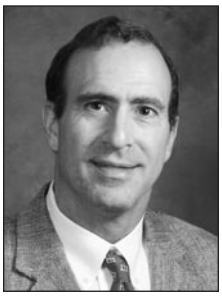

Suing Opposing Counsel

By Anthony Viorst

Introduction

The Restatement (Third) of the Law Governing Lawyers (2000) provides, at Section 56, that "[e]xcept as provided in §57 . . . a lawyer is subject to liability to a client or non-client when a nonlawyer would be in similar situations." However, the Colorado Supreme Court has limited the liability of attorneys to non-clients, based in part upon the adversarial nature of litigation, in which "injury to a third person often is the direct, intended objective of the attorney's representation."[1] Nonetheless, the Court has recognized exceptions where an attorney "has committed fraud or a malicious or tortious act, including negligent misrepresentation."[2] Successful fraud claims against attorneys are rare, because the non-client plaintiff must establish that opposing counsel knowingly made a false representation of material fact, and that the non-client plaintiff justifiably relied upon the misrepresentation made by his opponent's lawyer.[3] Other types of tortious acts justifying claims by non-clients against opposing counsel are discussed more fully below.

Potential Claims Against Opposing Counsel

A. Negligent Misrepresentation

An attorney may be liable to a non-client for negligent misrepresentation, which is defined according to Section 552 of the Restatement (Second) of Torts (1979). The elements of a claim of negligent misrepresentation are: (1) one in the course of his or her business, profession or employment; (2) makes a misrepresentation of a material fact, without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party justifiably relied on the misrepresentation to his or her detriment. The most common form of negligent misrepresentation against an attorney arises when an attorney provides a written opinion to a third party at the request of the attorney's client.[4]

As reflected in the elements set forth above, a successful claim for negligent misrepresentation requires a showing that the plaintiff was involved in a business transaction. In *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver,*[1] the Colorado Supreme Court held that a non-client stated a claim for negligent representation where the defendant attorneys prepared a series of opinion letters on behalf of their client stating that a pending lawsuit had no merit, in order to induce a bank to buy the client's municipal notes and bonds. The bank then purchased the notes and bonds, after which the pending lawsuit was successful and the bonds went into default. The breadth of the *Mehaffy* opinion was limited in *Allen v. Steele*,[2] in which the Supreme Court held that an attorney who gave a prospective client erroneous information regarding the applicable statute of limitations for a civil lawsuit could not be found liable for negligent misrepresentation, because a civil lawsuit does not involve a business or commercial relationship or transaction.

B. Malicious Prosecution and Abuse of Process

The tort of malicious prosecution addresses the situation where a person knowingly initiates baseless litigation, whereas the tort of abuse of process provides a remedy in situations where litigation is properly initiated, but is misused through an irregular, coercive act.[3] Generally, to prevail on a claim for malicious prosecution, the plaintiff must prove that: (1) the defendant contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) no probable cause; (4) malice; and (5) damages.[5] Abuse of process requires proof of: (1) an ulterior purpose in the use of judicial proceedings; (2) willful actions by a defendant in the use of process that are not proper in the regular conduct of a proceeding; and (3) damages.[6]

With regard to malicious prosecution, the plaintiff must prove, inter alia, that the prior action ended in his or her favor, meaning that the case was dismissed or won, and not settled.[7] A malicious prosecution claim may be brought against an attorney who wrongly prosecuted or initiated a prior case.[8] Malicious prosecution claims have been approved where the defendant initiated criminal proceedings,[9] civil proceedings,[10] arbitration proceedings,[11] and lis pendens actions.[12]

With regard to abuse of process, the plaintiff need not prove favorable termination of the underlying judicial proceeding, but must prove, inter alia, that the defendant had an ulterior purpose in the use of the judicial proceeding. The improper purpose is usually an attempt to secure some collateral advantage, such as the surrender of property or the payment of money, not properly includable in the process itself.[13] Thus, an abuse of process claim may be proper where an attorney pressures an individual to pay a personal judgment by placing a lis pendens upon property that was owned by that individual's corporation, but was not personally owned by that individual.[14]

