Chapter 28

COMMON LAW LEGAL MALPRACTICE CLAIMS BY CLIENTS

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§ 28.1 • INTRODUCTION

Legal malpractice litigation is among the most complex, bitter, and expensive types of litigation in the American courts. The subject of a legal malpractice claim can be any matter for which a lawyer may be hired to represent a client. The issues can be as difficult or arcane as was the former client's legal problem, with the added layer of accusations of professional malpractice. Not only must the court and the jury in a legal malpractice action address the issues of the legal malpractice claim itself, but, as part of the causation analysis, the court, the jury, and the parties' lawyers must address the issues in the underlying legal matter, the so-called "case within the case" or "transaction within the case."

The litigation of the "case within the case" can dramatically increase the costs and complexity of a legal malpractice action as compared to malpractice actions against physicians or other licensed professionals. In many legal malpractice lawsuits, the true battleground of the litigation is the "case within the case."

The central premise behind most legal theories of legal malpractice is that there is either (1) a client-lawyer relationship between the lawyer and the plaintiff or (2) a legal duty running from the lawyer to the plaintiff. Usually, the legal malpractice claim is based on professional negligence, but there are circumstances in which it is appropriate for the plaintiff to assert claims based on other legal theories, such as breach of fiduciary duty or breach of contract. In recent years, plaintiffs have asserted claims based on statutes such as the Racketeer Influenced and Corrupt Organizations Act or a consumer protection act. Far too often, however, counsel for the plaintiff in a legal malpractice action will plead multiple legal theories without a clear explanation of the applicability or limitations of the particular legal theory. The result of such lack of analysis or explanation is that the legal malpractice action, already an expensive and complicated undertaking, becomes even more expensive.

§ 28.1.1—Legal Bases For A Lawyer's Liability For Malpractice

Legal malpractice actions are generally based on common law claims that arise out of a legal relationship that is governed by a contract.[1] The lawyer's duties come into being because of the contract, *i.e.*, the creation of the client-lawyer relationship, but the lawyer's duties are generally not duties that arise from the contract. Rather, the duties are those that arise as a matter of law once the contract comes into existence. Although the legal duty comes into existence because of a contract, the claim for breach of duty of a lawyer to a client usually sounds in tort.[2]

The usual common law claims against lawyers are (1) negligence; (2) breach of fiduciary duty; and, sometimes, (3) breach of contract. Often, a plaintiff will assert breach of fiduciary duty and breach of contract claims based on the argument that the mere fact of a lawyer's negligence was itself a breach of fiduciary duty or a breach of contract.[3] Most often, however, the trial courts will dismiss the breach of fiduciary duty and breach of contract claims unless the plaintiff produces evidence of a breach of fiduciary duty or a breach of contract apart from evidence of negligence.[4] Moreover, since a party can recover only once for the same loss,[5] it usually does not strengthen the case to plead multiple claims unless the facts support a separate theory of recovery. If the appropriate claim is negligence and additional claims would merely be duplicative of the negligence claim, the better practice is to assert only the negligence claim.[6]

Recent decisions of the Colorado appellate courts have substantially narrowed the circumstances in which plaintiffs may assert breach of fiduciary duty and breach of contract claims. Now, there must be evidence of a breach apart from the breach of the standard of care.[7]

§ 28.2 • APPLICATION OF THE RULES OF PROFESSIONAL CONDUCT TO LEGAL MALPRACTICE CLAIMS

The Colorado Rules of Professional Conduct set forth an ethical standard for lawyers. The Rules are not binding on the courts and they do not have the force of law.[8] The Preamble to the Rules provides:

> Violation of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct though disciplinary agencies. *They are not designed to be a basis for civil liability*. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, *nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or extra-disciplinary consequences of violating such a duty*.[9]

As a consequence, the majority of jurisdictions have held that a violation of the Code of Professional Responsibility does not give rise to an independent cause of action and does not provide grounds for civil liability *per se*.[10]

Colorado courts have consistently recognized that the ethical rules are not the basis for civil liability against a lawyer. In *Bryant v. Hand*,[11] the Colorado Supreme Court refused to hold that a contingent fee contract was void because of a lawyer's failure to subject a contingent fee contract to the supervision of the courts as provided in a canon of ethics. The *Bryant* court instead held that the old canons of ethics "do not have the force of law."[12]

The Colorado Supreme Court reaffirmed the principle that the ethical rules are not the basis for civil liability in *Taylor v. Grogan*.[13] In that case, the court of appeals ordered a new trial after the plaintiff's lawyers violated the Code of Professional Responsibility by failing to withdraw after being subpoenaed to testify concerning matters that were possibly prejudicial to the lawyers' client.[14] The court of appeals found that the violation of the code automatically disqualified the plaintiff's lawyers, necessitating a new trial.[15] The supreme court reversed, holding that the violation of the code did not mandate a new trial; it reasoned that the code was "designed to provide ethical guidance to attorneys," but that "the mere violation of a disciplinary rule does not automatically result in disqualification."[16]

Likewise, in *Olsen and Brown v. City of Englewood*,[17] the Colorado Supreme Court explained that the ethical rules are "not designed to alter civil liability nor do they serve as a basis for such liability." Rather, the court reasoned, the ethical rules "are in place to provide guidance in the client-lawyer relationship and to serve as a mechanism of internal professional discipline."[18] The Colorado Court of Appeals applied these same standards to the modern Rules of Professional Conduct in *Norton Frickey, P.C. v. James B. Turner, P.C.*[19] The Colorado Supreme Court has the exclusive jurisdiction to oversee the Rules of Professional Conduct.[20]

Although a violation of the ethical rules does not constitute negligence *per se*, an expert witness may testify as to a lawyer's violations of the ethical rules if that testimony forms the basis of the expert's opinions on standard of care issues. In *Miami International Realty Company v. Paynter*,[21] the Tenth Circuit Court of Appeals permitted such expert testimony. There, the plaintiff's expert witness testified that the defendant lawyer's actions were contrary to the ethical rules.[22] The Tenth Circuit reasoned that if, after hearing the testimony regarding a violation of the ethical rules, the jury determined there was negligence *per se*, then the rules were improperly used.[23] If, however, the testimony regarding a violation of the rules was but one part of the evidence against the defendant lawyer, and the expert did not present the rules as "having the force and effect of a law" and did not present deviations from the rules as negligence *per se*, then such testimony was permissible.[24] Such a distinction may be difficult to make, as a court generally will not know how a jury may use an expert's testimony in its deliberations. In this case, the court determined that the lawyer's conduct was so negligent that it likely did not matter to a jury whether the code existed or not.[25]

§ 28.3 • PROFESSIONAL NEGLIGENCE

To establish a *prima facie* case of professional negligence, a plaintiff must show:

1) There was a client-lawyer relationship between the plaintiff and the defendant lawyer;
2) The lawyer breached a duty of care owed to the plaintiff;
3) The plaintiff suffered an injury or loss; and
4) Such injury or loss was caused by the breach of the duty.[26]

In a legal malpractice action, as with any negligence claim, these seemingly simple elements of negligence are only the starting point of the inquiry.

§ 28.3.1—Existence And Scope Of The Duty

In order for a plaintiff to recover for negligence in any type of tort litigation, the defendant must owe a duty of care to the plaintiff.[27] As a practical matter, once the plaintiff proves the existence of a client-lawyer relationship, the plaintiff will have established the existence of a duty by the lawyer to the plaintiff. The duty is to exercise "that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession at the time the task is undertaken."[28] The dispute may then be the scope of the client-lawyer relationship — in other words, what did the lawyer agree to do or not do for the client and what did the lawyer in fact do? A lawyer may agree to limit the scope of his or her work for a client. The client must consent to the limitation after consultation with the lawyer.[29] Whether a lawyer has breached his or her duty to a client depends upon whether the duty fell within the scope of the lawyer's employment.[30] Like all negligence claims, the scope of a lawyer's *duty* is ordinarily a question of law for the court to decide,[31] but the scope of the *representation* will usually be a disputed issue of fact for the jury. If the defendant has no duty to the plaintiff, the plaintiff may not recover for negligence.[32] The court's conclusion as to the existence of a duty is an "expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection."[33]

When determining the scope of a lawyer's duty, the court cannot disregard circumstances that provide reasonable notice that the client may have legal problems or remedies that fall outside the scope of the undertaking. Although the lawyer need not represent or counsel the client concerning matters outside the scope of the representation, the lawyer should generally inform the client of the need for legal assistance and that the lawyer will not be providing such services.[34] Similarly, when a lawyer limits the scope of his or her representation, the lawyer may not ask the client to agree to a representation so limited as to violate the lawyer's obligation to represent the client competently, or to surrender the right to terminate the lawyer's services or settle the litigation.[35] Simply because a lawyer represented a person on an earlier legal matter does not, however, make the person a client of the lawyer in a subsequent unrelated matter where the lawyer is representing another client.[36]

In defining the scope of a lawyer's duties, the *Restatement (Third) of the Law Governing Lawyers* now provides that a lawyer is required to:

> (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; (2) act with reasonable competence and diligence; (3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and (4) fulfill valid contractual obligations to the client.[37]

The consequences of breaching these various duties of care, fiduciary obligations, and contractual obligations to the client are discussed in further detail below.

§ 28.3.2—Privity

Although some jurisdictions still require strict privity between parties before a legal malpractice claim can exist, Colorado follows the majority approach of not requiring strict privity.[38] In general, the doctrine of privity has come to be defined more by its exceptions than by the rule.[39] Rather than applying the contractual doctrine of privity in legal malpractice cases, the vast majority are analyzed under a negligence standard, or some other analog.[40]

Under a negligence analysis, a lawyer's liability is contingent on the breach of a duty. In most cases, that duty is owed to the client alone. Claims brought by adverse parties,[41] family members of the client,[42] parties to a client's business transaction,[43] and even co-counsel[44] almost always fail for lack of a duty.[45] Most claims asserted against a lawyer by a non-client have failed in Colorado.[46] The general rule is that a plaintiff who does not have a client-lawyer relationship may not recover for legal malpractice in the absence of fraud or malice.[47] However, a necessarily narrow interpretation of a lawyer's duty should not be confused for a strict privity requirement. There are a number of circumstances under which a lawyer may be found liable to non-clients. Colorado courts have recognized claims against lawyers by non-clients for negligent misrepresentation,[48] and more recently, for aiding and abetting a breach of fiduciary duty.[49] A more thorough discussion of a lawyer's liability to non-clients can be found in Chapter 30.

