

## Chapter 32

# DEFENSES TO LEGAL MALPRACTICE CLAIMS

**Justin G. Blankenship, Esq.\***  
*Starrs Mihm & Caschette LLP*

**Michael T. Mihm, Esq.\***  
*Starrs Mihm & Caschette LLP*

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**§ 32.1 • ABSENCE OF A DUTY**

Claims for professional negligence and breach of fiduciary duty depend upon the existence of a duty owed by the lawyer to the client, and the lawyer's subsequent breach of that duty. Just as in ordinary negligence claims, the absence of a duty precludes liability. If a defendant owes no duty to the plaintiff, the plaintiff may not recover for negligence.<sup>1</sup>

**§ 32.1.1—Absence Of Client-Lawyer Relationship**

A plaintiff who proves the existence of a client-lawyer relationship with the defendant lawyer will have proved the existence of a duty because once the relationship is formed, the lawyer has a duty to the client as a matter of law. Every lawyer owes the client a duty to exercise “that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession at the time the task is undertaken.”<sup>2</sup> A lawyer owes a client both a duty of care, the breach of which constitutes professional negligence, and the duties of undivided loyalty and confidentiality,<sup>3</sup> the breach of which constitutes a breach of fiduciary duty.

Although, as discussed in Chapter 30, a lawyer may sometimes owe a duty to third-party non-clients, a plaintiff's inability to prove the existence of a client-lawyer relationship will be fatal to most negligence and fiduciary duty claims.<sup>4</sup> 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.”<sup>5</sup> The relationship can be created expressly or inferred from the conduct of the parties.<sup>6</sup> “The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed.”<sup>7</sup> The existence of a client-lawyer relationship is a question of fact for the jury and the client has the burden of proving its existence.<sup>8</sup>

**§ 32.1.2—Scope Of The Representation**

A lawyer may avoid liability if the alleged breach of duty was not within the scope of the lawyer's employment.<sup>9</sup> The scope of a lawyer's representation is typically defined by the fee agreement between the client and the lawyer, and may be limited accordingly. Although a lawyer may limit the scope of the 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 client's right to terminate the lawyer's services or settle the litigation.<sup>10</sup> 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.<sup>11</sup>

The scope of a lawyer's duty is ordinarily a question of law for the court to decide,<sup>12</sup> but the scope of the representation will usually be a disputed issue of fact for the jury. In *International Tele-Marine Corporation v. Malone & Associates*,<sup>13</sup> the defendant lawyers argued that they were only retained by the plaintiff to prepare Blue Sky filings. The plaintiff's underwriter faced securities investigations, and then eventually ceased operations entirely and was unable to proceed with the plaintiff's offering.<sup>14</sup> The allegation of negligence was that the defendant lawyers had a duty to disclose the problems facing the underwriter as they were facts material to the public offering.<sup>15</sup>

The federal district court stated that a lawyer is free to limit the scope of his or her representation and that whether a lawyer has breached a duty to a plaintiff depends on whether the alleged breach fell within the scope of the representation.<sup>16</sup> The court held that whether the alleged omission fell within the scope of the representation was an issue of fact for the jury to decide.<sup>17</sup>

## § 32.2 • ABSENCE OF PROXIMATE CAUSE

In order to prevail on a claim of legal malpractice, the plaintiff must prove that the defendant lawyer proximately caused his or her damages.<sup>18</sup> To establish proximate cause in a professional negligence action against a lawyer, the plaintiff must establish two things: (1) that but for the lawyer's actions, the injury would not have happened; and (2) that the "case within a case" for the underlying claim would have been successful if the lawyer had acted in accordance with his or her duty.<sup>19</sup>

The first element — "but for" causation — is addressed as it would be in any other negligence action. However, it is the complexity of the second element — of having to prove that a plaintiff would have received a better result in the "case within a case" — that makes legal malpractice actions unique.<sup>20</sup> The exercise of proving the "case within a case" is usually the most complex part of a legal malpractice case, as it may encompass any matter for which a lawyer may represent a client. Often, a lawyer who clearly breached a duty to a client can still successfully defend a legal malpractice claim by winning the case within a case, although it does place the lawyer in the uncomfortable position of arguing that the client's case (that he or she believed had merit when the lawyer represented the client) would have actually been unsuccessful or less successful than represented to the client.

Many legal malpractice cases involve an underlying business transaction rather than an underlying lawsuit. Thus, the causation issue may involve a "deal within the case" rather than a "case within the case." The issue of whether the "case within the case" analysis applies to legal malpractice cases involving business transaction has never been directly decided in Colorado.<sup>21</sup> Other courts have addressed the issue. The California Supreme Court recently held that the "case within the case" analysis applies to legal malpractice cases involving non-litigated matters. The California court held that "a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have a more favorable result."<sup>22</sup>

The *Restatement (Third) of the Law Governing Lawyers* also addresses proximate causation for transactional legal malpractice cases as follows:

- e. Nonlitigated matters. Generally applicable principles of causation and damages apply in malpractice actions arising out of a nonlitigated matter. When a lawyer is subject to liability to a nonclient under § 51(2) for negligence in preparing an opinion letter on which the nonclient reasonably relied, recovery is ordinarily governed

by the causation and damages rules applicable to negligent misrepresentation actions, unless the lawyer has undertaken greater responsibility to the nonclient (see *Restatement Second, Torts* § 552B).<sup>23</sup>

A plaintiff's injuries in a legal malpractice claim may be the result of more than one proximate cause. In *Brown v. Silvern*,<sup>24</sup> the appellate court concluded that the plaintiff's loss could be the result of two proximate causes: that his claim was filed outside the statute of limitations, and that his claim may have been barred for failing to comply with a consent-to-settle provision in his insurance agreement.<sup>25</sup> The trial court granted summary judgment in favor of the defendant attorney, but the Colorado Court of Appeals remanded the case and required the trial court to consider whether there was more than one proximate cause of the injuries.<sup>26</sup> A defendant lawyer may argue that the plaintiff's damages were caused in whole or in part by an intervening cause. Proximate cause is a question of fact to be determined by the jury.<sup>27</sup>

### § 32.3 • PROFESSIONAL JUDGMENT DEFENSE

Where a former client alleges that a lawyer's strategic or tactical decisions constitute malpractice, the lawyer may assert a "professional judgment" defense to a claim of professional negligence. This defense acknowledges that a lawyer has leeway to make decisions regarding a case based on his or her professional training and judgment. Indeed, the Colorado Rules of Professional Conduct emphasize that a lawyer is to maintain his or her independent professional judgment when representing a client,<sup>28</sup> so it stands to reason that the lawyer's exercise of professional judgment would be a defense in a legal malpractice case.

