Legal Malpractice Under Colorado Law

Legal Malpractice Under Colorado Law
March 7, 2024

Webinar: 1 General Credit, including 1 Ethics/Professionalism Credit
Home Study: MP3 | Video-on Demand: 1 General Credit, including 1 Ethics/Professionalism Credit

To report CLE credits:

1. Colorado attorneys and judges should log into the Colorado Supreme Court Online CLE Tracker with their Bar Number and Date of Birth.
2. Select **Enter Online Affidavits** and enter the Course ID located on the lower left corner of your affidavit for Live programs. For Webinars or Home studies, the Course ID number can be found in your CLE Dashboard.

Credits valid for two years.
All accredited home studies are valid for two years, expiring December 31st of the two-year period.

Scope of License
The contents of this CBA-CLE products are intended to be used solely by the original/single purchaser. Any sharing, copying, distribution, display, reuse or resale of the online or CD home studies or materials is strictly prohibited. Duplication of products, installation products on a computer network, electronic redistribution of its contents, and/or sharing of the physical product are expressly prohibited without payment of appropriate fees to Colorado Bar Association CLE.

Your use of CBA-CLE products indicates your acceptance of this single-user license. Products of CBA-CLE include: fillable forms, event course materials, CDs, MP3s and/or video-on-demand home studies.

IRS Circular 230 Notice
To ensure compliance with requirements imposed by the IRS, unless specifically indicated otherwise, any tax advice contained within this manual was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

Source Code: ET030724W

1290 Broadway, Suite 1700, Denver, Colorado 80203 | (303) 860-0608
clereception@cobar.org | cle.cobar.org

AGENDA

12:00 – 1:00 pm **Legal Malpractice Under Colorado Law**

This presentation will discuss the elements of legal malpractice claims based upon negligence cases, as well as claims based upon a breach of fiduciary duty. We will also discuss potential defenses to those claims. In addition, the certificate of review requirement will be discussed. The presentation will cover Colorado Rules of Professional Conduct 1.8 and 1.9, concerning a lawyer's duty to present and past clients.

*Presented by **Anthony Viorst, Esq.**, The Viorst Law Offices, P.C.*

BIOGRAPHICAL INFORMATION

FACULTY

Anthony Viorst, Esq., graduated Phi Beta Kappa from George Washington University and went on to receive his juris doctorate from Georgetown University in 1987, where he also served as editor for the Georgetown Law Journal. He has written numerous scholarly legal articles, on a variety of subjects, including medical malpractice, legal malpractice, and appellate law. Mr. Viorst has been named a Colorado SuperLawyer every year for the past 15 years. Mr. Viorst spent 10 years in the Colorado Public Defenders Office, where he tried over 100 cases, from DUI to murder. Since 2000, Mr. Viorst has also been practicing in the fields of personal injury, medical malpractice, legal malpractice, police brutality, and civil/criminal appeals. Mr. Viorst's medical malpractice case, Preston v. Dupont, 35 P.3d 433 (Colo. 2001), was named the case of the year by the Colorado Trial Lawyers Association. More recently, Mr. Viorst wrote a comprehensive summary of Colorado legal-malpractice law for the Colorado Bar Association's Colorado Lawyer publication. Mr. Viorst is licensed to practice in the Colorado state and federal courts, as well as the U.S. Supreme Court. He has the highest rating from his peers as independently reported to *Martindale Hubbell*.

Anthony Viorst is a shareholder in The Viorst Law Offices, P.C., where he specializes in professional negligence cases. —tony@viorstlaw.com.

Coordinating Editors: Doug Meier, dougmeier@att.net; Timothy Reynolds, timothy.reynolds@bclplaw.com

Legal Malpractice Under Colorado Law

by Anthony Viorst

This article discusses the various grounds, elements, and defenses for legal malpractice cases in Colorado.

In many ways, Colorado legal malpractice cases are just like traditional negligence cases. Depending on the basis for the malpractice claim, however, there may be some important differences, such as the requirement for expert witnesses, the standard for proving causation, and the damages available. In addition to the nuances of legal malpractice cases based on negligence, this article outlines malpractice claims based on breach of fiduciary duty and breach of contract and highlights how each is distinct from a negligence claim.