§ 28.3.3—Breach Of The Duty Of Care

"[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances."[50] A lawyer who breaches a duty of care owed to a client may be liable for professional negligence.[51] A defendant's liability for negligence applies to nonfeasance as well as malfeasance.[52] Fortunately, the law does not require that the lawyer be infallible.[53] The fact that a lawyer has made a mistake does not mean that the lawyer was negligent as a matter of law.[54] Similarly, a lawyer does not guarantee results but merely undertakes to use his or her best skill and judgment.[55]

The question of whether the lawyer breached a duty is usually an issue of fact for the jury, and not the judge, to decide.[56] However, if the facts are undisputed, the question of whether a lawyer's advice failed to meet the standard of care may be determined as a matter of law in some circumstances.[57]

Need for Expert Witness Testimony to Prove Breach of the Duty of Care

The plaintiff must generally prove the lawyer's breach of the duty of care through expert witness testimony. The Colorado Court of Appeals has repeatedly stated that expert testimony is required to establish the standard of professional conduct in legal malpractice actions.[58] This requirement exists in federal courts as well. Judge Kane, in *International Tele-Marine Corporation v. Malone & Associates, Inc.*,[59] commented that "[i]n malpractice actions, whether an attorney exercised a reasonable degree of care or skill in representing its client is a question of fact often determined through expert testimony and seldom decided as a matter of law."[60]

There are circumstances in which the plaintiff is not required to provide the testimony of an expert witness to establish a defendant lawyer's breach of a professional duty, but Colorado

courts have made it clear that such cases are limited to circumstances where the lawyer's negligence is "clear and palpable."[61] The general standard for admission of expert testimony in any type of malpractice action is whether it will provide assistance on a matter not within the knowledge or common experience of people of ordinary intelligence.[62] A plaintiff in a legal malpractice case is also required to provide expert testimony if the lawyer is being sued for negligent supervision of staff or other lawyers.[63] A plaintiff is required to provide expert witness testimony to prove breach of a confidential relationship, where duties arising from the confidential relationship would be measured against standards applicable to lawyers.[64] Expert testimony should not be excluded simply because it embraced an ultimate issue to be decided by the trier of fact.[65] A trial court may exclude expert testimony if the trial court, sitting as a finder of fact or as a court of equity, finds that the testimony would not be helpful in its deliberations.[66] An expert witness may testify that the underlying case would have been settled, and what a reasonable *client* would have done, but for the lawyer's negligence.[67]

The expert witness may not tell the jury or finder of fact what the law is, because that is the sole province of the trial court.[68] There may be a fine line between impermissible expert testimony about ultimate issues of law and permissible expert testimony about a standard of care or an expert's conclusion based upon mixed questions of facts and law.[69] Nevertheless, it is within the province of the trial court and not the expert witnesses to tell the jury what is the law.[70] As the Colorado Court of Appeals stated in *Tozer v. Scott Wetzel Services, Inc*:[71] "To submit such a question to the jury would not only require the jurors to assess the reasonableness of a legal argument, but it would require the parties . . . to provide the jurors with legal advice through the guise of expert testimony. This, itself, is improper."[72] The Tenth Circuit Court of Appeals also prohibits lawyers from testifying what the law is: "[W]hen the purpose of [expert] testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. *In no instance can a witness be permitted to define the law of the case*."[73] The Tenth Circuit explains the reasons as follows:

> When an attorney is allowed to usurp [the trial court's] function, harm is manifest in at least two ways. First . . . the jury may believe the attorney-witness . . . is more knowledgeable than the judge in a given area of the law . . . . Second, testimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same . . . . [I]t can be expected that both legal experts will differ over the principles applicable to the case. The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court.[74]

While the courts may have a legitimate concern about lawyer-experts telling the jury what the law is, as a practical matter, this rule can occasionally be a problem, particularly if the underlying case involves a particularly esoteric field of law. Trial judges cannot reasonably be expected to be intimately familiar with all areas of the law, and, when offering standard of care or causation opinions on a complicated or nuanced legal matter, it may be difficult for an expert to express his

or her opinions without discussing the substantive law from which the opinions are derived. As a practical matter, it may be necessary for the expert to explain what the law is in a complicated practice area as a predicate for explaining how the defendant lawyer met or deviated from a standard of reasonable care.

The expert witness also may not tell the jury what the outcome of the underlying case would have been; that is a matter for the jury to decide.[75]

Res Ipsa Loquitur

Res ipsa loquitur is a rule of evidence under which a presumption of negligence will arise.[76] The presumption of negligence arises when an unexplained event creates a *prima facie* case of negligence without proof of specific misfeasance.[77]

Reported Colorado appellate decisions have not employed the doctrine of *res ipsa loquitur* in a negligence claim against a lawyer. In fact, courts generally do not recognize the doctrine of *res ipsa loquitur* in legal malpractice actions.[78] However, Colorado courts have repeatedly stated expert witness testimony is necessary to establish a breach of the standard of care in all but "clear and palpable" cases,[79] thus implying that courts might apply the doctrine of *res ipsa loquitur* in certain legal malpractice cases.

Certificate of Review

In 1987, the Colorado General Assembly enacted C.R.S. §§ 13-20-601 and -602, which provide that in "every action for damages or indemnity based upon the alleged professional negligence of . . . a licensed professional . . . " the claimant must file a Certificate of Review within 60 days after the action is commenced.[80] The Certificate of Review must certify that the plaintiff or his or her counsel has consulted with an expert witness within the same area of expertise of the accused licensed professional, and that the expert witness has verified that the claim against the licensed professional is not without "substantial justification."[81] This is a very low standard and, as a practical matter, appears to mean only that if everything the plaintiff claims is true, the claims will pass muster under C.R.C.P. 11 or are not frivolous under C.R.S. § 13-17-202.

The General Assembly intended this legislation to encourage early and cost-effective resolution of civil actions filed against licensed professionals.[82] This requirement includes cases alleging claims of breach of fiduciary duty, breach of contract, or any other claim that requires expert testimony to establish a *prima facia* case.[83] The statute applies to all claims against licensed professionals in which expert testimony is required to establish the scope of the professional's duty or the failure of the professional to adhere to the duty.[84] The statute also applies to *pro se* plaintiffs pursuing legal malpractice actions.[85]

The filing of a Certificate of Review is a procedural prerequisite, not a jurisdictional prerequisite.[86] The failure of a plaintiff to file a Certificate of Review provides the defendant with a defense.[87] That defense, however, is waived if not timely asserted.[88] In *Giron v. Koktavsky*,[89] the Colorado Court of Appeals held that there was no need for the plaintiff to file a certificate of review because expert testimony was not needed to establish a *prima facie* case. It appears, there-

fore, that in cases where the lawyer's negligence is "clear and palpable" and expert testimony is not required, the failure to file a certificate of review will not be fatal to a plaintiff's case.

§ 28.3.4—Causation And The "Case Within The Case"

A plaintiff in a legal malpractice case must prove that the defendant lawyer caused his or her injury.[90] Consequently, the plaintiff is required to prove not only that the lawyer failed to exercise reasonable care, but also that the plaintiff would have achieved a better result in the underlying legal matter if the lawyer had performed properly.[91] The burden may be met by either direct or circumstantial evidence.[92] If the court determines as a matter of law that the plaintiff's underlying claim would not have been successful, the court need not consider the issue of whether the lawyer breached a duty.[93]

The "case within the case" portion of the legal malpractice case is usually the most difficult portion of a legal malpractice case for the judge, the jury, and the parties' lawyers. The "case within the case" analysis can be as complex as any legal matter for which a lawyer can represent a client. For example, if the defendant lawyer is a tax lawyer, the former client may claim that but for the lawyer's negligence, the client would have owed less tax than the client ultimately owed. The analysis then becomes, would the client have owed some or all of the tax anyway? Was the additional tax claimed by the IRS a result of the client losing a right to *defer* the tax (in which case the client would have had to eventually pay the tax, but possibly at a lower tax rate), or did the client lose the opportunity to structure his or her tax affairs so as to *avoid* the tax entirely? The analysis can be quite complex and involve other specialty areas of the law, and the problem may be resolved only with the assistance of experts in the area.

<u>Negligence in the Underlying Litigation</u>

When the legal malpractice claim is predicated on the lawyer's negligence in handling underlying litigation, the plaintiff must prove that he or she would have been more successful in the underlying lawsuit if the lawyer had performed properly.[94] The defendant lawyer will often maintain that because of the evidence (or lack of evidence), the rulings from the trial court or the limitations imposed by case law, the quality of the client or other persons as witnesses, or for any of many other reasons, the client could not have achieved a better result than the lawyer achieved for the client. This process can be quite cumbersome and often places the defendant lawyer in the uncomfortable position of having to take a position in the legal malpractice action opposite to the position that the lawyer took on behalf of the client in the underlying case.

In a legal malpractice case with an underlying lawsuit, the trial court is required to treat the jury in the legal malpractice case as it would treat the jury in the underlying litigation.[95] The trial court in the legal malpractice case must give the instructions that should have been given in the underlying case.[96] The trial judge is required to determine the issues of law as another trial judge might have decided the issues in the underlying case.[97] The Colorado Court of Appeals has held that it is the trial court's duty to tell the jury what the law is so that the jury may decide the dispute based upon the facts and the law:

> It is universally held that the law in every case, no matter in what form it may be presented, is a matter for the court's determination, and we hold it is the duty of the court to declare the law for it is the duty of the jury to render its verdict based upon the law and the evidence.[98]

Negligence in Negotiating a Settlement

A lawyer representing a client in a litigation matter has an obligation to advise the client fully of settlement negotiations and their ramifications.[99] This is also an obligation imposed on lawyers by Rule 1.4 of the Colorado Rules of Professional Conduct: "[A] lawyer negotiating on behalf of a client should . . . inform the client of communications from another party. . . ."[100] This obligation exists whether the client is paying the attorney fees or any settlement or whether the fees and settlement are being paid by a third party, such as an insurance company.[101] Lawyers are not excused from communicating settlement offers because they believe the offers are ambiguous or not genuine.[102] If the settlement offer is ambiguous, the ambiguity should be disclosed to the client.[103] This rule, however, may not apply if the client has no power of acceptance.[104]

The client need not prove the settlement offer was genuine in a subsequent legal malpractice case.[105] The defendant lawyer may, however, rebut the client's claim that he or she was harmed by the failure to communicate the settlement by offering evidence that the offer could not have been effectively accepted without clarification or that communication of the acceptance would have been impossible.[106] An expert witness may testify about whether the case would have been settled or the amount of the settlement but for the lawyer's negligence.[107] Whether to accept a settlement is ultimately the decision of the client,[108] but an expert may testify about what a reasonable client would have done under the circumstances.[109]

