, who purchased it for her grandchildren and recently widowed daughter-in-law. The parties agreed that Cavanaugh could remain in the house for six weeks after the closing. At the end of the six weeks, Mrs. Meiter inquired of Cavanaugh when she could take possession, as her daughter-in-law and grandchildren desperately needed a place to live. Cavanaugh refused to vacate before the end of his children's school year, grew belligerent, and called Mrs. Meiter, who had recently suffered from cancer, a "sick old woman." Cavanaugh threatened legal action, and implied that he had some special sway with the court. Mrs. Meiter was forced to purchase another house for her daughter-in-law and grandchildren. When Cavanaugh finally moved out, the house was damaged. Mrs. Meiter sued, and the jury awarded her damages for outrageous conduct and punitive damages. Cavanaugh appealed. Without discussing the defendant's status as a lawyer, the Colorado Court of Appeals affirmed the jury's verdict. The court held that while any one of Cavanaugh's actions, taken in isolation, may have been insufficient to constitute outrageous conduct, taken together, reasonable people could differ as to whether the conduct was outrageous.<sup>95</sup>

### **§ 31.3.4—Loss Of Reputation Damages**

If a lawyer's negligence causes a client substantial negative publicity and the client is unable to mitigate the harm to his or her reputation caused by the publicity, the client *may* be able to recover damages for loss of reputation. No reported Colorado appellate decision has directly addressed whether a former client may maintain a claim for loss of reputation resulting from a lawyer's malpractice.

Consequential damages, such as loss of reputation damages, are recoverable in *contract* if they are foreseeable.<sup>96</sup> "[D]amage awards in contract cases attempt to place the parties in the same financial position they would have occupied had the contract terms been fulfilled."<sup>97</sup> Merely speculative or remote damages, and damages that are impossible to

ascertain, are not recoverable in a breach of contract claim.<sup>98</sup> Consequential damages are also recoverable in tort if they are proximately caused by the tortious act and are reasonably ascertainable.<sup>99</sup> Thus, loss of reputation may be recoverable in a legal malpractice claim if the damages were foreseeable (under a contract claim) or if they were a natural and probable result of the injuries sustained (under a tort claim).

Some jurisdictions have permitted recovery of damages for loss of reputation in legal malpractice cases.<sup>100</sup> In *Kirtland and Packard v. The Superior Court of Los Angeles County*,<sup>101</sup> a physician recovered for injury to his reputation. There, the publicity over the physician's loss of a medical malpractice action resulted in another patient filing a second medical malpractice against the physician. The physician sued the lawyers who represented him in the first medical malpractice action, arguing that but for their negligence in that action, the second action would not have transpired. The court refused to dismiss the claim, stating "nor . . . are we prepared to make a categorical statement on the basis of the record before us" that the physician "suffered no damages at the hands of" his lawyers.<sup>102</sup> The Maine Supreme Court upheld an award of damages in a negligence-based legal malpractice case that included damages for loss of reputation.<sup>103</sup>

In Wisconsin, however, a court would not permit the award of consequential damages in a legal malpractice action for injuries resulting from the publication of an adverse verdict where the client eventually got the result he sought.<sup>104</sup> The court reasoned that "[i]f a party is permitted to sue his trial attorney for consequential damages even though he has received the remedy originally sought in the action, no legal check would remain on claims against trial lawyers by their clients."<sup>105</sup>

### **§ 31.3.5—Non-Economic Damages To Legal Entities**

Legal entities, such as estates and corporations, are incapable of pain and suffering, emotional distress, or "loss of enjoyment of life" as a matter of law, and may not recover for non-economic damages.<sup>106</sup>

