

Chapter 30

LIABILITY TO THIRD PARTIES

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§ 30.1 • LIABILITY TO THIRD PARTIES — GENERALLY

The general rule is that a plaintiff who does not have a client-lawyer relationship with a lawyer may not recover for legal malpractice against the lawyer in the absence of fraud or malice.¹ See the discussion regarding the client-lawyer relationship in Chapter 2. The policy reasons that courts have traditionally used to limit a lawyer's liability to non-client third parties are (1) the consideration of the lawyer's duty of loyalty and effective advocacy for his or her client; (2) the nature of the adversarial relationship between a lawyer and other parties; and (3) the

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

§ 30.1.1—Duties To Non-Clients

In the vast majority of claims against lawyers by non-clients, courts have found that the lawyer owed no duty to the non-client. One notable exception distinguished by Colorado courts is that they have allowed a claim by a third-party non-client for restitution. In *Berger v. Dixon & Snow, P.C.*,³ the defendant lawyers obtained a judgment of \$437,000 in favor of their client and against the plaintiff's predecessor-in-interest. The judgment was satisfied and the law firm took a percentage of the recovery as a contingency fee. In a subsequent determination, the plaintiff, a bankruptcy trustee, obtained a \$235,000 reduction in the judgment. The trustee then sought to recover \$78,333 from the defendant lawyers, which represented the lawyers' portion of contingency fee based on the \$235,000 reduction of the judgment. The court found that the trustee could assert a claim for restitution.⁴ The court distinguished claims for relief based on an alleged duty owed to a third party, noting that a claim for equitable restitution does not depend upon a breach of a duty and that restitution is obtainable without finding of fault or misconduct.⁵

Duties to Devisees, Beneficiaries, and Heirs

Colorado courts have been clear that a lawyer owes no duty of care to the third-party beneficiaries of a will. In *Shriners Hospital v. Southard*,⁶ the Colorado Court of Appeals found that an intended third-party beneficiary of a client's will did not have standing to assert a professional negligence claim against the lawyer for the decedent. The defendant lawyer had drafted a trust for a client that placed most of the client's assets in the trust. The dispositive provisions of the trust were identical to those of the client's existing will, which provided for a bequest to Shriners Hospital and designated Shriners Hospital as the residuary beneficiary of the estate.⁷ Soon thereafter, the lawyer drafted a codicil to the client's will bequeathing money to two other persons. The client then had the lawyer alter her trust to leave all assets to the same two persons named in the codicil. The lawyer amended the trust without also revising the client's will. Upon the client's death, the two persons received the trust assets.

Shriners Hospital brought a malpractice action, claiming the defendant lawyer was negligent in drafting the revised trust agreement because he did not confer personally with the client to determine her mental competency.⁸ The court dismissed the hospital's claim, finding that the hospital lacked standing to assert the malpractice claim.⁹ The court reasoned that a lawyer has a duty to act in the best interest of his or her client, and is liable to non-clients only for injuries caused by the lawyer's fraudulent, malicious, or intentionally tortious conduct.¹⁰ The court found that because the hospital's complaint alleged "simple negligence rather than fraudulent, malicious or intentionally tortious conduct," the lawyer had no duty to the hospital.¹¹

Duties to Spouses or Children

Similarly, Colorado precedent holds that a lawyer owes no duty to a client's family. In *Klancke v. Smith*,¹² the court of appeals affirmed the trial court's dismissal of claims of negligence and breach of fiduciary duty asserted against the defendant lawyers because the lawyers did not

have a client-lawyer relationship with the plaintiffs and, thus, no duty. The lawyers represented a wife in a wrongful death claim arising from the death of her husband in an airplane crash. The plaintiffs in the malpractice action, children of the decedent and stepchildren of the wife, attempted unsuccessfully to intervene in the wrongful death action, apparently because of a justifiable fear that their stepmother would not uphold her fiduciary duty to distribute the proceeds of any settlement or judgment. The lawyers obtained a favorable judgment in the wrongful death action, and distributed the proceeds to the wife.¹³ Thereafter, the deceased husband's children sought unsuccessfully to recover a portion of the wrongful death proceeds from the wife. When the wife filed a petition for bankruptcy, the children filed an action against the lawyers, claiming that the lawyers owed them a duty to ensure that any wrongful death proceeds recovered were shared with them.¹⁴

The court found that the lawyers owed no duty to their client's stepchildren.¹⁵ The stepchildren had not retained the defendant lawyers to represent them. In fact, an adversarial relationship existed between the stepchildren and the client, making it impossible for the lawyers to represent the stepchildren as well.¹⁶ The court found that absent a client-lawyer relationship, a lawyer is liable for injuries to third parties only if his or her conduct is fraudulent or malicious.¹⁷

The Colorado Court of Appeals likewise dismissed malpractice claims asserted by a child of a client in *McGee v. Hyatt Legal Services, Inc.*¹⁸ In that case, a mother hired the Hyatt law firm to represent her in a marriage dissolution action. As part of its representation, the law firm assisted the mother in obtaining temporary joint child custody orders. Thereafter, the mother became dissatisfied with the temporary orders and sought sole custody of her child. The Hyatt law firm obtained a court-ordered custody evaluation and a continuance for the permanent orders hearing until after completion of the evaluation six months later. Thereafter, the mother retained new counsel, who moved to modify the temporary orders and arranged for the completion of the custody evaluation. The evaluation report recommended joint custody, and the court entered an order for joint custody of the child.¹⁹ The mother and child then filed a lawsuit against the Hyatt firm. The jury awarded damages to both the mother and the child.²⁰ The Colorado Court of Appeals reversed, finding that the child could not recover against the Hyatt law firm because the law firm owed no duty to the child.²¹ "An attorney, while performing his obligations to his client, is liable to third parties only when his conduct is fraudulent or malicious."²²

Duties to Officers and Directors of a Client Corporation

It is a longstanding rule of Colorado law that a corporate officer or shareholder has no standing to bring suit individually on behalf of a corporation against an alleged tortfeasor to recover damages for an injury to the corporation.²³ "Where a corporation is harmed by some action of a third party, the right to seek redress for that wrong belongs to the corporation Since the wrong is to the corporation, the shareholders cannot recover separately for the indirect harm to their stock."²⁴ The Rules of Professional Conduct affirm this rule, providing that "[a] lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives, or other persons connected with the entity."²⁵

The Colorado Court of Appeals has ruled, albeit somewhat obliquely, that a lawyer does not have a client-lawyer relationship with a corporation's shareholders simply because the lawyer is representing the corporation. In *Schmidt v. Frankewich*,²⁶ the plaintiff shareholders were also the personal guarantors of the corporation's loan. When the corporation defaulted, both the company and the individual shareholders were sued.²⁷ The shareholders relied on the company's lawyers to stay the proceedings, and ended up being in default when no responsive pleadings had been filed.²⁸ The plaintiffs then sued the defendant lawyers on a third-party beneficiary theory.²⁹ The court upheld the dismissal of the legal malpractice claim, refusing to extend the prohibition of suits by non-client third parties in the absence of fraud or malice.³⁰ In doing so, the court cited three policy concerns in maintaining the prohibition against third party suits: "(1) the attorney's duty of loyalty and effective advocacy of his client; (2) the nature of the adversarial relationship between an attorney and other parties; and (3) the potential liability to an unlimited number of third parties if attorney liability to third parties is extended."³¹

A lawyer may directly or impliedly establish a client-lawyer relationship with shareholders, but they are otherwise not clients and are not third-party beneficiaries of the corporation's contract with the lawyer.³² There appears to be no reason, however, why shareholders could not assert a derivative action against a lawyer pursuant to C.R.C.P. 23.1. If the corporation refuses to prosecute the legal malpractice action, the action would then be brought in the name of the corporation, as opposed to the individual shareholder, but would be subject to all of the limitations of C.R.C.P. 23.1.