If the jury determines that the underlying case could not have been settled, then the lawyer cannot be held liable for negligence in negotiating the settlement or failing to communicate the settlement, as there could be no causation or damages.[110]

Negligence in Handling an Appeal

A plaintiff suing a lawyer for negligence in handling an appeal must prove that but for the lawyer's negligence, the appeal would have been successful.[111] It is not enough for the plaintiff to show that the lawyer mishandled the appeal or failed to perfect the appeal without also showing that the appeal would have been successful.[112] If the client fails to do so, the lawyer may be entitled to summary judgment or a directed verdict.[113]

Although Colorado has not addressed the question, other jurisdictions consider whether an appeal would or would not have been successful to be a question of law to only be decided by a judge.[114] As the Washington Supreme Court explained in *Daugert v. Pappas*:

> The overall inquiry is whether the client would have been successful if the attorney had timely filed the appeal. The determination of this issue would normally be within the sole province of the jury. Underlying the broad inquiry, however, are questions bearing legal analysis. The determination of whether review would have

> been granted and whether the client would have received a more favorable judgment depends on an analysis of the law and the rules of appellate procedure. Clearly, a judge is in a much better position to make these determinations.[115]

As the leading treatise on legal malpractice explains, what should have happened in an underlying appeal can *only* be decided by the judge:

> The resolution of a petition or [an] appeal must and can be made by the trial judge as an issue of law, based on review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied to the motion or appeal.[116]

Arguably, when the trial judge is deciding the issues of the underlying appeal as part of the legal malpractice case, the parties should adhere to the Rules of Appellate Procedure when briefing the underlying appeal issues.[117] And, as discussed under "Need for Expert Witness Testimony," above, an expert witness will usually not be permitted to tell the jury what the law is because the determination of questions of law is an issue for the judge, not the jury.[118]

Negligence in Business Transactions

If the negligence claim involves the lawyer's representation of the client in a failed business or real estate transaction, the lawyer's defense will often be that the transaction would have failed regardless of the lawyer's alleged negligence. To develop this defense, the defendant lawyer's defense team will often obtain all of the relevant financial documents and hire forensic accountants and business expert witnesses to analyze the financial data and determine whether the transaction's failure was because of the lawyer's mistake or for some other reason, such as the client's mismanagement, lack of financing or inadequate cash flow, market conditions, or some other factor beyond the lawyer's responsibility or control. If the plaintiff cannot prove that he or she should have been more successful in the underlying transaction but for the lawyer's malpractice, then the claim fails for lack of causation or damages.[119]

In *Roberts v. Holland & Hart*,[120] the Colorado Court of Appeals addressed the issue of whether a real estate developer could recover from his former lawyers the lost profits from a failed real estate development in Aspen. The developer had defaulted on several loans secured by real property in downtown Aspen.[121] The law firm admitted that it had negligently prepared a legal description as part of a land exchange between the real estate developer and Aspen Ski Company, which mistakenly conveyed to the Aspen Ski Company the entire southern half of the City of Aspen.[122] As a result of this error and a subsequent quiet title action, there was a one-year delay in foreclosure proceedings on the developer's property.[123] The developer had wished to bid at the foreclosure sale on a portion of his property where he proposed to build a Ritz-Carlton Hotel. After the one-year delay, the foreclosure proceeded but the developer could not secure the $17.5 million in financing needed to redeem the property from foreclosure.[124] Because of mechanics' liens on the property and a $16 million second deed of trust, the developer would have had to sell the property for at least $34 million to make a profit.[125]

In the legal malpractice case, the developer claimed lost profits of $36 million, arguing that because of the delay in foreclosing on the property, he lost the opportunity to secure financing to redeem the property.[126] The trial court disagreed, and granted a motion for partial summary judgment in favor of the law firm, denying the plaintiff the opportunity to recover lost profits. The court of appeals found that the real estate developer had failed to present any admissible evidence indicating that, but for the negligence of the law firm, he probably would have made a profit on the development. The court of appeals stated:

> [T]he record reveals that the entire project was too speculative in nature to warrant lost profits damages because the whole project was contingent upon finding a financier for an amount well above $17.5 million, and there is no evidence to suggest that such financing was available.
>
> We also disagree with Roberts [developer] that the lack of evidence of lost profits was caused by the defendant's negligence. Without showing that a viable financier existed, the plaintiff did not submit any admissible evidence to contradict the motion for summary judgment. That is, he failed to present evidence indicating that, but for the negligence of the defendant, he probably would have sustained a profit.[127]

The court held that because there was no evidence on the issue of lost net profits, the trial court properly granted partial summary judgment in favor of the law firm.[128]

In *Temple Hoyne Buell Foundation v. Holland & Hart*,[129] the defendant law firm was sued for malpractice because the lawyer prepared an option contract in connection with the client's purchase of stock in a corporation. The option allowed the client to obtain the selling shareholder's share of the corporation's interest in minerals underlying real property should the corporation ever distribute the mineral rights to the shareholders.[130] The corporation refused to honor the option contract when it eventually distributed the mineral interests, claiming that the option contract violated the rule against perpetuities.[131] The client and the corporation engaged in litigation and ultimately settled, with the client accepting 50 percent of the claimed mineral interests.[132] At the trial of the legal malpractice case, the trial judge ruled that the option contract did indeed violate the rule against perpetuities.[133] The client's experts testified that the law firm was negligent for failing to research the rule against perpetuities, for failing to advise the client that litigation may result as a result of a dispute over the rule, and for failing to draft a savings clause in the option contract to prevent the dispute. The lawyer who drafted the option contract testified that he did not research or consider the rule against perpetuities because he "knew the rule against perpetuities" and "knew when it applied" and could spot such issues.[134] The jury awarded a multi-million dollar verdict against the defendant law firm.

On appeal, the court of appeals held that the option contract in fact did *not* violate the rule against perpetuities.[135] The court of appeals refused to dismiss the lawsuit outright, however, because there was disputed expert testimony (including testimony from one of the law firm's own expert witnesses) about whether a reasonable lawyer would have foreseen that the option, as draft-

ed, was likely to result in litigation concerning the rule against perpetuities and that reasonable lawyers in similar circumstances would have taken steps to prevent such a dispute.[136] The court found that one of the obligations of a lawyer was to anticipate reasonably foreseeable risks.[137] The court ordered a new trial on the legal malpractice claim.[138]

In summary, litigation of the "case within the case" in the legal malpractice action may be as complicated and may involve as many legal and factual issues as the original representation, with the added layer of the often-bitter disputes inherent in the legal malpractice claim itself. Lawyers considering filing a legal malpractice action should carefully analyze the case-within-the-case issues before filing the legal malpractice lawsuit and should advise the client about the complexity, the costs, and the likelihood of prevailing on the underlying case, even if the breach of the standard of care of the prospective defendant lawyer is clear.

§ 28.4 • BREACH OF FIDUCIARY DUTY CLAIMS AGAINST LAWYERS

§ 28.4.1—What Is A Fiduciary?

The Colorado Supreme Court has defined a "fiduciary" as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking."[139] A fiduciary has a duty to deal "with utmost good faith and solely for the benefit" of the beneficiary.[140] A fiduciary's obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries.[141] "One who is acting as a fiduciary for another has the duty to act with the utmost good faith and loyalty on behalf of, and for the benefit of, the other person."[142] A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the fiduciary duty.[143] Fiduciary liability requires not only a repose of trust, but also an assumption of a duty and a breach of that duty.[144] Whether a fiduciary relationship exists is generally a question of fact to be resolved by the jury.[145] However, some fiduciary duties arise as a matter of law.[146] The nature and scope of a fiduciary duty is a question to be resolved by the court.[147]

§ 28.4.2—Lawyers As Fiduciaries To Client

The relationship between a lawyer and a client is a distinct fiduciary relationship that arises as a matter of law.[148] The foundation of this relationship is grounded upon a special trust and confidence[149] and requires that a client have the utmost faith in the chosen counsel.[150] A lawyer is required to exercise the highest degree of fairness and good faith in dealings with the client.[151] A confidential relationship giving rise to fiduciary duties may be established under certain circumstances when one party has reposed special trust or justifiable confidence in the other and that confidence is invited, accepted, or undertaken by the other.[152] The foundation for any confidential or fiduciary relationship between a lawyer and a client must, however, necessarily be based on the existence of the client-lawyer relationship, unless there is some other relationship between the parties.[153]

Scope of a Lawyer's Fiduciary Obligations to Client

Although the relationship between a lawyer and his or her client is a fiduciary one,[154] not every act of a lawyer is in the capacity of a fiduciary and not every allegation of malpractice states a claim for breach of a fiduciary duty. Rather, the fiduciary obligations of a lawyer to the client are twofold: undivided loyalty and confidentiality.[155] The fiduciary obligations set a standard of *conduct*, as distinguished from a standard of *care*.[156] An action for professional negligence against a lawyer arises out of a breach of duty to meet the standard of *care*.[157]

A breach of a lawyer's duty of undivided loyalty occurs when the lawyer "obtains a personal advantage in dealing with a client" or when the lawyer "creates circumstances that adversely affect a client's interests."[158] A lawyer's duty of loyalty to a client is not limitless, however. For example, the lawyer does not breach the duty of loyalty by attempting to resolve the client's legal problems without using obnoxious tactics. As the Colorado Supreme Court has said, "Efforts of a lawyer to obtain an amicable disposition do not subject him to a charge of treason."[159]

Rule 1.6 of the Colorado Rules of Professional Conduct sets forth a lawyer's duty of confidentiality to a client. Colo. RPC 1.6 provides, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ."[160] The authorized exceptions to this general principle allow a lawyer to reveal the intention of a client to commit a crime,[161] and to reveal such information that the lawyer reasonably believes necessary to establish a claim or defense in a controversy between the lawyer and the client.[162]

Implicit in the lawyer's duty of loyalty is a duty to remain free of conflicts of interest. When a conflict of interest is alleged as part of a legal malpractice case, it is most often pleaded as a breach of fiduciary duty claim.[163] The subject of conflicts of interests, as pertaining to lawyers, is of sufficient importance that it deserves its own section. A more thorough discussion of conflicts-of-interest issues is included in Chapter 5.