## **§ 31.4 PUNITIVE DAMAGES**

Punitive damages are available in Colorado only by statute.<sup>107</sup> A demand for punitive damages may not be included in the original complaint, but may be added by amendment only after the exchange of initial disclosures and only after a plaintiff proves the existence of a triable issue of punitive damages.<sup>108</sup> To award punitive damages, a jury must find beyond a reasonable doubt that the conduct at issue was attended by circumstances of fraud, malice, or a wanton and reckless disregard of the injured party's rights and feelings.<sup>109</sup> "Willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.<sup>110</sup> The sufficiency of evidence to support an award of punitive damages is a question of law for the court.<sup>111</sup> "Conduct that is merely negligent . . . cannot serve as the basis for exemplary damages."<sup>112</sup>

An exemplary damage “claim” is not a separate claim for relief and “has no application in the absence of a successful underlying claim for actual damages.”<sup>113</sup> C.R.S. § 13-21-102 “permits an award of punitive damages only in conjunction with an underlying and independent ‘civil action’ in which actual damages are assessed for some legal wrong to the injured party.”<sup>114</sup>

Punitive damages are not ordinarily recoverable in breach of contract cases.<sup>115</sup> Thus, if the legal malpractice plaintiff’s other claims against the defendant lawyer (*e.g.*, negligence or breach of fiduciary duty) are barred by, say, the statute of limitations, then the plaintiff’s punitive damages “claim” is likewise barred. “If a claim for punitive damages is based upon circumstances for which the law does not impose a duty, there is no cognizable claim.”<sup>116</sup>

A plaintiff may recover punitive damages for a breach of fiduciary duty.<sup>117</sup> These damages will be subject to the limitations of C.R.S. § 13-21-102.

Punitive damages are typically limited to the amount of the actual damages proved by the plaintiff.<sup>118</sup> Under certain circumstances, such as where the defendant’s wrongful conduct continues during the litigation, the trial court, in its discretion, may award up to three times the actual damages as punitive damages.<sup>119</sup>

### **§ 31.5 -AWARD OF ATTORNEY FEES INCURRED IN LEGAL MALPRACTICE ACTION**

As a general rule, a prevailing party may not recover attorney fees in the absence of a statute, court rule, or private contract to the contrary, in either a contract or tort action.<sup>120</sup> This reasoning is based on the American rule, which requires each party in a lawsuit to bear its own legal expenses.<sup>121</sup>

There are, however, several exceptions to the American rule.<sup>122</sup> One exception is when the plaintiff brings a suit against a fiduciary for breach of trust.<sup>123</sup> Although it has been said that “[i]n effect any alleged malpractice by an attorney also evidences a simultaneous breach of trust,”<sup>124</sup> a client may not recover attorney fees in a legal malpractice action unless the action is one involving a breach of fiduciary duty separate and apart from negligence.<sup>125</sup>

There are no published decisions from Colorado appellate courts upholding an award of attorney fees in a legal malpractice case based on a breach of fiduciary duty. Nevertheless, the appellate courts have suggested that such an award *might* be appropriate in actions involving a breach of trust.

In *Smith v. Mehaffy*,<sup>126</sup> a plaintiff challenged the denial of an award of attorney fees in a legal malpractice case arising from his lawyer’s negligence in advising him regarding adequate notice to creditors. The court of appeals recognized the exception to the American rule when a plaintiff brings a suit against a fiduciary for breach of trust.<sup>127</sup> The appellate

court found there was no breach of fiduciary duty because there was no evidence of a breach of standard of conduct, such as the duty of undivided loyalty or confidentiality.<sup>128</sup> Therefore, the appellate court found the lawyer's conduct "did not fall within the breach of fiduciary duty exception to the American rule."<sup>129</sup>