Duties to Owners of a Closely Held Business

The principle that a corporate officer or shareholder has no individual standing to bring suit on behalf of a corporation applies with equal force to closely held corporations. As stated by the Colorado Supreme Court in *Industrial Com. of Colorado v. Lavach*,³³ "Even where all the stock is owned by a sole shareholder, there seems no adequate reason to depart from the general rule that the corporation and its shareholders are to be treated as distinct legal persons." This rule of standing applies even where the value of the shareholder's stock has been diminished by the third party's tort.³⁴ Thus, although the corporation may be owned by only a handful of shareholders, or even one, the lawyer's duty is still to the corporation, not to the shareholder. That shareholder would still have to file a derivative suit against the negligent lawyer on behalf of the corporation.

Where a lawyer represents a large group of clients who are not recognized as a legal entity, however, a client-lawyer relationship exists with each member of the group.³⁵

Duties to Business Partners

A lawyer representing a joint venture or partnership does not have a client-lawyer relationship with individual partners and, thus, no liability to the partners for malpractice.³⁶ As the Colorado Court of Appeals held in *Turkey Creek, LLC v. Rosania*,³⁷ "[T]he fact that an attorney represents a partnership does not, standing alone, create an attorney-client relationship with each of the partners, for that transaction or otherwise." Similarly, representing one partner does not create a duty between the lawyer and the partnership or joint venture.³⁸

It is also worth noting that the existence of a partnership continues after the dissolution of the partnership, until the winding up of the partnership affairs is complete,³⁹ which may also extend the lawyer's duty longer than one might expect. Other jurisdictions have allowed a partner to bring suit against a negligent lawyer during the winding up process.⁴⁰

§ 30.1.2—Assumptions Of Duties To Non-Clients

A lawyer may end up owing a duty to a non-client by inadvertently creating a client-lawyer relationship. A client-lawyer relationship is “established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions.”⁴¹ The relationship can be created expressly, or inferred from the conduct of the parties.⁴² “The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed.”⁴³ Thus, a lawyer who irresponsibly offers legal advice to a non-client (who then relies upon that advice) may be found to have entered into a client-lawyer relationship. A lawyer who believes that the client-lawyer relationship has terminated is advised to communicate that clearly to a client, because that duty is deemed continuing until the client understands or should reasonably understand it to have ceased.⁴⁴

Although there are no reported cases in Colorado, other jurisdictions have found that a lawyer may, through some undertaking, owe a duty to a non-client without giving rise to a client-lawyer relationship.⁴⁵ The *Restatement (Third) of the Law Governing Lawyers* has adopted this approach, stating that a lawyer owes a duty to a non-client to the extent that “the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies”⁴⁶ These situations often arise at loan closings, where a non-client may reasonably rely on some piece of advice offered by the lawyer.⁴⁷ Similar situations may arise when a lawyer offers some sort of opinion letter, but this is more likely to surface in Colorado as an action for negligent misrepresentation.⁴⁸

§ 30.2 • POSSIBLE CLAIMS BY THIRD PARTIES

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

§ 30.2.1—Negligent Misrepresentation

Despite the limitation on a lawyer's liability to third-parties, a non-client may recover from a lawyer for negligent misrepresentation.⁴⁹ Although several jurisdictions around the country still cite lack of privity between a lawyer and a plaintiff asserting a negligent misrepresentation claim as a basis for dismissal,⁵⁰ privity is not a necessary element in Colorado.⁵¹ The tort of negligent misrepresentation exists independently from a typical professional negligence claim. Lawyers are most likely to run the risk of exposing themselves to liability when issuing some sort of opinion upon which a third party may reasonably rely. The *Restatement (Third) of the Law Governing Lawyers* has adopted the position that a lawyer may be liable to a non-client when “the

lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies"⁵²

In *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver, N.A.*,⁵³ the lawyers represented the Town of Winter Park and the Winter Park Development Authority in connection with notes and bonds issued by the authority to raise funds to build a new parking garage. Central Bank of Denver, N.A., expressed an interest in purchasing certain notes. The authority's plans for issuing the notes had been approved by voters in a special election. However, before the bank purchased the notes, the local school district and other government entities filed a lawsuit challenging the authority's issuance of the notes. The bank told the underwriters that it would not purchase the notes if there was any risk that the lawsuit would succeed and cause the default on the notes. At the request of the underwriter, two law firms issued opinion letters stating that, in the lawyers' opinions, the lawsuit had no merit. The opinion letters were provided to the bank. The bank purchased \$4 million in notes. Some months later, in February 1985, the authority issued \$4.5 million in new notes (1985 notes) to retire the 1984 notes. The lawyers advised the bank that the 1985 notes were valid and, again, that in their opinion the lawsuit was without merit. The bank agreed to purchase the 1985 notes but, before doing so, issued a "comfort letter" to the town and authority in which it stated that it was relying on its own investigation of the facts relating to the transaction.

In April 1985, the district court dismissed the lawsuit. The plaintiffs in the lawsuit filed a Motion for Reconsideration. In October 1985, the authority issued bonds to retire the 1985 notes. The bank again desired an opinion letter and, again, the lawyers issued an opinion letter stating the bonds were valid and the lawsuit was without merit. On October 16, 1985, the bank issued a second comfort letter. On October 23, 1985, the trial court granted the Motion for Reconsideration. On October 24, 1985, the bank purchased the new bonds. On March 11, 1986, the trial court granted partial summary judgment to the plaintiffs, invalidating the town's approval of the financing plan. Subsequently, the authority defaulted on payment of its bonds. The bank filed a lawsuit asserting a negligent misrepresentation and malpractice claim against the lawyers who issued the opinion letters arguing that it relied on the advice of the lawyers in purchasing the bonds and notes.

The Colorado Supreme Court held that Central Bank stated a claim for negligent misrepresentation, finding that the opinion letters contained mixed statements of law and fact that might constitute misrepresentations of material fact on which to base a negligent misrepresentation claim.⁵⁴ The court refused, however, to permit the banks to assert a professional negligence claim against the lawyers, finding that the lawyers did not owe a duty of reasonable care to the banks.⁵⁵

In *Zimmerman v. Dan Kamphausen Co.*,⁵⁶ father Dan Kamphausen and son Dunbar Kamphausen entered into a partnership and created a trust. The plaintiff and Dan Kamphausen then entered into a contract for the sale of real estate secured by a promissory note. The defendant law firm, representing Kamphausen and the partnership, issued an opinion letter to the plaintiff, opining that the partnership had the legal power to execute a guaranty of the note and perform its obligations thereunder and that Dan Kamphausen Co. had the authority to sign the guaranty on behalf of the partnership. The partnership, the trust, and another corporation owned by the father guaranteed the real estate contract. Several years later, the partnership defaulted on the promissory

note and the plaintiff foreclosed on the real estate. The father, the trust, and the father's corporation confessed judgment. The plaintiff then commenced an action against the partnership and the son to collect the remaining amount owed on the real estate and against the law firm for negligent misrepresentation.