§ 28.4.3—Lawyers As Fiduciaries To Others

There are no reported decisions in Colorado of a court finding that a lawyer owed a fiduciary duty to a non-client, and such a duty would only likely arise under exceptional circumstances.[164] In *Turkey Creek, LLC v. Rosania*,[165] the plaintiff, who participated in a mining exploration joint venture with another company, sued the lawyers for that company alleging, *inter alia*, that they breached a fiduciary duty to him by engaging in self-dealing to eventually acquire all interests in the joint venture. After the court determined that no client-lawyer relationship existed between the plaintiff and the defendant lawyers, it addressed whether the lawyers owed him a fiduciary duty as a tenant-in-common, a non-client third party, or a member of the joint venture.[166]

Although the court of appeals held that there was no fiduciary relationship between the plaintiff and the lawyers under any of the theories presented, the court's analysis leaves open the possibility that a lawyer may be found to be a fiduciary to a non-client. The court held that a fiduciary relationship may arise when one party has a high degree of control over the property or sub-

ject matter of another, or when a benefiting party places a high degree of trust and confidence in a potential fiduciary to look out for that party's best interests.[167] In order for a breach of fiduciary duty to have occurred, the court noted that a confidential relationship, such that ordinary care and vigilance is justifiably relaxed, must have been established before the date of the transaction giving rise to the claim.[168] The court found that although tenants-in-common have a good faith obligation when dealing with jointly owned property, the relationship does not give rise to a fiduciary duty absent any evidence of a special confidence or reliance.[169] Further, although partners owe one another the highest degree of loyalty, the lawyers representing only one partner do not assume that same duty to the other partner, even if that other partner was a third-party beneficiary to the client-lawyer relationship.[170] Finally, although the lawyers likely owed the plaintiff a duty of loyalty as partners, the plaintiff's claim here was not asserted on behalf of himself or his partnership, so no fiduciary duty was found.[171] A lawyer, however, may be subject to professional discipline for breaching a fiduciary duty owed to non-clients while acting in the capacity of a general partner.[172]

§ 28.4.4—Elements Of Breach Of Fiduciary Duty Claim — Generally

"[A] lawyer is civilly liable to a client if a lawyer breaches a fiduciary duty owed to a client . . . ."[173] In order to recover against a lawyer on a breach of fiduciary duty claim, the plaintiff must prove the following elements:

1) A client-lawyer relationship exists between the defendant (as the lawyer) and the plaintiff (as the client);
2) The lawyer was acting as a fiduciary of the plaintiff;
3) The lawyer breached a fiduciary duty to the plaintiff;
4) The plaintiff suffered an injury or loss; and
5) The lawyer's breach of fiduciary duty was a cause of the plaintiff's injury or loss.[174]

When the fiduciary relationship is based on the existence of the lawyer-client relationship, the nature of the relationship and the attendant duties must be measured against standards applicable to lawyers.[175] As with a professional negligence claim, a client asserting a breach of fiduciary duty claim against a lawyer must prove the claim by expert testimony.[176]

§ 28.4.5—Distinction Between Professional Negligence And Breach Of Fiduciary Duty

While a breach of fiduciary duty is a type of legal malpractice, it is not the same as professional negligence, although it is often (and inappropriately) pleaded as an alternative to a negligence claim. The leading treatise on legal malpractice, Ronald Mallen and Jeffrey Smith, *Legal Malpractice* (2005 ed.), describes the distinction between a lawyer's negligence and a lawyer's breach of fiduciary duty:

> Although the attorney-client relationship is a fiduciary relationship, a wrong by an attorney does not thereby become a fiduciary breach. Thus, claims of negligence, which do not implicate a duty of confidentiality or loyalty, do not support a cause of action for fiduciary breach.[177]

The Colorado Supreme Court has suggested, albeit in *dicta*, that professional negligence and breach of fiduciary duty claims in the legal malpractice setting are not co-extensive.[178] The Colorado Court of Appeals has been somewhat clearer in distinguishing between legal malpractice claims alleging professional negligence and breach of fiduciary duty. In *Moguls of Aspen, Inc. v. Faegre & Benson*,[179] the plaintiff appealed a jury verdict in favor of the defendant law firm in a legal malpractice case arising out of a retail lease. The plaintiff asserted professional negligence and breach of fiduciary duty claims. The plaintiff's expert witnesses testified at trial that the law firm's alleged acts and omissions constituted professional negligence as well as breaches of their fiduciary duties to "act with due diligence" and "in the client's best interest."[180] The trial court refused to give the plaintiff's tendered instruction consistent with CJI-Civ. 26:1 based upon the supposed violation of fiduciary duties, determining that because there was no evidence to support a breach of fiduciary duty claim beyond professional negligence, the claim was covered in the negligence instruction.[181]

The Colorado Court of Appeals affirmed, holding that when the evidence supporting the breach of fiduciary duty claim is the same as the evidence supporting the professional negligence claim, the breach of fiduciary duty claim should be dismissed as duplicative.[182] The court stated:

> All of these allegations, while serious, do not implicate defendants' actions except in a negligence or malpractice context. There is no allegation or evidence that defendants' acts or omissions, if any, resulted from an improper motive, a conflict of interest, or any other consideration beyond carelessness and lack of attention.
>
> Under such circumstances, other courts have concluded that a claim for breach of a fiduciary duty is duplicative of a claim for professional malpractice and that only the latter claim should be the subject of adjudication. As stated in *Calhoun v. Rane*, 234 Ill. App.3d 90, 95, 175 Ill. Dec. 304, 307, 599 N.E.2d 1318, 1321 (1992):
>
>> A fiduciary relationship exists as a matter of law between an attorney and his client. Thus, in effect any alleged malpractice by an attorney also evidences a simultaneous breach of trust; however, that does not mean every cause of action for professional negligence also sets forth a separate and independent cause of action for breach of fiduciary duty. In the present case, we find that [the client] has not plead [*sic*] a cause of action for breach of fiduciary duty distinct from the alleged malpractice case still pending in the trial court. A duplicative count may be properly dismissed.[183]

The court of appeals also stated, in *dicta*, that "circumstances may exist in which a lawyer may be guilty both of malpractice and of other violations of his or her fiduciary obligations. If a claimed fiduciary violation is separate and independent from any alleged negligence, separate claims may well be properly asserted."[184]

In a recent case, not selected for official publication as of this handbook's printing, the Colorado Court of Appeals seems to have, at first blush, blurred the distinction between professional negligence claims and breach of fiduciary duty claims. In *Aller v. Law Office of Carole C.*

Schriefer,[185] in a confusing opinion, the court noted that other jurisdictions recognize a difference between a lawyer's duty to represent a client competently (a duty of care), and a lawyer's fiduciary obligations of loyalty and confidentiality (a standard of conduct). The court found, however, that this traditional distinction "is technically deficient when applied to assess claims of malpractice. In some cases the distinction between duties based upon a standard of conduct and a standard of care is of no meaningful consequence."[186] The plaintiff's main claim in the case was that her former lawyer breached her duties of loyalty and confidence by representing a business associated in an action against her.[187] The court, however, found that the plaintiff's breach of fiduciary duty action alleged a breach of "the standard exercised by a reasonable attorney under the circumstances — that is, the standard for negligence."[188] But the court also stated that the plaintiff acquiesced to having her claim treated as a negligence claim, rather than a breach of fiduciary duty claim, because she filed a certificate of review under C.R.S. § 13-20-602, which applies to professional negligence actions.[189] This particular language may pose a quandary for plaintiffs attempting to assert only a breach of fiduciary duty action, since C.R.S. § 13-20-602 has been interpreted as applying not just to negligence actions, but to all actions against professionals requiring expert testimony to establish a breach of the standard of care and so may be inconsistent with other authority.[190]

In *dicta*, the *Aller* court suggests that a breach of fiduciary duty claim may require some aspect of intent. The court stated that "[w]here, as here, the operative allegations of the complaint assert violations of both standards of conduct and standards of care *without making specific and particularized allegations of intentional conduct*, we conclude that the malpractice claim is based on negligence."[191] This approach, however, would be a departure from a traditional understanding of breach of fiduciary duty claims, which have never been held to require an intent element in the past.[192] The distinction between negligence and breach of fiduciary duty claims may have been confused in *Aller* because the plaintiff appears to have attempted to cast a negligence claim as a breach of fiduciary duty claim, and the concepts became muddled at both the trial court and appellate level.

Thus, the plaintiff in a legal malpractice case must, at the minimum, prove more than negligence to recover for a breach of fiduciary duty; the plaintiff must prove a breach of confidence or a breach of loyalty *separate and apart* from the breach of the standard of care.[193] This rule is consistent with what is required to prove a breach of fiduciary duty by other professionals and individuals in a position of trust.[194] As Judge Carrigan observed in *Zukowski v. Howard, Needles, Tammen, Bergendoff, Inc.*:[195]

> [T]his is a negligence suit. There is no virtue in pleading a profusion of claims for relief when the law provides a well-established and straight forward [*sic*] remedy. Indeed, the practice is inimical to the interests of plaintiff for at least two reasons. First, it delays prosecution of the case and increases costs because of the time spent in addressing motions such as those filed in this case. Second, it creates an expanded possibility for reversible error in the event the pleader is persistent or the trial judge is diffident. In the instant case, claims for relief based on negligence coupled with those for exemplary damages provide the remedies contemplated by established law.[196]

The decision in *Moguls of Aspen, Inc. v. Faegre & Benson* is consistent with the rule in most other jurisdictions.[197]

§ 28.4.6—Business Transactions With Clients

As part of a lawyer's fiduciary duty of undivided loyalty to a client, a lawyer is prohibited from creating a conflict of interest by entering into a business transaction with a client that is anything other than fair and reasonable for the client. C.R.P.C. 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is informed that the use of independent counsel may be advisable and is given a reasonable opportunity to seek the advice of such independent counsel in the transaction; and (3) the client consents in writing thereto.[198]

A failure to comply with the prerequisites for entering into a business transaction with a client may result in disciplinary suspension.[199]

In addition to the stated restrictions on direct business transactions between a client and lawyer, a lawyer is also prohibited from exploiting information relating to the representation to the client's disadvantage.[200] The example provided in the comments to C.R.P.C. 1.8 is of a lawyer who learns of his client's plans to invest in real estate and acquires nearby property, negatively impacting the client's plans.[201] C.R.P.C. 1.8(a), however, does not apply to standard commercial transactions for products or services that the client generally markets to others where the lawyer has no potential unfair advantage in dealing with the client.[202]

Besides the potential for professional sanctions, a lawyer entering into a business transaction with a client or former client may face the possibility of being exposed to malpractice liability under a breach-of-fiduciary-duty theory. Even a lawyer who enters into a business relationship intending to only be an investor may face a claim for breach of fiduciary duty.[203] The more likely danger a lawyer will face, however, is the loss of potential profits that may have resulted from the business relationship should a dispute arise, as a court will presume that the lawyer took unfair advantage of the client. In *Legal Malpractice* (2005 ed.), the leading treatise on legal malpractice, authors Ronald Mallen and Jeffrey Smith describe the common law rule:

