

Chapter 30

LIABILITY TO THIRD PARTIES

Ross W. Pulkrabek, Esq.*

Starrs Mihm & Pulkrabek LLP

Michael T. Mihm, Esq.*

Starrs Mihm & Pulkrabek LLP

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§ 30.1 LIABILITY TO THIRD PARTIES — GENERALLY

The general rule in Colorado is that a lawyer, while fulfilling his or her fiduciary duty to act in his or her client's best interests, is liable for injuries to third parties only when his or her conduct is fraudulent, malicious, or intentionally tortious.¹ The policy reasons that courts have traditionally used to limit a lawyer's liability to non-client third parties are (1) the consideration of the lawyer's "duty of loyalty and effective advocacy for his [or her] client"; (2) "the nature of the adversarial relationship between [a lawyer] and other parties";

and (3) the potential exposure to an unlimited number of third parties if a lawyer's duty is extended to parties who are not clients.² Although courts have created numerous exceptions to the bar against liability to non-clients, the general prohibition has been repeatedly affirmed in Colorado.

§ 30.1.1—No Presumptive Duty Of Care To Persons Affiliated With The Client

It is common for a lawyer to represent clients who are related in some capacity. For example, a lawyer frequently will represent a corporation and one or more constituents, such as owners or employees. In personal injury cases, the lawyer often will represent the client's spouse with respect to claims for loss of consortium. Nevertheless, the existence of a relationship between the client and a third party — even a fiduciary relationship — does not in and of itself give rise to a duty of care owed by that lawyer to the third party.

No Duty of Care to devisees, Beneficiaries, and Heirs

A lawyer owes no duty of care to third parties who are the client's heirs, devisees under the client's will, or beneficiaries of a trust settled by the client. In *Shriners Hospital for Crippled Children, Inc. v. Southard*,³ the Colorado Court of Appeals found that an intended residuary beneficiary of a client's estate did not have standing to assert a professional negligence claim against the lawyer. The defendant lawyer drafted a trust for a client that placed most of the client's assets in the trust. "The dispositive provisions of the trust were identical to those of the [client's] existing will," which provided for a bequest to Shriners Hospital and designated Shriners Hospital as the residuary beneficiary of the estate.⁴ Soon thereafter, the lawyer drafted a codicil to the client's will bequeathing money to two other persons. The client then had the lawyer alter her trust to leave all assets to the same two persons named in the codicil. The lawyer amended the trust without also revising the client's will. Upon the client's death, the two persons received the trust assets.

Shriners Hospital brought a malpractice action, claiming the defendant lawyer was negligent in drafting the revised trust agreement because he did not confer personally with the client to determine her mental competency.⁵ The court dismissed the hospital's claim, finding that the hospital lacked standing to assert the malpractice claim.⁶ The court reasoned that a lawyer has a duty to act in the best interest of his or her client, and is liable to non-clients only for injuries caused by the lawyer's fraudulent, malicious, or intentionally tortious conduct.⁷ The court found that because the hospital's complaint alleged "simple negligence rather than fraudulent, malicious, or intentionally tortious conduct," the lawyer had no duty to the hospital.⁸

No Duty of Care to Spouses or Children

Similarly, a lawyer owes no duty to a client's family. In *Klancke v. Smith*,⁹ the court of appeals affirmed the trial court's dismissal of claims for negligence and breach of fiduciary duty asserted against the defendant lawyers because the lawyers had no client-lawyer relationship with the plaintiffs. The lawyers represented a wife in a wrongful death claim arising from the death of her husband in an airplane crash. The plaintiffs in the malpractice action, children of the decedent and stepchildren of the wife, attempted unsuccessfully to intervene in the wrongful death action, apparently because of a justifiable fear that their stepmother would not uphold her fiduciary duty to distribute the proceeds of

any settlement or judgment. The lawyers obtained a favorable judgment in the wrongful death action, and distributed the proceeds to the wife.¹⁰ Thereafter, the deceased husband's children unsuccessfully sought to recover a portion of the wrongful death proceeds from the wife. When the wife filed a petition for bankruptcy, the children filed an action against the lawyers, claiming that the lawyers owed them a duty to ensure that any wrongful death proceeds recovered were shared with them.¹¹

The court found that the lawyers owed no duty to their client's stepchildren.¹² The stepchildren had not retained the defendant lawyers to represent them. In fact, an adversarial relationship existed between the stepchildren and the client, making it impossible for the lawyers to represent the stepchildren.¹³ The court held that absent a client-lawyer relationship, a lawyer is liable for injuries to third parties only if his or her conduct is fraudulent or malicious.¹⁴

The Colorado Court of Appeals likewise dismissed malpractice claims asserted by a child of a client in *McGee v. Hyatt Legal Services, Inc.*¹⁵ In that case, a mother hired the Hyatt law firm to represent her in a marriage dissolution action. As part of its representation, the law firm assisted the mother in obtaining temporary joint child custody orders. Thereafter, the mother became dissatisfied with the temporary orders and sought sole custody of her child. The Hyatt law firm obtained a court-ordered custody evaluation and a continuance for the permanent orders hearing until after completion of the evaluation. Thereafter, the mother retained new counsel, who moved to modify the temporary orders and arranged for the completion of the custody evaluation. The evaluation report recommended joint custody, and the court entered an order for joint custody of the child.¹⁶ The mother and child then filed a lawsuit against the Hyatt firm. The jury awarded damages to both the mother and the child.¹⁷ The Colorado Court of Appeals reversed, finding that the child could not recover against the Hyatt law firm because the law firm owed no duty to the child.¹⁸ "An attorney, while performing his obligations to his client, is liable to third parties only when his conduct is fraudulent or malicious."¹⁹

No Duty of Care to Shareholders, Officers, or Directors of a Client Corporation

A corporate officer or shareholder lacks standing to bring suit individually against an alleged tortfeasor to recover damages for an injury to the corporation.²⁰ "Where a corporation is harmed by some action of a third party, the right to seek redress for that wrong belongs to the corporation. Since the wrong is to the corporation, the shareholders cannot recover separately for the indirect harm to their stock."²¹

A lawyer does not have a client-lawyer relationship with a corporation's shareholders simply because the lawyer represents the corporation. In *Schmidt v. Frankewich*,²² the plaintiff shareholders were personal guarantors of the corporation's loan. When the corporation defaulted, the individual shareholders were sued.²³ The shareholders relied on the company's lawyers to stay the proceedings, but were defaulted when no responsive pleadings were filed.²⁴ The plaintiffs then sued the defendant lawyers on a third-party beneficiary theory.²⁵ The court upheld the dismissal of the legal malpractice claim, refusing to extend the prohibition of suits by non-client third parties in the absence of fraud or malice.²⁶ In doing so, the court cited three policy concerns in maintaining the prohibition

against third party suits: “(1) the attorney’s duty of loyalty and effective advocacy for his client; (2) the nature of the adversarial relationship between an attorney and other parties; and (3) the potential liability to an unlimited number of third parties if attorney liability to third parties is extended.”²⁷

A lawyer may directly or impliedly establish a client-lawyer relationship with shareholders or other constituents of a corporate client, but they are otherwise not clients and are not third-party beneficiaries of the corporation’s contract with the lawyer.²⁸ There appears to be no reason, however, why shareholders could not assert a derivative action against a lawyer pursuant to C.R.C.P. 23.1.

No Duty of Care to Owners of a Closely Held Business

The principle that a corporate officer or shareholder has no individual standing to bring suit on behalf of a corporation applies with equal force to closely held corporations. As stated by the Colorado Supreme Court in *Industrial Commission of Colorado v. Lavach*,²⁹ “Even where all the stock is owned by a sole shareholder, there seems no adequate reason to depart from the general rule that the corporation and its shareholders are to be treated as distinct legal persons.” This rule of standing applies even where the value of the shareholder’s stock has been diminished by the third party’s tort.³⁰ Thus, although the corporation may be owned by only a handful of shareholders, or even one, the lawyer’s duty is still to the corporation, not to the shareholder. In practice, of course, lawyers routinely represent both the closely held business entity and its owners. Such an arrangement generally poses no problems, as long as no conflict of interests arises. Frequently, the lawyer will represent one or more owners in forming or acquiring the business entity, will represent the entity and potentially the owners in various legal matters relating to the business, and will represent the owners and the entity in winding up or selling the business.