Attorney–Client Relationship Required

To prevail on a claim of legal malpractice, the complaining party must prove they had an attorney-client relationship with the lawyer.[1] The best way to show the existence of an attorney-client relationship is with a fee agreement, but it is not the only way. The test for whether an attorney-client relationship exists is subjective. It may be inferred from the parties' conduct or the client's perception of the relationship.[2]

Once an attorney-client relationship has been established, an attorney cannot make an agreement with the client that prospectively limits the lawyer's liability, except under very narrow circumstances.[3] Although Colorado attorneys are not obligated to carry professional malpractice insurance, all attorneys in private practice must disclose to the bar whether they carry such insurance.[4]

Under the strict privity rule, an attorney's obligation is typically limited to their client and does not extend to any third party.[5] Thus, the Colorado courts have dismissed legal malpractice

claims under a third-party beneficiary theory.[6] Although the absence of an attorney-client relationship does not preclude an aggrieved party from successfully pursuing a legal action, the claims available to a non-client are usually limited to negligent misrepresentation, fraud, and malicious or tortious acts.[7]

Legal malpractice cases are not assignable to third parties because they involve matters of personal trust and personal service, and permitting the transfer of such claims would undermine the attorney-client relationship.[8]

Legal Malpractice Case Based on Negligence

Under well-settled Colorado law, in a legal malpractice case involving the mishandling of an underlying claim, as in other types of negligence cases, the plaintiff must prove that (1) the lawyer owed a duty of care to the plaintiff, (2) the lawyer breached the duty of care, (3) the breach proximately caused an injury to the plaintiff, and (4) damages resulted.[9] In addition, as discussed below, in a legal malpractice case based on a lost judgment or other monetary harm in an underlying matter, the plaintiff must also prove collectability, an element that is unique to legal malpractice cases.

Duty and Breach

To determine whether an attorney's conduct is negligent, a fact finder must compare that conduct with what an attorney, having and using that knowledge and skill of attorneys practicing law at the same time, would or would not have done under the same or similar circumstances.[10] Except in clear and palpable cases, such as failing to file a lawsuit within the statute of limitations, expert testimony is necessary to establish the standards of acceptable professional conduct.[11]

Although the Colorado Rules of Professional Conduct explicitly state that a rule violation alone should neither give rise to a cause of action against a lawyer nor create a presumption of a breach of legal duty, in appropriate cases, a lawyer's violation of a rule may be evidence that the lawyer breached the applicable standard of conduct.[12]

Causation

Four aspects of causation in legal malpractice cases based on negligence are discussed below.

Lost judgment or other monetary harm in an underlying matter. In legal malpractice cases predicated on a lost judgment or other monetary harm in an underlying matter, causation is proved by presenting evidence in support of the underlying claim, also known as the "case within a case."[13] When an attorney commits legal malpractice that prevents the underlying case from reaching a fair judicial resolution—because the case was either not timely filed or not litigated in a competent manner—the merits of the underlying claim must be proved by a preponderance of the evidence. In legal malpractice cases predicated upon an unfavorable business transaction, a plaintiff must show that they would have obtained a more favorable result in the underlying transaction but for the attorney's negligence.[14]

When an attorney commits legal malpractice, but the case nonetheless settles, the aggrieved client can still bring a legal malpractice case[15] if they can show that the attorney's negligence effectively forced a settlement.[16] Under such circumstances, "damages are calculated based on the difference between the actual settlement amount and . . . what the result should have been through judicial resolution."[17] Of course, the decision whether to accept a settlement offer in a litigated case is ultimately the subjective decision of the particular client.[18] However, in legal malpractice cases involving a settlement of the underlying case, the fact finder must determine "what a reasonable client would have done under the particular circumstances confronting the plaintiff."[19]

Lost legal fees and costs directly related to attorney malpractice. The "case within a case" need not be proved in every legal malpractice case and particularly not when the only damages alleged are legal fees and costs directly related to the attorney malpractice.[20] When the injury claimed is not based on the success of the underlying litigation or business transaction, the case-within-a-case methodology does not apply.[21] To prove causation in cases of this nature, the claimant need only prove financial loss or harm caused by their attorney's negligent acts or omissions.[22] Thus, in *Boulders at Escalante, LLC v. Otten Johnson Robinson Neff & Ragonetti*,[23] the plaintiff-client sought to recover the attorney fees and costs incurred in pursuing counterclaims against a general contractor that would not have been pursued "had Law Firm correctly advised it that there was no insurance coverage to pay a judgment against the contractor on the counterclaims."[24] Even though this legal malpractice action was premised

upon the theory that the underlying claim was clearly *lacking* in merit, the Colorado Court of Appeals held that such damages were recoverable because the attorney's negligence caused the client to pursue the meritless claim.[25]

The objective standard. The Colorado Supreme Court has held that to prove causation in a legal malpractice case, the plaintiff "must demonstrate that the claim underlying the malpractice action *should have been successful* if the attorney had acted in accordance with his or her duties."[26]

Although the Colorado appellate courts have never defined the "should have been successful" standard, the US District Court for the District Court of Colorado has explained that a trial-within-a-trial should determine "what the result should have been (an objective standard), not what the result would have been by a particular judge or jury (a subjective standard)."[27] This is because, as a general rule, the decision maker's mental processes are inadmissible.[28] Further, the case-within-a-case inquiry focuses on what the proper result should have been absent negligence, not what a particular judge or jury would have decided.[29]