> [I]n any transaction in which an attorney is charged with obtaining an unfair advantage from or taken of the client, the advantage is presumed to have been obtained without adequate consideration and because of undue influence. This usually means that the transaction is voidable, at the option of the client, but not void.[204]

§ 28.4.7—Sexual Relationships With Clients

A sexual relationship with a client implicates a lawyer's duty of loyalty to the client. Such a relationship is interpreted as placing the lawyer in a position that is adverse to the personal interests of the client.[205] Although the language of the Colorado Rules of Professional Conduct do not explicitly address sexual relations with clients, the Committee Comments make clear that such a relationship will almost always violate Colo. RPC 8.4(h).[206] A consensual sexual relationship with a client can be grounds for suspension.[207] A sexual assault on a client is grounds for suspension or disbarment.[208]

The majority approach among jurisdictions that have considered the issue is to find that sexual relations with a client will not give rise to a legal malpractice claim unless the legal representation was adversely affected.[209] However, the client's representation is affected and liability may arise for a breach of fiduciary duty where a lawyer exploits his or her position of trust and authority to gain sexual favors,[210] or uses confidential information obtained during the representation to somehow induce an inappropriate relationship.[211]

§ 28.4.8—Aiding And Abetting A Breach Of Fiduciary Duty

Even in the absence of a direct fiduciary duty with a plaintiff, a lawyer may still be found liable to a third party for aiding and abetting a client's breach of fiduciary duty. In *Anstine v. Alexander*,[212] the client followed bad advice offered by its lawyers and the company was forced to file for bankruptcy. The lawyers' advice caused the client to breach fiduciary duties owed to creditors, and the bankruptcy trustee brought suit against both the client and the lawyers for aiding and abetting that breach.[213]

In their defense, the lawyers argued that they could not be liable to the plaintiff for aiding and abetting because they owed no duty to the non-client third-party creditors.[214] The court disagreed, noting that aiding and abetting is a distinct and separate claim from legal malpractice.[215] The tort of aiding and abetting a breach of fiduciary duty requires proof of (1) a breach by a fiduciary of a duty owed to plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages.[216] Even in the absence of a duty owed to the plaintiff, the court upheld the jury verdict against the lawyers based on the breach of the client's fiduciary duties to its creditors.[217]

§ 28.5 • BREACH OF CONTRACT

§ 28.5.1—Breach Of Contract Claims Against Lawyers — Generally

While a claim for breach of the client-lawyer contract is cognizable, it must be based on a specific term of the contract.[218] If in a written or an oral agreement the lawyer agreed to take a specific action on behalf of the client, or achieve a particular result, and then failed to take that action or achieve the result, despite an agreement to do so, the client may have a basis for a breach of contract claim.[219] A breach of contract claim that simply restates a lawyer's duties of care and loyalty owed to the client is encompassed within the negligence claim.[220] A breach of contract claim will be dismissed when it is pleaded simply as an alternative to the negligence claim.[221]

While the client-lawyer relationship is based in contract, a claim based on a violation of duty imposed by the client-lawyer relationship sounds in tort.[222] A client may recover on a breach of contract theory against his or her lawyer if there is evidence supporting the breach of contract other than mere negligence.[223] In other words, a lawyer does not breach a contract with a client simply because the lawyer agreed to competently represent a client on a legal matter but was then negligent in carrying out the representation.[224]

§ 28.5.2—Elements Of Breach Of Contract Claim

The elements of a breach of contract claim in a legal malpractice action are the same as in any breach of contract case: the plaintiff must prove (1) that he or she entered into a contract with the defendant lawyer to undertake a specific legal task, and (2) the lawyer breached the contract by failing to do what he or she had agreed.

§ 28.5.3—Damages

Successful plaintiffs of contract actions in Colorado are entitled to actual damages.[225] Actual damages typically mean that a plaintiff wronged by a breach of contract is entitled to the benefit of the bargain, reflecting the reasonable expectations of the parties within the agreement.[226] The benefit of a client's bargain would be the successful result of a lawyer's representation, had the breach of contract or breach of duty not occurred. As a practical matter, the remedy for a breach of contract and a tort action against a lawyer are likely to be the same, with expert testimony required to establish the standard of care in either case.[227]

§ 28.6 • FRAUD CLAIMS AGAINST LAWYERS

§ 28.6.1—Elements Of Common Law Fraud

In order to prove fraud, the plaintiff must prove that:

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.[228]

In order to prove "knowing fraudulent concealment" against a licensed professional, the plaintiff must prove that (1) the defendant knew that he or she had committed a negligent act or omission, and (2) the defendant intentionally made a material misrepresentation or failed to disclose material information that impeded the plaintiff's discovery of that negligence.[229]

§ 28.6.2—Fraud Arising Out Of Giving A False Opinion

There are no reported Colorado appellate decisions addressing a common law fraud claim in the context of legal malpractice. Other jurisdictions considering the claim in the legal malprac-

tice context hold that a showing of a lawyer's opinion to a client, if a representation of the law is made with either knowledge that it is false or with reckless disregard as to its truth or falsity, establishes a claim for fraud.[230] A lawyer's good faith serves as a defense to a claim of fraud, because it negates the "intentional" element of all fraud claims.[231]

§ 28.6.3—Damages

Successful plaintiffs in fraud actions are entitled to actual damages caused by the fraudulent representation.[232] As in a breach of contract action, these damages are typically measured by determining what the plaintiff should have received from the benefit of the bargain.[233] Therefore, as a practical matter, basic damages for fraud are unlikely to vary from the damages arising from a professional negligence claim. A plaintiff in a fraud claim, however, is also entitled to seek non-economic damages.[234] Furthermore, C.R.S. § 13-21-102 allows a plaintiff to seek exemplary damages where "the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct . . . ."[235]

§ 28.7 • CONVERSION

Conversion of client funds is an offense that merits suspension,[236] or even disbarment.[237] In addition to professional discipline, a lawyer can be sued for a breach of fiduciary duty,[238] which is more likely, or for conversion itself.

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.

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

NOTES

1. *See* Chapter 2 of this handbook for a discussion about forming a client-lawyer relationship.

2. *Backstreet v. Hopp & Flesch, LLC*, 107 P.3d 1022, 1027 (Colo. App. 2004), *cert. granted* 2005 Colo. LEXIS 160 (Feb. 22, 2005); *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 847 (Colo. App. 1996); *International Tele-Marine Corp. v. Malone & Associates, Inc.*, 845 F. Supp. 1427, 1435 (D. Colo. 1994).

3. *Martinez v. Badis*, 842 P.2d 245, 252 (Colo. 1992) ("Breach of fiduciary duty claims are in some, but not all, contexts basically negligence claims incorporating particularized and enhanced duty of care concepts often requiring the plaintiff to establish the identical elements that must be established by a plaintiff in negligence actions.").

4. *Aller v. Law Office of Carole C. Schriefer*, 2005 Colo. App. LEXIS 1210 (July 28, 2005); *Moguls of Aspen v. Faegre & Benson*, 956 P.2d 618, 621 (Colo. App. 1997) (stating that when a breach of fiduciary claim is duplicative of a professional malpractice claim, the fiduciary duty claim may be properly dismissed).

5. *Quist v. Specialties Supply Co.*, 12 P.3d 863, 866 (Colo. App. 2000); *Lexton-Ancira Real Estate Fund 1972 v. Heller*, 826 P.2d 819, 823 (Colo. 1992); *Rusch v. Lincoln-DeVore Testing Lab., Inc.*, 698 P.2d 832 (Colo. App. 1984); *see also* CJI-Civ. 6:14 (CLE ed. 2005).

6. *See*, *e.g.*, *Zukowski v. Howard, Needles, Tammen & Bergendoff, Inc.*, 657 F. Supp. 926, 929 (D. Colo. 1987).

7. *Aller v. Law Office of Carole C. Schriefer*, 2005 Colo. App. LEXIS 1210 (July 28, 2005) ("[T]here is no reason to distinguish a legal malpractice suit based on negligence from one based on a breach of a fiduciary duty if all that is alleged is an attorney's breach of the standard of care.").

8. *Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1270 (Colo. App. 2004) (*citing Bryant v. Hand*, 404 P.2d 521, 522 (Colo. 1965)).

9. Colo. RPC, Scope (emphasis added). *See also Restatement (Third) of the Law Governing Lawyers* § 52(2) ("Proof of a violation of a rule or statute regulating the conduct of lawyers . . . does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty.").

10. *Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348, 352-353 (10th Cir. 1988). *Accord Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22, (E.D. Tenn. 1972), *aff'd* 477 F.2d 598 (6th Cir. 1973); *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978), *aff'd* 590 F.2d 341 (8th Cir. 1978); *Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A.*, 655 F. Supp. 1573, 1575 (S.D. Fla. 1987), *aff'd mem.* 846 F.2d 753 (11th Cir. 1988), *cert. denied* 488 U.S. 854 (1988); *Noble v. Sears*, *Roebuck & Co.*, 33 Cal. App.3d 654, 658, 109 Cal. Rptr. 269, 271-272 (1973); *Pichon v. Benjamin*, 702 P.2d 890, 892 (Idaho App. 1985); *Young v. Hecht*, 597 P.2d 682, 687 (Kan. App. 1979); *Spencer v. Burglass*, 337 So.2d 596, 600-602 (La. App. 1976), *cert. denied* 340 So.2d 990 (La. 1977); *Sullivan v. Birmingham*, 416 N.E. 2d 528, 534 (Mass. App. 1980); *Carlson v. Morton*, 745 P.2d 1133, 1135-1136 (Mont. 1987); *Drago v. Buonagurio*, 46 N.Y. 2d 778, 779-780, 386 N.E. 2d 821, 822, 413 N.Y. S.2d 910, 911 (1978); *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 844-849 (Ore. 1981); *Ayyildiz v. Kidd*, 266 S.E. 2d 108, 112 (Va. 1980); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W. 2d 118, 127-128 (Wis. 1985); *Baxt v. Liloia*, 714 A.2d 271, 274 (N.J. 1998); *In re Disciplinary Bd. of the Haw. Supreme Court*, 984 P.2d 688, 695 (Haw. 1999); *Biles v. Sullivan*, 793 So.2d 708, 713 (Ala. 2000); *Atty. Griev. Comm'n v. Stein*, 373 Md. 531 (Md. App. 2003); *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 136 (Minn. 2003); *Walker v. Gribble*, 689 N.W.2d 104 (Iowa 2004); *Byers v. Cummings*, 87 P.3d 465, 470 (Mont. 2004); *Gray v. Noteboom*, 159 S.W.3d 750, 752 (Tex. App. 2005); *Behrens v. Wedmore*, 698 N.W.2d 555 (S.D. 2005).