No Duty of Care to Business Partners

A lawyer representing a joint venture or partnership does not have a client-lawyer relationship with individual partners and, thus, no liability to the partners for malpractice.³¹ As the Colorado Court of Appeals held in *Turkey Creek, LLC v. Rosania*,³² “[T]he fact that an attorney represents a partnership does not, standing alone, create an attorney-client relationship with each of the partners, for that transaction or otherwise.” Similarly, representing one partner does not create a duty between the lawyer and the partnership or joint venture.³³

It is also worth noting that the existence of a partnership continues after the dissolution of the partnership, until the winding up of the partnership affairs is complete,³⁴ which may also extend the lawyer’s duty longer than one might expect. Other jurisdictions have allowed a partner to bring suit against a negligent lawyer during the winding-up process.³⁵

§ 30.2 CLAIMS BY THIRD PARTIES

Outside the usual framework of claims for professional negligence, breach of fiduciary duty, and breach of contract lay a number of other claims under which lawyers may be liable, including intentional torts. In some cases, a lawyer may be liable to third-party non-clients.

§ 30.2.1—Negligent Misrepresentation

The most significant exception to the general rule that a lawyer, when representing his or her clients, is liable to third parties only for fraudulent or malicious conduct, is that a lawyer may be held liable for negligently supplying false information to another person for use in a business transaction. Colorado has recognized liability for negligent misrepresentations made in the course of business transactions at least since 1980, if not earlier.³⁶ In *First National Bank v. Collins*,³⁷ the Colorado Court of Appeals adopted § 552 of the *Restatement (Second) of Torts* (1977), which defines the tort of negligent misrepresentation as follows:

(1) One who, in the course of his business profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) . . . [T]he liability stated in subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it. . . .

Throughout the 1980s and early 1990s, Colorado courts recognized claims for negligent misrepresentation against various professionals, including certified public accountants,³⁸ engineers,³⁹ real estate brokers,⁴⁰ and securities brokers.⁴¹

Colorado courts at first declined, however, to permit claims for negligent misrepresentation against lawyers.⁴² In 1993, the Colorado Court of Appeals decided that there was no reasonable basis for exempting lawyers from liability for negligent misrepresentations, considering that other professionals were subject to liability for their negligent misrepresentations.⁴³

The first published decisions by Colorado courts recognizing claims for negligent misrepresentation against lawyers by non-clients involved opinion letters prepared by lawyers to induce third parties to enter into business deals.⁴⁴ In *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*,⁴⁵ the lawyers represented the Town of Winter Park, Colorado, and the Winter Park Development Authority in an offering of municipal bonds to finance an urban renewal plan. Local voters approved the offering in a special election, and Central Bank of Denver expressed interest in buying the bonds. Before the Bank purchased any bonds, however, the local school district filed a lawsuit alleging that the Town's council failed to make required factual findings before it approved the urban renewal plan. The

Bank informed the underwriter that it would not purchase the bonds if there was a risk that the lawsuit would succeed.

At the request of their clients, the Town and the Authority, the lawyers wrote opinion letters addressed to the Bank stating that the lawsuit lacked merit and that the bonds were valid. The Bank then purchased several million dollars worth of bonds. The Bank also participated in later bond offerings, receiving similar opinion letters prepared by the lawyers before each purchase. The district court subsequently granted partial summary judgment in favor of the school district in its lawsuit against the Town and the Authority, invalidating the urban renewal plan and the financing for bonds. The Authority defaulted on the bonds.

The Bank sued the lawyers for professional negligence and for negligent misrepresentation. The trial court dismissed both claims on summary judgment on the basis that no client-lawyer relationship existed between the Bank and the lawyers.⁴⁶ On appeal, the Colorado Court of Appeals reinstated the claim for negligent misrepresentation.⁴⁷ The Colorado Supreme Court granted certiorari and affirmed the decision of the court of appeals. In support of its opinion, the Colorado Supreme Court emphasized that the lawyers' allegedly false representations were made in the course of a non-adversarial business transaction and that the lawyers knew the Bank was relying upon their representations in purchasing the bonds.⁴⁸ The Colorado Supreme Court held that "[t]o establish a claim for negligent misrepresentation, it must be shown that the defendant supplied false information to others in a business transaction, and failed to exercise reasonable care or competence in obtaining or communicating information on which other parties justifiably relied."⁴⁹ The court further stated that "the misrepresentation must be of a material fact that presently exists or has existed in the past" and that "[e]xpressions of opinion cannot support a misrepresentation claim."⁵⁰

The next case addressing lawyer liability for negligent misrepresentations to non-clients, *Zimmerman v. Dan Kamphausen Company*,⁵¹ also involved an opinion letter. In *Zimmerman*, the plaintiff agreed to sell real property to Dan Kamphausen in exchange for deferred payments under a promissory note. Under his agreement with the plaintiff, Kamphausen was required to obtain guaranties of his obligations under the promissory note from several affiliated entities, including a partnership in which he and his son were general partners. To induce the plaintiff to complete the sale, Kamphausen's lawyer provided the plaintiff with an opinion letter stating that the "partnership has the legal power to execute and deliver the [guaranty] . . . and execution and delivery of the [guaranty] by [Kamphausen] on behalf of the partnership is authorized under the Partnership Agreement."⁵² The plaintiff closed on the transaction, allegedly relying upon the opinion letter. When Kamphausen defaulted on the promissory note, the plaintiff sued the partnership and Kamphausen's son to enforce the guaranty, and sued Kamphausen's lawyer for negligent misrepresentation. The partnership and Kamphausen's son denied liability on the guaranty, arguing that Kamphausen lacked authority to sign the guaranty on the partnership's behalf. The trial court granted summary judgment in favor of Kamphausen's lawyer, but the court of appeals reversed, disagreeing with the lawyer's argument that his opinion letter set forth only legal opinions as opposed to representations of fact.⁵³

On February 19, 2009, the Colorado Court of Appeals announced its opinion in *Steele v. Allen*,⁵⁴ holding that a lawyer can be liable for incorrect legal advice negligently given to a prospective client during an initial consultation, even though the prospective client and lawyer do not proceed to enter into a client-lawyer relationship. In *Steele*, the plaintiffs, Jack and Danette Steele, alleged that they sought legal advice from the defendant lawyer after Mr. Steele was injured in an automobile collision. Mr. and Mrs. Steele alleged that the lawyer told them the applicable statute of limitations on claims against the other driver for negligence and negligence *per se* was five years, rather than the three-year limitations period prescribed by C.R.S. § 13-80-101(1)(n)(I). The Steeles further alleged that the lawyer told them they could not bring a claim against the other driver until they settled any workers' compensation claim that Mr. Steele might have. The Steeles alleged that they relied upon the lawyer's advice and, as a result, lost their valuable claims against the other driver. Significantly, however, the Steeles did not allege that they formed a client-lawyer relationship with the lawyer or her law firm. The Steeles sued the lawyer and her firm for professional negligence and for negligent misrepresentation.

The trial court granted the lawyer's motion to dismiss both of the Steeles' claims pursuant to C.R.C.P. 12(b)(5). The trial court concluded that the Steeles' failure to allege a client-lawyer relationship with the lawyer or her firm was fatal to their claim for professional negligence. The trial court further reasoned that claims by non-clients against lawyers for negligent misrepresentation were limited to cases in which the lawyer issued an opinion letter for the purpose of persuading the plaintiff to enter into a business transaction.