The trial court granted summary judgment in favor of the law firm, but the court of appeals reversed. Relying on *Mehaffy, Rider, Windholz & Wilson v. Central Bank*,⁵⁷ the court of appeals found that a lawyer owes a duty to a third party to whom he or she issues an opinion letter or whom he or she expects will rely on the letter. A claim for misrepresentation requires a showing that the lawyer provided false information regarding a material fact in a business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information upon which the third party relied. The court of appeals found that the opinion letter contained both legal and factual representations. The letter's factual representations, coupled with the plaintiff's contention that he relied on the opinion letter in completing the real estate transaction, created issues of material fact regarding whether the defendant lawyers made a negligent misrepresentation.

§ 30.2.2—Malicious Prosecution

A non-client may also recover from a lawyer for malicious prosecution. For example, in *Havens v. Hardesty*,⁵⁸ the court of appeals upheld a jury verdict against a lawyer in favor of a non-client who sued for malicious prosecution.⁵⁹ In a case of mistaken identity, the lawyer had the plaintiff served, and eventually arrested, believing the plaintiff to be a judgment debtor of the same name.⁶⁰ The lawyer argued unsuccessfully that he had been acting in good faith as an officer of the court, and that a third party may only recover from a lawyer acting on his client's behalf upon a showing of fraud or malice.⁶¹ The jury verdict was allowed to stand and the court noted that the intentional tort of malicious prosecution does not depend upon the existence of a duty.⁶²

The purpose of a malicious prosecution action is to compensate one sued in a malicious and baseless action for attorney fees, costs, psychic damages, and loss of reputation.⁶³ In order to prevail on a malicious prosecution claim, a plaintiff must prove that:

- 1) The defendant contributed to bringing a civil or criminal proceeding against the plaintiff;
- 2) The proceeding was resolved in the plaintiff's favor;
- 3) There was no probable cause for the proceeding;
- 4) The defendant acted with malice; and
- 5) The plaintiff was damaged.⁶⁴

Civil suits, counterclaims, criminal prosecutions, disciplinary actions, administrative proceedings, and arbitration actions all may be the basis of a malicious prosecution claim.⁶⁵

Before a plaintiff may assert a malicious prosecution claim, the plaintiff must first prevail on the underlying action that forms the basis of the malicious prosecution claim.⁶⁶ In order for the proceeding to be considered terminated in favor of the malicious prosecution plaintiff, the under-

lying proceedings must have been dismissed on the merits.⁶⁷ Although Colorado courts have yet to address whether a claim for malicious prosecution may stand while the prior proceedings are on appeals, the majority and better reasoned view holds that such a claim cannot stand until the appeals are complete.⁶⁸ A similar view has been adopted by the *Restatement*, which provides that “[a] lawyer is liable only if there was no probable cause for bringing the civil proceeding, the lawyer did not act primarily to aid the client in securing a proper adjudication of the client’s claim, and the civil proceeding has terminated in favor of the defending party.”⁶⁹

§ 30.2.3—Abuse Of Process

A lawyer faces similar exposure to abuse of process claims. An abuse of process claim consists of:

- 1) An improper use of a legal proceeding;
- 2) An ulterior purpose for the use of the legal proceeding;
- 3) Willful action in the use of that process that is not proper in the regular course of proceedings; and
- 4) Damages.⁷⁰

“The essence of the tort of abuse of process is not the beginning of an action causing process to issue without justification, but rather the misapplication of process, proper in itself but for an end other than that which it was designed to accomplish.”⁷¹

A plaintiff asserting an abuse of process claim or malicious prosecution claim may recover attorney fees incurred in defending against the underlying litigation.⁷² A plaintiff may not, however, recover attorney fees incurred in bringing the malicious prosecution or abuse of process action itself.⁷³

Colorado has not addressed either a malicious prosecution claim or abuse of process claim in a legal malpractice context. Other jurisdictions have held that a meritless suit may constitute an ethical violation, but is not a basis for a malicious prosecution or abuse of process claim.⁷⁴

§ 30.2.4—Invasion Of Privacy

Colorado courts have recognized several variations of the tort of invasion of privacy.⁷⁵ The tort of invasion of privacy by intrusion on the seclusion of another requires an unreasonable manner of intrusion for an unwarranted purpose.⁷⁶ Invasion of privacy by appropriation of another’s name or likeness requires a showing that:

- 1) The defendant used the plaintiff’s name or likeness;
- 2) The use of the name or likeness was for the plaintiff’s purposes or benefit;
- 3) The plaintiff suffered damages; and
- 4) The defendant caused the damages.⁷⁷

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

- 1) The facts disclosed were private in nature;
- 2) The disclosure was made to the public;
- 3) The disclosure was one that would be highly offensive to a reasonable person;
- 4) The facts disclosed were not of legitimate concern to the public; and
- 5) The defendant acted with reckless disregard as to the private nature of the exposed facts.⁷⁸

Colorado does not recognize a false light invasion of privacy claim.⁷⁹

There are no reported cases in Colorado of a lawyer being successfully sued for invasion of privacy. Other jurisdictions, however, have found lawyers liable for the use of exceptional tactics to obtain private facts during an investigation.⁸⁰ Any instance of a lawyer found liable for invasion of privacy would likely result from some extreme or outrageous action on the part of the lawyer. The act of filing a lawsuit is not an invasion of privacy as a matter of public policy⁸¹ and statements made during the course of litigation are absolutely privileged, protecting the lawyer from liability for statements related to judicial proceedings.⁸²

§ 30.2.5—Interference With A Prospective Economic Relationship

Colorado courts have recognized the tort of interference with prospective economic relationships.⁸³ The tort consists of “intentionally ‘(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.’”⁸⁴ The tort does not require the plaintiff to prove the existence of an underlying contract, but merely intentional and improper interference that prevents the formation of a contract.⁸⁵

There are public policy reasons why a lawyer should not be liable for such a tort. A lawyer’s role requires him or her to have the freedom to advise a client regarding claims and relationships with third parties.⁸⁶ The U.S. District Court for the District of Colorado seems to agree with this reasoning at least in part. In *Williams v. Burns*,⁸⁷ the defendant lawyer advised his client, the Anschutz Corporation, not to purchase the plaintiff’s oil rigs, informing his client that the transaction was fraudulent and that the rigs had already been sold by the bankruptcy court. In his defense, the lawyer argued that he was privileged to interfere with such prospective relations because of his role as an advisor to his client.⁸⁸ The trial court agreed that the privilege existed here, but found that a triable issue of fact existed as to whether the lawyer had acted with malice.⁸⁹ The *Restatements* have adopted the principle that such a privilege should apply to lawyers.⁹⁰

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

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

- 1) A defamatory statement about another;
- 2) Published to a third party;
- 3) Negligence, or greater fault, on behalf of the publisher; and
- 4) Special damages to the plaintiff caused by publication or actionability of the statement irrespective of damages.⁹¹

Any legitimate claim against a lawyer for defamation must be for statements occurring outside the litigation context. However, statements of opinion are not actionable as a matter of law.⁹² Thus, for liability to attach to a lawyer, the statement must be unrelated to litigation and must involve some sort of defamatory statement of fact causing damage to a third party.