C. Intentional Interference with Contract or Prospective Contract

Colorado recognizes the tort of intentional interference with contract, which is set forth in Restatement (Second) of Torts Section 766 (1979), consisting of the following elements: (1) The plaintiff had a contract with a third party; (2) The defendant knew or reasonably should have known of the contract; (3) the defendant intentionally caused the third party to breach the contract; (4) The defendant's interference with the contract was improper; and (5) The defendant's interference with the contract caused the plaintiff to suffer damages.[15] Likewise, the Colorado appellate courts have recognized the tort of intentional interference with prospective contractual relations, as set forth in the Restatement.[16] With regarding to whether the defendant's conduct was improper, it is "very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper."[17]

Because contracting parties sometimes need advice and assistance, lawyers are generally protected against claims of interference with contractual or prospective-contractual relations. Thus, the Restatement (Third) of the Law Governing Lawyers (2000), at Section 57(3), states in relevant part that "a lawyer who advises or assists a client to...enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations . . . **if the lawyer acts to advance the client's objectives without using wrongful means**." (Emphasis added).

Regarding advancement of the client's objectives, Section 57, comment g, states in relevant part as follows:

> . . . So long as the lawyer acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction in the consequences to a nonclient. Nor does a lawyer become liable to nonclients for giving with a proper purpose advice that is negligent or harms the client. **But a lawyer who acts or advises a client for the lawyer's own benefit . . . is subject to liability to a nonclient when the lawyer's activities satisfy the other requirements of the tort**.[18] (Emphasis added).

Regarding the issue of wrongful means, Colorado case law defines this term as "conduct wrongful by reason of a statute or regulation, a recognized rule of common law, an established standard of a trade or profession, violence, threats, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood."[19]

Although no Colorado appellate case has explicitly addressed Sections 56 and 57 of the Restatement (Third) of the Law Governing Lawyers, the Court of Appeals has held that a nonclient can pursue a claim against an attorney for intentional interference with contractual and prospective-contractual advantage, based upon false and defamatory statements that caused a builder to stop working on the plaintiffs' home.[20]

Other Considerations

A. Special Considerations Relating to Insurance Defense Counsel

With regard to those cases in which opposing counsel is retained by insurance company, there are special considerations relating to the potential for interference with a contract. An insurance defense attorney, like all other attorneys, owes his own client a duty of undivided loyalty.[21] Regarding an attorney's own personal financial interest, a breach of the duty of undivided loyalty occurs when an attorney "creates circumstances that adversely affect the client's interests."[22] And, in executing the duty of undivided loyalty, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall abide by a client's decision whether to settle a matter." Colo. RPC 1.2(a).

Regarding a lawyer retained by an insurance company to represent an insured, Colorado Formal Ethics Opinion 91 (January 16, 1993) states that "th[e] retention does not create an attorney-client relationship between the attorney and the carrier" and that "[a] lawyer retained by a liability insurance carrier to defend a claim against the company's insured must represent the insured with undivided fidelity." Colorado case law also provides that insurance defense counsel has a duty of undivided loyalty to the insured.[23] Nonetheless, insurance defense counsel may also feel an allegiance toward the insurance company that hired him to represent the insured, and that

may seek to hire him again in the future. Therefore, when an insured is facing a potential judgment in excess of insurance policy limits, insurance defense counsel is obligated to recommend that the insured hire independent counsel.[24]

It is axiomatic that an injured plaintiff cannot sue the insured tortfeasor's appointed counsel for legal malpractice, because there is no attorney-client relationship between the plaintiff and opposing counsel. Nor can the plaintiff take an assignment from the tortfeasor of any legal malpractice claim he might have against insurance defense counsel.[25] However, if insurance defense counsel shows greater loyalty to the insurer than the insured, by failing to timely and adequately relay a monetary settlement offer made by the plaintiff, or by failing to timely and adequately relay an offer to enter into a *Nunn*/*Bashor* agreement,[26] the injured plaintiff may have grounds to assert a claim for intentional interference with prospective contractual advantage. Similarly, if insurance defense counsel shows greater loyalty to the insurer than the insured, by failing to recommend that the insured retain independent counsel to provide advice regarding a potential excess verdict, such an omission by insurance defense counsel such can serve as evidence of bad faith by the insurance company in any subsequent *Nunn/Bashor* proceedings.[27]

B. The Litigation Privilege

The litigation privilege has its roots in Restatement (Second) of Torts §586 (1977), which provides that "[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." In Colorado, this privilege was originally intended to protect defamatory statements made during the course of litigation,[28] but it has been extended to apply to non-defamatory statements.[29] Under Colorado law, the privilege applies to "**statement[s]** made in the course of litigation,"[30] and the privilege arguably does not apply to claims based upon the action or inaction of the defendant.[31] Indeed, expanding the litigation privilege to apply to acts and omissions of counsel during the course of litigation would effectively abrogate the well-settled case law, cited above, holding that an attorney **can** be held liable for malicious and tortious acts committed against a third party.[32] In addition, Colorado appellate courts, as well as courts from other jurisdictions, have placed certain limitations upon the litigation privilege that require good faith and prohibit self-dealing.[33]

Conclusion

Claims against opposing counsel are difficult, but not impossible. A party who has been wronged by opposing counsel, and who has suffered economic or noneconomic harm, should consider pursuing one of the claims described above.