Although the opinion was later vacated by the Colorado Supreme Court, in *Anstine v. Alexander*,<sup>130</sup> the Colorado Court of Appeals clarified that the exception to the American rule in cases involving a breach of fiduciary duty is limited to cases involving a breach of trust. In *Anstine*, the defendant lawyers were sued for legal malpractice and aiding and abetting a breach of fiduciary duty. The claims arose out of a company's sale of home warranties where the insurance the company purchased on the warranties turned out to be fraudulent. The lawyers advised the president of the company to warehouse the warranty premiums and assisted the president in using those premiums to purchase unacceptable offshore policies. Although the jury found in favor of the lawyers on the legal malpractice claim, the lawyers were found liable for aiding and abetting the president's breach of fiduciary duty owed to the company. On appeal, the lawyers argued that the trial court erred in awarding the plaintiff attorney fees. The court of appeals agreed, interpreting the breach of fiduciary duty American rule exception to apply to cases involving a breach of trust "where a fiduciary holds funds in trust for the benefit of a party who is ultimately injured by the breach."<sup>131</sup> "Because the underlying breach of fiduciary duty here did not involve a trust, or other circumstances where a fiduciary is holding funds for the benefit of the injured party," the court reversed the award of attorney fees.<sup>132</sup>

The Colorado Supreme Court found that the plaintiff had failed to allege the president had breached a fiduciary duty and therefore vacated the portion of the court of appeals' decision with the lawyers' liability.<sup>133</sup> Nevertheless, the court of appeals' decision in *Anstine* suggests that attorney fees will not be awarded in breach of fiduciary duty/legal malpractice cases where a lawyer breaches the duty of confidentiality or breaches the duty of undivided loyalty unless the claim involves funds held by the lawyer for the benefit of the client.

\*Updating a chapter originally written in 1999 by Michael T. Mihm, Starrs Mihm & Caschette LLP; and Leslie C. Dolan, Leventhal, Brown & Puga, P.C.

## NOTES

1. *Restatement (Third) of the Law Governing Lawyers* § 53 (hereinafter, *Restatement*); *Fleming v. Lentz, Evans & King, P.C.*, 873 P.2d 38, 40 (Colo. App. 1994); *Coon v. Ginsberg*, 509 P.2d 1293, 1295 (Colo. App. 1973); *Broker House Int'l v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998).

2. *Id.*

3. *See, e.g., McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244 (Colo. 1996).

4. *See* Cmt. b, *Restatement* § 53.