“All lawyers are protected by an absolute privilege against defamation actions based on conduct in judicial proceedings.”⁹³ Colorado courts have taken a broad view of the traditional absolute privilege, holding that the absolute privilege attaches to a lawyer’s publications or statements made in the course of and reasonably related to judicial proceedings.⁹⁴ In *Russell v. Turnbaugh*,⁹⁵ the U.S. District Court for the District of Colorado held that statements made in the course of a judicial proceeding, including the allegations in a plaintiff’s complaint, are absolutely privileged from liability.⁹⁶ Presumably, the absolute privilege also applies to statements made in the answer to the complaint and other court filings. The absolute privilege extends to all individuals who are an integral part of the judicial process, including judges, prosecutors, witnesses, and others who perform official functions in the judicial process.⁹⁷

Even statements made prior to the initiation of judicial proceedings are subject to the absolute privilege, if the statement has some relation to the proceeding that is “actually contemplated in good faith.”⁹⁸ In making the determination whether the statement is sufficiently related to the subject of proposed litigation, “No strained or close construction will be indulged to exempt a case from the protection of privilege.”⁹⁹

The absolute privilege has been applied to a variety of other contexts. It has been invoked with respect to a letter written to county commissioners asking for revocation of a liquor license,¹⁰⁰ to statements made in a written report preliminary to a workers’ compensation hearing,¹⁰¹ and to a verbal complaint of a race “fix” made by a driver to a racing steward who had authority to commence racing commission proceedings.¹⁰² In *Wagner v. Hilkey*,¹⁰³ the court of appeals held that absolute privilege extends to all civil claims based on a witness’s testimony, regardless of malice or actual knowledge of falsity of the testimony.¹⁰⁴ In *Williams v. Boyle*,¹⁰⁵ the court of appeals clarified in *dicta* that “the absolute privilege that exists for certain communications by a lawyer to a third party is not the result of the confidential relationship between the lawyer and the client but, rather, exists only when the lawyer’s statement is made in relation to a proposed or occurring judicial proceeding.”¹⁰⁶

Besides defamation cases, where it is most often applied,¹⁰⁷ absolute immunity has been extended to apply to nearly every claim that could be based on a witness’s testimony: civil rights violations under 42 U.S.C. § 1983,¹⁰⁸ invasion of privacy,¹⁰⁹ slander of title,¹¹⁰ misappropriation of trade secrets,¹¹¹ tortious interference with contract,¹¹² and intentional infliction of emotional distress.¹¹³ Although witnesses in most quasi-judicial proceedings, including administrative hearings, are granted absolute immunity, the Colorado Supreme Court has held that absolute immunity does not extend as far as witness statements in personnel disciplinary proceedings.¹¹⁴ A witness’s statements made in a videotaped deposition replayed at trial in lieu of trial testimony are protected as well.¹¹⁵ The *Restatement (Third) of the Law Governing Lawyers* has adopted the position that a lawyer should be absolutely privileged to publish statements regarding a non-client if: (1) the pub-

lication occurs in a proceeding before a tribunal or is preliminary to such a proceeding; (2) “the lawyer participates as counsel in that proceeding;” and (3) the statement is “published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.”¹¹⁶

§ 30.2.7—Aiding And Abetting A Breach Of Fiduciary Duty

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

In *Holmes v. Young*,¹¹⁷ the plaintiff was a limited partner in a partnership. The defendant lawyer represented the partnership in a real estate action, and the partnership settled the case. The plaintiff was dissatisfied with the settlement and obtained his own lawyer to dispute the settlement and the distribution of the settlement proceeds. Thereafter, the plaintiff settled his suit against the partnership, the general partner, and the defendants in the underlying action, whereby the partnership and the general partner agreed to make payments to the plaintiff. At the time of this settlement, in 1983, the partnership terminated. In 1985, the defendant lawyer delivered the remaining funds of the partnership to the general partner. The defendant lawyer’s involvement with the partnership ended in 1986.¹¹⁸ From 1983 until 1987, the general partner made the required payments to the plaintiff. In 1988, the general partner failed to make a payment to the plaintiff.¹¹⁹

The plaintiff then filed an action against the partnership and the general partner, alleging breach of fiduciary duty and breach of contract, and against the defendant lawyer for aiding and abetting a breach of fiduciary duty. The trial court dismissed the action, and the appellate court affirmed, holding that the plaintiff could not maintain a claim for aiding and abetting. Because the partnership terminated, the court found that no fiduciary duty existed between the partnership and the plaintiff or between the general partner and the plaintiff.¹²⁰ Thus, in the absence of a fiduciary duty, the defendant lawyer could not be liable for aiding and abetting the breach of a fiduciary duty. Further, the court found that even if a fiduciary duty did exist, the defendant lawyer did not *knowingly* assist in the breach of that duty.¹²¹ The knowledge required to aid and abet is knowing that the primary violator is a fiduciary and the knowledge that the primary’s conduct contravenes a fiduciary duty.¹²²

In *Anstine v. Alexander*,¹²³ Builders Home Warranty, Inc. (BHW) purchased insurance to cover its warranty obligations from two individuals who sold it fraudulent insurance policies. Lawyers for BHW advised its president that it could either file bankruptcy, or use funds from the premiums it had already received to purchase replacement coverage.¹²⁴ When the president was unable to find adequate alternative coverage, BHW found itself enjoined from the further sale of warranties by the federal court.¹²⁵ After filing for bankruptcy protection, the bankruptcy trustee brought suit on behalf of fictitious creditors against BHW’s president for breach of fiduciary duty, and against the lawyers for aiding and abetting that breach of fiduciary duty.¹²⁶

In their defense, the lawyers argued that they could not be liable to BHW’s creditors for aiding and abetting because they owed no duty to the non-client third-party creditors.¹²⁷ The court disagreed, noting that aiding and abetting is a distinct and separate claim from legal malprac-

tice.¹²⁸ 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.¹²⁹ The court recognized that the only party to whom the lawyers owed a professional duty was BHW, but ultimately upheld the jury verdict against the lawyers for aiding and abetting based on the fiduciary duty that existed between BHW and its president.¹³⁰ The court was clear that even in the absence of a fiduciary duty between the lawyers and the creditors to whom BHW owed a duty, the lawyers could still be found liable for aiding and abetting the breach of that duty.¹³¹ Ultimately, liability was imposed on the lawyers not in their capacities as lawyers for rendering professional advice, but for other affirmative steps taken to aid and abet the breach of an independent fiduciary duty, including creating and exporting the funds that were used to purchase the inadequate policies.¹³²

§ 30.2.8—Civil Conspiracy Claims

To successfully assert a claim for civil conspiracy, a plaintiff must show the existence of “(1) two or more persons. . . ; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.”¹³³ An aiding and abetting claim is substantially similar to a conspiracy claim. It requires a showing that one aided and substantially assisted another in committing a wrongful act knowing that the participation furthered the illegal conduct.¹³⁴ There are no reported cases of legal malpractice claims in Colorado successfully asserting a civil conspiracy claim against a lawyer. In *Anstine v. Alexander*,¹³⁵ the court of appeals upheld a jury verdict against the defendant lawyers for aiding and abetting a breach of fiduciary duty.