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Endnotes:

[1] *Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011) (citing Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice*, § 7:1 at 768 (2011)); *accord, Bewley v. Semler*, 432 P.3d 582, 587 (Colo. 2018); *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872, 877 (Colo. 2016).

[2] *Allen,* 252 P.3d at 482; *accord*, *Baker v. Wood, Ris*, 364 P.3d at 877.

[3] *See Vinton v. Virzi*, 269 P.3d 1242, 1247 (Colo. 2012) (plaintiff Virzi had no right to rely upon alleged misrepresentations of attorney Vinton relating to title of certain property, where title records were public and easily accessible).

[4] *Allen*, 252 P.3d at 483 (citing Mallen and Smith, *supra* note 1, § 7:14 at 864).

[5] *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo.1995).

[6] *Allen v. Steele*, 252 P.3d 476 (Colo. 2011).

[7] *Mintz v. Accident & Injury Specs., P.C.*, 284 P.3d 62, 66 (Colo. App. 2010).

[8] *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007); *see also* CJI–Civ. 4th 17:1 (2020).

[9] *Hewitt*, 154 P.3d at 414; *see also* CJI–Civ. 4th 17:10 (2020).

[10] *Hewitt v. Rice*, 154 P.3d at 411-412.

[11] *Id*. at 414 (noting that plaintiff's case concerned "malicious prosecution complaint . . . founded upon the [Law] Firm's preparation of the 1998 CUFTA claim and its accompanying lis pendens"); *Slee v. Simpson*, 15 P.2d 1084 (Colo. 1932) (malicious prosecution claim properly brought against attorney who asserted cross-claim relating to motor vehicle accident).

[12] *Schenck v. Minolta Office Systems, Inc.*, 802 P.2d 1131 (Colo. App. 1990).

[13] *Slee*, 15 P.2d 1084.

[14] Walford v. Blinder, Robinson & Co., 793 P.2d 620 (Colo. App. 1990).

[15] *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 504 (Colo. 2004); *Westfield Dev. Co. v. Rifle Inv. Associates*, 786 P.2d 1112. 1118-19 (Colo. 1990).

[16] *See Hertz v. Luzenac Group*, 576 F.3d 1103, 1117-18 (10th Cir. 2009) (citing W. Page Keeton *et al*., *Prosser and Keeton on Torts* § 121, at 898 (5th ed. 1984)); *Walker v. Van Laningham,* 148 P.3d 391, 394 (Colo. App.2006) (citing *Palmer v. Tandem Mgmt. Servs., Inc.,* 505 N.W.2d 813, 817 (Iowa 1993)).

[17] *See Hewitt v. Rice,* 154 P.3d 408, 411 (Colo. 2007) (plaintiff's claim that "the Firm improperly pressured Hewitt to pay

the judgment he owed the Bank by making VPA's property unmarketable" could have warranted a claim for abuse of process, but for the expiration of the statute of limitations relating to this claim).

[18] COLJI-Civ 24:1 (2020); *Krystkowiak v. W.O. Brisben Cos.,* 90 P.3d 859, 871 (Colo. 2004).

[19] *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995); *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1195-96 (Colo. App. 2009); *Dolton v. Capital Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo. App. 1981).

[20] Restatement (Second) of Torts §767 comment d (1977); *see also W.O. Brisben Companies, Inc. v. Krystkowiak*, 66 P.3d 133, 137 (Colo. App. 2002) (with regard to claim for intentional interference with contract, "we conclude that an agent acts improperly only when he or she is motivated solely by the desire to harm one of the contracting parties or to interfere in the contractual relations between the parties.").

[21] Restatement (Third) of the Law Governing Lawyers §57, comment *g* (2000) (emphasis supplied); *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709, (8th Cir. 1993) (applying Minnesota law) ("An attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment **or acts for personal gain**") (emphasis supplied).