11. *Bryant*, 404 P.2d at 522.

12. *Id.* at 522-523; *see also Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1543-44 (D. Colo. 1990).

13. *Taylor v. Grogan*, 900 P.2d 60 (Colo. 1995).

14. *Id.* at 61.

15. *Id.* at 62.

16. *Id*. at 63, *quoting Federal Deposit Ins. Co. v. Isham*, 782 F. Supp. 524, 528 (D. Colo. 1992).

17. *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995).

18. *Id*. *See also Astarte, Inc. v. Pacific Indus. Sys.*, 865 F. Supp. 693, 706 (D. Colo. 1994) (finding that under Colorado law, "ethical codes are not designed to prescribe standards for civil liability of attorneys and do not create a private cause of action.").

19. *Norton Frickey*, 94 P.3d at 1270.

20. *Colorado Supreme Court Grievance Committee v. District Court, City and County of Denver*, 850 P.2d 150, 152 (Colo. 1993).

21. *Miami Int'l Realty*, 841 F.2d at 351-52.

22. *Id*.

23. *Id*.

24. *Id*.

25. *Id.* at 353.

26. *Mehaffey*, 892 P.2d at 239; *Peltz v. Shidler*, 952 P.2d 793, 796 (Colo. App. 1997); *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998); *Fleming v. Lentz, Evans & King, P.C.*, 873 P.2d 38, 40 (Colo. App. 1994); *McCafferty v. Musat*, 817 P.2d 1039, 1042-1043 (Colo. App. 1990).

27. *Observatory Corp. v. Daly*, 780 P.2d 462, 465-466 (Colo. 1989).

28. *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. App. 1989); *McCafferty*, 817 P.2d at 1043; *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985); *Rantz v. Kaufman*, 109 P.3d 132, 139 (Colo. 2005); *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999); *Mehaffy, Rider, Windholz & Wilson v. Central Bank, N.A.*, 892 P.2d 230, 240 (Colo. 1995).

29. Colo. RPC 1.2(c).

30. *International Tele-Marine*, 845 F. Supp. at 1433-1434; *Maillard v. Dowdell*, 528 So.2d 512, 514-15 (Fla. App. 1988), *rev. denied* 539 So.2d 475 (Fla. 1988).

31. *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. App. 1998); *Glover v. Southard*, 894 P.2d 21, 24 (Colo. App. 1994); *McCafferty*, 817 P.2d at 1042; *Federal Deposit Ins. Corp. v. Clark*, 768 F. Supp. 1402, 1407 (D. Colo. 1989).

32. *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987).

33. *Id*. at 57, *quoting* W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* § 37, at 236 (5th ed. 1984); *Glover*, 894 P.2d at 24.

34. *International Tele-Marine*, 845 F. Supp. at 1434; 1 R. Mallen & J. Smith, *Legal Malpractice* (2005 ed.) [*hereinafter*, *Legal Malpractice*] § 8.2 at p. 918-22.

35. Cmt., Colo. RPC 1.2(c); *Jones v. Jones*, 188 P.2d 892, 893 (Colo. 1948); *Serna v. Kingston Enters.*, 72 P.3d 376, 383 (Colo. App. 2002).

36. *Zimmermann v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998), *cert. denied* (Feb. 16, 1999); Colo. RPC 1.9; *see also*, *e.g.*, *Monus v. Colorado Baseball 1993, Inc.*, 103 F.3d 145, 150 (10th Cir. 1996).

37. *Restatement (Third) of the Law Governing Lawyers* § 16.

38. *See*, *e.g.*, *Mehaffy, Rider, Windholz & Wilson v. Central Bank, N.A.*, 892 P.2d 230 (Colo. 1995) (holding that privity was not required for a non-client to assert a negligent misrepresentation claim against a lawyer).

39. *See generally* Jay M. Feinman, "Attorney Liability to Nonclients," 31 *Tort & Ins. L.J.* 735 (Spring 1996).

40. The vast majority of legal malpractice actions state a claim for professional negligence, followed by a breach of fiduciary duty. The analysis of a fiduciary duty claim is analogous to negligence, but with a focus on a breach of a standard of conduct, rather than the breach of a standard of care. The exception to the negligence frame would be an action for breach of contract.

41. *See*, *e.g.*, *Johnson v. Wiegers*, 46 P.3d 563 (2002).

42. *See*, *e.g.*, *Weiss v. Manfredi*, 639 N.E.2d 1122 (N.Y.S. 1994); *McGee v. Hyatt Legal Services, Inc*., 813 P.2d 754 (Colo. App. 1990).

43. *See*, *e.g.*, *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagrin & Stewart*, 648 S.W.2d 410 (Tex. App. 1983).

44. *See*, *e.g.*, *Mason v. Levy & Van Bourg*, 77 Cal. App.3d 60 (1978).

45. *See generally Legal Malpractice* § 7.7 at p. 814.

46. *See*, *e.g.*, *Shriners Hospital v. Southard*, 892 P.2d 417 (Colo. App. 1994); *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991).

47. *See Essex Ins. Co. v. Tyler*, 309 F. Supp.2d 1270, 1272 (D. Colo. 2004); *Turkey Creek*, 953 P.2d at 1313; *Glover v. Southard*, 894 P.2d 21, 24 (Colo. App. 1994); *Shriners Hospital v. Southard*, 892 P.2d 417 (Colo. App. 1994); *Schmidt v. Frankewich*, 819 P.2d 1074 (Colo. App. 1991); *Montano v. Land Title Guarantee Co.*, 778 P.2d 328 (Colo. App. 1989); *Weigel v. Hardesty*, 549 P.2d 1335 (Colo. App. 1976).

48. *Mehaffy, Rider, Windholz & Wilson v. Central Bank, N.A.*, 892 P.2d 230 (Colo. 1995); *Zimmermann v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998).

49. *Anstine v. Alexander*, 2005 Colo. App. LEXIS 587 (April 21, 2005).

50. *Restatement (Third) of the Law Governing Lawyers* § 52(1).

51. *See id.* at § 48.

52. *McCafferty*, 817 P.2d at 1042.

53. *Myers*, 712 P.2d at 1094; *Eadon v. Reuler*, 361 P.2d 445, 450 (Colo. 1961); *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300, 304 (D. Colo. 1995).

54. *Myers*, 712 P.2d at 1094; *Merchant*, 874 F. Supp. at 304; *Metropolitan Gas Repair Services, Inc. v. Kulik*, 621 P.2d 313, 318 (Colo. 1980).

55. *Eadon*, 361 P.2d at 450.

56. *Fleming v. Lentz, Evans, & King, P.C.*, 873 P.2d 38, 40 (Colo. App. 1994); *McCafferty*, 817 P.2d at 1044.

57. *Backstreet*, 107 P.3d at 1024; *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002) (holding that failing to advise a client to appeal in an attempt to mitigate malpractice damages does not fall below the standard of care as a matter of law).

58. *McLister*, 934 P.2d at 847; *see also Zick v. Krob*, 872 P.2d 1290, 1294 (Colo. App. 1993); *McCafferty*, 817 P.2d at 1044; *Boigegrain*, 784 P.2d at 850; *Kelton v. Ramsey*, 961 P.2d 569, 571 (Colo. App. 1998); *Giron v. Koktavy*, 2005 Colo. App. LEXIS 254 (Colo. App. 2005); *Boyd v. Garvert*, 9 P.3d 1161, 1164 (Colo. App. 2000) ("The standards of professional conduct, the deviation from which would constitute legal malpractice, are not necessarily limited to conduct as defined by statute. Rather, these standards are generally proven by expert testimony.").

59. *International Tele-Marine Corp.*, 845 F. Supp. at 1427.

60. *Id.* at 1434; *see also FDIC v. Clark*, 768 F. Supp. 1402, 1407 (D. Colo. 1989), *aff'd* 978 F.2d 1541 (10th Cir. 1992).

61. *McLister*, 934 P.2d at 847; *Zick*, 872 P.2d at 1294; *Rosenberg v. Grady*, 843 P.2d 25, 26 (Colo. App. 1992); *McCafferty*, 817 P.2d at 1044; *Boigegrain*, 784 P.2d at 850; *Giron v. Koktavy*, 2005 Colo. App. LEXIS 254 (Colo. App. 2005).

62. *Zick*, 872 P.2d at 1294; *Scognamillo v. Olsen*, 795 P.2d 1357, 1361-1362 (Colo. App. 1990).

63. *McLister*, 934 P.2d at 847.

64. *Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179, 1182-1183 (Colo. App. 1995); *Abdelsamed v. United States*, 90 A.F.T.R.2d (RIA) 5963 (D. Colo. 2002).

65. *Grogan v. Taylor*, 877 P.2d 1374, 1384 (Colo. App. 1993), *rev'd in part on other grounds* 900 P.2d 60 (Colo. 1995).

66. *Zick*, 872 P.2d at 1294.

67. *Scognamillo*, 795 P.2d at 1361-1362.

68. *Grogan*, 877 P.2d at 1384; *Specht v. Jensen*, 853 F.2d 805, 807-810 (10th Cir. 1988).

69. *Grogan*, 877 P.2d at 1384.

70. *Id*.

71. *Tozer v. Scott Wetzel Services, Inc.*, 883 P.2d 496, 499 (Colo. App. 1994).

72. *Id.*

73. *Specht*, 853 F.2d at 809-810 (emphasis added). *See also* Advisory Notes, FRE 704 (stating that FRE 704, which permits expert testimony as to ultimate issues does not permit testimony as to ultimate issues of law, which are considered detrimental to the trial process).

74. *Specht*, 853 F.2d at 809, *quoted with approval in Grogan*, 877 P.2d at 1384.

75. *But see Scognamillo*, 795 P.2d at 1361-1362 (expert witness permitted to testify whether underlying case would have been settled or not).

76. *See*, *e.g.*, *Bilawsky v. Faseehudin*, 916 P.2d 586, 589 (Colo. App. 1995); *Black's Law Dictionary* (6th ed. 1990).

77. *Id*. at 589.

78. David J. Meiselman, *Attorney Malpractice: Law and Procedure* §§ 8.2 and 10.5 (1980); *see*, *e.g.*, *Martinez v. Badis*, 842 P.2d 245 (Colo. 1992); *Berman v. Rubin*, 227 S.E.2d 802 (Ga. 1976); *Barth v. Reagan*, 564 N.E.2d 1196 (Ill. 1990); *Hacker v. Holland*, 570 N.E.2d 951 (Ind. 1991).

79. *McLister*, 934 P.2d at 847-848; *Boigegrain*, 784 P.2d at 850; *Giron v. Koktavy*, 2005 Colo. App. LEXIS 254 (Colo. App. 2005).