In *Fasing v. LaFond*,¹³⁶ the plaintiff, a lawyer, asserted a civil conspiracy counterclaim against his client, another lawyer. LaFond represented Fasing in an employment action. Initially, Fasing paid LaFond an hourly fee for his legal work. Later, LaFond drafted a contingent fee agreement and ceased hourly billing. Fasing, however, did not sign the agreement and LaFond did not send Fasing a duplicate copy within 10 days.¹³⁷ The employment action settled, and LaFond sought to retain a 25 percent share of the settlement pursuant to the contingent fee agreement. Fasing argued that she never entered into a contingent fee agreement and thus did not owe LaFond 25 percent of the settlement.¹³⁸ LaFond filed a counterclaim against Fasing, alleging civil conspiracy.¹³⁹ The trial court determined that no contingent fee agreement existed and that LaFond's counterclaim of civil conspiracy, along with his claims for fraudulent misrepresentation, promissory estoppel, and intentional interference with contract, were “impermissible attempts to evade the public policy behind the contingent fee agreement rules.”¹⁴⁰ The court of appeals affirmed.

In *Eadon v. Reuler*,¹⁴¹ the plaintiff sued her lawyers after deeming a property division unsatisfactory. She claimed that her lawyers conspired with her former husband and his lawyer to obtain the divorce decree and alleged unequitable distribution of the property. The Colorado Supreme Court affirmed the trial court's dismissal of the conspiracy and fraud charges, stating:

A lawyer does not guarantee results. He merely undertakes to use his best skill and judgment. A result unsatisfactory to the litigant scarcely justifies a suit charging the lawyers with fraud and conspiracy. Efforts of a lawyer to obtain an amicable disposition do not subject him to a charge of treason.¹⁴²

§ 30.2.9—Consumer Protection Act Claims

Although there are no reported cases in Colorado holding so, it is conceivable that a lawyer might face a deceptive trade practice claim from a third party. The portions of the Colorado Consumer Protection Act (CCPA) that may potentially apply to lawyers are those where a person makes false representations as to the nature of services, represents that services are of a different standard or quality than they really are, fails to disclose material information concerning services, or refuses to obtain all government licenses to perform the required services.¹⁴³

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

(1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.¹⁴⁴

There are no reported cases in Colorado of a plaintiff successfully asserting a CCPA claim against a lawyer. (See Chapter 29, § 29.1, of this handbook for a more in-depth discussion of CCPA claims against lawyers.) The requirement that a plaintiff must have suffered an injury in fact to a legally protected interest makes it unlikely that any such claim by a non-client third party could succeed. However, the Colorado Supreme Court has held that a third-party non-consumer may have standing to pursue a CCPA claim, so long as he or she suffered some injury in fact.¹⁴⁵ It is conceivable that some statement by a lawyer could be relied upon as legal advice and cause damage to a third party, but the statement would presumably have to be excessively irresponsible. A claim against a non-lawyer for the unauthorized practice of law could potentially proceed under the CCPA in the absence of a true client-lawyer relationship.

§ 30.2.10—Conversion And Civil Theft

One who wrongfully exercises dominion over the property of another may be liable for conversion. To state a claim for conversion against a lawyer, a plaintiff must show (1) that the plaintiff had the right to ownership or possession of the property in question; (2) the lawyer's wrongful control over the property; and (3) damages.¹⁴⁶

A lawyer sued for conversion by a non-client has no special immunities that would protect him or her from liability.¹⁴⁷ Even if the defendant lawyer's actions were taken for the benefit of the client, the lawyer may still be liable to a third party.¹⁴⁸

In *Ruscitti v. Sackheim*,¹⁴⁹ a lawyer obtained a default judgment on behalf of his client and executed the judgment against the defaulting party's grocery store. The lawyer was thereafter sued for conversion by the defaulting party's wife, who alleged that she was a co-owner of the store.¹⁵⁰ The court held that the lawyer was not liable for conversion because he was acting lawfully, further noting that joint property may be seized to secure the debts of only one of several co-owners.¹⁵¹

Although there are no reported claims, a lawyer might be liable to a non-client for a statutory claim of civil theft.¹⁵² A civil theft claim may have particular force in a lawsuit against a lawyer, as the civil theft statute permits treble damages and attorney fees.¹⁵³

§ 30.2.11—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.¹⁵⁴

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.¹⁵⁵

The general rule is that a lawyer is not liable to a third party non-client in the absence of fraud or malice.¹⁵⁶ When a fraudulent act has been committed, however, a lawyer may be liable to third parties, potentially even adversaries.¹⁵⁷ Liability to a non-client third party must usually be predicated upon an affirmative misrepresentation, unless the third party can prove that the lawyer owes him or her a duty.¹⁵⁸

§ 30.2.12—Subrogation And Indemnity

A lawyer may also face potential claims from third party non-clients under theories of subrogation or indemnification. Although a lawyer’s primary duty is always to the client, insurance companies forced to pay on claims because of a lawyer’s negligence have been known to assert claims against a lawyer under a theory of equitable subrogation. Under equitable subrogation, a party secondarily liable, usually an insurer, who has paid on behalf of the primary party may step into the shoes of that party and institute an action against any other party at fault to be made whole.¹⁵⁹

In *Essex Ins. Co. v. Tyler*,¹⁶⁰ an insurance company was unsuccessful in its effort to recover against its insured’s lawyer for legal malpractice. This is an instance where the doctrine of privity still limited a lawyer’s liability to third parties. Because of the issues of personal trust and personal service implicated in the client-lawyer relationship, the court of appeals has held that legal malpractice claims are not assignable under Colorado law.¹⁶¹ In *Essex*, the U.S. District Court for the District of Colorado, predicting how the Colorado Supreme Court might decide the issue, determined that an equitable subrogation claim against a lawyer is essentially an assignment of a legal malpractice action to a third party.¹⁶² The court held that equitable subrogation claims against lawyers should be prohibited for the same policy reasons.¹⁶³ The Colorado Supreme Court and the Colorado Court of Appeals have yet to address this issue.

A lawyer contributing to a client's loss also faces the possibility that a non-client may argue that the lawyer's actions were an intervening cause of the plaintiff's damages and seek indemnification from the lawyer. Conceivably, this threat extends to a client's past lawyers as well.¹⁶⁴ A third party would typically seek indemnity by joining the lawyer as a defendant in the lawsuit pursuant to C.R.C.P. 14(a).¹⁶⁵ Designating a current lawyer as a party in litigation has obvious devastating effects on the client-lawyer relationship, not only denying the client counsel of his or her choice, but also threatening work product confidentiality and attorney-client privilege.

In *Stone v. Satriana*,¹⁶⁶ the defendant lawyers attempted to designate the plaintiff's legal malpractice counsel as non-parties at fault and join them in the lawsuit as contributing defendants. The Colorado Supreme Court cited three policy reasons for disallowing a client's lawyers to be designated as nonparties at fault: (1) the danger of joining current or successive counsel as nonparties as an unfair litigation tactic; (2) the adverse effect it would have in allowing a client to pursue a legal malpractice claim; and (3) interference with attorney-client confidences.¹⁶⁷ In addition, the court held that the legal malpractice counsel in this case had no duty to ameliorate the damages of previous counsel, thus there was no breach of duty to the client or a third party.¹⁶⁸ Considering that the lawyer from whom indemnification was sought had not breached any duty, and in consideration of the policy concerns enumerated above, the court found that the trial court had erred in allowing the plaintiff's lawyers to be disqualified and designated as non-parties at fault.¹⁶⁹

§ 30.2.13—Employee Retirement Income Security Act (ERISA)

A lawyer may be sued by the trustee of a plan under the Employment Retirement Income Security Act (ERISA).¹⁷⁰ The statute expressly allows a beneficiary to assert a claim for breach of fiduciary duty on behalf of the plan.¹⁷¹

A lawyer offering advice to a plan is not automatically a fiduciary under ERISA.¹⁷² According to the act:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.¹⁷³

Another potential basis for lawyer liability is found in ERISA's prohibition against fiduciaries receiving personal compensation from a party dealing with the plan. A lawyer paying bribes to fiduciaries in order to secure legal business from the plan has been sued for bribery under the act.¹⁷⁴

A lawyer wishing to avoid liability under ERISA "should refrain from participating in any significant business decisions or transactions involving the plan, its assets or members."¹⁷⁵

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

NOTES

1. See *Essex Ins. Co. v. Tyler*, 309 F. Supp.2d 1270, 1272 (D. Colo. 2004); *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1313 (Colo. App. 1998); *Glover v. Southard*, 894 P.2d 21 (Colo. App. 1994); *Shriners Hosp. 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).