The seminal case approving the "professional judgment" defense is a federal case arising in Tennessee, *Woodruff v. Tomlin*.<sup>29</sup> There, the court rejected a plaintiff's claim that her lawyer committed malpractice by failing to attempt to obtain a change of venue, object to a jury instruction, and consult with a traffic reconstruction expert. The Sixth Circuit Court of Appeals found that a lawyer is not liable for any acts or omissions that are based upon his or her professional judgment.<sup>30</sup>

Although not addressed in the legal malpractice context, Colorado courts do give great deference to a lawyer's tactical judgments. In *Davis v. People*,<sup>31</sup> a criminal defendant argued that his lawyer provided ineffective counsel during the sentencing phase of his trial. Specifically, the defendant alleged that his lawyer failed to adequately investigate a variety of mitigating factors and failed to raise certain arguments concerning the death penalty. The Colorado Supreme Court disagreed, stating that "mere disagreement as to trial strategy . . . will not support a claim of ineffectiveness."<sup>32</sup> The court quoted the U.S. Supreme Court's reasoning in *Strickland v. Washington*<sup>33</sup> that:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Thus, the fact that lawyers and clients may disagree about strategy at trial does not render counsel ineffective.

Likewise, a former client's disagreement over his or her lawyer's professional judgment in an underlying case is not a basis for a malpractice claim. The U.S. District Court for the District of Colorado addressed (but refused to apply) the judgmental immunity in *Merchant v. Kelly, Haglund, Garnsey & Kahn*.<sup>34</sup> Judge Lewis T. Babcock stated the following regarding judgmental immunity:

This principle permits a court to determine, as a matter of law, that an attorney was not negligent based on an error in professional judgment because the law was unsettled on the issue or the attorney made a tactical decision from among equally viable alternatives. *Halvorsen v. Ferguson*, 46 Wash. App. 708, 735 P.2d 675, 681 (1986); see *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. App. 1992).<sup>35</sup>

## § 32.4 • APPORTIONMENT OF FAULT

A lawyer liable for legal malpractice may still argue that all or part of the plaintiff's damages are attributable to an alternative source. The most common approach is to point the finger at non-parties at fault, or back at the client through a theory of comparative negligence.

### § 32.4.1—Non-Parties At Fault

Colorado law provides, by statute, that in cases involving death or injury to persons or property, persons not named as defendants can be designated by a defendant as potential non-parties at fault.<sup>36</sup> The statute provides that no defendant is to be liable for an amount greater than the degree or percentage of the negligence or fault attributable to that defendant which caused the injury, damage, or loss.<sup>37</sup> The statute was enacted to ameliorate the harsh effects of joint and several liability where more than one defendant is present.<sup>38</sup> The statute allows the jury to apportion responsibility to *all* persons who may be responsible for the harm caused to the plaintiff, regardless of whether the persons are parties to the case.<sup>39</sup> The jury is required to return a special verdict determining the percentage of negligence or fault attributable to each of the parties and any non-parties to whom the jury has attributed some negligence or fault.<sup>40</sup> The term "fault" is broader than the term "negligence," also including intentional torts, but it likewise implies legal responsibility.<sup>41</sup> A defendant alleging the negligence of another party must still establish a duty, a breach, causation, and damages.<sup>42</sup> The statute is also designed to bring such other potentially responsible parties to the attention of the plaintiff and to allow the plaintiff to amend the complaint to add

additional parties.<sup>43</sup> Generally, the person or entity designated under C.R.S. § 13-21-111.5 must owe a duty recognized by the law to the injured plaintiff in order for the non-party's fault or negligence to be measured under the statute.<sup>44</sup>

The statute does make an exception "for two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act."<sup>45</sup> Such persons shall still be found to be jointly liable, but shall have the right to seek contribution from fellow defendants.<sup>46</sup>

The defendants have 90 days from the date the case is *filed* to designate the non-parties.<sup>47</sup> If the plaintiff delays serving the summons and complaint, the 90 days may have already expired or be about to expire by the time the defendants learn of the lawsuit. Courts will generally grant reasonable extensions of time to designate non-parties, so that the defendants have an opportunity to conduct some discovery and analyze the evidence. As a practical matter, a defendant who fails to designate a non-party within the time allowed is not precluded from pointing the finger at a non-party as a causation defense. However, rather than being allowed to argue an apportionment of liability, the defendant would have to establish a complete defense by proving that the actions of the non-party were a non-foreseeable intervening cause.<sup>48</sup>

In *Stone v. Satriana*,<sup>49</sup> the lawyer defendants in a legal malpractice action attempted to designate the plaintiff's counsel as a non-party at fault in an effort to disqualify the lawyer. The defendants argued that plaintiff counsel's failure to file an appeal from the underlying federal suit was a partial cause of the plaintiff's damages.<sup>50</sup> The Colorado Supreme Court noted that the majority approach in other jurisdictions has been to prevent legal malpractice defendants from designating opposing counsel as nonparties.<sup>51</sup> The court cited three public policy concerns and approved of the reasoning in all three: (1) the danger of allowing a non-party designation to be used as an unfair litigation tactic; (2) the adverse effect that a non-party designation would have on a plaintiff's ability to pursue a legal malpractice claim; and (3) the concern that a non-party designation would interfere with client-lawyer confidences.<sup>52</sup> Finally, the court also held that plaintiff's counsel in the legal malpractice case has no legal duty to ameliorate the damages of prior counsel.<sup>53</sup>

#### § 32.4.2—Comparative Negligence

Comparative negligence is a defense to a legal malpractice claim in Colorado.<sup>54</sup> A defendant lawyer "is entitled to have the jury consider a client's negligence even when the client is not an attorney if it is reasonable to expect the client to understand the legal obligations or formalities that must be fulfilled in connection with a particular transaction."<sup>55</sup> The client's negligence must relate to the injury caused by the lawyer's negligence and must relate to the lawyer's representation.<sup>56</sup> The "comparative negligence instruction may be based on evidence that the client (1) failed to supervise, review, or inquire as to the representation; (2) refused to follow advice or instructions; (3) failed to provide the attorney with essential information; (4) failed to mitigate damages caused by the lawyer's negligence; or (5) interfered with the attorney's representation."<sup>57</sup>

Ordinarily, the client's negligence preceding the lawyer's engagement is not a proper basis for a comparative negligence instruction, even though the client's prior negligence may have been the cause of the client's legal problem.<sup>58</sup> Evidence of the client's prior negligence may, however, be relevant to the issue of causation.<sup>59</sup>