The Steeles appealed the dismissal of their claim for negligent misrepresentation, and the court of appeals reversed the trial court's order. In concluding that the Steeles had pleaded a viable claim for negligent misrepresentation, the court of appeals reasoned that, although the Colorado Supreme Court's opinion in *Mehaffy* concerned lawyer liability for misrepresentations negligently made in opinion letters, the supreme court did not intend to limit claims for negligent misrepresentation against lawyers to such circumstances.⁵⁵ The court of appeals further noted that courts in other jurisdictions had upheld claims against lawyers for negligent misrepresentations made outside the context of opinion letters.⁵⁶

Additionally, the court of appeals was persuaded by the articulation of the duty of care owed by a lawyer to a prospective client set forth in § 15 of the *Restatement (Third) of the Law Governing Lawyers* (2000) and Comment e thereto. Section 15 of the *Restatement* provides in relevant part as follows: "When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must . . . use reasonable care to the extent the lawyer provides the person legal services."⁵⁷ Comment e offers the following elaboration on that duty of care:

When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the

prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it.⁵⁸

The court of appeals further stated, however, that “the specter of potential liability to an unlimited number of third parties . . . is alleviated by the requirement in a claim for negligent misrepresentation that the plaintiff show that the defendant supplied false information in the context of a business transaction regarding the representation of a potential client.”⁵⁹ “[I]nformal statements by an attorney in a social setting would generally not result in a viable claim against the attorney.”⁶⁰ The court of appeals added, “Thus, whether statements are made during an initial consultation for legal services or in a casual manner in a social setting may ultimately be determinative of whether a lawyer is liable for negligent misrepresentation.”⁶¹

The court of appeals’ decision in *Steele* is significant in a least two respects. First, the decision further erodes precedent that disallowed claims based upon incorrect statements about what the law does or does not require. In *Mehaffy*, for example, the Colorado Supreme Court implied that an “opinion of law” would not support a claim for negligent misrepresentation against a lawyer, but concluded that the opinion letters at issue in that case could be viewed as containing misstatements of fact.⁶² Several earlier published decisions in Colorado also took the position that an opinion as to what the law does or does not require will not support a claim for negligent misrepresentation.⁶³ In holding lawyers’ opinion letters to be actionable, the *Mehaffy* and *Zimmerman* cases already had gone a long way toward erasing any practical distinction between legal opinions and factual statements by lawyers; however, the *Mehaffy* and *Zimmerman* courts articulated their conclusions that the relevant lawyers’ letters were not pure opinions of law. In contrast, the court of appeals’ opinion in *Steele* does not state whether the panel viewed the defendant lawyer’s alleged misrepresentations as pure statements of fact or mixed statements of fact and law. Presumably, the court of appeals concluded that the lawyer’s alleged false statements concerning the limitations period for the Steeles’ negligence claims, and their legal ability to pursue those claims prior to resolving any workers’ compensation claims belonging to Mr. Steele, were sufficiently intertwined with factual information to support a claim for negligent misrepresentation. Alternatively, however, the court of appeals tacitly may have accepted an argument advanced by the Steeles on appeal — namely, that if a statement about the law is capable of being proved true or false, it is a factual statement and not mere opinion. It would be possible to prove the falsity of the lawyer’s alleged statement that the Steeles’ negligence claims arising from Mr. Steele’s automobile accident were subject to a five-year statute of limitations.

More significantly, however, *Steele* is one of a very few reported decisions by any court holding that a lawyer may be liable for negligent misrepresentations made to a prospective client during an initial consultation. In what may be the most notable other reported decision, *Togstad v. Vesely, Otto, Miller & Keefe*,⁶⁴ the Minnesota Supreme Court affirmed a jury verdict against a lawyer based on evidence that the lawyer negligently told plaintiff Joan Togstad during an initial consultation that she and her husband did not have a claim for medical malpractice, without qualifying his opinion or advising the Togstads to seek other counsel, causing them not to pursue a valuable claim. In that case, the Togstads’

expert witness testified that the lawyer fell below the standard of care by providing a legal opinion about whether the Togstads had a viable claim without first reviewing pertinent hospital records or consulting an expert before rendering his opinion.⁶⁵ The expert's opinion was reinforced by the testimony of a lawyer with whom the defendant regularly associated in medical malpractice cases.⁶⁶ For his part, the defendant maintained that "the only thing I told [Mrs. Togstad] after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."⁶⁷ The *Togstad* decision offers a glimpse at the range of negligent misrepresentations made by lawyers to prospective clients that arguably could be actionable in Colorado under *Steele*.

§ 30.2.2—False Arrest

A non-client may recover from a lawyer for false arrest. For example, in *Havens v. Hardesty*,⁶⁸ the court of appeals upheld a jury verdict against a lawyer in favor of a non-client who sued for false arrest.⁶⁹ In a case of mistaken identity, the lawyer initiated a proceeding under C.R.C.P. 69 to force the plaintiff, whom the lawyer thought was his client's judgment debtor, to appear in court to testify about his assets. The lawyer did not confirm the judgment debtor's physical description or other information before having the plaintiff served and eventually arrested.⁷⁰ The lawyer argued unsuccessfully that he had been acting in good faith as an officer of the court, and that a third party may only recover from a lawyer acting on his client's behalf upon a showing of fraud or malice.⁷¹ The jury verdict was allowed to stand, and the court noted that the intentional tort of malicious prosecution does not depend upon the existence of a duty.⁷²

§ 30.2.3—Malicious Prosecution

In order to prevail on a malicious prosecution claim, a plaintiff must prove that:

- 1) The defendant contributed to bringing a civil or criminal proceeding against the plaintiff;
- 2) The proceeding was resolved in the plaintiff's favor;
- 3) There was no probable cause for the proceeding;
- 4) The defendant acted with malice; and
- 5) The plaintiff was damaged.⁷³

The purpose of a claim for malicious prosecution is to allow a person who was sued in a baseless legal action to recover his or her costs and attorney fees, any non-economic damages, including psychic damages, caused by having to defend the baseless action, and damages for loss of reputation in the community resulting from the filing and notoriety of baseless allegations.⁷⁴ Civil suits, counterclaims, criminal prosecutions, disciplinary actions, administrative proceedings, and arbitration actions all may be the basis of a malicious prosecution claim.⁷⁵

Before a plaintiff may assert a malicious prosecution claim, the plaintiff must first prevail on the underlying action that forms the basis of the malicious prosecution claim.⁷⁶ The plaintiff must show one of the following: (1) that a competent tribunal adjudicated the claim in his or her favor; (2) the person who commenced the proceedings withdrew them; or

(3) the proceedings were dismissed due to failure to prosecute.⁷⁷ A favorable adjudication may be by a judgment rendered by a court after trial, or by order granting a motion to dismiss or motion for summary judgment.⁷⁸ The adjudication “is a sufficient termination of the proceedings, unless an appeal is taken.”⁷⁹ “If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.”⁸⁰ A settlement does not constitute favorable termination for purposes of a malicious prosecution action.⁸¹

§ 30.2.4—Abuse Of Process

To prove a claim for abuse of process, the plaintiff must establish the following elements:

- 1) “[A]n ulterior purpose for the use of [the legal] proceeding;
- 2) [W]illful action in the use of that process [that is] not proper in the regular course of the proceedings; and
- 3) [R]esulting damages.”⁸²

“The essence of the tort is the use of legal process ‘against another primarily to accomplish a purpose for which it was not designed.’”⁸³

A plaintiff suing a lawyer for abuse of process must show that the claim asserted against the plaintiff was “devoid of reasonable factual support or, if so supported, lacked a cognizable basis in law *and* that the primary purpose for asserting such claim was to harass the other party or to accomplish some other improper objective.”⁸⁴ Allegations that the lawyer violated C.R.C.P. 11 will not, in and of themselves, support a claim for abuse of process.⁸⁵

A plaintiff asserting an abuse of process claim or malicious prosecution claim may recover attorney fees incurred in defending against the underlying litigation.⁸⁶ A plaintiff may not, however, recover attorney fees incurred in bringing the malicious prosecution or abuse of process action itself.⁸⁷