2. *Montano*, 778 P.2d at 330-331; *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995).

3. *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149 (Colo. App. 1993).

4. *Id.* at 1151.

5. *Id.* at 1152-1153.

6. *Shriners Hosp. v. Southard*, 892 P.2d 417 (Colo. App. 1994);

7. *Id.* at 418.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; see also *Mehaffey, Rider, Windholz & Wilson*, 892 P.2d at 235; *Glover*, 894 P.2d at 24 (lawyer not liable to intended third-party testamentary beneficiary for negligently drafting the testamentary instrument so long as the document accurately reflects the testator's intent).

12. *Klancke v. Smith*, 829 P.2d 464, 466 (Colo. App. 1991).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *McGee v. Hyatt Legal Services, Inc.*, 813 P.2d 754 (Colo. App. 1990).

19. *Id.* at 756.

20. *Id.* at 756-757.

21. *Id.* at 757.

22. *Id.*

23. *Box v. Roberts*, 148 P.2d 810 (1944); *Holmes v. Jewett*, 55 Colo. 187, 134 P. 665 (1913); *A.R.A. Mfg. Co. v. Cohen*, 654 P.2d 857, 860 (Colo. App. 1982); see also *Larimer & Weld Reservoir Co. v. Fort Collins Milling & Elevator Co.*, 60 Colo. 241, 152 P. 1160 (1915).

24. *A.R.A. Mfg. Co.*, 654 P.2d at 860 (citations omitted). See also *McDaniel v. Painter*, 418 F.2d 545, 547 (10th Cir. 1969).

25. Colo. RPC 1.13(a).

26. *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991).

27. *Id.* at 1076.

28. *Id.*

29. *Id.*

30. *Id.* at 1079.

31. *Id.* (citing *Montano v. Land Title Guarantee Co.*, 778 P.2d 328 (Colo. App. 1989)).

32. *Id.*

33. *Industrial Comm'n of Colorado v. Lavach*, 439 P.2d 359, 361 (Colo. 1968).
34. *Box*, 148 P.2d at 811-812.
35. *Abbott v. Kidder, Peabody & Co., Inc.*, 42 F. Supp.2d 1046 (D. Colo. 1999).
36. *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998) *cert. denied* (Feb. 16, 1999).
37. *Turkey Creek*, 953 P.2d at 1311.
38. *Id.*
39. *Hooper v. Yoder*, 737 P.2d 852 (Colo. 1987).
40. *Berk v. Sherman*, 682 A.2d 209 (D.C. App. 1996).
41. *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986).
42. *Id.*; *Turkey Creek*, 953 P.2d at 1311.
43. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).
44. *Id.* (citing *In re Weiner*, 586 P.2d 194, 197 (Ariz. 1978)).
45. 1 R. Mallen & J. Smith, *Legal Malpractice* (2005 ed.) (*hereinafter*, *Legal Malpractice*) § 7.2 at 800 (“An attorney can assume an undertaking requiring a duty of care to a nonclient, which does not involve the creation of an attorney-client relationship.”).
46. *Restatement (Third) of the Law Governing Lawyers* § 51(2)(a).
47. *See, e.g., Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); *Vanguard Prod., Inc. v. Martin*, 894 F.2d 375 (10th Cir. 1990).
48. *See, e.g., Mehaffy, Rider, Windholz & Wilson*, 892 P.2d at 235.
49. *Id.* at 236.
50. *See, e.g., Holland v. Lawless*, 623 P.2d 1004 (N.M. App. 1981); *Schuler v. Meschke*, 435 N.W.2d 156 (Minn. App. 1989); *Krawczyk v. Bank of Sun Prairie*, 496 N.W.2d 218 (Wis. App. 1993).
51. *Mehaffy, Rider, Windholz & Wilson*, 892 P.2d at 236. In general, the exceptions to the requirement of privity in legal malpractice actions have begun to overtake the rule throughout the country. For a general discussion on the decline of the privity requirement, see Jay M. Feinman, “Attorney Liability to Nonclients,” 31 *Tort & Ins. L.J.* 735 (Spring 1996).
52. *Restatement (Third) of the Law Governing Lawyers* § 51(2)(a).
53. *Mehaffy, Rider, Windholz & Wilson*, 892 P.2d at 235.
54. *Id.* at 237-238.
55. *Id.* at 240.
56. *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998) *cert. denied* (Feb. 16, 1999).
57. *Mehaffy, Rider, Windholz & Wilson*, 892 P.2d at 235.
58. *Havens v. Hardesty*, 600 P.2d 116 (Colo. App. 1979).
59. *Id.* at 119.
60. *Id.* at 118.
61. *Id.* at 119.
62. *Id.*
63. *Walford v. Blinder, Robinson & Co. Inc.*, 793 P.2d 620, 623 (Colo. App. 1990).
64. *Hewitt v. Rice*, 2004 Colo. App. LEXIS 2418 (2004).
65. *Walford*, 793 P.2d at 623.
66. *See, e.g., Moran v. Klatzke*, 682 P.2d 1156, 1157 (Ariz. 1984).
67. *See Hewitt v. Rice*, 2004 Colo. App. LEXIS 2418, at *6 (2004).
68. *See Restatement (Second) of Torts* § 674, Comment j (1977); *Moran*, 682 P.2d at 1158; *Mattingly v. Whelden*, 435 N.E.2d 61 (Ind. App. 1982); *Parisi v. Michigan Townships Ass'n*, 332 N.W.2d 587 (Mich. App. 1983); *Breen v. Shatz*, 267 S.W.2d 942, 943 (Ky. App. 1954); 54 *C.J.S. Malicious Prosecution* § 56 at 1024 (1948); 41 *A.L.R.2d* 863 (1955); 52 *Am. Jur.2d, Malicious Prosecution* § 44 at 212 (1970).
69. *Cmt. d, Restatement (Third) of the Law Governing Lawyers* § 57.