5. *McCafferty v. Musat*, 817 P.2d 1039 (Colo. App. 1990).
6. *Id.* at 1042-1045.
7. *Id.* at 1045. *See also* Cmt. c, *Restatement* § 53.
8. *McCafferty*, 817 P.2d at 1045.
9. *Id.*
10. *Id.* at 1045, *citing* *Campagnola v. Mulholland, Minion & Roe*, 543 N.Y.S.2d 516 (N.Y. App. Div. 1989), and *Strauss v. Fost*, 517 A.2d 143 (N.J. Super. 1986).
11. *Myers v. Beem*, 712 P.2d 1092 (Colo. App. 1985).
12. *Id.* at 1093.
13. *Lawson v. Sigfrid*, 83 Colo. 116, 262 P. 1018 (1927).
14. *Id.*
- 14a. A recent unpublished decision from the Colorado Court of Appeals held that collectibility is an element of a *prima facie* legal malpractice case. *Giron v. Koltavy*, No. 07CA0766, 2008 Colo. App. LEXIS 1015 (Colo. App. June 12, 2008). Because the decision is unpublished, it is not of precedential value. C.A.R. 35(f).
15. *See, e.g., Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1995); *Sitton v. Clements*, 257 F. Supp. 63, 66-67 (E.D. Tenn. 1966), *aff'd* 385 F.2d 869 (6th Cir. 1967); *DiPalma v. Seldman*, 33 Cal. Rptr. 2d 219, 220-21 (Cal. Ct. App. 1994) (*citing* *Campbell v. Magana*, 8 Cal. Rptr. 32 (Cal. Ct. App. 1960)); *Palmieri v. Winnick*, 482 A.2d 1229, 1230 (Conn. Super. Ct. 1984); *Fernandes v. Barrs*, 641 So.2d 1371 (Fla. App. 1994) (burden on the plaintiff, except when the defendant lawyer's negligence makes it impossible to prove collectibility, then burden shifts to defendant); *McDow v. Dixon*, 226 S.E.2d 145, 146-47 (Ga. Ct. App. 1976); *Sheppard v. Krol*, 578 N.E.2d 212, 216-17 (Ill. App. 1991) (*citing* *Goldzier v. Poole*, 82 Ill. App. 469, 471 (1898); *Kohler v. Woollen, Brown & Hawkins*, 304 N.E.2d 677 (Ill. Ct. App. 1973)); *Christy v. Saliterman*, 179 N.W.2d 288 (Minn. 1970); *Eno v. Watkins*, 429 N.W.2d 371, 372-73 (Neb. 1988); *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 30 (S.D. 1983); *Gay & Taylor, Inc. v. Am. Cas. Co.*, 381 S.W.2d 304, 306 (Tenn. Ct. App. 1963); *Mackie v. McKenzie*, 900 S.W.2d 445, 448-49 (Tex. App. 1995); *Tilly v. Doe*, 746 P.2d 323, 326 (Wash. Ct. App. 1987).
16. *See, e.g., Lindenman v. Kreitzer*, 775 N.Y.S.2d 4, 8 (N.Y. App. Div. 2004), *overruling* *Larson v. Crucet*, 481 N.Y.S.2d 368, 368 (N.Y. App. Div. 1984); *Smith v. Haden*, 868 F. Supp. 1 (D. D.C. 1994) (defendant lawyer has burden of proving judgment in underlying case uncollectible); *Power Constructors, Inc., v. Taylor & Hintze*, 960 P.2d 20 (Alaska 1998) (same); *Jourdain v. Dineen*, 527 A.2d 1304 (Me. 1987) (same); *Teodorescu v. Bushnell, Gage, Reizen & Byington*, 506 N.W.2d 275 (Mich. Ct. App. 1993) (same); *Carbone v. Tierney*, 864 A.2d 308 (N.H. 2004) (same); *Hoppe v. Ranzini*, 385 A.2d 913 (N.J. Super. Ct. App. Div. 1978) (same); *Ridenour v. Lewis*, 854 P.2d 1005 (Ore. Ct. App. 1993) (collectibility not part of the plaintiff's *prima facie* case); *Albee Assocs. v. Orloff, Lowenbach, Stifelman and Siegel, P.A.*, 721 A.2d 750 (N.J. Super. Ct. App. Div. 1999) (defendant lawyer has burden of proving judgment in underlying case uncollectible); *Kituskie v. Corbman*, 714 A.2d 1027 (Pa. 1998) (same); *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 440 (Ind. Ct. App. 2006).
17. *See, e.g., Lindenman v. Kreitzer*, 775 N.Y.S.2d 4, 8 (N.Y. App. Div. 2004), *overruling* *Larson v. Crucet*, 481 N.Y.S.2d 368, 368 (N.Y. App. Div. 1984).
18. *See, e.g., Fernandes v. Barrs*, 641 So.2d 371 (Fla. Dist. Ct. App. 1994) (burden on the plaintiff, except when the defendant lawyer's negligence makes it impossible to prove collectibility, then burden shifts to defendant).
19. Cmt. b, *Restatement* § 53, at 391.
20. *Id.* ("Even when a plaintiff would have recovered through trial or settlement in a previous civil action, recovery in the negligence or fiduciary-breach action of what would have been the judgment or settlement in the previous action is precluded in some circumstances. Thus, the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible, for example because the previous defendant was insolvent and uninsured. The defendant lawyer bears the burden of coming forward with evidence that this was so. Placement of this burden on the defending lawyer is appropriate because most civil judgments are collectible and because the defendant lawyer was the

one who undertook to seek the judgment that the lawyer now calls worthless. The burden of persuading the jury as to collectibility remains with the plaintiff.”)