Colorado courts have cited *Bebo Construction v. Mattox & O'Brien, P.C.* multiple times for the proposition that a legal malpractice plaintiff must prove that they "should have been successful" if not for the attorney malpractice.[30] However, our courts have also cited *Bebo Construction* for the proposition that a legal malpractice plaintiff must show that they "would have been successful" if not for the attorney malpractice.[31] Although Colorado courts have employed both phrases, "should have" and "would have," the standard in legal malpractice cases appears to remain an objective one.[32]

Division of labor between judge and jury. Although no Colorado appellate court has expressly described the division of labor between judge and jury in legal malpractice cases, the US District Court for the District of Colorado has held that when a malpractice case is based on proving that the underlying action should have been successful, the "guiding principle in identifying issues of law and fact is to utilize the same classifications as should have been applied in the underlying case."[33] That is, the jury makes findings of fact related to liability and damages and the judge determines issues of law.[34] As a practical matter, in a legal malpractice case where an attorney failed to file an appropriate motion or a timely appeal in the underlying case, the trial judge must determine whether the motion or appeal should have been successful.[35]

Damages

Certainty as to the full amount of financial harm is not required for a legal malpractice claim to accrue., as long as the plaintiff has suffered financial harm in some amount.[36] In most cases, only economic damages are available.

Economic damages. In legal malpractice cases, economic damages causally related to attorney negligence are not capped by law, unless a statutory cap would have applied in the underlying case.[37] Thus, in cases predicated upon a lost judgment, a legal malpractice plaintiff can recover the amount of the jury verdict or judicial award that should have been obtained had the attorney performed competently.[38] In proving this sum, the plaintiff-client can present the damages evidence that should have been presented in the underlying case or "expert testimony establishing what likely would have transpired and how much [the plaintiff] would have recovered."[39]

When a malpractice case does not depend on the merits of the underlying matter, a plaintiff-client can recover for unnecessary legal fees that were incurred as a result of substandard legal advice.[40] In addition, a plaintiff-client is entitled to recover fees paid in the underlying case for work that was performed negligently and incompetently, regardless of whether the client can also prove that the underlying case should have or would have been successful.[41] Additionally, an attorney who breaches a duty of reasonable care and/or a fiduciary duty by representing multiple clients with conflicting interests without full consent may be denied compensation for legal services.[42]

In legal malpractice cases predicated on an unfavorable business transaction, a plaintiff may recover for any foreseeable business losses, including lost profits.[43] Evidence of lost profits may be proved by documentary evidence or by testimony from the plaintiff or other witnesses.[44] Lost profits may be recovered by an existing or new business, as long as the evidence supporting the claim is credible and detailed.[45] Conversely, a legal malpractice plaintiff cannot recover economic damages for unforeseeable business losses.[46]

Damages can also include attorney fees paid to the negligent attorney or their law firm to ameliorate the impact of the negligence.[47] In addition, the financial harm can also include the fees paid to successor counsel to remedy the problems caused by the negligent attorney.[48]

Noneconomic damages. In Colorado, noneconomic damages are generally not recoverable in legal malpractice cases.[49] Colorado appellate courts have stated clearly that a legal malpractice plaintiff cannot recover for emotional distress based solely upon financial losses caused by the legal malpractice,[50] nor can a legal malpractice plaintiff recover noneconomic damages in child custody cases.[51] One rationale for these holdings is that, in Colorado, noneconomic damages are generally unavailable in negligence cases that do not involve "an unreasonable risk of bodily harm."[52]

However, noneconomic damages related to wrongful incarceration are potentially recoverable, on the grounds that such damages do involve an unreasonable risk of bodily harm. Colorado law does not define the term "bodily harm," but it does define the term "bodily injury," which is essentially synonymous. The term "bodily injury" is "physical pain, illness, or any impairment of physical or mental condition."[53] This definition, which is satisfied merely by showing that a victim suffered "physical pain," is very broad. The risk of being wrongfully incarcerated—which necessarily involves cohabitation with other convicted persons, regular shackling by correctional officers, and suboptimal living conditions—also creates the risk of physical pain and therefore could satisfy the definition of bodily injury or bodily harm.

Colorado cases directly addressing noneconomic damages related to legal malpractice are civil, not criminal, and Colorado appellate courts have not addressed whether a loss of liberty caused by a criminal defense attorney's malpractice is a compensable noneconomic harm. However, in *Schultz v. Boston Stanton*,[54] Schultz brought a legal malpractice claim against his former criminal defense attorneys, alleging that he had "been damaged by being incarcerated in a federal prison" as a direct and proximate result of their professional negligence. In *Schultz*, the court of appeals reversed the trial court's summary judgment order (which was based on grounds other than the issue of damages) and remanded the case for trial.