70. *James H. Moore & Assoc. Realty v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. App. 1994); *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 202 (Colo. App. 1998).
71. Notes on Use, CJI-Civ.3d. 17:10 (CLE ed. 2005).
72. See *Technical Computer Services, Inc. v. Buckley*, 844 P.2d 1249, 1256 (Colo. App. 1992), citing *Bernstein v. Simon*, 235 P. 375 (Colo. 1925); Cmt. c, *Restatement (Second) of Torts* § 671 (1977); *Walford*, 793 P.2d at 623.
73. *Buckley*, 844 P.2d at 1256, citing C. McCormick, *Damages* § 66 (1935); 54 C.J.S. *Malicious Prosecution* § 97 (1987).
74. *Drago v. Buonagurio*, 386 N.E.2d 821, 822 (N.Y. 1978).
75. *People v. Home Ins. Co.*, 591 P.2d 1036, 1038 (Colo. 1979) (citing W. Prosser, *Torts* (4th ed. 1971) § 117, for the proposition that “the common law tort of invasion of privacy contains four distinct kinds of invasion of four different interests: (1) intrusion upon physical solitude; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of name or likeness.”); *Slaughter v. John Elway Dodge Southwest AutoNation*, 107 P.3d 1165, 1170-71 (Colo. App. 2005) (noting that Colorado has recognized three distinct torts sharing the moniker “invasion of privacy”).
76. *Slaughter*, 107 P.3d at 1171.
77. *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001).
78. *Tonnessen v. Denver Publ. Co.*, 5 P.3d 959 (Colo. App. 2000).
79. *Denver Publ. Co. v. Bueno*, 54 P.3d 893 (Colo. 2002).
80. See, e.g., *Noble v. Sears, Roebuck & Co.*, 33 Cal. App.3d 654 (1973). But see *Dopp v. Fairfax Consultants, Ltd.*, 771 F. Supp. 494 (D.P.R. 1990) (a private investigation does not rise to the level of an invasion of privacy).
81. See *Legal Malpractice* § 6.29 at 789.
82. See Discussion, § 30.2.6, of this Chapter.
83. See, e.g., *McCormick v. Bradley*, 870 P.2d 599 (Colo. App. 1993); *Plaza Esteban v. La Casa Nino, Inc.*, 738 P.2d 410 (Colo. App. 1989), *rev'd on other grounds* 762 P.2d 669 (Colo. 1988).
84. *Wasalco, Inc. v. El Paso Co.*, 689 P.2d 730, 732 (Colo. App. 1984) (quoting *Restatement (Second) of Torts* § 766B (1979)).
85. See *Williams v. Burns*, 540 F. Supp. 1243, 1251-52 (D. Colo. 1982); *Dolton v. Capital Savings & Loan Assoc.*, 642 P.2d 21 (Colo. App. 1981).
86. See, e.g., *Legal Malpractice* § 6.26 at 773.
87. *Williams v. Burns*, 540 F. Supp. 1243 (D. Colo. 1982).
88. *Id.* at 1252.
89. *Id.*
90. See Cmt. g, *Restatement (Third) of the Law Governing Lawyers* § 57 (2000); *Restatement (Second) of Torts* § 772 (1979).
91. *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1153 n. 13 (Colo. 1997); *Williams v. District Court*, 866 P.2d 908, 912 n. 4 (Colo. 1993).
92. *Gordon v. Boyles*, 9 P.3d 1106, 1120 (Colo. 2000) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-21 (1990)).
93. *Robinson v. Volkswagenwerk, AG*, 940 F.2d 1369, 1372 (10th Cir. 1991).
94. See, e.g., *Glasson v. Bowen*, 267 P. 1066, 1067 (Colo. 1928); *Renner v. Chilton*, 351 P.2d 277, 278 (Colo. 1960); *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034, 1044-45 (D. Colo. 1988); see also *MacLarty v. Whiteford*, 496 P.2d 1071, 1072 (Colo. 1972); see generally *Restatement (Second) of Torts* §§ 585-589 (1977); W. Keeton, *Prosser and Keeton on the Law of Torts* (5th ed. 1984), pp. 815-820.
95. *Russell v. Turnbaugh*, 18 *Media L. Rptr.* 2189, 18 U.S.P.Q.2d 1948 (D. Colo. 1991), *motion to vacate denied* 774 F. Supp. 597 (D. Colo. 1991), *appeal dismissed* 957 F.2d 796 (10th Cir. 1992).
96. *Id.*
97. See *Hoffler v. Colo. Dept. of Corr.*, 27 P.3d 371, 374 (Colo. 2001).
98. *Merrick v. Burns*, 43 P.3d 712, 714 (Colo. App. 2001). See also *Club Valencia Homeowners Assn., Inc. v. Valencia Assoc.*, 712 P.2d 1024, 1027 (Colo. App. 1985).

99. *Id.*
100. *Liningier v. Knight*, 226 P.2d 809 (1951).
101. *Dorr v. C.B. Johnson, Inc.*, 660 P.2d 517, 519 (Colo. App. 1983).
102. *Andrescu v. Lane*, 5 *Media L. Rptr.* 1290 (Arapahoe Dist. Ct. 1979). The *Media Law Reporter* is available at the Federal Courthouse Library in Denver.
103. *Wagner v. Hilkey*, 914 P.2d 460, 462 (Colo. App. 1995), *aff'd* 933 P.2d 1311 (Colo. 1997).
104. *Id.* at 462; *see also Dixon v. Bowen*, 85 Colo. 194, 196-197, 274 P. 824, 825 (1929) (finding no civil liability for perjury).
105. *Williams v. Boyle*, 72 P.3d 392 (Colo. App. 2003).
106. *Id.* at 400.
107. *See, e.g., Robinson v. Volkswagenwerk, AG*, 940 F.2d 1369, 1372 (10th Cir. 1991) (“All lawyers are protected by an absolute privilege against defamation actions based upon litigation conduct in judicial proceedings.”); *Buckhannon v. U.S. West Communs.*, 928 P.2d 1331, 1335 (Colo. App. 1996) (“The privilege not only shields attorneys from defamation claims arising from statements made during the course of litigation, but it also bars other non-defamation claims that stem from the same conduct.”); Cmt. c, *Restatement (Third) of the Law Governing Lawyers* § 57 (“As is true of parties to litigation and other participants such as witnesses, a lawyer is absolutely privileged against defamation liability for publishing a defamatory statement relating to civil or criminal litigation before a tribunal exercising a judicial function, even if the lawyer acts maliciously and knows the statement to be false.”).
108. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 329-34 (1983); *Collins v. Walden*, 613 F. Supp. 1306 (N.D. Ga. 1985), *aff'd without opinion* 784 F.2d 402 (11th Cir. 1986); *Dale v. Bartels*, 552 F. Supp. 1253 (S.D. N.Y. 1982), *aff'd in part and rev'd on other grounds* 732 F.2d 278 (2d Cir. 1984); *Gilliam v. Napa Co.*, 2002 U.S. Dist. LEXIS 15449 (Aug. 8, 2002).
109. *See, e.g., Anderson v. Glismann*, 577 F. Supp. 1506 (D. Colo. 1984); *Rohda v. Franklin Life Ins. Co.*, 689 F. Supp. 1034, 1044-45 (D. Colo. 1988); *Mantia v. Hanson*, 79 P.3d 404 (Ore. App. 2003).
110. *See, e.g., Wendy's of South Jersey, Inc. v. Blanchard Mgt. Corp.*, 170 N.J. Super. 491, 406 A.2d 1337 (1979); *Procacci v. Zacco*, 402 So.2d 425 (Fla. App. 1981).
111. *ITT Telecom Prods. Corp. v. Dooley*, 262 Cal. Rptr. 773, 781-783 (1989).
112. *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 117 A.2d 889 (N.J. 1955); *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Assn.*, 172 A.2d 22 (N.J. Super. 1961); *Drummond v. Stahl*, 618 P.2d 616, 619 (Ariz. App. 1980); *Procacci*, 402 So.2d at 427; *Meyer v. Hubbell*, 324 N.W.2d 139 (Mich. App. 1982); *Blake v. Levy*, 464 A.2d 52 (Conn. 1983); *Western Technologies, Inc. v. Sverdrup & Parcel, Inc.*, 739 P.2d 1318 (Ariz. App. 1986); *Pelagatti v. Cohen*, 536 A.2d 1337, 1342-1343 (Pa. Super. 1987); *Jacobsen v. Garzo*, 542 A.2d 265 (Vt. 1988); *Blanchette v. Cataldo*, 734 F.2d 869, 877-878 (1st Cir. 1984); *Sriberg v. Raymond*, 414 F. Supp. 396, 398 (D. Mass.), *aff'd* 544 F.2d 15 (1st Cir. 1976); *McLaughlin v. Copeland*, 455 F. Supp. 749, 752 (D. Del. 1978), *aff'd without opinion* 595 F.2d 1213 (3d Cir. 1979); *Hoover v. Van Stone*, 540 F. Supp. 1118 (D. Del. 1982).
113. *See, e.g., Bencomo v. Morgan*, 210 So.2d 236 (Fla. App. 1968); *Knox v. Dick*, 665 P.2d 267 (Nev. 1983); *Thompson v. Sikov*, 490 A.2d 472 (Pa. Super. 1985); *Kirschstein v. Haynes*, 788 P.2d 941 (Okla. 1990). *See also Brody v. Montalbano*, 87 Cal. App.3d 725, 738, 151 Cal. Rptr. 206, 215 (1978) (privilege bars claim for conspiracy to inflict emotional distress); *Brown v. Delaware Valley Transplant Program*, 539 A.2d 1372 (Pa. Super. 1988) (privilege bars claim for mutilation of corpse); *Aisenberg v. Hillsborough Co. Sheriff's Office*, 325 F. Supp.2d 1366, 1375 (M.D. Fla. 2004) (“A prosecutor receives absolute immunity only for acts “that are connected with the prosecutor’s role in judicial proceedings” (quoting *Burns v. Reed*, 500 U.S. 478, 494-95 (1991)); *Sophamysay v. City of Sergeant Bluff*, 218 F. Supp.2d 1027 (N.D. Iowa 2002) (finding that a government lawyer prosecuting a child neglect action was performing a function analogous to a prosecutor and therefore enjoyed absolute immunity). The *Restatement* has taken the position that, while a claim by a non-client for emotional distress is possible, a lawyer’s conduct in vigorously prosecuting a client’s case should be immune. Cmt. g, *Restatement (Third) of the Law Governing Lawyers* § 56 (“[A] lawyer’s partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client’s case in such a proceeding is not considered extreme and outrageous and is privileged from such tort liability to the opposing party”).