80. C.R.S. § 13-20-602(1)(a).

81. C.R.S. § 13-20-602(3)(a).

82. *Martinez*, 842 P.2d at 250.

83. *Id*; *Giron v. Koktavy*, 2005 Colo. App. LEXIS 254 (Colo. App. 2005).

84. *Martinez*, 842 P.2d at 252.

85. *Rosenberg v. Grady*, 843 P.2d 25, 26 (Colo. App. 1992).

86. *See State v. Nieto*, 993 P.2d 493, 496-97 (Colo. 2000); *Miller v. Rowtech, LLC*, 3 P.3d 492, 494-95 (Colo. App. 2000).

87. *Miller*, 3 P.3d at 495.

88. *Id.*

89. *Giron*, 2005 Colo. App. LEXIS 254.

90. *See*, *e.g.*, *Fleming*, 873 P.2d at 40-41; *Morris v. Geer*, 720 P.2d 994, 998 (Colo. App. 1986); *Tripp v. Borchard*, 29 P.3d 345, 347 (Colo. App. 2001).

91. *Miller v. Byrne*, 916 P.2d 566, 579 (Colo. App. 1995); *Fleming*, 873 P.2d at 40; *Geer*, 720 P.2d at 998; *White v. Jungbauer*, 2005 Colo. App. LEXIS 840 (June 2, 2005) (holding that malpractice claims are permissible, even when the plaintiff's underlying claim has already settled).

92. *Geer*, 720 P.2d at 998.

93. *Fleming*, 873 P.2d at 40.

94. *Byrne*, 916 P.2d at 579; *Fleming*, 873 P.2d at 40 (physician employed by professional corporation had to show that he could state a claim under the federal Age Discrimination Act); *Geer*, 720 P.2d at 998 (plaintiff was required to show that if defendant lawyer had properly prosecuted a motion to reopen a dissolution decree because of ex-husband's fraud, she would have received a larger property distribution as a result); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999); *Tripp v. Borchard*, 29 P.3d 345, 347 (Colo. App. 2001).

95. *Byrne*, 916 P.2d at 579.

96. *Id*.

97. *Grogan*, 877 P.2d at 1384.

98. *Maloy v. Griffith*, 240 P.2d 923, 926 (Colo. 1952). *See also Tozer*, 883 P.2d at 499.

99. *Byrne*, 916 P.2d at 574.

100. Committee Cmt., Colo. RPC 1.4 ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.").

101. *Byrne*, 916 P.2d at 574.

102. *Id*.

103. *Id*.

104. *Id*.

105. *Id*.

106. *Id*.

107. *Scognamillo*, 795 P.2d at 1361-1362.

108. *Id*.

109. *Id*.; *Jones*, 188 P.2d at 893.

110. *Byrne*, 916 P.2d at 579.

111. *See St. Paul Fire & Marine Ins. Co. v. Speerstra*, 666 P.2d 255 (Or. App. 1983), *cert. denied*, 670 P.2d 1036 (1983). *Accord Kilmer v. Carter*, 78 Cal. Rptr. 800 (Cal. 1969); *Gillion v. Tieman*, 407 N.E.2d 1146 (Ill. App. 1980); *Nat'l Wrecking Co. v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101 (7th Cir. 1986) (Indiana law); *Dings v. Callahan*, 602 P.2d 542 (Kan. App. 1979); *Nelson v. Appalachian Ins. Co.*, 399 So.2d 711 (La. App. 1981); *Katsaris v. Scelsi*, 453 N.Y. S.2d 994 (1982); *Belfer v. Speigel*, 480 N.E.2d 825 (Ohio App. 1984); *Floyd v. Kosko*, 329 S.E.2d 459 (S.C. App. 1985); *Millhouse*

v. Wiesenthal, 775 S.W.2d 626 (Tex. 1989); *Young v. Bridwell*, 437 P.2d 686 (Utah 1968); *Daugert v. Pappas*, 704 P.2d 600 (Wash. 1985); *Burk v. Burzynski*, 672 P.2d 419 (Wyo. 1983); *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574 (6th Cir. 1998); *Dow Chem. Co. v. Ogletree*, 514 S.E.2d 836 (Ga. App. 1999).

112. *Fleming*, 873 P.2d at 40-41.

113. *See Belfer*, 480 N.E.2d at 826-27.

114. *See*, *e.g*., *Daugert*, 704 P.2d at 604; *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 133 F. Supp.2d 747 (D. Md. 2001); *Tinelli v. Redl*, 199 F.3d 603, 606-07 (2d Cir. 1999); *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 718 A.2d 186, 191 (Me. 1998) ("Numerous courts have recognized that the determination of whether an appeal not taken would have succeeded is within the exclusive province of the court, not the jury") (internal quotations omitted); *Phillips v. Clancy*, 733 P.2d 300, 306 (Ariz. App. 1986); *Croce v. Sanchez*, 64 Cal. Rptr. 448 (1967), *cert. denied* 391 U.S. 927 (1968); *Oteiza v. Braxton*, 547 So.2d 948 (Fla. App. 1989); *Jaraysi v. Soloway*, 451 S.E.2d 521 (Ga. App. 1994); *Nat'l Wrecking Co*., 782 F.2d 101; *Cabot, Cabot & Forbes Co. v. Brian, Simon, Peragine, Smith & Redfearn*, 568 F. Supp. 371 (E.D. La. 1983), *aff'd* 835 F.2d 286 (5th Cir. 1987); *Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773 (Mich. 1994); *Hyduke v. Grant*, 351 N.W.2d 675 (Minn. App. 1984); *Katsaris*, 453 N.Y.S.2d 944; *Floyd*, 329 S.E.2d 459; *Millhouse*, 775 S.W.2d 626; *Daugert*, 704 P.2d at n. 78.

115. *Id.*

116. *Legal Malpractice*, *supra* n. 34 at § 30.52, p. 1257.

117. *See, e.g., Jablonski v. Higgins*, 453 N.E.2d 1296 (Ohio 1983), *overruled on other grounds Cincinnati Ins. Co. v. Byers*, 151 F.3d 574 (6th Cir. 1998).

118. *Grogan*, 877 P.2d at 1384.

119. *Roberts v. Holland & Hart*, 857 P.2d 492, 497 (Colo. App. 1993).

120. *Id*.

121. *Id.* at 494.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 497.

127. *Id.* at 498.

128. *Id*.

129. *Temple Hoyne Buell Found. v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992).

130. *Id.* at 194.

131. *Id.*

132. *Id.*

133. *Id.* at 195.

134. *Id.* at 199.

135. *Id.* at 198.

136. *Id*.

137. *Id*.

138. *Id.* at 199.

139. *Destefano v. Grabrian*, 763 P.2d 275, 284 (Colo. 1988); *see also Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 157 (Colo. App. 1995); *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992).

140. *Destefano*, 763 P.2d at 284; *Winkler*, 923 P.2d at 157; *Woodmoor Improvement Ass'n v. Brenner*, 919 P.2d 928, 933 (Colo. App. 1996).

141. *Destefano*, 763 P.2d at 284; *Winkler*, 923 P.2d at 157; *see Restatement (Second) of Trusts* §§ 170, 174, 183 (1959); *Restatement (Third) of Trusts* §§ 77-79 (defining the duties as prudence (care, skill, and caution), loyalty, and impartiality).

142. *Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285 (Colo. 1996).

143. *Destefano*, 763 P.2d at 284, *citing Restatement (Second) of Torts* § 874 (1979).

144. *Winkler*, 923 P.2d at 157.

145. *Moses v. Diocese of Colorado*, 863 P.2d 310, 321 (Colo. 1993); *Crystal Homes*, 895 P.2d at 1181; *Winkler*, 923 P.2d at 157.

146. *Winkler*, 923 P.2d at 157; *Moses v. Diocese of Colorado*, 863 P.2d 310, 321 (Colo. 1993); *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992); *Graphic Directions v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993).

147. *Command Communs, Inc. v. Fritz Cos.*, 36 P.3d 182, 186 (Colo. App. 2001); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. App. 1998).

148. *Olsen & Brown v. City of Englewood*, 889 P.2d 673, 675 (Colo. 1995); *Moses*, 863 P.2d at 321; *Bailey*, 844 P.2d at 1339; *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000); *Moguls of Aspen*, 956 P.2d at 621.

149. *Enyart v. Orr*, 78 Colo. 6, 15, 238 P. 29, 34 (1925); *Olsen and Brown*, 889 P.2d at 675.

150. *Olsen and Brown*, 889 P.2d at 675.

151. *Lewis v. Helm*, 40 Colo. 17, 23, 90 P. 97, 99 (1907).

152. *Crystal Homes*, 895 P.2d at 1182, *citing Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *First Nat'l Bank of Meeker v. Theos*, 794 P.2d 1055 (Colo. App. 1990).

153. *Crystal Homes*, 895 P.2d at 1182, *citing Steiger v. Borroughs*, 878 P.2d 131 (Colo. App. 1994).

154. *See, e.g., Olsen and Brown*, 889 P.2d at 675.

155. *See generally Legal Malpractice*, *supra* n. 34, at § 14.1, p. 485 ("Thus, the basic fiduciary obligations [of a lawyer] are two-fold: undivided loyalty and confidentiality."); *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000). For the *Restatement*'s definition of a lawyer's fiduciary duties to a client, *see Restatement (Third) of the Law Governing Lawyers* § 16(3).

156. *Legal Malpractice, supra* n. 34 at § 14.2, p. 491.

157. *Fleming*, 873 P.2d at 40; CJI-Civ. 15:22 & 15:23 (CLE ed. 2005).

158. *Smith*, 30 P.3d at 733.

159. *Eadon*, 361 P.2d at 450.

160. Colo. RPC 1.6. For further guidance regarding the responsibilities of lawyers to maintain confidences, *see Restatement (Third) of the Law Governing Lawyers* §§ 59-67.

161. Colo. RPC 1.6(b).

162. Colo. RPC 1.6(c).

163. *See*, *e.g*., *Boyd v. Garvert*, 9 P.3d 1161 (Colo. App. 2000).

164. *See*, *e.g*., *Anstine v. Alexander*, 2005 Colo. App. LEXIS 587 (April 21, 2005) ("We recognize that ordinarily a lawyer does not owe a fiduciary duty to nonclients, even where the lawyer's client owes the nonclient a fiduciary duty.").

165. *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1312 (Colo. App. 1998).

166. *Id.* at 1312.

167. *Id.* (*citing Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. App. 1992)).

168. *Id.* (*citing Nicholson v. Ash*, 800 P.2d 1352 (Colo. App. 1990)).