Collectibility

In legal malpractice cases based on a lost judgment or other monetary harm in an underlying matter, the plaintiff must prove not only the traditional elements of a negligence case—breach of duty, causation and damages—but also the element of collectibility.[55] The Colorado Supreme Court has explained that in legal malpractices claims where an attorney allegedly mishandled an

underlying case, the measure of damages is the amount the client-plaintiff could have collected from the underlying judgment.[56] In contrast, if the underlying judgment or other monetary gain would have been uncollectible due to insufficient assets or bankruptcy, "the lost value of the judgment is not the proximate result of an attorney's negligence."[57] The best way to prove collectibility, according to the Court, would be to prove that the underlying defendant was insured for the loss.[58] Alternatively, a legal malpractice plaintiff can prove collectibility by deposing the underlying defendant regarding their net worth or by presenting evidence of unencumbered assets, such as real estate, that is available through public records.[59]

Defenses

Most defenses available in traditional negligence cases are also available in legal malpractice cases, including the affirmative defenses of statute of limitations and comparative negligence.

Regarding the statute of limitations, legal malpractice claims based on negligence must be brought within two years after the action accrues.[60] A claim for negligence accrues "on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."[61] In legal malpractice claims, this is when the plaintiff learns "facts that 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."[62] Because a legal malpractice claim based on negligence accrues when the plaintiff has actual or constructive notice that their attorney has acted negligently and that this negligent conduct has caused financial or other cognizable harm, the filing of an appeal of the judgment in the underlying case usually has little or no bearing upon the accrual date.[63]

Examples of comparative negligence can include the following acts and omissions of the client: (1) failure to supervise, review, or inquire as to the representation; (2) refusal to follow the attorney's advice or instructions; (3) failure to provide the attorney with essential information; (4) failure to mitigate damages caused by the attorney's negligence; or (5) interference with the attorney's representation.[64]

Regarding the duty to mitigate damages, legal malpractice plaintiffs, like other litigants claiming damages caused by negligence, have a duty to take reasonable steps to minimize their damages.[65] Any damages that result from a failure to take such reasonable steps cannot be

awarded. However, to satisfy this duty, a legal malpractice plaintiff need not take measures that are "unreasonable, impractical or involve expense disproportionate to the loss to be avoided."[66] The Colorado Supreme Court has held that "[a] failure to appeal can never be a failure to mitigate damages caused by malpractice in an underlying trial."[67] As grounds for this ruling, the Court stated that the law does not require a person to institute and prosecute lawsuits in order to mitigate damages.[68] It is not clear whether other legal actions, such as a motion to reconsider or a motion for new trial, might be mandated by the duty to mitigate.

Some defenses have been explicitly excluded by Colorado reviewing courts, such as attributing fault to the plaintiff-client's current attorneys.[69] Likewise, the US District Court for the District of Colorado has held that a legal malpractice defendant may not assert an affirmative defense of judgmental immunity, which is merely a denial that the attorney-defendant acted negligently.[70]

Negligence Claims versus Breach of Fiduciary Duty Claims

An attorney can commit legal malpractice by acting negligently (breaching the standard of care) or by breaching a fiduciary duty (violating standards of conduct).[71] As a fiduciary, an attorney has a duty of undivided loyalty to every client.[72] A breach of the duty of undivided loyalty occurs when an attorney obtains a personal advantage in dealing with a client or when the attorney creates circumstances that adversely affect the client's interests.[73]

In general, when a claim against an attorney for breach of a fiduciary duty arises out of the same material facts as a claim for negligence, the claims are duplicative and the fiduciary duty claim should be dismissed.[74] However, Colorado courts recognize that a claim for breach of fiduciary duty is not inherently duplicative of a claim for negligence.[75] Where "a claimed fiduciary violation is separate and independent from any alleged negligence, separate claims may well be properly asserted."[76] Thus, a claim for breach of fiduciary duty, separate and apart from a claim for negligence, may exist where a lawyer improperly converts client funds or acts with an improper motive based on self-interest or a conflict of interest.[77] The Colorado Court of Appeals held that an attorney was properly found liable for both legal malpractice based on negligence and for a breach of fiduciary duty where he (1) negligently failed to advise a baby's parents of the availability of relinquishment counseling and (2) acted with a conflict of interest

during an adoption proceeding by representing both the biological parents and the adoptive parents.[78]

In addition to having different factual grounds, claims for professional negligence and claims for breach of fiduciary duty have important practical differences. For instance, legal malpractice claims based on negligence have a two-year statute of limitations, whereas claims for breach of fiduciary duty have a three-year limitation period.[79] In addition, although attorney fees are not available for professional negligence claims, attorney fees can be awarded in breach of fiduciary cases that rise to the level of a breach of trust.[80] Further, although exemplary damages can be awarded in professional negligence cases when counsel has also engaged in willful and wanton conduct,[81] as a practical matter, such damages are much easier to obtain in cases involving a breach of fiduciary duty.[82] Finally, whereas noneconomic damages are either limited or unavailable in legal malpractice cases based on negligence, such damages can be awarded in cases involving breach of fiduciary duty.[83]