[22] *Amoco,* 908 P.2d at 502 n.6. (citing *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 900 P.2d 191, 194 (Idaho 1995)).

[23] *See Begley v. Ireson*, 399 P.3d 777 (Colo. App. 2017).

[24] *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000) (citing Mallen and Smith, *supra* note 1, § 14.2 (4th ed. 1996)).

[25] *Smith v. Mehaffy*, 30 P.3d at 733.

[26] *See also State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1066 (Colo. 2008) ("[E]ven when an insurance company hires an attorney to represent its insured, the attorney owes a duty only to the insured"); *Essex Ins. Co. v. Tyler*, 309 F.Supp.2d 1270, 1272 (D. Colo. 2004) ("In Colorado, an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured."); *accord*, *Weitz Co., LLC v. Ohio Cas. Ins. Co.*, 2011 WL 2535040 (D. Colo. 2011).

[27] *See Bankruptcy Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 525 (Colo. App. 2008); citing Mallen and Smith, *supra* note 1, § 30.21, at 338 (where the insured is facing a potential excess verdict, an independent attorney "can counsel the insured concerning whether to risk the excess exposure and should function as an advocate against the insurer.").

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

[29] The term "*Bashor* agreement," which emanates from *Northland Ins. Co. v. Bashor*, 494 P.2d 1292 (Colo. 1972), describes agreements whereby the insured formally assigns his bad-faith claims against the insurer to the third party plaintiff in exchange for a covenant not to execute on the insured's assets. *See Old Republic Ins. Co. v. Ross*, 180 P.3d 427, 431 (Colo. 2008). The agreement in *Bashor* was entered following a trial and the imposition of a judgment in excess of insurance-policy limits. *Id.* In *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 122-23 (Colo. 2010), the Colorado Supreme Court held that such agreements may include a stipulated judgment, and may be enforceable even when executed prior to any trial on the merits of the injured party's claim against the insured. Under such circumstances, the stipulated judgment will not be binding on the insurer until the insurer has had a chance to defend itself at a "bad faith" trial. *Id.* At the "bad faith" trial, the insurer would be entitled to dispute the allegation that it acted in bad faith, as well as the amount of the stipulated judgment, and if the jury determined that the insurer acted improperly in handling the insurance claim, it could "award whatever damages, up to the amount of the stipulation, it [found] reasonable." *Id.*

[30] *See Bankruptcy Estate of Morris*, 192 P.3d at 525 (evidence that defense counsel advised the insured that he had "an option" to retain independent counsel, rather than "recommending" independent counsel, was pertinent to the issue of whether the insurance company acted reasonably or in bad faith).

[31] *See Club Valencia Homeowners Ass'n, Inc. v. Valencia Associates*, 712 P.2d 1024 (Colo. App. 1985).

[32] *See Patterson v. James*, 454 P.3d 345, 350 (Colo App. 2018) ("The privilege not only shields attorneys from defamation claims arising from statements made in the course of litigation, but also bars other nondefamation claims that stem from the same conduct.").

[33] *Id.* at 350 (citing *Buckhannon v. U.S. West Communications, Inc.*, 928 P.2d 1331, 1335 (Colo. App. 1996)) (emphasis supplied).

[34] *See Roe v. McCollum*, 2014 WL 717008 (D. Colo. 2014) (finding "no support for the idea that an attorney is immune from suit for invasion of privacy under Colorado law if his actions are taken in the course of litigation").

[35] *See Allen v. Steele*, 252 P.3d 476 (Colo. 2011) (attorney may be liable to non-clients where attorney "has committed fraud or a malicious or tortious act . . ."); *accord, Bewley v. Semler*, 432 P.3d 582, 587 (Colo. 2018); *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872, 877 (Colo. 2016).

[36] *See Begley v. Ireson*, 399 P.3d 777, 781 (Colo. App. 2017) (finding the litigation privilege inapplicable to pre-litigation statements, unless related to prospective litigation which is contemplated in good faith); *Cf. Taylor v. McNichols*, 243 P.3d 642, 657 (Idaho 2010) (litigation privilege inapplicable where attorney "has acted solely for his own interests and not his client's"); *accord*, *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co.*, 434 P.3d 1275, 1287 (Idaho 2019); *Berkshire Investments, LLC v. Taylor*, 278 P.3d 943 (Idaho 2012).