21. *Miller v. Byrne*, 916 P.2d 566, 581 (Colo. App. 1995).
22. *Scognamillo v. Olsen*, 795 P.2d 1357, 1361 (Colo. App. 1990).
23. *Id.*
24. *Id.* at 1360.
25. *Id.*
26. *Id.*
27. *Id.* at 1361.
28. *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).
29. *Id.* at 581.
30. *Id.* (quoting *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So.2d 589, 592 (Fla. Dist. Ct. App. 1984)).
31. *Miller*, 916 P.2d at 581-82.
32. *Scognamillo*, 795 P.2d at 1363.
33. See Cmt. e, *Restatement* § 53.
34. *Roberts v. Holland & Hart*, 857 P.2d 492, 497 (Colo. App. 1993). See also, e.g., *Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348, 350-51 (10th Cir. 1988).
35. *Roberts*, 857 P.2d at 496-97, citing *Lee v. Durango Music*, 355 P.2d 1083 (Colo. 1960).
36. *Roberts*, 857 P.2d at 497.
37. *Id.*
38. *Id.*
39. *Id.*; *Cope v. Vermeer Sales & Serv.*, 650 P.2d 1307, 1309 (Colo. App. 1982).
40. *Roberts*, 857 P.2d at 497; *Republic Nat'l Life Ins. Co. v. Red Lion Homes, Inc.*, 704 F.2d 484, 490 (10th Cir. 1983); *Lee v. Durango Music*, 355 P.2d 1083 (Colo. 1960).
41. See, e.g., *Roberts*, 857 P.2d at 497; *Miami Int'l Realty v. Paynter*, 841 F.2d 348 (10th Cir. 1988); *Power Equip. Co. v. Fulton*, 513 P.2d 234, 237 (Colo. App. 1973).
42. *United States v. Griffith, Gornall & Carman, Inc.*, 210 F.2d 11, 13-14 (10th Cir. 1954).
43. See, e.g., *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300 (D. Colo. 1995); *Linck v. Barakas & Martin*, 667 P.2d 171 (Alaska 1983).
44. R. Mallen and J. Smith, 3 *Legal Malpractice* § 33.7, at 953 (Thompson/West, 2009 ed.) (*hereinafter*, *Legal Malpractice*).
45. *Id.*
46. *Alpert v. Shea Gould Climenko & Casey*, 559 N.Y.S.2d 312, 315 (N.Y. App. Div. 1990).
47. See, e.g., *Ackerman v. Schwartz*, 947 F.2d 841 (7th Cir. 1991) (lawyer would be liable for reckless representation for tax-shelter opinion letter for client's venture); *Norman v. Brown, Todd & Heburn*, 693 F. Supp. 1259 (D. Mass. 1988) (lawyer liable for assisting client's fraud by providing tax-shelter legal opinion and assisting the client, when the lawyer should have known of the client's fraud).
48. See, e.g., *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192, 198 (Colo. App. 1992); see also *First Interstate Bank, N.A. v. Berenbaum*, 872 P.2d 1297, 1299 (Colo. App. 1993); Cmt. f, *Restatement* § 53.
49. *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992).
50. *Temple Hoyne Buell Found.*, 851 P.2d at 198-199.
51. See, e.g., *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992); *Tilly v. Doe*, 746 P.2d 323 (Wash. Ct. App. 1987); *Keister v. Talbott*, 391 S.E.2d 895 (W. Va. 1990).
52. *Deaton v. Mason*, 616 P.2d 994, 995 (Colo. App. 1980).
53. *Id.*
54. *Buder v. Sartore*, 774 P.2d 1383, 1390 (Colo. 1989); *Restatement (Second) of Agency* §§ 403, 404 (1958); CJI-Civ. 26:5 (CLE ed. 2009).
55. *Buder*, 774 P.2d at 1390; *Restatement (Second) of Agency* § 402 (1958); CJI-Civ. 26:5 (CLE ed. 2009).
56. *Buder*, 774 P.2d at 1390; CJI-Civ. 26:5 (CLE ed. 2009).