Negligence Claims versus Contract Claims

Unlike a legal malpractice claim grounded in negligence, a contract claim against an attorney arises when a lawyer breaches a duty to perform a mutually agreed-upon contractual obligation.[84] Thus, whereas a claim based on breach of a duty imposed by the attorney-client *relationship* sounds in tort, "a claim for breach of the attorney-client *contract* is cognizable, [but] it must be based on a specific term in the contract."[85]

Based on this distinction, Colorado appellate courts have declined to find a distinct contract claim based on an attorney's contractual requirement to represent their client "faithfully and with due diligence,"[86] or based on a contractual requirement to provide "professional and competent legal services."[87] Rather, in such circumstances, the courts have found that the contract claim was subsumed within the plaintiff's legal malpractice claim.[88] But a contract claim has been deemed viable where the complaint alleged counsel's failure to comply with the representation agreement's provision that a specific attorney would be primarily responsible for the client's defense.[89] Under these circumstances, the "breach of contract allegation was founded specifically on a term of the agreement for which the parties had bargained: a claim separate and distinct from their claims sounding in negligence."[90]

Regarding the practical differences between professional negligence and breach of contract claims, professional negligence claims are governed by a two-year statute of limitations, whereas breach of contract claims have a three-year limitation period.[91] Attorney-client fee disputes that do not implicate the competence of the attorney are more appropriately pursued as breach of contract claims rather than professional negligence claims.

The Certificate of Review Requirement

The certificate of review requirement is found at CRS § 13-20-602(1)(a), which provides that a plaintiff who files a lawsuit alleging professional negligence must provide a certificate of review for "each . . . licensed professional named as a party." Notwithstanding this language, the Colorado appellate courts have determined that a certificate of review is necessary only for professional negligence claims that require expert testimony to establish a prima facie case.[92] Certificates of review are generally required for breach of fiduciary duty claims, because such claims require expert testimony on the scope of the attorney's duty and the manner in which that duty was breached.[93] Likewise, a certificate of review will be required for breach of contract claims against attorneys when such claims require expert testimony.[94]

However, the Colorado Court of Appeals has joined other states in holding that no certificate of review is required in legal malpractice cases concerning an attorney's failure to file an action within the applicable statute of limitations.[95] Such a mistake "is an example of the sort of negligence so apparent as to make expert evidence as to the standard of care and deviation therefrom unnecessary."[96]

Under the express terms of CRS § 13-20-602(1)(a), a trial court may grant leave to file an untimely certificate of review if there is good cause to excuse the late filing. To determine whether good cause exists, the trial court must consider (1) whether the neglect causing the late filing was excusable, (2) whether the moving party has alleged a meritorious claim or defense, and (3) whether permitting the late filing would be consistent with equitable considerations, including any prejudice to the nonmoving party.[97] In determining whether good cause exists, the district court should consider all three of these criteria.[98] In addition, a district court should be guided by the general rule favoring resolution of disputes on their merits.[99]

Conclusion

As shown above, in many ways Colorado legal malpractice cases are similar to traditional negligence cases, but certain unique characteristics distinguish these cases from their brethren. Attorneys specializing in this field, and perhaps all Colorado practitioners, should be aware of these differences.

Notes

1. *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 239 (Colo. 1995); *accord State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1065 (Colo.App. 2008).

2. *People v. Bennet*, 810 P.2d 661, 664 (Colo. 1991) (internal citations omitted); *accord Allen v. Steele*, 252 P.3d 476, 485 n.7 (Colo. 2011).

3. Colo. RPC 1.8(h).

4. CRCP 227(A)(2).

5. *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872, 877 ¶ 20 (Colo. 2016).

6. *Id.* (estate beneficiaries precluded from asserting legal malpractice claim against testator's lawyer); *Bewley v. Semler*, 432 P.3d 582 (Colo. 2018) (individual homeowner association member precluded from asserting legal malpractice claim against attorney for association).

7. *Allen*, 252 P.3d at 482; *accord Baker*, 364 P.3d at 877 ¶ 20.

8. *Roberts v. Holland & Hart*, 857 P.2d 492, 495 (Colo.App. 1993).

9. *Gibbons v. Ludlow*, 304 P.3d 239, 245 (Colo. 2013).

10. COLJI-Civ. 15:21 (2022). *See also McCafferty v. Musat,* 817 P.2d 1039, 1044 (Colo.App. 1990); *Boigegrain v. Gilbert,* 784 P.2d 849, 850 (Colo.App. 1989) ("The measure of the duty owed by an attorney to his client is that he must employ that degree of skill, knowledge, and judgment ordinarily possessed by a member of the legal profession at the time the task is undertaken.").

11. *Boigegrain*, 784 P.2d at 850 (citing *Berman v. Rubin,* 227 S.E.2d 802 (Ga.Ct.App. 1976)).