§ 30.2.5—Invasion Of Privacy

Colorado courts have recognized several variations of the tort of invasion of privacy.⁸⁸ The tort of invasion of privacy by intrusion on the seclusion of another “requires an unreasonable manner of intrusion or an intrusion for an unwarranted purpose.”⁸⁹ Invasion of privacy by appropriation of another’s name or likeness requires a showing that:

- 1) The “defendant used the plaintiff’s name or likeness”;
- 2) The “use of the name or likeness was for the defendant’s purposes or benefit”;
- 3) The “plaintiff suffered damages”;
- and
- 4) The “defendant caused the damages.”⁹⁰

A claim of invasion of privacy through unreasonable publicity requires a plaintiff to prove that:

- 1) The facts disclosed were private in nature;
- 2) The disclosure was made to the public;
- 3) The disclosure was one that would be highly offensive to a reasonable person;
- 4) The facts disclosed were not of legitimate concern to the public; and
- 5) -The defendant acted with reckless disregard as to the private nature of the exposed facts.⁹¹

Colorado does not recognize a false light in violation of privacy claim.⁹²

There are no reported cases in Colorado of a lawyer being successfully sued for invasion of privacy. Other jurisdictions, however, have found lawyers liable for the use of exceptional tactics to obtain private facts during an investigation.⁹³ The act of filing a lawsuit is not an invasion of privacy as a matter of public policy,⁹⁴ and statements made during the course of litigation are absolutely privileged, protecting the lawyer from liability for statements related to judicial proceedings.⁹⁵

§ 30.2.6—Interference With A Prospective Economic Relationship

Colorado courts have recognized the tort of interference with prospective economic relationships.⁹⁶ The tort consists of “intentionally ‘(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.’”⁹⁷ The tort does not require the plaintiff to prove the existence of an underlying contract, but merely intentional and improper interference that prevents the formation of a contract.⁹⁸

There is debate as to whether a lawyer should be liable for interference with a prospective business relationship in the absence of fraudulent or malicious conduct. A lawyer’s role requires him or her to have the freedom to advise a client regarding claims and relationships with third parties.⁹⁹ In *Williams v. Burns*,¹⁰⁰ the defendant lawyer advised his client, the Anschutz Corporation, not to purchase the plaintiff’s oil rigs, informing his client that the transaction was fraudulent and that the rigs had already been sold by the bankruptcy court. In his defense, the lawyer argued that he was privileged to interfere with such prospective relations because of his role as an advisor to his client.¹⁰¹ The trial court agreed that a conditional privilege existed here, but found that a triable issue of fact existed as to whether the lawyer had acted with malice.¹⁰² The *Restatements* have adopted the principle that such a privilege should apply to lawyers “if the lawyer acts to advance the client’s objectives without using wrongful means.”¹⁰³ A lawyer may well face liability, however, for assisting his or her client to interfere tortiously with a prospective economic relationship between third parties.

§ 30.2.7—Defamation And Liability For Statements Made In The Course Of Litigation

A plaintiff must prove the following elements to establish a claim for defamation:

- 1) A defamatory statement about another;
- 2) Published to a third party;
- 3) Negligence, or greater fault, on behalf of the publisher; and

4) Special damages to the plaintiff caused by publication or actionability of the statement irrespective of damages.¹⁰⁴

Any legitimate claim against a lawyer for defamation must be for statements occurring outside the litigation context. However, statements of opinion are not actionable as a matter of law.¹⁰⁵ Thus, for liability to attach to a lawyer, the statement must be unrelated to litigation and must involve some sort of defamatory statement of fact causing damage to a third party.

“All lawyers are protected by an absolute privilege against defamation actions based upon litigation conduct in judicial proceedings.”¹⁰⁶ Colorado courts have taken a broad view of the privilege, holding that an absolute privilege attaches to a lawyer’s publications or statements made in the course of and reasonably related to judicial proceedings.¹⁰⁷ In *Russell v. Turnbaugh*,¹⁰⁸ the U.S. District Court for the District of Colorado held that statements made in the course of a judicial proceeding, including the allegations in a plaintiff’s complaint, are absolutely privileged from liability.¹⁰⁹ Presumably, the absolute privilege also applies to statements made in the answer to the complaint and other court filings. The absolute privilege extends to all individuals who are an integral part of the judicial process, including judges, prosecutors, witnesses, and “others who perform official functions in the judicial process.”¹¹⁰

Even statements made prior to the initiation of judicial proceedings are subject to the absolute privilege, if the statement has some relation to the proceeding that is “actually contemplated in good faith.”¹¹¹ In making the determination whether the statement is sufficiently related to the subject of proposed litigation, “No strained or close construction will be indulged to exempt a case from the protection of privilege.”¹¹²

The absolute privilege has been applied to a variety of other contexts. It has been invoked with respect to a letter written to county commissioners asking for revocation of a liquor license,¹¹³ to statements made in a written report preliminary to a workers’ compensation hearing,¹¹⁴ and to a verbal complaint of a race “fix” made by a driver to a racing steward who had authority to commence racing commission proceedings.¹¹⁵ In *Wagner v. Hilkey*,¹¹⁶ the court of appeals held that absolute privilege extends to all civil claims based on a witness’s testimony, regardless of malice or actual knowledge of falsity of the testimony.¹¹⁷ In *Williams v. Boyle*,¹¹⁸ the court of appeals clarified in *dicta* that “the absolute privilege that exists for certain communications by an attorney to a third party is not the result of the confidential relationship between the attorney and the client but, rather, exists only when the attorney’s statement is made in relation to a proposed or occurring judicial proceeding.”¹¹⁹

Besides defamation cases, where it is most often applied,¹²⁰ absolute immunity has been extended to apply to nearly every claim that could be based on a witness’s testimony: civil rights violations under 42 U.S.C. § 1983,¹²¹ invasion of privacy,¹²² slander of title,¹²³ misappropriation of trade secrets,¹²⁴ tortious interference with contract,¹²⁵ and intentional infliction of emotional distress.¹²⁶ Although witnesses in most quasi-judicial proceedings, including administrative hearings, are granted absolute immunity, the Colorado Supreme Court has held that absolute immunity does not extend as far as witness statements in

personnel disciplinary proceedings.¹²⁷ A witness's statements made in a videotaped deposition replayed at trial in lieu of trial testimony are protected as well.¹²⁸ The *Restatement (Third) of the Law Governing Lawyers* has adopted the position that a lawyer should be absolutely privileged to publish statements regarding a non-client if (1) the publication occurs in a proceeding before a tribunal or is preliminary to such a proceeding; (2) "the lawyer participates as counsel in that proceeding"; and (3) the statement is "published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding."¹²⁹

§ 30.2.8—Aiding And Abetting A Breach Of Fiduciary Duty

A lawyer may be found liable for aiding and abetting another person, including his or her client to breach a fiduciary duty, providing that the lawyer knowingly participates in aiding the client's breach.