In *Scognamillo v. Olsen*,<sup>60</sup> a lawyer who represented the owners of a company that sold machine tool distributorships was accused of professional negligence in a lawsuit filed by a number of investors. The underlying lawsuit involved claims of fraud, breach of contract, and civil conspiracy. During the course of the trial to the court, the plaintiffs in the underlying case offered to settle for \$54,000.<sup>61</sup> Both of the plaintiffs in the malpractice case, Scognamillo and Faircloth, agreed to the offer, but another defendant in the underlying case, Volger, refused and the offer was rejected.<sup>62</sup> After the trial, but before the verdict, the lawyer, Olsen, withdrew from representing the company's owners.<sup>63</sup> Subsequently, the trial court in the underlying case entered judgment against the owners of the company for \$214,830 in actual damages and \$849,020 in punitive damages, jointly and severally.<sup>64</sup> Scognamillo and Faircloth subsequently hired another lawyer to prosecute an appeal, but the appeal was dismissed as untimely. Scognamillo subsequently settled with the investors for \$200,000.<sup>65</sup>

Both Scognamillo and Faircloth filed a malpractice case against Olsen, claiming that Olsen had failed to properly evaluate and advise them of their potential liability, and that Olsen had improperly represented all of the defendants, in spite of their personal animosities, divergent interests in the company, and conflicting views on settlement.<sup>66</sup>

At the trial of the legal malpractice case, the jury found in favor of Faircloth in the sum of \$1,133,735, and charged 59 percent negligence to Olsen and 41 percent to Faircloth; the jury found for Scognamillo in the amount of \$275,948, with 74 percent negligence charged to Olsen and 26 percent charged to Scognamillo.<sup>67</sup> The trial court ordered a reduction of each plaintiff's verdict by \$27,000, that being half of the \$54,000 for which the case could have been settled.<sup>68</sup>

On cross-appeal of the legal malpractice verdict, the plaintiffs argued that the trial court improperly submitted the issue of comparative negligence to the jury, arguing that the defense was improper because they did not have skill and training similar to Olsen.<sup>69</sup> The court of appeals disagreed, holding that even when a client is not a lawyer, if it is reasonable to expect the client to understand the legal obligations and formalities that have to be fulfilled in connection with a particular transaction, the lawyer is entitled to have the jury consider the client's negligence.<sup>70</sup> The court of appeals stated that because there was evidence at the trial of the legal malpractice case that Scognamillo and Faircloth had prior experience with lawsuits and were aware of the concept of punitive damages, and because Olsen had advised them as to their exposure for punitive damages and that they should settle for \$54,000, the trial court properly submitted the contributory negligence defense to the jury.<sup>71</sup>

In *McLister v. Epstein & Lawrence, P.C.*,<sup>72</sup> the defendant lawyers represented the plaintiff in a workers' compensation case. A health care aide had sued the plaintiff for injuries sustained in the plaintiff's home. The plaintiff did not have workers' compensation insurance for his home

health care aides, although he was required by law to have such insurance.<sup>73</sup> The health care aide had previously settled with the plaintiff's homeowner insurance carrier, but the claims adjuster for the insurance company had failed to obtain approval of the settlement by the Division of Workers' Compensation.<sup>74</sup> The health care aide then also sought workers' compensation recovery and the plaintiff hired the defendant law firm to represent him in the workers' compensation action.<sup>75</sup>

The law firm's sole defense was that the health care worker's settlement operated as an election of remedies.<sup>76</sup> Following a hearing, the administrative law judge ruled in favor of the health care worker. The decision was overturned by the Industrial Claim Appeals Panel, but ultimately reinstated by the court of appeals.<sup>77</sup> Subsequently, the plaintiff brought a legal malpractice action alleging that the defendant lawyers acted negligently in representing him, that they had breached their fiduciary duties and the client-lawyer contract, and that they negligently supervised the associate lawyer who tried the workers' compensation case.<sup>78</sup>

In a trial to a jury, the court instructed the jury on comparative negligence. While the jury concluded that the defendants had been negligent and that the negligence had caused the plaintiff's damages, it also concluded that the plaintiff had been 81 percent comparatively negligent. Accordingly, the trial court entered judgment in favor of the defendants.<sup>79</sup>

The court of appeals reversed in part, holding that the trial court erred in giving the comparative negligence instruction. The court of appeals held:

Although comparative negligence is a defense to a claim of legal malpractice in Colorado, the client's alleged negligence must relate to the injury alleged to have been caused by the attorney's negligence and must relate to the attorney's representation.<sup>80</sup>

The court found that the plaintiff's negligence in not obtaining workers' compensation insurance did not relate to the injury caused by the lawyers' negligence or to the lawyers' representation, but that the plaintiff's uninsured status related only to the issue of causation.<sup>81</sup> The court also found that the trial court erred in instructing the jury that it is not a defense to the client's negligence that the client was unaware that his or her conduct violated law. Accordingly, because the only evidence of the client's violation of law was the failure to obtain workers' compensation insurance, the court ruled that the trial court erred in giving a comparative negligence instruction.<sup>82</sup>

In *Smith v. Mehaffy*,<sup>83</sup> the plaintiff and his business partner hired the defendant lawyers to represent them in the severance of their business. As part of the winding up of the business, the plaintiff sent notices to various creditors informing them that he no longer intended to be bound by his past personal guaranties.<sup>84</sup> The plaintiff alleged that he asked the defendant lawyers whether the notices should have been sent certified mail, to which they replied that certified mail was unnecessary.<sup>85</sup> The plaintiff's former partner defaulted on three business debts and filed for bankruptcy. The creditors denied receiving notice from the plaintiff and sought payment directly from him.<sup>86</sup> After settling those claims, the plaintiff proceeded against the defendant lawyers alleging they were negligent in failing to protect him from personal exposure.<sup>87</sup> The defendants

asserted a comparative negligence defense, arguing that the plaintiff had been negligent in sending the notices by regular mail, in keeping poor records of the mailings, and in failing to provide them with information that the plaintiff's former partner was experiencing financial difficulties.<sup>88</sup>

On appeal, the defendants asserted that the trial court improperly dismissed their comparative negligence defense, arguing that *McLister* was wrongly decided.<sup>89</sup> The appellate court upheld *McLister*, and found that it necessitated the dismissal of the comparative negligence defense because the plaintiff's allegedly negligent acts occurred before the defendants agreed to represent him and they were aware of those acts at the time.<sup>90</sup> Regarding the plaintiff's failure to inform the defendants of his former partner's financial woes, the court held that the information was not essential information in the case and that it was not relevant in evaluating the sufficiency of the defendants' legal advice.<sup>91</sup>

### § 32.5 • ASSUMPTION OF THE RISK

An assumption of the risk defense is generally available in legal malpractice actions to the same extent and in the same jurisdictions where it could be applied to a negligence action.<sup>92</sup> C.R.S. § 13-21-111.7 permits a trier of fact to consider whether the plaintiff in a negligence case assumed the risk of injury or damage by "voluntarily or unreasonably" exposing himself or herself to injury or damage "with knowledge or appreciation of the danger and risk involved."<sup>93</sup> If the trial court provides the jury with an assumption of risk instruction, the jury is required to consider and apportion the assumption of risk when allocating negligence pursuant to C.R.S. § 13-21-111. There are no reported legal malpractice cases in Colorado addressing the assumption of risk defense; however, the defense has been used in legal malpractice cases in other jurisdictions.<sup>94</sup>