12. Colo. RPC, Scope.

13. *See Bebo Constr. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78, 83 (Colo. 1999); *Brown v. Silvern*, 45 P.3d 749 (Colo.App. 2001); *Miller v. Bryne*, 916 P.2d 566, 579 (Colo.App. 1995; *Tripp v. Borchard*, 29 P.3d 345, 347 (Colo.App. 2001); *Morris v. Geer*, 720 P.2d 994 (Colo.App. 1986) (requiring plaintiff to prove that motion to reopen dissolution of marriage case could have been successfully prosecuted and that plaintiff would have received higher property distribution).

14. *Gibbons*, 304 P.3d at 245 ¶ 16. The plaintiff may prove that they would have obtained a more favorable result in one of two ways: (1) by proving that they would have been able to obtain a better deal in the underlying transaction—the "better deal" scenario; or (2) by proving that they would have been better off by walking away from the deal—the "no deal" scenario. *Id.*

15. *White v. Jungbauer*, 128 P.3d 263, 265 (Colo.App. 2005). *See McCafferty v. Musat*, 817 P.2d 1039 (Colo.App. 1990) (upholding legal malpractice award based upon assertion that "by recommending settlement before adequately pursuing discovery, attorney . . . failed to use degree of skill, knowledge, and judgment ordinarily possessed by members of legal profession.").

16. Mallen, *Legal Malpractice*, § 33 at 87 (ThRe 2022).

17. *Id. See also Miller*, 916 P.2d at 579 ("[B]ecause the underlying wrongful death claim was itself settled . . . the issue then becomes whether the passenger's widow should have prevailed if the wrongful death case had proceeded to trial, and if so, what amount of verdict should have entered."); *Coon v. Ginsberg*, 509 P.2d 1293, 1295 (Colo.App. 1973).

18. *Scognamillo v. Olsen*, 795 P.2d 1357, 1362 (Colo.App. 1990); Colo. RPC 1.2(a).

19. *Scognamillo*, 795 P.2d at 1362.

20. *See, e.g., Boulders at Escalante, LLC v. Otten Johnson Robinson Neff & Ragonetti, PC*, 412 P.3d 751, 761 ¶ 48 (Colo.App. 2015) ("When the theory of the case is not that the plaintiff

would have obtained a more favorable result in the underlying litigation or business transaction but for the attorney's negligence, it makes no sense to require the plaintiff to prove that he or she would have done so.").

21. *Id.* at 761 ¶ 49 (citing 4 Mallen, *Legal Malpractice* § 37 at 87 (West 2015)).

22. *Id.* at ¶ 44.

23. *Id.* at 761.

24. *Id.* at 763 ¶ 60.

25. *Id.* at 764 ¶ 64.

26. *Bebo Constr. Co.*, 990 P.2d at 83 (emphasis added); CJI Civ. 15:19 (2022).

27. *Silverman v. Greenfield*, No. 16-cv-0110, 2019 U.S. Dist. LEXIS 15582, at *32–33 (D.Colo. Jan. 31, 2019) (quoting Mallen, *Legal Malpractice* at § 37 at 87 (West 2019) (parentheses in original).

28. *Phillips v. Clancy*, 733 P.2d 300, 305 (Ariz.App. 1987). *See also* Mallen, *supra* note 16 § 37 at 150.

29. McConnell, "Proximate Causation in Colorado Legal Malpractice Litigation," 31 *Colo. Law.* 9 (Jan. 2002) (citing Mallen and Smith, 5 *Legal Malpractice* § 33.8 at 69–70 (5th ed. West 2000).

30. *See Rantz v. Kaufman*, 109 P.3d 132, 136 (Colo. 2005); *Brown v. Silvern*, 45 P.3d 749, 751 (Colo.App. 2005); *Tripp v. Borchard*, 29 P.3d 345, 347 (Colo.App. 2001); *Powell v. Astrue*, No. 13-cv-171, 2013 WL 1155483 (D.Colo. Mar. 19, 2013); *Silverman*, No. 16-cv-0110, 2019 U.S. Dist. LEXIS 15582; *Lariviere, Grubman & Payne, LLP v. Phillips*, No. 07-cv-01723, 2011 U.S. Dist. LEXIS 13584 (D.Colo. Feb. 11, 2011).

31. *See LeHouillier v Gallegos*, 434 P.3d 156, 159–60 ¶ 19 (Colo. 2019); *Gibbons v. Ludlow*, 304 P.3d at 245 ¶ 16; *Stanton v. Schultz*, 222 P.3d 303, 307 (Colo. 2010); *Boulders at Escalante,* 412 P.3d at 759 ¶ 33 (Colo.App. 2015); *Bristol Co, LP v. Osman*, 190 P.3d 752, 755 (Colo.App. 2007); *Luttgen v. Fisher*, 107 P.3d 1152, 1154 (Colo.App. 2005); *Wyers v. Greenbeg Traurig, LLP*, No. 12-cv-00750, 2014 WL 2673594 (D.Colo. June 13, 2014).