57. *Elijah v. Fender*, 674 P.2d 946, 951 (Colo. 1984).
58. *Restatement (Second) of Agency* § 401 (1958); *White v. Brock*, 584 P.2d 1224, 1227 (Colo. App. 1978); CJI-Civ. 26:5 (CLE ed. 2009).
59. *McCafferty*, 817 P.2d at 1045.
60. *In re Life Ins. Trust Agreement of Seeman*, 841 P.2d 403, 405 (Colo. App. 1992).
61. *Id.*
62. *Id.*
63. *Rutenbeck v. Grossenbach*, 867 P.2d 36, 37 (Colo. App. 1993).
64. C.R.S. § 13-21-102.5(2)(b).
65. Cmt. g, *Restatement* § 53.
66. *Gavend v. Malman*, 946 P.2d 558 (Colo. App. 1997).
67. *Id.* at 563.
68. *Id.*; *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23, 26-27 (Colo. App. 2005).
69. 3 *Legal Malpractice* § 21.11, at 36 (emphasis in original).
70. *Boatright v. Derr*, 919 P.2d 221 (Colo. 1996).
71. *Id.* at 227.
72. C.R.S. § 13-21-102.5(3)(a); Secretary of State of Colorado, Adjusted Limitation on Damages Certificate, available at [www.sos.state.co.us/pubs/info\\_center/damages.pdf](http://www.sos.state.co.us/pubs/info_center/damages.pdf).
73. *General Elec. Co. v. Niemet*, 866 P.2d 1361, 1368 (Colo. 1994).
74. *Smith v. Hoyer*, 697 P.2d 761, 764 (Colo. App. 1984).
75. *Smith*, 697 P.2d at 764; *Trimble v. City & County of Denver*, 697 P.2d 716, 731 (Colo. 1985).
76. C.R.S. §§ 13-21-102.5(3)(a) through (c).
77. *Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 620-21 (Colo. App. 1997).
78. *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23 (Colo. App. 2005).
79. *Id.* at 26.
80. *Id.* at 28 (citing *Camenisch v. Superior Court*, 52 Cal. Rptr.2d 450 (Cal. Ct. App. 1996)).
81. *Id.* at 29-30.
82. *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409 (Colo. 2004).
83. *Id.*
84. *Id.* at 417.
85. *Id.*
86. *Id.*
87. *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 675 (Colo. 1995) (“The relationship between an attorney and client is a distinct fiduciary affiliation which arises as a matter of law. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992). The foundation of this relationship is grounded upon a special trust and confidence, *Enyart v. Orr*, 78 Colo. 6, 15, 238 P. 29, 34 (Colo. 1925), and requires that a client have the utmost faith in chosen counsel.”).
88. *Id.*
89. *Goodson*, 89 P.3d at 417.
90. See Lawrence Kessler, “The Unchanging Face of Legal Malpractice: How the ‘Captured’ Regulators of the Bar Protect Attorneys,” 86 *Marq. L. Rev.* 457, 477-91 (2002).
91. *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 882 (Colo. 1994).
92. *Destefano v. Grabrian*, 763 P.2d 275, 286 (Colo. 1988); see also *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988).
93. See, e.g., *Cummings v. Pinder*, 574 A.2d 843 (Del. 1990).
94. *Meiter v. Cavanaugh*, 580 P.2d 399 (Colo. App. 1978).
95. *Id.*
96. *Prutch v. Ford Motor Co.*, 618 P.2d 657, 661-62 (Colo. 1980).
97. *Republic Nat’l Life Ins. Co. v. Red Lion Homes, Inc.*, 704 F.2d 484, 488 (10th Cir. 1983), quoted in *Colo. Nat’l Bank of Denver v. Friedman*, 846 P.2d 159, 174 (Colo. 1993).
98. *Colo. Nat’l Bank*, 846 P.2d at 174.
99. *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 872 (Colo. 2002).