Assumption of risk is part of Colorado's comparative negligence scheme.<sup>95</sup> It appears to be most applicable where the lawyer has specifically advised the client not to proceed in a particular manner, and the client has ignored the advice and elected to proceed anyway.<sup>96</sup> Although the defense is available almost universally, cases where it has been cited successfully as a defense to professional negligence are few and far between. The disparity in knowledge between a professional and a client generally precludes the client from knowing whether the professional's conduct is in fact negligent.<sup>97</sup>

### § 32.6 • FAILURE TO MITIGATE DAMAGES

A plaintiff claiming damages for professional negligence has the duty to take reasonable steps to mitigate or minimize the damages.<sup>98</sup> A plaintiff who fails to take such reasonable steps cannot be awarded damages for injuries that result from the plaintiff's failure to take such reasonable steps.<sup>99</sup>

The duty to mitigate, however, does not extend so far as to require subsequent counsel on a legal malpractice claim to ameliorate the injuries caused by the negligent counsel. In *Stone v. Satriana*,<sup>100</sup> the Colorado Supreme Court held that a law firm's failure to advise its client to appeal an adverse judgment to mitigate the plaintiff's damages was not itself a breach of the legal duty owed to the plaintiff.

## § 32.7 • STATUTES OF LIMITATIONS

The statutes of limitation are often defenses in legal malpractice cases. According to the *Restatement (Third) of the Law Governing Lawyers*, three special principles apply to the application of statutes of limitations to legal malpractice claims: (1) the statute of limitations will normally not run so long as the lawyer still represents the client, because the client is entitled to assume that the lawyer will deflect or mitigate the threatened harm; (2) the statute does not run until the malpractice is disclosed to the client or the facts are such that the client reasonably should have known of the malpractice; and (3) the statute does not run until the client has suffered significant harm.<sup>101</sup> The second and third principles have been adopted in Colorado, and will be discussed in § 32.7.1 under "Accrual of a Negligence Claim," below.<sup>102</sup> The continuous representation rule, however, has not been adopted in Colorado.<sup>103</sup> Therefore, it is important for a plaintiff to be aware that a cause of action can accrue before representation by the negligent lawyer is discontinued.

Unlike a personal injury claim or wrongful death claim, it is not always clear when a client's legal malpractice claim accrues. In a legal malpractice lawsuit, the battle usually will be about when the legal malpractice claim has accrued. "When the undisputed facts demonstrate that a plaintiff discovered or reasonably should have discovered the defendant's conduct as of a particular date, the issue of when the cause of action accrued may be determined as a matter of law."<sup>104</sup>

### § 32.7.1—Statute Of Limitations For A Professional Negligence Claim

The statute of limitations period for negligence claims is two years.<sup>105</sup> The Colorado Revised Statutes provide that a claim for negligence accrues when the plaintiff, in the exercise of reasonable diligence, "knew or should have known" that a claim had accrued.<sup>106</sup> The knowledge of the plaintiff's agents concerning the wrongful act and the injury is imputed to the plaintiffs.<sup>107</sup>

#### Accrual of a Negligence Claim

"For purposes of the statute of limitations, a legal malpractice action against an attorney accrues at the time the client discovers or through the use of reasonable diligence should have discovered the negligent act of the attorney, and the client sustains some damage."<sup>108</sup> As the court of appeals explained in *Morris v. Geer*:<sup>109</sup>

As a matter of law, what is critical in determining when a legal malpractice action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which an action may be brought . . . . Thus, the focus is on a plaintiff's knowledge of facts which would put a reasonable person on notice of the

general nature of damage and that the damage was caused by the wrongful conduct of an attorney.<sup>110</sup>

As the court of appeals held in *Duell v. United Bank of Pueblo*,<sup>111</sup> although a tort claim does not normally accrue until at least some damage has resulted from the defendant's actions, once *some* injury has occurred, the statute begins to run, notwithstanding that further injury continues to occur.<sup>112</sup> Thus, for a claim for legal malpractice to accrue, the client must have incurred some injury or loss, but the client need not have incurred all of the damages he or she claims.<sup>113</sup>

While the issue of when a claim accrues is generally a question of fact, as noted above, the issue may be decided as a matter of law where the undisputed facts clearly show that the plaintiff discovered, or reasonably should have discovered, the negligent conduct and the initial damage as of a particular date.<sup>114</sup>

Thus, for example, in *Palisades National Bank v. Williams*,<sup>115</sup> the plaintiff bank claimed that the defendant lawyer committed malpractice by improperly drafting an agreement. In September 1986, the bank discovered the agreement was improperly drafted; one month later, it hired another lawyer to solve the problem. The bank argued that the statute did not run until the date it was sued because of the way the agreement had been drafted. The court of appeals disagreed:

[O]nce a plaintiff becomes aware of his attorney's negligence and damage in the form of legal fees is incurred to ameliorate the impact of that negligence, he has suffered injury for purposes of the accrual of a legal claim. Uncertainty as to the total extent of the damages does not delay accrual of the claim itself.<sup>116</sup>

A client's cause of action may accrue before the lawyer ceases representing the client.<sup>117</sup> A number of jurisdictions have adopted the continuous representation rule, which provides that the statute of limitations is tolled while the lawyer continues to represent the client.<sup>118</sup> However, Colorado appellate courts have not adopted the continuous representation rule, and have refused the opportunity to do so.<sup>119</sup>

A related but independent issue is whether the statute of limitations for a legal malpractice claim is tolled pending appeal.<sup>120</sup> In *Morrison v. Goff*,<sup>121</sup> the Colorado Supreme Court considered the narrow question of whether the statute of limitations is tolled pending the appellate resolution of a wrongful conviction claim.<sup>122</sup> After considering the merits of competing approaches in other jurisdictions, the court adopted what it called the "two-track approach."<sup>123</sup> Under the two-track approach, a criminal defendant is required to file a legal malpractice claim within the statute of limitations, and the civil court faced with the legal malpractice action can proceed with the case on a separate track, or stay the matter pending resolution of the appeal.<sup>124</sup> Although the *Morrison* holding is narrow, Colorado courts have also held that the statute of limitations is not tolled on a legal malpractice claim pending the outcome of a civil appeal.<sup>125</sup>

The Colorado Supreme Court recently addressed, in an original proceeding, whether a former client, convicted of a crime, must prevail on a Rule 35(c) motion before the client could pursue the legal malpractice claim against the defendant lawyers.<sup>126</sup> The court rejected “the notion that a former client cannot establish the damage element necessary to sustain a malpractice action against his or her criminal defense attorney unless he or she first obtains postconviction relief.”<sup>127</sup> The court reaffirmed the “two-track” approach authorized in *Morrison v. Goff*.<sup>128</sup>