Liability for aiding or abetting a tortious act will be found if the party whom the defendant aids performs a wrongful act that causes an injury, the defendant is generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance, and the defendant knowingly and substantially assists the principal violation.¹³⁰

The plaintiff must prove the following elements: (1) breach by a fiduciary of a duty owed to the plaintiff, (2) the defendant's knowing participation in the breach, and (3) damages.¹³¹

In *Holmes v. Young*,¹³² the plaintiff was a limited partner in a partnership. The defendant lawyer represented the partnership in a real estate action, and the partnership settled the case. The plaintiff was dissatisfied with the settlement and obtained his own lawyer to dispute the settlement and the distribution of the settlement proceeds. Thereafter, the plaintiff settled his suit against the partnership, the general partner, and the defendants in the underlying action, whereby the partnership and the general partner agreed to make payments to the plaintiff. At the time of this settlement, in 1983, the partnership terminated. In 1985, the defendant lawyer delivered the remaining funds of the partnership to the general partner. The defendant lawyer's involvement with the partnership ended in 1987.¹³³ From 1983 until 1987, the general partner made the required payments to the plaintiff. In 1988, the general partner failed to make a payment to the plaintiff.¹³⁴

The plaintiff then filed an action against the partnership and the general partner, alleging breach of fiduciary duty and breach of contract, and against the defendant lawyer for aiding and abetting a breach of fiduciary duty. The trial court dismissed the action, and the appellate court affirmed, holding that the plaintiff could not maintain a claim for aiding and abetting. Because the partnership terminated, the court found that no fiduciary duty existed between the partnership and the plaintiff or between the general partner and the plaintiff.¹³⁵ Thus, in the absence of a fiduciary duty, the defendant lawyer could not be liable for aiding and abetting the breach of a fiduciary duty. Further, the court found that even if a fiduciary duty did exist, the defendant lawyer did not *knowingly* assist in the breach of that

duty.¹³⁶ The knowledge required to aid and abet is knowing that the primary violator is a fiduciary and the “knowledge that the primary’s conduct contravenes a fiduciary duty.”¹³⁷

§ 30.2.9—Civil Conspiracy Claims

To successfully assert a claim for civil conspiracy, a plaintiff must show the existence of “(1) two or more persons . . . ; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.”¹³⁸ However, the Colorado Supreme Court recognized the viability of such claims in *Resolution Trust Corporation v. Heiserman*.¹³⁹ In that case, the plaintiff alleged that the lawyers consciously and deliberately pursued a common plan with their clients to create “asset protection trusts and partnerships” (more commonly known as fraudulent transfers) for the purpose of frustrating recovery by legitimate creditors.¹⁴⁰ The Colorado Supreme Court concluded that joint and several liability against the lawyers could be based on evidence from which a tacit agreement to act in concert could be implied.¹⁴¹

In *Fasing v. LaFond*,¹⁴² the plaintiff, a lawyer, asserted a civil conspiracy counterclaim against his client, another lawyer. LaFond represented Fasing in an employment action. Initially, Fasing paid LaFond an hourly fee for his legal work. Later, LaFond drafted a contingent fee agreement and ceased hourly billing. Fasing, however, did not sign the agreement and LaFond did not send Fasing a duplicate copy within 10 days.¹⁴³ The employment action settled, and LaFond sought to retain a 25 percent share of the settlement pursuant to the contingent fee agreement. Fasing argued that she never entered into a contingent fee agreement and thus did not owe LaFond 25 percent of the settlement.¹⁴⁴ LaFond filed a counterclaim against Fasing, alleging civil conspiracy.¹⁴⁵ The trial court determined that no contingent fee agreement existed and that LaFond’s counterclaim of civil conspiracy, along with his claims for fraudulent misrepresentation, promissory estoppel, and intentional interference with contract, were “impermissible attempts to evade the public policy behind the contingent fee agreement rules.”¹⁴⁶ The court of appeals affirmed.

In *Eadon v. Reuler*,¹⁴⁷ the plaintiff sued her lawyers after deeming a property division unsatisfactory. She claimed that her lawyers conspired with her former husband and his lawyer to obtain the divorce decree and alleged inequitable distribution of the property. The Colorado Supreme Court affirmed the trial court’s dismissal of the conspiracy and fraud charges, stating:

A lawyer does not guarantee results. He merely undertakes to use his best skill and judgment. A result unsatisfactory to the litigant scarcely justifies a suit charging the lawyers with fraud and conspiracy. Efforts of a lawyer to obtain an amicable disposition do not subject him to a charge of treason.¹⁴⁸

§ 30.2.10—Consumer Protection Act Claims

Although there are no reported cases in Colorado holding so, it is conceivable that a lawyer might face a deceptive trade practice claim from a third party. The portions of the Colorado Consumer Protection Act (CCPA) that may potentially apply to lawyers are those where a person makes false representations as to the nature of services, represents that

services are of a different standard or quality than they really are, fails to disclose material information concerning services, or refuses to obtain all government licenses to perform the required services.¹⁴⁹

In order to establish a claim under the CCPA, a plaintiff must show:

(1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.¹⁵⁰

The Colorado Supreme Court has held that lawyers may be liable for violations of the CCPA and that no special test for CCPA liability should be applied to lawyers. A CCPA claim must allege that the lawyer "or law firm knowingly engaged in a deceptive trade practice, which occurred in the course of the [lawyer] or firm's business, vocation, or occupation, significantly impacting the public as actual or potential consumers of legal services, and causing injury in fact to a legally protected interest of the plaintiff."¹⁵¹ The public impact requirement of a CCPA claim requires an impact beyond the private contract with a client, most likely deceptive advertising practices that affect the public at large, and will therefore rarely accompany a legal malpractice claim.¹⁵² (See Chapter 29, § 29.1, for a more in-depth discussion of CCPA claims against lawyers.) The Colorado Supreme Court has held that a third-party non-consumer may have standing to pursue a CCPA claim, so long as he or she suffered some injury in fact.¹⁵³

§ 30.2.11—Conversion And Civil Theft

One who wrongfully exercises dominion over the property of another may be liable for conversion. To state a claim for conversion against a lawyer, a plaintiff must show (1) that the plaintiff had the right to ownership or possession of the property in question; (2) the lawyer's wrongful control over the property; and (3) damages.¹⁵⁴

A lawyer sued for conversion by a non-client has no special immunities that would protect him or her from liability.¹⁵⁵ Even if the defendant lawyer's actions were taken for the benefit of the client, the lawyer may still be liable to a third party.¹⁵⁶

In *Ruscitti v. Sackheim*,¹⁵⁷ a lawyer obtained a default judgment on behalf of his client and executed the judgment against the defaulting party's grocery store. The lawyer was thereafter sued for conversion by the defaulting party's wife, who alleged that she was a co-owner of the store.¹⁵⁸ The court held that the lawyer was not liable for conversion because he was acting lawfully, further noting that joint property may be seized to secure the debts of only one of several co-owners.¹⁵⁹

A lawyer or firm that disburses funds from a COLTAF account, when those funds are subject to a lien, may be liable under Colorado's civil theft statute, C.R.S. § 18-4-405. In *Lariviere, Grubman & Payne, LLP v. Phillips*,¹⁶⁰ the plaintiff law firm sued its former client

and local counsel for its client for theft of funds that were subject to the plaintiff's charging lien. The plaintiff represented the client under a contingent fee agreement that contained a clause providing that, in the event the client terminated the representation without cause, the plaintiff would be paid the reasonable value of its services.¹⁶¹ The plaintiff proceeded to represent the client at trial, where a jury returned a verdict of \$1.85 million in the client's favor.¹⁶² The client discharged the plaintiff and retained new counsel while post-trial motions were pending.¹⁶³ The plaintiff promptly filed a charging lien in the case pursuant to C.R.S. § 12-5-119.¹⁶⁴

Following post-verdict negotiations, the plaintiff's former client received \$2.55 million in settlement of his claims.¹⁶⁵ The plaintiff alleged that the client's new counsel and local counsel committed civil theft by ignoring the plaintiff's charging lien, paying themselves \$1.65 million in legal fees, and disbursing the remainder to the client.¹⁶⁶ The court denied the defendant lawyers' motions to dismiss the civil theft claim. The court concluded that the plaintiff had a proprietary interest in the settlement funds by virtue of its charging lien, and that the plaintiff adequately pleaded a civil theft claim by alleging that the defendant lawyers knowingly obtained or exercised control over the settlement funds without the plaintiff's authorization.¹⁶⁷

§ 30.2.12—Fraud

The general rule is that a lawyer, while acting in his or her client's best interests, is not liable to a third party in the absence of fraud or malice.¹⁶⁸ When a fraudulent act has been committed, however, a lawyer may be liable to third parties, potentially even adversaries.¹⁶⁹ Liability to a non-client normally is predicated upon an affirmative misrepresentation.¹⁷⁰ At least one court in Colorado, however, has recognized a claim for fraudulent concealment against a lawyer by a non-client.¹⁷¹

In order to prove fraudulent misrepresentation, the plaintiff establish the following:

- 1) The defendant made a false representation of a material fact while knowing that representation to be false;
- 2) The "person to whom the representation was made was ignorant of the falsity";
- 3) The "representation was made with the intention that it be acted upon";
- 4) The plaintiff in fact relied upon the representation; and
- 5) The "reliance resulted in damage to the plaintiff."¹⁷²

§ 30.2.13—Subrogation And Indemnity

Lawyers have faced potential claims from non-clients under theories of subrogation or indemnification. Insurance companies forced to pay on claims because of a lawyer's negligence have been known to assert claims against a lawyer under a theory of equitable subrogation. Under equitable subrogation, a party secondarily liable, usually an insurer, who has paid on behalf of the primary party may step into the shoes of that party and institute an action against any other party at fault to be made whole.¹⁷³

In *Essex Insurance Company v. Tyler*,¹⁷⁴ an insurance company was unsuccessful in its effort to recover against its insured's lawyer for legal malpractice. An insurer's claim for

equitable subrogation likewise was rejected in *State Farm Fire & Casualty Company v. Weiss*.¹⁷⁵ Because the client-lawyer relationship involves a high degree of personal trust and personal service, Colorado courts have held that legal malpractice claims are not assignable.¹⁷⁶ The Colorado Supreme Court has yet to address this issue.