100. See generally 3 *Legal Malpractice* § 21.12, at 47-49.
101. *Kirtland & Packard v. Superior Court*, 59 Cal. App. 3d 140 (1976).
102. *Id.* at 146.
103. *Burton v. Merrill*, 612 A.2d 862, 865-66 (Me. 1992).
104. *Bolte v. Joy*, 443 N.W.2d 23 (Wis. Ct. App. 1989).
105. *Id.* at 25.
106. See, e.g., *Hill v. Boatright*, 890 P.2d 180, 185 (Colo. App. 1994), *aff'd in part, rev'd in part on other grounds*, 919 P.2d 221 (Colo. 1996); *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994); *Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1040 n. 2 (11th Cir. 1986); *Earth Scientists Ltd. v. United States Fidel. & Guar. Co.*, 619 F. Supp. 1465, 1474 (D. Kan. 1985); *Barreca v. Nickolas*, 683 N.W.2d 111, 124 (Iowa 2004); *Wilson v. Colonial Penn Life Ins. Co.*, 454 F. Supp. 1208, 1212 n. 9 (D. Minn. 1978).
107. *Kaitz v. District Court*, 650 P.2d 553, 556 (Colo. 1982); C.R.S. § 13-21-102.
108. C.R.S. § 13-21-102(1.5)(a).
109. C.R.S. § 13-21-102(1)(a); C.R.S. § 13-25-127(2); *Miller v. Byrne*, 916 P.2d 566, 580 (Colo. App. 1995); *Palmer*, 684 P.2d at 213; *Ress v. Rediess*, 278 P.2d 183, 187 (Colo. 1954) (“To justify a recovery of exemplary damages, the act causing the injuries must be done with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive.” (internal quotation and citation removed)).
110. C.R.S. § 13-21-102(1)(b).
111. *Miller*, 916 P.2d at 580; *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986).
112. *Tri-Aspen Constr. Co.*, 714 P.2d at 486. See also *Kedar v. Public Serv. Co.*, 709 P.2d 15, 17 (Colo. App. 1985); *Peters v. Boulder Ins. Agency, Inc.*, 829 P.2d 429, 434 (Colo. App. 1991).
113. *Palmer v. A.H. Robins Co. Inc.*, 684 P.2d 187, 213-14 (Colo. 1984).
114. *Id.* at 214.
115. *Mortgage Fin. Co. v. Podleski*, 742 P.2d 900, 903 (Colo. 1987).
116. *Hines v. Denver & Rio Grande W. R.R. Co.*, 829 P.2d 419, 422 (Colo. App. 1991).
117. *Mahoney Marketing Corp. v. Sentry Builders of Colo., Inc.*, 697 P.2d 1139, 1140-41 (Colo. App. 1985). See also *White v. Brock*, 584 P.2d 1224, 1227 (Colo. App. 1978) (whether breach of fiduciary duty was wanton and reckless so as to justify award of exemplary duties is a question for the jury).
118. C.R.S. § 13-21-102(1)(a).
119. C.R.S. § 13-21-102(3).
120. *In re Estate of Klarner*, 113 P.3d 150, 157 (Colo. 2005); *Bernhard v. Farmers Ins. Exchg.*, 915 P.2d 1285, 1288 (Colo. 1996).
121. *Bernhard*, 915 P.2d at 1288.
122. *Id.* at 1287.
123. See *Smith v. Mehaffy*, 30 P.3d 727, 732-34 (Colo. App. 2000) (denying award of attorney fees because no breach of fiduciary duty); *Bernhard*, 915 P.2d at 1289; *Heller v. First Nat'l Bank, N.A.*, 657 P.2d 992 (Colo. App. 1982).
124. *Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 621 (Colo. App. 1997).
125. *Mehaffy*, 30 P.3d at 733-34.
126. *Id.*
127. *Id.* at 732 (denying award of attorney fees because no breach of fiduciary duty).
128. *Id.* at 733-34.
129. *Id.* at 734.
130. *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), *overruled in part, vacated in part, Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007).
131. *Id.* at 259.
132. *Id.* at 259-60.
133. *Alexander*, 152 P.3d at 503.