The court rejected what has been called the “exoneration rule” adopted by some other jurisdictions. The exoneration rule required the former client to prove that he or she had been exonerated before being allowed to proceed with the legal malpractice claims against criminal defense counsel. The court held that it was unnecessary for the former client to obtain postconviction relief prior to filing suit. The court recognized that if the client’s postconviction relief was denied by the trial court and the appellate courts, that client may very well be collaterally estopped from relitigating a number of issues in the legal malpractice case.<sup>129</sup>

### **Definition of an “Injury” for Purposes of the Statute of Limitations**

The *Restatement (Second) of Torts*, § 11(1) defines an injury as “the invasion of any legally protected interest of another.”<sup>130</sup> Courts have defined an injury in the legal malpractice context as the loss or impairment of a right, remedy, or interest, or the imposition of a liability.<sup>131</sup>

The issue of when a client accrues a legal malpractice claim by suffering an injury has been the subject of a number of cases, particularly involving a lawyer’s negligence in missing a statute of limitations or other deadline. In *Finlayson v. Sanbrook*,<sup>132</sup> the California Court of Appeals addressed the issue of when a client incurs injury for purpose of triggering the statute of limitations. The California court held that in circumstances where the lawyer’s malpractice consists of missing the statute of limitations, a plaintiff sustains “actual injury” when the underlying action is lost due to the lawyer’s malpractice. The California court stated as follows:

First, there can be no doubt the Legislature intended to commence that statute upon discovery of the *fact* of damage rather than upon final confirmation of the amount of damage. The fact of damage is apparent *when a right or remedy is lost due to an attorney’s failure to file within a statutory limitation*.<sup>133</sup>

The view of the California Court of Appeals is echoed by the Idaho Supreme Court. In *Fairway Development Company v. Petersen, Moss, Olsen, Meacham & Carr*,<sup>134</sup> the defendant law firm was accused of malpractice for failing to exhaust all of the plaintiff’s administrative remedies in a challenge to property tax assessments. When the trial court dismissed a lawsuit challenging the property tax assessment, the time to file the administrative appeals had expired. Idaho law is similar to Colorado law in that, for purposes of the statute of limitations, a claim for negligence is said not to accrue until the plaintiff has suffered actual injury.<sup>135</sup> In the subsequent legal malpractice case, the Idaho Supreme Court found that the plaintiff suffered “some damage” when the trial court dismissed the underlying tax assessment case for failure to exhaust administrative remedies, thus leaving plaintiff with a claim barred because of the expiration of the administrative deadlines.

As of November 3, 1988, Fairway lost its right to pursue the tax assessment claims at trial, regardless of whether those claims were ever found to be of merit. Fairway was then forced to retain other attorneys to prosecute a claim against Petersen and to represent Fairway on the tax assessments because of Petersen's potential conflict of interest in continuing to represent Fairway. Any fees incurred by Fairway thus far in the tax assessment litigation for the years 1980 to 1984 were also lost when those tax claims were dismissed. When the district court dismissed Fairway's tax claims [for failure to exhaust administrative remedies], Fairway's malpractice claim accrued.<sup>136</sup>

The Idaho court held that the fact that the plaintiff did not know the exact amount of the damages until the supreme court had issued a decision on the tax case, did not stop the legal malpractice claim from accruing.<sup>137</sup> The California Supreme Court has recognized that "the loss or diminution of a right or remedy is well recognized as constituting injury or damage."<sup>138</sup>

According to Colorado courts, once legal fees have been incurred in an effort to ameliorate the impact of a lawyer's negligence, then the plaintiff has suffered injuries and the claim has accrued.<sup>139</sup>

#### **§ 32.7.2—Statute Of Limitations For A Breach Of Fiduciary Duty Claim**

The statute of limitations period for a breach of fiduciary duty claim is three years.<sup>140</sup> The statute of limitations for a breach of fiduciary duty claim begins to run as soon as the plaintiff has knowledge of the fiduciary's breach of trust.<sup>141</sup> The claim accrues when the plaintiff discovers the breach or, in the exercise of reasonable diligence, should have discovered the breach.<sup>142</sup> If the plaintiff learns of the breach of trust or fiduciary duty, the date for accruing a claim is not, if later, the date of actual injury.<sup>143</sup>

#### **§ 32.7.3—Statute Of Limitations For A Breach Of Contract Claim**

The statute of limitations for a breach of contract claim is three years.<sup>144</sup> The statute of limitations for a breach of contract claim accrues at the time the alleged breach of contract is discovered or should have been discovered through the exercise of reasonable diligence.<sup>145</sup> Moreover, because even nominal damages may be recovered for breach of contract,<sup>146</sup> the plaintiff asserting a breach of contract claim as part of a legal malpractice lawsuit need not have incurred any actual damages as a result of the alleged breach in order for the statute of limitations to commence running.

#### **§ 32.7.4—Statute Of Limitations For A Fraud Claim**

The statute of limitations for a fraud claim is three years.<sup>147</sup> The statute of limitations accrues when the fraud, misrepresentation, concealment, or deceit is discovered or when the fraud, misrepresentation, concealment, or deceit should have been discovered through the exercise of reasonable diligence.<sup>148</sup>

**§ 32.7.5—Statute Of Limitations Applicable To A Punitive Damage “Claim”**

A punitive damage “claim” is not properly a separate claim for relief, and “has no application in the absence of a successful underlying claim for actual damages.”<sup>149</sup> C.R.S. § 13-21-102 permits an award of punitive damages only in conjunction with an underlying and independent “civil action” in which actual damages are assessed for some legal wrong to the injured party.<sup>150</sup> Thus, if the legal malpractice plaintiff’s other claims against the defendant lawyer are barred by the statute of limitations, then the plaintiff’s punitive damages “claim” is likewise barred.