§ 30.2.14—Employee Retirement Income Security Act (ERISA)

A lawyer may be sued by the trustee of a plan under the Employment Retirement Income Security Act (ERISA).¹⁷⁷ The statute expressly allows a beneficiary to assert a claim for breach of fiduciary duty on behalf of the plan.¹⁷⁸

A lawyer offering advice to a plan is not automatically a fiduciary under ERISA.¹⁷⁹ According to the act:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.¹⁸⁰

Another potential basis for lawyer liability is found in ERISA's prohibition against fiduciaries receiving personal compensation from a party dealing with the plan. A lawyer paying bribes to fiduciaries in order to secure legal business from the plan has been sued for bribery under the act.¹⁸¹ A lawyer wishing to avoid liability under ERISA "should refrain from participating in any significant business decisions or transactions involving the plan, its assets or members."¹⁸²

* Updating and supplementing previous work by Michael T. Mihm, Starrs Mihm & Pulkrabek LLP; Justin G. Blankenship, Esq.; and Leslie C. Dolan, Leventhal Brown & Puga, P.C.

NOTES

1. See *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1313 (Colo. App. 1998); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994); *Shriners Hosp. for Crippled Children, Inc. v. Southard*, 892 P.2d 417, 418 (Colo. App. 1994); *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991); *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 330-31 (Colo. App. 1989); *Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. App. 1976).

2. *Montano*, 778 P.2d at 330-31; *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995).

3. *Shriners Hosp.*, 892 P.2d 417.

4. *Id.* at 418.

5. *Id.*

6. *Id.*
7. *Id.*
8. *Id.* at 419; *see also Mehaffey, Rider, Windholz & Wilson*, 892 P.2d at 235; *Glover*, 894 P.2d at 24 (lawyer not liable to intended third-party testamentary beneficiary for negligently drafting the testamentary instrument so long as the document accurately reflects the testator's intent).
9. *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *McGee v. Hyatt Legal Servs., Inc.*, 813 P.2d 754 (Colo. App. 1990).
16. *Id.* at 756.
17. *Id.* at 756-57.
18. *Id.* at 757.
19. *Id.*
20. *Box v. Roberts*, 148 P.2d 810, 811-12 (Colo. 1944); *Holmes v. Jewett*, 55 Colo. 187, 192, 134 P. 665, 667 (1913); *A.R.A. Mfg. Co. v. Cohen*, 654 P.2d 857, 860 (Colo. App. 1982); *see also Larimer & Weld Reservoir Co. v. Fort Collins Milling & Elevator Co.*, 60 Colo. 241, 152 P. 1160 (1915).
21. *A.R.A. Mfg. Co.*, 654 P.2d at 860 (citations omitted). *See also McDaniel v. Painter*, 418 F.2d 545, 547 (10th Cir. 1969).
22. *Schmidt v. Frankewich*, 819 P.2d 1074, 1076 (Colo. App. 1991).
23. *Id.*
24. *Id.*
25. *Id.* at 1079.
26. *Id.*
27. *Id.* (citing *Montano*, 778 P.2d 328).
28. *Id.*
29. *Indus. Comm'n of Colo. v. Lavach*, 439 P.2d 359, 361 (Colo. 1968) (quoting *Box*, 148 P.2d at 812)).
30. *Box*, 148 P.2d at 811-12.
31. *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998).
32. *Turkey Creek*, 953 P.2d at 1311.
33. *Id.*
34. *Hooper v. Yoder*, 737 P.2d 852, 858-59 (Colo. 1987).
35. *Berk v. Sherman*, 682 A.2d 209 (D.C. 1996).
36. *See First Nat'l Bank v. Collins*, 616 P.2d 154, 155 (Colo. App. 1980); *see also Denver & R. G. W. R. Co. v. Marty*, 353 P.2d 1095, 1098 (Colo. 1960) (implicitly recognizing the existence of a claim for negligent misrepresentation); *Birkenmayer & Co. v. Homestead Minerals*, 510 P.2d 449, 451 (Colo. App. 1973) (discussing liability for negligent misrepresentations).
37. *First Nat'l Bank*, 616 P.2d at 155 (quoting *Restatement (Second) of Torts* § 552 (1977)).
38. *See Marquest Medical Products, Inc. v. Daniel, McKee & Co.*, 791 P.2d 14, 15-17 (Colo. App. 1990) (implicitly recognizing a cause of action for negligent misrepresentations made by CPAs).
39. *See Wolther v. Schaarschmidt*, 738 P.2d 25, 27-28 (Colo. App. 1986).
40. *See Messler v. Phillips*, 867 P.2d 128 (Colo. App. 1993).
41. *See Ebrahimi v. E.F. Hutton & Co.*, 794 P.2d 1015, 1016 (Colo. App. 1989).
42. *See Montano*, 778 P.2d at 330.
43. *See Central Bank, N.A. v. Mehaffy, Rider, Windholz & Wilson*, 865 P.2d 862 (Colo. App. 1993).
44. The vast majority of reported decisions involving claims against lawyers for negligent misrepresentation involve opinion letters. *See generally* 1 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 7.14 (2008).

45. *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 233 (Colo. 1995).
46. *See id.* at 235.
47. *Central Bank*, 865 P.2d 862.
48. *Mehaffy*, 892 P.2d at 235.
49. *Id.* at 236.
50. *Id.* at 237.
51. *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998).
52. *Id.* at 240.
53. *See id.*
54. *Steele v. Allen*, No. 07CA2163, 2009 Colo. App. LEXIS 214 (Colo. App. Feb. 19, 2009), *cert. pending*.
55. *Id.* at *7.
56. *Id.* at **7-8.
57. *Restatement (Third) of the Law Governing Lawyers* § 15(1)(c) (2000).
58. *Id.* § 15 cmt. e.
59. *Steele*, 2009 Colo. App. LEXIS 214, at **9-10.
60. *Id.* at *10.
61. *Id.* at **10-11.
62. *See Mehaffy*, 892 P.2d at 237-38.
63. *See Chacon v. Scavo*, 358 P.2d 614, 614-15 (1960) (holding that the buyer of lots could not base a claim for misrepresentation against the seller on allegations that the seller falsely stated that houses could be built on the lots, because whether houses could be built on the lots depended upon interpretation of ordinances and was a question of law); *Two, Inc. v. Gilmore*, 679 P.2d 116, 117 (Colo. App. 1984) (holding that a hotel owner's representation that a management agreement would allow the plaintiff to share the hotel's liquor license was an opinion of law and not actionable).
64. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980).
65. *See id.* at 691-92.
66. *See id.* at 692.
67. *Id.* at 691.
68. *Havens v. Hardesty*, 600 P.2d 116 (Colo. App. 1979).
69. *Id.* at 119.
70. *Id.* at 118.
71. *Id.* at 119.
72. *Id.*
73. *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007).
74. *Walford v. Blinder, Robinson & Co., Inc.*, 793 P.2d 620, 623 (Colo. App. 1990).
75. *Id.*
76. *See, e.g., Moran v. Klatzke*, 682 P.2d 1156, 1157 (Ariz. Ct. App. 1984).
77. *See Hewitt*, 154 P.3d at 415.
78. *See id.*
79. *See id.* (quoting *Restatement (Second) of Torts* § 674 cmt. j (1997)).
80. *See id.* (quoting *Restatement (Second) of Torts* § 674 cmt. j (1997)).
81. *See id.*
82. *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994); *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 202 (Colo. App. 1998).
83. Notes on Use CJI-Civ. 17:10 (CLE ed. 2009) (quoting *Restatement (Second) of Torts* § 682 (1977)).
84. *See Henry v. Kemp*, 829 P.2d 505, 507 (Colo. App. 1992) (emphasis added).
85. *See id.* at 506. The *Henry* court also held that C.R.C.P. 11 does not give rise to an independent cause of action. *See id.* at 506-07.
86. *See Technical Computer Servs., Inc. v. Buckley*, 844 P.2d 1249, 1256 (Colo. App. 1992) (citing *Bernstein v. Simon*, 235 P. 375 (Colo. 1925); cmt. c, *Restatement (Second) of Torts* § 671 (1977)); *Walford*, 793 P.2d at 623.