169. *Id.*

170. *Id.* at 1314.

171. *Id.*

172. *People v. Sachs*, 732 P.2d 633, 634 (Colo. 1987).

173. *Restatement (Third) of the Law Governing Lawyers* § 49.

174. *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993) (setting forth elements of breach of fiduciary duty claim); CJI-Civ. 26:3 (CLE ed. 2005); *see also Byrne*, 916 P.2d at 575 ("To prove a claim for breach of fiduciary duty, a plaintiff must demonstrate, *inter alia*, that he or she has incurred damages and that the defendants' breach of fiduciary duty was a cause of the damages sustained."); *Rupert v. Clayton Brokerage Co. of St. Louis*, 737 P.2d 1106, 1112 (Colo. 1987).

175. *Crystal Homes*, 895 P.2d at 1182.

176. *Id.* at 1183; *Martinez v. Badis*, 842 P.2d 245, 252 (Colo. 1992); *Aller v. Law Office of Carole Schriefer*, 2005 Colo. App. LEXIS 1210 (July 28, 2005).

177. *Legal Malpractice*, *supra* n. 34 at § 14.2, p. 492.
178. *Martinez*, 842 P.2d at 251-252.
179. *Moguls of Aspen v. Faegre & Benson*, 956 P.2d 618, 621 (Colo. App. 1997).
180. *Id.* at 619.
181 *Id.* at 620.
182. *Id.* at 621.
183. *Id*.
184. *Id*.
185. *Aller v. Law Office of Carole C. Schriefer*, 2005 Colo. App. LEXIS 1210 (July 28, 2005).
186. *Id.* at *10.
187. *Id.* at *1-3.
188. *Id.* at *12.
189. *Id.* at *14-15.
190. *Martinez*, 842 P.2d at 252.
191. *Aller*, 2005 Colo. App. LEXIS 1210, at *10-11 (emphasis added). Later in the decision, the court offers the siphoning of a client's funds as an example of a claim that may be considered a breach of fiduciary duty, rather than negligence. *Id.*
192. CJI-Civ § 26:3 (CLE ed. 2005).
193. *See also Spoor v. Serota*, 852 P.2d 1292 (Colo. App. 1992), *cert. denied* (breach of fiduciary duty claim dismissed as duplicative of negligence claim in a medical malpractice case); *Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) (same).
194. *See*, *e.g*., *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Jet Courier Service, Inc. v. Muelei*, 771 P.2d 486 (Colo. 1989); *Van Schaack Holdings, Ltd., v. Van Schaack*, 867 P.2d 892 (Colo. 1994); *River Management Corp. v. Lodge Properties, Inc.*, 829 P.2d 398 (Colo. App. 1991); *Rifkin v. Platt*, 824 P.2d 32 (Colo. App. 1991); *Marshall v. Grauberger*, 796 P.2d 34 (Colo. App. 1990); *Steeby v. Fial*, 765 P.2d 1081 (Colo. App. 1988); *T-A-L-L, Inc. v. Moore & Co.*, 765 P.2d 1039 (Colo. App. 1988), *aff'd with modification* 792 P.2d 794 (Colo. 1990); *Rubenstein v. South Denver Nat'l Bank*, 762 P.2d 755 (Colo. App. 1988); *Collie v. Becknell*, 762 P.2d 727 (Colo. App. 1988), *cert. denied*; *Rupert v. Clayton Brokerage Co. of St. Louis, Inc.*, 737 P.2d 1106, 1109 (Colo. App. 1987).
195. *Zukowski v. Howard, Needles, Tammen, Bergendoff, Inc.*, 657 F. Supp. 926 (D. Colo. 1987).
196. *Zukowski*, 687 F. Supp. at 929.
197. *See*, *e.g*., *Majumdar v. Lurie*, 653 N.E.2d 915, 921 (Ill. 1995); *Metrick v. Chatz*, 639 N.E.2d 198, 203 (Ill. 1994); *Calhoun v. Rane*, 599 N.E.2d 1318, 1321 (Ill. 1992); *Bukoskey v. Walter W. Shuham, CPA, P.C.*, 666 F. Supp 181, 184 (D. Alaska 1987); *Tante v. Herring*, 453 S.E.2d 686, 687 (Ga. 1994) (where lawyer took advantage of a client sexually, but handled her legal matters competently, client did not state a claim for professional negligence, but, rather, stated a claim for breach of fiduciary duty); *Owen v. Pringle*, 621 So.2d 668 (Miss. 1993) (where lawyer competently represented client in chiropractic malpractice suit, but divulged confidences to client's ex-wife with whom lawyer was romantically involved, client did not state a claim for breach of the standard of care, but stated a claim for breach of fiduciary duty); *see also Edwards v. Thorpe*, 876 F. Supp. 693, 694 (E.D. Penn. 1995).
198. Colo. RPC 1.8(a).
199. *See*, *e.g*., *People v. Foreman*, 966 P.2d 1062 (Colo. 1998); *In re Cimino*, 3 P.3d 398 (Colo. 2000).
200. Cmt., Colo. RPC 1.8.
201. *Id.*
202. *Id*.
203. *Buechel v. Bain*, 766 N.E.2d 914 (N.Y. App. 2001).
204. 2 R. Mallen & J. Smith, *Legal Malpractice* (2005 Edition), § 15.4, at 628-29.
205. *Id*. § 15.3 at 613 ("The wrong is an interest adverse to the client. The interest involved is the personal interest of the lawyer.").

206. Committee Cmt., Colo. RPC 8.4(h) (*citing People v. Good*, 893 P.2d 101 (Colo. 1995); *People v. Bergner*, 873 P.2d 726 (Colo. 1994). Colo. RPC 8.4(h) provides, "It is professional misconduct for a lawyer to: . . . (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.").

207. *See*, *e.g*., *People v. Barr*, 929 P.2d 1325 (Colo. 1996).

208. *See*, *e.g*., *In re Egbune*, 971 P.2d 1065 (Colo. 1999); *People v. Espe*, 967 P.2d 159 (Colo. 1998).

209. *Kling v. Landry*, 686 N.E.2d 33 (Ill. App. 1997) (finding that the alleged breach of fiduciary duty was not sufficiently related to the representation to constitute malpractice); *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997) (finding that no claim for negligence had been established, but noting in *dicta* that a breach of fiduciary duty claim may have been appropriate if properly pleaded); *Tante v. Herring*, 453 S.E.2d 686, 687 (Ga. 1994) (holding that there could be no liability for malpractice where the plaintiff's underlying claim was successful, but that a breach of fiduciary duty occurred where the lawyer misused confidential information to seduce his client).

210. *Kling*, 686 N.E.2d at 40-41.

211. *Tante*, 453 S.E.2d at 688-89; *Walter v. Stewart*, 67 P.3d 1042 (Ut. App. 2003).

212. *Anstine*, 2005 Colo. App. LEXIS 587 (April 21, 2005).

213. *Id.* at *1-4.

214. *Id.* at *10-11.

215. *Id.* at *11.

216. *Id. See also Holmes*, 885 P.2d at 308-309.

217. *Anstine*, 2005 Colo. App. LEXIS 587, at *14.

218. *McLister*, 934 P.2d at 847; *International Tele-Marine*, 845 F. Supp. at 1435; *see FDIC v. Clark*, 768 F. Supp. 1402, 1411 (D. Colo. 1989), *aff'd* 978 F.2d 1541 (10th Cir. 1992); *Backstreet*, 107 P.3d at 1027. For general guidelines concerning contracts between lawyers and clients, and limitations to the scope of a lawyer's duties through contract, *see Restatement (Third) of the Law Governing Lawyers* §§ 18-19.

219. *McLister*, 934 P.2d at 847.

220. *Id.* at 847; *International Tele-Marine Corp.*, 845 F. Supp. at 1435; *Backstreet*, 107 P.3d at 1027. *See generally Restatement (Third) of the Law Governing Lawyers* § 55(c).

221. *McLister*, 934 P.2d at 847, *citing International Tele-Marine Corp.*, 845 F. Supp. 1427; *see FDIC*, 768 F. Supp. at 1411; *Backstreet*, 107 P.3d at 1027.

222. *McLister*, 934 P.2d at 847.

223. *Backstreet*, 107 P.3d at 1027.

224. *Pittman v. Larson Distributing Co.*, 724 P.2d 1379, 1386 (Colo. App. 1986) (*quoting Morrison v. Goodspeed*, 68 P.2d 458 (1937)).

225. CJI-Civ. 30:33 (CLE ed. 2005).

226. *See*, *e.g*., *East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 976 (Colo. 2005).

227. *See Legal Malpractice, supra* n. 34 at § 8.7, p. 971 (*citing Celentano v. Grudberg*, 818 A.2d 841 (2003); *Gorski v. Smith*, 812 A.2d 683 (2002).

228. *Coors v. Security 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* § 8.11 at 984.

229. *Smith v. Boyett*, 908 P.2d 508, 513 (Colo. 1995).

230. *See*, *e.g*., *Seller v. Knight*, 64 So. 329 (Ala. 1913); *Lawson v. Cagle*, 504 So.2d 226 (Ala. 1987).

231. *See*, *e.g*., *Helms*, 70 P.2d 65; *see generally Legal Malpractice* § 8.9 at 595-99.

232. CJI-Civ. 19:17 (CLE ed. 2005).

233. *Colorado Performance Corp. v. Mariposa Assocs.*, 754 P.2d 401 (Colo. App. 1987).

234. *Anson v. Trujillo*, 56 P.3d 114, 120 (Colo. App. 2002).

235. C.R.S. § 13-21-102.

236. *People v. Lujan*, 890 P.2d 109 (Colo. 1995); *People v. Franco*, 698 P.2d 230 (Colo. 1985).

237. *See*, *e.g.*, *People v. Ain*, 35 P.3d 734 (Colo. 2003); *People v. Radosevich*, 783 P.2d 841 (Colo. 1989); *People v. Lefly*, 902 P.2d 361 (Colo. 1995).

238. *See*, *e.g.*, *Government of Rwanda v. Rwanda Working Group*, 227 F. Supp.2d 45 (D. D.C. 2002).

239. *See generally Legal Malpractice*, *supra* n. 34 at § 6.30 at 790; *Byron v. York Inv. Co*., 296 P.2d 742, 745 (1956) (defining "conversion" as "any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another"). The owner's demand for a return of the property and the controlling party's refusal are both predicates to asserting a successful conversion claim. *See Finance Corp. v. King*, 370 P.2d 432 (1962); *Glenn Arms Associates v. Century Mortgage & Inv. Corp*., 680 P.2d 1315, 1317 (Colo. App. 1984).