**§ 32.7.6—Statute Of Limitations For A Civil Conspiracy Claim**

When a conspiracy is alleged, the applicable statute of limitations is for the overt acts that constituted the conspiracy, since the injury flows from those acts, not from the conspiracy itself.<sup>151</sup> Thus, “[w]here there is an alleged conspiracy, the statute of limitations runs from each act of conspiracy.”<sup>152</sup>

**§ 32.7.7—Statute Of Limitations For A Deceptive Trade Practices Claim**

Claims for deceptive trade practices are limited by the statute of limitations set forth in the Colorado Consumer Protection Act. The statute provides that all actions brought under the Act must be brought “within three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.”<sup>153</sup> The act further provides that the limitations period may be extended by up to one year if the plaintiff can prove that a failure to commence an action within three years was due to the defendant’s inducement of the plaintiff to refrain from filing an action.<sup>154</sup>

**§ 32.7.8—Statute Of Limitations For A RICO Claim**

The statute of limitations for a claim under the Racketeer Influenced and Corrupt Organizations Act is the four-year period of limitations for civil enforcement actions under the Clayton Act.<sup>155</sup> The statute of limitations accrues when the plaintiff knew or should have known of the existence of the injury.<sup>156</sup>

**§ 32.7.9—Statute Of Limitations For A COCCA Claim**

There is no express statute of limitations in the Colorado Organized Crime Control Act. Colorado courts have held that the general two-year statute of limitations applies.<sup>157</sup> Like RICO, the statute of limitations may be tolled until the time the plaintiff should have reasonably discovered the injurious acts.<sup>158</sup>

**§ 32.7.10—Statute Of Limitations For A Securities Fraud Claim**

The statute of limitations for any private right of action involving a claim of “fraud, deceit, manipulation, or contrivance in contravention” of securities laws is two years from the time the plaintiff was placed on notice of the claim, or five years after the occurrence of the facts giving rise to the claim, whichever is earlier.<sup>159</sup> The Tenth Circuit has held that the statute of limitations begins to run once the plaintiff, through the exercise of reasonable diligence, should have discovered the facts underlying the fraud.<sup>160</sup> The standard for determining this date follows a two-step process: (1) the date when a plaintiff was placed on inquiry notice, when there were “suffi-

cient storm warnings” to alert a reasonable person to the possibility that misleading statements or significant omissions were made; and (2) the period after that time when a diligent investor should have discovered the fraud.<sup>161</sup>

## § 32.8 • DOCTRINE OF *IN PARI DELICTO*

The term “*in pari delicto*” means “in equal fault” or “equally culpable or criminal.”<sup>162</sup> Under the defense of *in pari delicto*, clients who sue their lawyers for allegedly telling them to engage in fraudulent misrepresentations, to lie, or to defraud may not recover for legal malpractice. According to the *Restatement (Third) of the Law Governing Lawyers*, the defense should only be available “in circumstances in which a client may reasonably be expected to know that the activity is wrong despite the lawyer’s implicit endorsement of it . . . .”<sup>163</sup>

Colorado recognizes the defense of *in pari delicto*.<sup>164</sup> In *Bushner v. Bushner*,<sup>165</sup> the Colorado Supreme Court rejected the defense of *in pari delicto* where the defendant failed to show that any party acted to delay or defraud. More recently, in *Sender v. Kidder Peabody & Co., Inc.*,<sup>166</sup> the court of appeals held that a plaintiff lacked standing to assert negligence, breach of fiduciary duty, and aiding and abetting claims where it was *in pari delicto*. In *Sender*, Hedged Investments Associates, Inc. (HIA), acting through its principal, perpetrated an elaborate Ponzi scheme, which ultimately collapsed and forced HIA to file for bankruptcy.<sup>167</sup> Sender, HIA’s bankruptcy trustee, sued various companies alleging that they aided and abetted HIA, were negligent, and breached their fiduciary duty to HIA.<sup>168</sup> The court dismissed the action, holding that Sender did not have standing: “[W]hen a participant in illegal, fraudulent or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them.”<sup>169</sup>

In *Anstine v. Alexander*,<sup>170</sup> the court of appeals first considered the defense in the context of a legal malpractice case. Builders Home Warranty, Inc. (BHW) had inadvertently purchased fraudulent insurance to cover its warranty obligations. Lawyers for BHW advised its president that it could either file bankruptcy or use funds from the premiums that it had already received to purchase replacement coverage.<sup>171</sup> The president chose the latter, but when he was unable to find adequate alternative coverage, BHW found itself enjoined from the further sale of warranties by the federal court.<sup>172</sup> After BHW filed for bankruptcy protection, the bankruptcy trustee brought suit on behalf of creditors against BHW’s president for breach of fiduciary duty, and against the lawyers for aiding and abetting that breach of fiduciary duty.<sup>173</sup> The defendant lawyers argued that the trustee had no standing to bring suit because the lawyers, the president, and BHW were *in pari delicto*.<sup>174</sup> The court ultimately concluded that the doctrine was inapplicable here, because under bankruptcy law, the trustee was standing in the shoes of fictitious creditors, not BHW and the president.<sup>175</sup>

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\* 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. *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987).
2. *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002); *Rantz v. Kaufman*, 109 P.3d 132, 139 (Colo. 2005); *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); *Boigegrain v. Gilbert*, 784 P.2d 849, 850 (Colo. App. 1989); *McCafferty v. Musat*, 817 P.2d 1039, 1043 (Colo. App. 1990); *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985).
3. See generally 2 R. Mallen & J. Smith, *Legal Malpractice* § 14.1, p. 485 (2005 ed.) (*hereinafter, Legal Malpractice*) (“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).
4. See, e.g., *Mehaffy*, 892 P.2d at 239 (“A party must prove the existence of an attorney-client relationship between the complaining party and the lawyer to prevail on a claim of legal malpractice.”).
5. *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986).
6. *Id.*; *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998).
7. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).
8. *International Tele-Marine Corp. v. Malone & Assoc.*, 845 F. Supp. 1427, 1431 (D. Colo. 1994).
9. *Id.* at 1433-1434; *Maillard v. Dowdell*, 528 So.2d 512, 514-15 (Fla. App. 1988), *rev. denied* 539 So.2d 475 (Fla. 1988).
10. *Cmt.*, Colo. RPC 1.2; *Jones v. Jones*, 188 P.2d 892, 893 (Colo. 1948); *Serna v. Kingston Enters.*, 72 P.3d 376, 383 (Colo. App. 2002).
11. *International Tele-Marine Corp.*, 845 F. Supp. at 1434; *Legal Malpractice* § 8.2 at p. 918-22.
12. *Turkey Creek*, 953 P.2d at 1312; *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).
13. *International Tele-Marine Corp. v. Malone & Assoc.*, 845 F. Supp. 1427 (D. Colo. 1994).
14. *Id.* at 1430.
15. *Id.* at 1431.
16. *Id.* at 1434.
17. *Id.* at 1433.
18. See, e.g., *Rantz v. Kaufman*, 109 P.3d 132, 134 (Colo. 2005); *Stone*, 41 P.3d at 712; *Brown v. Silvern*, 45 P.3d 749, 752 (Colo. App. 2001).
19. *Brown*, 45 P.3d at 751 (*citing North Colorado Medical Center v. Committee on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996), and *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999)).
20. *Miller v. Byrne*, 916 P.2d 566, 579 (Colo. App. 1995); *Flemming v. Lentz, Evans, & King, P.C.*, 873 P.2d 38, 40 (Colo. App. 1994); *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).
21. It is, however, the experience of the lead author that both the trial courts and legal malpractice trial counsel have assumed that the “case within the case” analysis applies to legal malpractice cases arising from underlying transactions, and the trial courts have instructed the juries accordingly.
22. *Viner v. Sweet*, 70 P.3d 1046, 1050-54 (Cal. 2003).
23. *Cmt. e, Restatement (Third) of the Law Governing Lawyers* § 53.
24. *Brown v. Silvern*, 45 P.3d 749 (Colo. App. 2001).
25. *Id.* at 752.
26. *Id.*
27. *Id.* at 751 (*citing Ekberg v. Greene*, 588 P.2d 375 (Colo. 1978)).
28. Colo. RPC 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”).