32. *See Lombardo v. Huysentruyt*, 91 Cal.App.4th 656, 668 (Cal.App. 2001).

33. *See Lariviere, Grubman & Payne, LLP*, 2011 U.S. Dist. LEXIS 13584, at *41 (internal quotations and citations omitted); Mallen, *supra* note 16 at § 37 at 101. *See also Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 777 (Mich. 1994) (same).

34. *Mallen, supra* note 16 at § 37 at 150.

35. *Charles Reinhart Co. v. Winiemko,* 513 N.W.2d at 783–84 & n.40 (holding that "whether an appeal lost because of an attorney's negligence would have succeeded . . . is an issue for the court," and noting that "at least nineteen jurisdictions addressing the issue have found it to be one of law"); *see Myers v. Beem*, 712 P.2d 1092, 1094 (Colo.App. 1985) (where attorney failed to file complaint within applicable statute of limitations, trial court properly denied directed verdict and allowed elements of legal malpractice claim to be decided by jury); *Cotter v. Hickenlooper*, No. 15-cv-00782, 2015 U.S. Dist. LEXIS 51564 (D.Colo. April 20, 2015) (granting summary judgment to attorney in legal malpractice claim when attorney failed to file a timely appeal in a workers' compensation hearing and ALJ's denial of workers' compensation claim was supported by substantial evidence).

36. *Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963–64 (Colo.App. 1991); *accord Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 152 ¶ 26 (Colo.App. 2018); *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo.App. 1998).

37. Nonetheless, as a practical matter, the target attorney's insurance policy limits may restrict the available monetary recovery.

38. *See Miller*, 916 P.2d at 579; *Morris v. Geer*, 720 P.2d 994, 998 (Colo.App. 1986); *Coon*, 509 P.2d at 1295.

39. *Sterenbuch v. Goss*, 266 P.3d 428, 434 (Colo.App. 2011) (parentheses omitted).

40. *Boulders at Escalante, LLC,* 412 P.3d at 761 ¶ 49.

41. *See Froid v. Zacheis*, 494 P.3d 673, 682 ¶ 43 (Colo.App. 2021); *Roberts*, 857 P.2d at 498. *See also Parks v. Edward Dale Parrish, LLC*, 452 P.3d 141, 145 ¶ 16 (Colo.App. 2019).

42. *In re Life Ins. Tr. Agreement of Julius F. Seeman,* 841 P.2d 403, 405 (Colo.App. 1992). *See also In re Marriage of Redmond & Bezdek*, 131 P.3d 1167, 1170 (Colo.App. 2005) (court may order an attorney special advocate to refund fees, in whole or in part, under its inherent powers as punishment for a Colo. RPC violation).

43. *Roberts*, 857 P.2d at 496–97.

44. *Id.* at 497; *Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348, 351 (10th Cir. 1988).

45. *Roberts*, 857 P.2d at 497–97; *Miami Int'l Realty Co.*, 841 F.2d at 351.

46. *Boulders at Escalante, LLC,* 412 P.3d at 764 ¶ 65. *See also Roberts*, 857 P.2d at 496–97; *accord Gibbons*, 304 P.3d at 246.

47. *Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963 (Colo.App. 1991); *accord Miller,* 916 P.2d at 582; *Jacobson v. Shine*, 859 P.2d 911, 913 (Colo.App. 1993).

48. *Froid*, 494 P.3d at 682 ¶ 44.

49. *See id.* at 678 ¶ 23 (citing 7 Grund et al., *Colorado Practice Series: Personal Injury Torts and Insurance* § 22:20 (3d ed. Westlaw updated Dec. 2020)).

50. *See Aller v. Law Off. of Carole C. Schriefer, P.C.*, 140 P.3d 23, 26 (Colo.App. 2005); *accord Froid*, 494 P.3d at 678 ¶ 23.

51. *Froid*, 494 P.3d at 678–79 ¶¶ 24–26.

52. *Id.* at 678 ¶ 23 (citing *Aller*, 140 P.3d at 26).

53. CRS § 18-1-901(2)(c).

54. *Schultz v. Stanton*, 198 P.3d 1253 (Colo.App. 2008), *aff'd on other grounds*, 222 P.3d 303 (Colo. 2010).

55. *LeHouillier v. Gallegos,* 434 P.3d at 160 ¶ 22.

56. *Id.* at 162 ¶ 34.

57. *Id.* at ¶ 33.

58. *Id.* at 163 ¶ 38.

59. *Id.* at ¶ 40.

60. CRS § 13-80-102(1)(a).

61. CRS § 13-80-108(1).

62. *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004); *Torrez v. Edwards*, 107 P.3d 1110, 1113 (Colo.App. 2004).