114. *Hoffler v. Colo. Dept. of Corr.*, 27 P.3d 371, 374 (Colo. 2001).
115. *See Dalton v. Miller*, 984 P.2d 666, 669 (Colo. App. 1999).
116. *Restatement (Third) of the Law Governing Lawyers* § 57(1).
117. *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994).
118. *Id.* at 307.
119. *Id.* at 308.
120. *Id.* at 309.
121. *Id.*
122. *Id.* at 309-310.
123. *Anstine v. Alexander*, 2005 Colo. App. LEXIS 587 (April 21, 2005).
124. *Id.* at *2.
125. *Id.* at *2-3.
126. *Id.* at *4.
127. *Id.* at *10-11.
128. *Id.* at *11.
129. *Id.* *See also Holmes*, 885 P.2d at 308-309.
130. *Anstine*, 2005 Colo. App. LEXIS 587, at *14.
131. *Id.* at *13-14.
132. *Id.* at *14.
133. *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989).
134. *See, e.g., People v. Ager*, 928 P.2d 784, 791 (Colo. App. 1996) (discussing complicity statute); *Nelson v. Elway*, 971 P.2d 245 (Colo. App. 1998).
135. *Anstine v. Alexander*, 2005 Colo. App. LEXIS 587 (April 21, 2005). *See further discussion in* § 30.7 of this Chapter.
136. *Fasing v. LaFond*, 944 P.2d 608, 610 (Colo. App. 1997).
137. *Id.*
138. *Id.*
139. *Id.* at 611.
140. *Id.*
141. *Eadon v. Reuler*, 361 P.2d 445 (Colo. 1961).
142. *Id.* at 450.
143. C.R.S. §§ 6-1-105(e), (g), (u), and (z).
144. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).
145. *Hall v. Walter*, 969 P.2d 224, 231-32 (Colo. 1998).
146. *See generally Legal Malpractice* § 6.30 at 790.
147. *ERA Realty Co. v. RBS Properties*, 586 N.Y.S.2d 831, 832 (N.Y. App. Div. 1992) (“The defendants’ attorney has no privilege or immunity because an attorney is liable if he or she causes process to be issued which occasions loss to the party against whom it is enforced.”).
148. *Id.*
149. *Ruscitti v. Sackheim*, 817 P.2d 1046 (Colo. App. 1991).
150. *Id.* at 1047.
151. *Id.* at 1049.
152. C.R.S. § 18-4-405.
153. *Id.*
154. *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.
155. *Smith v. Boyett*, 908 P.2d 508, 513 (Colo. 1995).
156. *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 (Colo. App. 1994); *Shriners Hosp. 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).

157. *Wilbourn v. Mostek Corp.*, 537 F. Supp. 302, 305 (D. Colo. 1982).
158. See, e.g., *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764 (Mo. App. 2003); *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App.3d 692 (Cal. App. 1991).
159. See, e.g., *Essex Ins. Co. v. Tyler*, 309 F. Supp.2d 1270, 1272 (D. Colo. 2004); *Mid-Century Ins. Co. v. Travelers Indem. Co. of Ill.*, 982 P.2d 310, 315 (Colo. 1999).
160. *Essex*, 309 F. Supp.2d at 1272.
161. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993) (relying on the reasoning of *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389 (Cal. App. 1976), which feared that allowing the assignment of legal malpractice claims would lead to a commoditization of those claims in the marketplace increasing unjustified suits against members of the legal profession).
162. *Essex*, 309 F. Supp.2d at 1274-75.
163. *Id.* at 1274-75.
164. See *Legal Malpractice* § 7.15 at 888.
165. F.R.C.P. 14(a); C.R.C.P. 14(a). See discussion in *Legal Malpractice* § 7.15 at 889.
166. *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002).
167. *Id.* at 709.
168. *Id.* at 711-12.
169. *Id.* at 712.
170. 29 U.S.C. §§ 1001-1381. See, e.g., *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002); *Assoc. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561 (7th Cir. 1991); *Southern Council of Industrial Workers v. Ford*, 83 F.3d 966 (8th Cir. 1996); *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 208 F.3d 1170 (9th Cir. 2000); *Chapman v. Klemick*, 3 F.3d 1508 (11th Cir. 1991).
171. 29 U.S.C. § 1109.
172. See, e.g., *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996); *Associates in Adolescent Psychiatry, S.C.*, 941 F.2d at 568; *Chapman*, 3 F.3d at 1509-10.
173. 29 U.S.C. § 1002(21)(A).
174. *Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869 (S.D. N.Y. 1997).
175. *Legal Malpractice* § 9.3 at 1019.