29. *Woodruff v. Tomlin*, 423 F. Supp. 1284 (W.D. Tenn. 1976), *judg. rev'd* 593 F.2d 33 (6th Cir. 1979) *reh'g* 616 F.2d 924 (6th Cir. 1980), *cert. denied* 449 U.S. 888 (1980).
30. *Woodruff*, 616 F.2d at 929, 930; *see also Goldstein v. Lustig*, 507 N.E.2d 164, 168-69 (Ill. App. 1987); *Hanlin v. Mitchelson*, 623 F. Supp. 452, 456 (S.D. N.Y. 1985), *aff'd in part and rev'd in part* 794 F.2d 834 (2d Cir. 1986); *Burk v. Burzynski*, 672 P.2d 419 (Wyo. 1983).
31. *Davis v. People*, 871 P.2d 769, 771 (Colo. 1994).
32. *Id.* at 773.
33. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).
34. *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300 (D. Colo. 1995).
35. *Id.* at 304.
36. C.R.S. § 13-21-111.5.
37. *Id.*
38. *Waters v. Pelican Intern., Inc.*, 706 F. Supp. 1452 (D. Colo. 1989); *Moody v. A.G. Edwards Sons, Inc.*, 847 P.2d 215 (Colo. App. 1992); *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).
39. *Miller*, 916 P.2d at 576; *Moody*, 847 P.2d at 217.
40. *Id.*
41. *Miller*, 916 P.2d at 577; *see O'Quinn v. Wedco Technology, Inc.*, 746 F. Supp. 38, 39 (D. Colo. 1990).
42. *See Redden v. Sci Colo. Funeral Servs.*, 38 P.3d 75, 80-81 (Colo. 2001) (holding that a non-party at fault designation is improper if the defendant fails to establish a *prima facie* breach of duty).
43. *Miller*, 916 P.2d at 577.
44. *Id.* at 578.
45. C.R.S. § 13-21-111.5(4).
46. *Id.*
47. C.R.S. § 13-21-111.5.
48. *See Redden*, 38 P.3d at 81.
49. *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002).
50. *Id.* at 708.
51. *Id.* at 709.
52. *Id.* at 709-11.
53. *Id.* at 711.
54. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000); *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 846 (Colo. App. 1996); *Scognamillo v. Olsen*, 795 P.2d 1357, 1363 (Colo. App. 1990). "In jurisdictions in which comparative negligence is a defense in negligence and fiduciary-breach actions generally, it is generally a defense in legal-malpractice and fiduciary-breach actions based on negligence to the same extent and subject to the same rules." Cmt. d, *Restatement (Third) of the Law Governing Lawyers* § 54.
55. *Scognamillo*, 795 P.2d at 1363 (quotations omitted).
56. *McLister*, 934 P.2d at 846; *Smith*, 30 P.3d at 731.
57. *Id.*; *see also Legal Malpractice* § 21.2, p. 1159.
58. *McLister*, 934 P.2d at 846-847.
59. *Id.*
60. *Scognamillo v. Olsen*, 795 P.2d 1357, 1363 (Colo. App. 1990).
61. *Id.* at 1358.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1358-59.
67. *Id.* at 1359.
68. *Id.*
69. *Id.* at 1363.
70. *Id.*

71. *Id.*
72. *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 846 (Colo. App. 1996)
73. *Id.* at 845.
74. *Id.*
75. *Id.* at 845-46.
76. *Id.* at 846.
77. *Id.*
78. *Id.* at 845-846.
79. *Id.* at 846.
80. *Id.*
81. *Id.* at 846-847.
82. *Id.* at 847.
83. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000).
84. *Id.* at 729.
85. *Id.*
86. *Id.* at 729.
87. *Id.*
88. *Id.* at 731.
89. *Id.*
90. *Id.*
91. *Id.*
92. See Cmt. e, *Restatement (Third) of the Law Governing Lawyers* § 54.
93. C.R.S. § 13-21-111.7.
94. See, e.g., *Stedman v. Hoogendoorn, Talbot, Davids, Godfrey & Milligan*, 843 F. Supp. 1512, 1521 (N.D. Ill. 1994), *vacated and remanded on other grounds* 61 F.3d 906 (7th Cir. 1995); *Mali v. Odom*, 367 S.E.2d 166 (S.C. App. 1988).
95. *Harris v. The Ark*, 810 P.2d 226, 233-234 (Colo. 1991).
96. See, e.g., *Stedman*, 843 F. Supp. at 1521.
97. See *Morrison v. MacNamara*, 407 A.2d 555, 567 (D.C. App. 1979).
98. *Scognamillo*, 795 P.2d at 1359.
99. *Id.*
100. *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002) (holding that in the absence of a legal duty to mitigate damages, the plaintiff's legal malpractice lawyers could not be designated non-parties at fault).
101. Cmt. i, *Restatement (Third) of the Law Governing Lawyers* § 54.
102. See § 32.7.1, "Accrual of a Negligence Claim."
103. See *Broker House Int'l*, 952 P.2d at 864 ("The continuous representation rule acts to toll the statute of limitations until the termination of the attorneys' representation concerning the particular matter that gave rise to the claim of negligence. Such a rule, however, has not been adopted in Colorado.") (*citing Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986)).
104. *Anderson v. Somatogen, Inc.*, 940 P.2d 1079, 1083 (Colo. App. 1996); *Reider v. Dawson*, 856 P.2d 31, 32-33 (Colo. App. 1992), *aff'd* 872 P.2d 212 (Colo. 1994).
105. C.R.S. § 13-80-102(1)(a); *Miller*, 916 P.2d at 582.
106. C.R.S. § 13-80-108(1).
107. See *Dickman v. DeMoss*, 660 P.2d 1, 2 (Colo. App. 1982); *Miller*, 916 P.2d at 582.
108. *Smith*, 30 P.3d at 732; see also *Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963-64 (Colo. App. 1991); *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998).
109. *Morris v. Geer*, 720 P.2d 994, 997 (Colo. App. 1986).
110. *Id.* (internal citations omitted). See also *Adams v. Leidholdt*, 563 P.2d 15 (Colo. App. 1977), *aff'd* 579 P.2d 618 (Colo. 1978); *Peltz v. Shidler*, 952 P.2d 793 (Colo. App. 1997).
111. *Duell v. United Bank of Pueblo*, 892 P.2d 336 (Colo. App. 1994).