87. *Buckley*, 844 P.2d at 1256 (citing C. McCormick, *Damages* § 66 (1935); 54 C.J.S. *Malicious Prosecution* § 97 (1987)).
88. *People v. Home Ins. Co.*, 591 P.2d 1036, 1038 (Colo. 1979) (citing W. Prosser, *Torts* § 117 (4th ed. 1971), for the proposition that “the common law tort of invasion of privacy contains four distinct kinds of invasion of four different interests: (1) intrusion upon physical solitude; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of name or likeness.”); *Slaughter v. John Elway Dodge Sw. AutoNation*, 107 P.3d 1165, 1170-71 (Colo. App. 2005) (noting that Colorado has recognized three distinct torts sharing the moniker “invasion of privacy”).
89. *Slaughter*, 107 P.3d at 1171 (quoting *Denver Publ’g Co. v. Bueno*, 54 P.3d 893 (Colo. App. 2002)).
90. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 997 (Colo. 2001).
91. *Tonnessen v. Denver Publ’g Co.*, 5 P.3d 959, 966 (Colo. App. 2000).
92. *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 904 (Colo. 2002).
93. See, e.g., *Noble v. Sears, Roebuck & Co.*, 33 Cal. App.3d 654, 660 (1973).
94. See *Legal Malpractice* § 6.29 at 789.
95. See discussion in § 30.2.7 of this Chapter.
96. See, e.g., *Plaza Esteban v. La Casa Nino, Inc.*, 738 P.2d 410, 412 (Colo. App. 1989), *rev’d on other grounds*, 762 P.2d 669 (Colo. 1988); *Dolton v. Capitol Fed. Sav. & Loan Ass’n*, 642 P.2d 21, 23 (Colo. App. 1981).
97. *Wasalco, Inc. v. El Paso Co.*, 689 P.2d 730, 732 (Colo. App. 1984) (quoting *Restatement (Second) of Torts* § 766B (1979)).
98. See *Williams v. Burns*, 540 F. Supp. 1243, 1251-52 (D. Colo. 1982); *Dolton*, 642 P.2d at 23.
99. See, e.g., *supra* n. 44, *Legal Malpractice* § 6.26, at 773.
100. *Williams v. Burns*, 540 F. Supp. 1243 (D. Colo. 1982).
101. *Id.* at 1252.
102. *Id.*
103. *Restatement (Third) of the Law Governing Lawyers* § 57(3) (2000); see also *Restatement (Second) of Torts* § 772 (1979).
104. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1153 n. 13 (Colo. 1997); *Williams v. Dist. Ct.*, 866 P.2d 908, 912 n. 4 (Colo. 1993).
105. *Gordon v. Boyles*, 9 P.3d 1106, 1120 n. 14 (Colo. 2000) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 6-21 (1990)).
106. *Robinson v. Volkswagenwerk AG*, 940 F.2d 1369, 1372 (10th Cir. 1991).
107. See, e.g., *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034, 1044-45 (D. Colo. 1988); *Renner v. Chilton*, 351 P.2d 277 (Colo. 1960); *Glasson v. Bowen*, 267 P. 1066, 1067 (Colo. 1928); see also *MacLarty v. Whiteford*, 496 P.2d 1071, 1072 (Colo. App. 1972); see generally *Restatement (Second) of Torts* §§ 585 through 589 (1977); W. Keeton, *Prosser and Keeton on the Law of Torts* 815-20 (5th ed. 1984).
108. *Russell v. Turnbaugh*, 18 *Media L. Rptr.* 2189, 18 U.S.P.Q.2d 1948 (D. Colo. 1991), *motion to vacate denied*, 774 F. Supp. 597 (D. Colo. 1991), *appeal dismissed* 957 F.2d 796 (10th Cir. 1992).
109. *Id.*
110. See *Hoffler v. Colo. Dep’t of Corr.*, 27 P.3d 371, 374 (Colo. 2001).
111. *Merrick v. Burns*, 43 P.3d 712, 714 (Colo. App. 2001). See also *Club Valencia Home-owners Ass’n, Inc. v. Valencia Assocs.*, 712 P.2d 1024, 1027 (Colo. App. 1985).
112. *Club Valencia Home owners Ass’n*, 712 P.2d at 1027.
113. *Lininger v. Knight*, 226 P.2d 809, 812-13 (Colo. 1951).
114. *Dorr v. C.B. Johnson, Inc.*, 660 P.2d 517, 519 (Colo. App. 1983).
115. *Andrescu v. Lane*, 5 *Media L. Rptr.* 1290 (Arapahoe Dist. Ct. 1979). The *Media Law Reporter* is available at the Federal Courthouse Library in Denver.
116. *Wagner v. Hilkey*, 914 P.2d 460, 462 (Colo. App. 1995), *aff’d*, 933 P.2d 1311 (Colo. 1997).

117. *Id.* at 462; *see also* *Dixon v. Bowen*, 85 Colo. 194, 196-97, 274 P. 824, 825 (1929) (finding no civil liability for perjury).

118. *Williams v. Boyle*, 72 P.3d 392 (Colo. App. 2003).

119. *Id.* at 400.

120. *See, e.g., Robinson*, 940 F.2d at 1372 (“All lawyers are protected by an absolute privilege against defamation actions based upon litigation conduct in judicial proceedings.”); *Buckhannon v. U.S. West Communs.*, 928 P.2d 1331, 1335 (Colo. App. 1996) (“The privilege not only shields attorneys from defamation claims arising from statements made during the course of litigation, but it also bars other non-defamation claims that stem from the same conduct.”); Cmt. c, *Restatement (Third) of the Law Governing Lawyers* § 57 (“As is true of parties to litigation and other participants such as witnesses, a lawyer is absolutely privileged against defamation liability for publishing a defamatory statement relating to civil or criminal litigation before a tribunal exercising a judicial function, even if the lawyer acts maliciously and knows the statement to be false.”).

121. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 329-34 (1983); *Collins v. Walden*, 613 F. Supp. 1306, 1314 (N.D. Ga. 1985), *aff’d without opinion*, 784 F.2d 402 (11th Cir. 1986); *Dale v. Bartels*, 552 F. Supp. 1253, 1267-68 (S.D.N.Y. 1982), *aff’d in part and rev’d in part on other grounds*, 732 F.2d 278 (2d Cir. 1984); *Gilliam v. Napa Co.*, No. C02-00705 WHA, 2002 U.S. Dist. LEXIS 15449 (N.D. Cal. Aug. 8, 2002).

122. *See, e.g., Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034, 1044-45 (D. Colo. 1988); *Mantia v. Hanson*, 79 P.3d 404, 410-13 (Ore. Ct. App. 2003).