63. *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo.App. 1998); *Jacobson v. Shine,* 859 P.2d 911, 913 (Colo.App. 1993); *Morris v. Geer,* 720 P.2d 994, 997–98 (Colo.App. 1986).

64. *Smith v. Mehaffy*, 30 P.3d 727, 731 (Colo.App. 2000) (citing *McLister v. Epstein & Lawrence,* 934 P.2d 844 (Colo.App. 1996)).

65. *Scognamillo*, 795 P.2d at 1359; Mallen, *supra* note 16 § 21 at 32.

66. Mallen, *supra* note 16 § 21 at 32.

67. *Stone v. Satriana*, 41 P.3d 705, 712 (Colo. 2002).

68. *Id.* (citing *Robinson v. Carney,* 632 A.2d 106, 108 (D.C. 1993)).

69. *Stone v. Satriana*, 41 P.3d at 709.

70. *Phillips v. Duane Morris, LLP*, No. 13-CV-01105, 2014 WL 2207194, at *2 (D.Colo. May 28, 2014).

71. *See Smith,* 30 P.3d at 733.

72. *Id.* (citing 2 Mallen and Smith, *Legal Malpractice* § 14.2 (4th ed. West 1996)).

73. *Id.* at 733.

74. *Aller v. Law Off. of Carole C. Schriefer, P.C.,* 140 P.3d at 27 (Colo.App. 2005); *Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 620–21 (Colo.App. 1997); *Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo.App. 1993); *Spoor v. Serota*, 852 P.2d 1292, 1294–95 (Colo.App. 1992).

75. *See Smith*, 30 P.3d at 733; *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 n.13 (Colo. 1993) (breach of fiduciary duty is a breach of trust and does not require a professional relationship or a professional standard of care; legal malpractice is a negligence action based on a professional relationship and a professional standard of care.).

76. *Moguls of Aspen, Inc.*, 956 P.2d at 621.

77. *See Aller*, 140 P.3d at 28; *Moguls of Aspen, Inc.*, 956 P.2d at 620–21. *See also* Colo. RPC 1.8(a).

78. *Boyd v. Garvert*, 9 P.3d 1161, 1163 (Colo.App. 2000).

79. *See* CRS § 13-80-101(1)(f); *accord Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 606 (Colo.App. 2000).

80. *Eder v. Cedarblade (In re Delluomo)*, 328 P.3d 291, 296 ¶ 23 (Colo.App. 2014).

81. *Miller*, 916 P.2d at 580 (in legal malpractice case, evidence indicating that "defendants acted purposefully in rejecting the settlement offer without discussing the matter with [client]" supported punitive damage claim).

82. *Peterson v. McMahon*, 99 P.3d 594, 599 (Colo. 2004) (exemplary damages available against trustee who misappropriated trust funds).

83. *See Aller*, 140 P.3d at 29 (contrasting legal malpractice cases, in which noneconomic damages are unavailable, with breach of fiduciary duty cases, in which such damages can be awarded).

84. *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275, 1284–85 (Colo.App. 2010) (citing *Martinez v. Badis,* 842 P.2d 245, 251 (Colo.1992)).

85. *McLister v. Epstein & Lawrence, P.C.*, 934 P.2d 844, 847 (Colo.App. 1996) (emphasis added).

86. *Id.* at 847.

87. *Torrez v. Edwards,* 107 P.3d 1110, 1113 (Colo.App. 2004).

88. *McLister*, 934 P.2d at 847; *Torrez*, 107 P.3d at 1110.

89. *Gen. Steel Domestic Sales,* 230 P.3d at 1284–85.

90. *Id.*

91. CRS § 13-80-101(1)(a).

92. *Giron v. Koktavy*, 124 P.3d 821, 825 (Colo.App. 2005) (citing *Shelton v. Penrose/St. Francis Healthcare Sys.,* 984 P.2d 623 (Colo. 1999) and *Baumgarten v. Coppage,* 15 P.3d 304 (Colo.App. 2000)).

93. *Woo v. Baez*, 522 P.3d 739 ¶ 19 (Colo.App. 2022).

94. *Martinez v. Badis*, 842 P.2d 245, 252 (Colo. 1992).

95. *Giron v. Koktavy,* 124 P.3d at 825.

96. *Id.* at 825 (quoting *Allyn v. McDonald,* 910 P.2d 263, 266 (Nev. 1996)).

97. *RMB Services, Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo.App. 2006).

98. *Hane v. Tubman*, 899 P.2d 332, 335 (Colo.App. 1995); *accord Yadon v. Southward*, 64 P.3d 909, 913 (Colo.App. 2002).

99. *RMB Servs.,* 151 P.3d at 676; *Hane*, 899 P.2d at 335 (citing *Craig v. Rider*, 651 P.2d 397 (Colo. 1982)).