112. *Id.* at 340; *see also Dove v. Delgado*, 808 P.2d 1270, 1273-74 (Colo. 1991). (“Dove’s failure to reach ‘maximum medical improvement’ is a damages problem to be resolved at trial and in no way affected her ability to file a complaint when she admittedly knew of her injuries since the date of the accident.”); *Smith*, 30 P.3d at 732.
113. *Jacobson v. Shine*, 859 P.2d 911, 913 (Colo. App. 1993).
114. *Palisades Nat’l Bank*, 816 P.2d at 963; *see Miller*, 916 P.2d at 582; *Geer*, 720 P.2d at 997; *Poleson v. Wills*, 998 P.2d 469, 472 (Colo. App. 2000); *Broker House Int’l*, 952 P.2d at 863.
115. *Palisades Nat’l Bank*, 816 P.2d at 963.
116. *Id.* at 963-64; *see also Jacobson*, 859 P.2d at 913; *Miller*, 916 P.2d at 582.
117. *Id.* at 582.
118. *See, e.g., Amfac Distribution Corp. v. Miller*, 673 P.2d 795 (Ariz. App. 1983), *opinion approved as supplemented* 673 P.2d 792 (Ariz. 1983); *Economy Housing Co., Inc. v. Rosenberg*, 475 N.W.2d 899 (Neb. 1991); *Morrison v. Watkins*, 889 P.2d 140 (Kan. App. 1995).
119. *Geer*, 720 P.2d at 997-998; *Broker House Int’l, Ltd. v. Bendelow*, 952 P.2d 860 (Colo. App. 1998).
120. *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004).
121. *Id.*
122. *Id.* at 1052.
123. *Id.* at 1056.
124. *Id.* at 1055.
125. *Jacobson*, 859 P.2d at 913; *Broker House Int’l*, 952 P.2d at 864.
126. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005).
127. *Id.* at 136.
128. *Morrison*, 91 P.3d at 1056-57.
129. *Rantz*, 109 P.3d at 136-37.
130. *Restatement (Second) of Torts* § 11(1).
131. *Adams v. Paul*, 904 P.2d 1205, 1208-1209 (Cal. 1995); *Foxborough v. Van Atta*, Cal. Rptr.2d 525, 529 (Cal. App. 1994); *Sharts v. Natelson*, 885 P.2d 642, 645 n. 1 (N.M. 1994); *Cherry v. Williams*, 36 S.W.3d 78, 84 (Tenn. App. 2000).
132. *Finlayson v. Sanbrook*, 13 Cal. Rptr.2d 406 (Cal. App. 1992).
133. *Id.* at 409 (emphasis added); *see also Adams v. Paul*, 904 P.2d 1205, 1208 (Cal. 1995).
134. *Fairway Development Company v. Petersen, Moss, Olsen, Meacham & Carr*, 865 P.2d 957 (Idaho 1993).
135. *Id.* at 959.
136. *Id.* at 960.
137. *Id.* *See also Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999).
138. *Adams*, 904 P.2d at 1209; *see also Sharts*, 885 P.2d at 646; *Foxborough*, 31 Cal. Rptr.2d at 530.
139. *See Jacobson*, 859 P.2d at 913; *Palisades Nat’l Bank*, 816 P.2d at 963-64.
140. C.R.S. § 13-80-101(1)(f).
141. *Anderson*, 940 P.2d at 1083.
142. C.R.S. § 13-80-108(6); *Anderson*, 940 P.2d at 1083; *Eads v. Dearing*, 874 P.2d 474, 478 (Colo. App. 1993); *see also Irwin v. West End Development Co.*, 481 F.2d 34, 39 (10th Cir. 1973), *cert. denied* 414 U.S. 1158 (1974) (a statute of limitations begins to run as soon as the plaintiff has knowledge that trust has been violated).
143. *Anderson*, 940 P.2d at 1083, *distinguishing In re Trust Created by Belgard*, 829 P.2d 457 (Colo. App. 1991).
144. C.R.S. § 13-80-101(1)(a).
145. C.R.S. § 13-80-108(6); *see State Farm Mut. Auto. Ins. Co. v. Springle*, 870 P.2d 578, 579 (Colo. App. 1993).
146. *See General Ins. Co. of America v. City of Colorado Springs*, 638 P.2d 752, 759 (Colo. 1981); *Overland Dev. Co. v. Marston Slopes Dev. Co.*, 773 P.2d 1112, 1114 (Colo. App. 1989).

147. C.R.S. § 13-80-101(1)(c).
148. *See, e.g., SMLL, LLC v. Daly*, 2005 Colo. App. LEXIS 927, \*4-5 (June 16, 2005).
149. *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 213-14 (Colo. 1984).
150. *Palmer*, 684 P.2d at 214.
151. *Abdelsamed v. United States*, 90 A.F.T.R.2d (RIA) 5963 (D. Colo. 2002) (citing *Scherer v. Balkema*, 840 F.2d 437, 439 (7th Cir. 1988)).
152. *Merrigan v. Affiliated Bankshares of Colo., Inc.*, 775 F. Supp. 1408, 1412 (D. Colo. 1991).
153. C.R.S. § 6-1-115.
154. *Id.*
155. 15 U.S.C. § 15(b). *See Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987); *Ballen v. Prudential Bache Sec.*, 23 F.3d 335 (10th Cir. 1994);
156. *Rotella v. Wood*, 528 U.S. 549, 553-54 (2000) (adopting what the Court called the “injury discovery accrual rule”).
157. C.R.S. § 13-80-102(1)(i). *See FDIC v. Refco Group*, 989 F. Supp. 1052, 1078 (D. Colo. 1997).
158. *Todd Holding Co. v. Super Valu Stores*, 874 P.2d 402, 405 (Colo. App. 1993).
159. 28 U.S.C. § 1658.
160. *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998).
161. *Id.*; *Stichting Pensioenfonds, ABP v. Qwest Communs., Int’l, Inc.*, 2005 U.S. Dist LEXIS 9026 (March 28, 2005).
162. *Black’s Law Dictionary* (6th ed. 1990).
163. Cmt. f, *Restatement (Third) of the Law Governing Lawyers* § 54.
164. *See, e.g., Abernethy v. Wright*, 148 P. 277 (Colo. App. 1915).
165. *Bushner v. Bushner*, 307 P. 2d 204, 207 (Colo. 1957).
166. *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779 (Colo. App. 1997).
167. *Id.* at 780.
168. *Id.* at 780-81.
169. *Id.* at 782.
170. *Anstine v. Alexander*, 2005 Colo. App. LEXIS 587 (Apr. 21, 2005).
171. *Id.* at \*2.
172. *Id.* at \*2-3.
173. *Id.* at \*4.
174. *Id.* at \*8-9.
175. *Id.* at \*9-10.