123. *See, e.g., Wendy’s of South Jersey, Inc. v. Blanchard Mgmt. Corp.*, 494, 406 A.2d 1337, 1338 (N.J. Super. Ct. 1979); *Procacci v. Zacco*, 402 So.2d 425, 427 (Fla. Dist. Ct. App. 1981).

124. *ITT Telecom Prods. Corp. v. Dooley*, 262 Cal. Rptr. 773, 781-83 (Cal. Ct. App. 1989).

125. *Rainier’s Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889, 895 (N.J. 1955); *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass’n*, 172 A.2d 22, 25 (N.J. Super. Ct. App. Div. 1961); *Drummond v. Stahl*, 618 P.2d 616, 619 (Ariz. Ct. App. 1980); *Procacci*, 402 So.2d at 427; *Meyer v. Hubbell*, 324 N.W.2d 139, 143 (Mich. Ct. App. 1982); *Western Tech., Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318, 1321-24 (Ariz. Ct. App. 1986); *Pelagatti v. Cohen*, 536 A.2d 1337, 1342-43 (Pa. Super. Ct. 1987); *Blanchette v. Cataldo*, 734 F.2d 869, 877-78 (1st Cir. 1984); *Sriberg v. Raymond*, 414 F. Supp. 396, 398 (D. Mass. 1976), *aff’d*, 544 F.2d 15 (1st Cir. 1976); *McLaughlin v. Copeland*, 455 F. Supp. 749, 752 (D. Del. 1978), *aff’d without opinion*, 595 F.2d 1213 (3d Cir. 1979); *Hoover v. Van Stone*, 540 F. Supp. 1118, 1121-22 (D. Del. 1982).

126. *See, e.g., Bencomo v. Morgan*, 210 So.2d 236, 237 (Fla. Dist. Ct. App. 1968); *Knox v. Dick*, 665 P.2d 267, 270 (Nev. 1983); *Thompson v. Sikov*, 490 A.2d 472, 473 (Pa. Super. Ct. 1985); *Kirschstein v. Haynes*, 788 P.2d 941, 947 (Okla. 1990). *See also Brody v. Montalbano*, 87 Cal. App.3d 725, 738 (1978) (privilege bars claim for emotional distress); *Brown v. Delaware Valley Transplant Program*, 539 A.2d 1372, 1374-75 (Pa. Super. Ct. 1988) (privilege bars claim for mutilation of corpse); *Aisenberg v. Hillsborough County Sheriff’s Office*, 325 F. Supp. 2d 1366, 1375 (M.D. Fla. 2004) (“A prosecutor receives absolute immunity only for acts “that are connected with the prosecutor’s role in judicial proceedings. . . .”) (quoting *Burns v. Reed*, 500 U.S. 478, 494-95 (1991)); *Sophamysay v. City of Sergeant Bluff*, 218 F. Supp. 2d 1027, 1046 (N.D. Iowa 2002) (finding that a government lawyer prosecuting a child neglect action was performing a function analogous to a prosecutor and therefore enjoyed absolute immunity). The *Restatement* has taken the position that, while a claim by a non-client for emotional distress is possible, a lawyer’s conduct in vigorously prosecuting a client’s case should be immune. Cmt. g, *Restatement (Third) of the Law Governing Lawyers* § 56 (“[A] lawyer’s partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client’s case in such a proceeding is not considered extreme and outrageous and is privileged from such tort liability to the opposing party. . . .”).

127. *Hoffler v. Colo. Dep’t of Corr.*, 27 P.3d 371, 374-75 (Colo. 2001).

128. *See Dalton v. Miller*, 984 P.2d 666, 669 (Colo. App. 1999).

129. *Restatement (Third) of the Law Governing Lawyers* § 57(1).

130. *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994).

131. *See id.*

132. *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994).

133. *Id.* at 307.
134. *Id.* at 308.
135. *Id.* at 309.
136. *Id.*
137. *Id.* at 309-10.
138. *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989).
139. *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1057 (Colo. 1995).
140. *See id.* at 1053.
141. *See id.* at 1056.
142. *Fasing v. LaFond*, 944 P.2d 608, 610-11 (Colo. App. 1997).
143. *Id.* at 610.
144. *Id.*
145. *Id.* at 611.
146. *Id.*
147. *Eadon v. Reuler*, 361 P.2d 445 (Colo. 1961).
148. *Id.* at 450.
149. C.R.S. §§ 6-1-105(e), (g), (u), and (z).
150. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).
151. *Crowe v. Tull*, 126 P.3d 196, 200 (Colo. 2006).
152. *Id.* at 208.
153. *Hall v. Walter*, 969 P.2d 224, 231-32 (Colo. 1998).
154. *See generally Legal Malpractice, supra* n. 44, § 6.30, at 790.
155. *ERA Realty Co. v. RBS Props.*, 586 N.Y.S.2d 831, 832 (App. Div. 1992) (“The defendants’ attorney has no privilege or immunity because an attorney is liable if he or she causes irregular process to be issued which occasions loss to the party against whom it is enforced.”).
156. *Id.*
157. *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991).
158. *Id.* at 1047.
159. *Id.* at 1049.
160. *Lariviere, Grubman & Payne, LLP v. Phillips*, No. 07-cv-01723-MSK-CBS, 2008 U.S. Dist. LEXIS 67404 (D. Colo. Sept. 4, 2008).
161. *See id.* at **2-3.
162. *See id.* at *3.
163. *See id.* at **3-4.
164. *See id.* at *4.
165. *See id.*
166. *See id.* at **4-5.
167. *See id.* at **19-21.
168. *See Essex Ins. Co.*, 309 F. Supp. 2d at 1272; *Turkey Creek*, 953 P.2d at 1313; *Glover*, 894 P.2d at 23; *Shriners Hosp.*, 892 P.2d at 418; *Frankewich*, 819 P.2d at 1079; *Montano*, 778 P.2d at 330; *Weigel*, 549 P.2d at 1337.
169. *Wilbourn v. Mostek Corp.*, 537 F. Supp. 302, 305 (D. Colo. 1982).
170. *See, e.g., Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 777 (Mo. Ct. App. 2003); *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App.3d 692, 711 (Ct. App. 1991).
171. *See Wilbourn v. Mostek Corp.*, 537 F. Supp. 302, 305-06 (D. Colo. 1982).
172. *Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 66 (Colo. 2005) (*citing Brody v. Bock*, 897 P.2d 769, 775-76 (Colo. 1995)); *see generally Legal Malpractice, supra* n. 44, § 8.11, at 984.
173. *See, e.g., Essex Ins. Co.*, 309 F. Supp. 2d at 1272; *Mid-Century Ins. Co. v. Travelers Indem. Co. of Ill.*, 982 P.2d 310, 315 (Colo. 1999).
174. *Essex*, 309 F. Supp. 2d at 1272-75.
175. *State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1067-69 (Colo. App. 2008).

176. *Weiss*, 194 P.3d at 1067-69; *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo. App. 1993) (relying on the reasoning of *Goodley v. Wank & Wank, Inc.*, 62 Cal. App.3d 389 (1976), which feared that allowing the assignment of legal malpractice claims would lead to a commoditization of those claims in the marketplace increasing unjustified suits against members of the legal profession).

177. 29 U.S.C. §§ 1001 through 1381. *See, e.g.*, *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002); *Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561 (7th Cir. 1991); *S. Council of Indus. Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996); *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 208 F.3d 1170 (9th Cir. 2000); *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1993).

178. 29 U.S.C. § 1109.

179. *See, e.g.*, *Custer v. Sweeney*, 89 F.3d 1156, 1162 (4th Cir. 1996); *Assocs. in Adolescent Psychiatry, S.C.*, 941 F.2d at 568-70; *Chapman*, 3 F.3d at 1509-10.

180. 29 U.S.C. § 1002(21)(A).

181. *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869 (S.D.N.Y. 1997).

182. *Legal Malpractice*, *supra* n. 44, § 9.3, at 1019.