



# Nonclient Claims against Lawyers

William Dewey and Greg Hearing  
February 19, 2025

**GRSM50**  
GORDON REES SCULLY MANSUKHANI  
YOUR 50 STATE LAW FIRM™

# Speakers

## Greg Hearing

---

Partner  
Denver, CO  
Laramie, Wyoming  
[ghearing@grsm.com](mailto:ghearing@grsm.com)

## William Dewey

---

Associate  
Denver, CO  
[wdewey@grsm.com](mailto:wdewey@grsm.com)



# Disclaimer

This presentation is for general informational purposes only and is not legal advice. It is not designed to be comprehensive and it may not apply to your particular facts and circumstances. Consult as needed with your own attorney or other professional advisor.

This presentation does not amend, or otherwise affect, the provisions or coverages of any insurance policy. Any discussion of coverages is about those generally available in the marketplace and is not based specifically on the policies or products of any particular carrier.

# Professional Liability Claims from Nonclients

- Majority of professional malpractice claims against lawyers are brought by clients or former clients.
- Increasingly, claims are made by parties other than clients including opposing parties and other third-parties.
- While the law generally imposes no duty to third-parties, there are limited areas where lawyers may face potential liability.

# The General Rule – No Duty

- It is a fundamental rule that an attorney owes no duty of reasonable care to a nonclient, particularly an adversary in litigation. *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872, 877-78 (Colo. 2016); *Accident & Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658, 663-64 (Colo. 2012); *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 240 (Colo. 1995).
- Because an attorney's duties are owed solely to the client, the attorney is not liable to non-client third parties for negligence. *Miller v. Byrne*, 916 P.2d 566, 578 (Colo. App. 1995); *Glover v. Southard*, 894 P.2d 21, 23 (Colo. App. 1994); *Shriners Hospital for Crippled Children, Inc. v. Southard*, 892 P.2d 417, 418-19 (Colo. App. 1994); *Klancke v. Smith*, 829 P.2d 464, 467 (Colo. App. 1991); *Schmidt v. Frankewich*, 819 P.2d 1074, 1079 (Colo. App. 1991); *McGee v. Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990); *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 330-31 (Colo. App. 1989); *Estate of Brooks*, 596 P.2d 1220, 1222 (Colo. App. 1979).
- “As a general rule, an attorney does not owe a legal duty to his client's adversary when acting on behalf of his client.... [T]here is no room for existence of a duty running to the adversary.” *Allied Fin. Servs., Inc. v. Easley*, 676 F.2d 422, 422-23 (10th Cir. 1982)

# The General Rule – No Duty

- Embodied in the Model Rules of Professional Conduct.
- Duty of loyalty.
- Conflicts of interest in representing both sides to a transaction or dispute.

# Areas of Potential Third-Party Liability

- Misrepresentation
- Libel/Slander/Defamation
- Malicious Prosecution/Abuse of Process
- RICO and State Equivalents
- Asset Protection/Claims of Creditor Frustration
- Consumer Protection Statutes
- Funds Transfer Fraud
- Data Breach

# Misrepresentation

- Often arises in negotiations and business transactions.
- Most jurisdictions have adopted the definition of negligent misrepresentation set forth in section 552(1) of the Restatement (Second) of Torts:
  - One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information
- Importantly, it is possible for a lawyer to be liable for negligent misrepresentation where they acted with no ill intent but failed to exercise the degree or level of care required under the same or similar circumstances. See *Nelson v. Wardyn*, 820 N.W.2d 82, 87 (Neb. Ct. App. 2012).



# Defamation

- Claims can arise in multiple contexts
- Claims made based on the contents of court filings
- Claims made regarding out of court statements regarding ongoing litigation such as press conferences
- Claims made regarding statements made outside of litigation including demand letters published to third parties.
- Required elements:
  - False statement
  - Publication
  - Fault
  - Harm

# Defamation

- Defenses available.
- Qualified or absolute immunity depending on the jurisdiction and circumstances.
- Generally, statements made by attorneys and witnesses in the course of judicial proceedings are absolutely privileged from liability for defamation. *Glasson v. Bowen*, 267 P. 1066, 1067 (Colo. 1928); *Renner v. Chilton*, 351 P.2d 277, 277 (Colo. 1960); *McDonald v. Lakewood Country Club*, 461 P.2d 437, 444 (Colo. 1960); *Merrick v. Burns, Wall, Smith & Mueller, P.C.*, 43 P.3d 712, 714-15 (Colo. App. 2001); *Dalton v. Miller*, 984 P.2d 666, 668-69 (Colo. App. 1999); *Club Valencia Homeowners Assn. v. Valencia Assoc.*, 712 P.2d 1024, 1027 (Colo. App. 1985). See generally RESTATEMENT (SECOND) OF TORTS §§ 586-588 (1979). This privilege is absolute, not merely qualified.
- Absolute litigation privilege also generally include court filings but separate issues may arise under Rule 12(f) for immaterial, impertinent, or scandalous matter.

# Defamation

- Extra-judicial statements may enjoy absolute immunity; but some may not.
- Colorado courts have taken a broad view of the absolute privilege attaching to statements made in the course of and reasonably related to judicial proceedings. Statements made and published in the course of judicial proceedings are absolutely immune from liability so long as they are made in reference to the litigation's subject matter, although they need not be strictly relevant to any issue involved in it. *Club Valencia*, 712 P.2d at 1027.
- Extrajudicial statements made by an attorney are privileged if they relate to a proceeding. See *Killmer, Lane & Newman, LLP v. BKP, Inc.*, 535 P.3d 91, 96 (Colo. 2023). This can include Extrajudicial statements made by an attorney preliminary to judicial proceedings. See *Buckhannon*, 928 P.2d at 1334-35.
- This is a jurisdiction dependent inquiry and the scope of immunity for extra-judicial statements can vary.

# Malicious Prosecution/Abuse of Process

Elements of Malicious Prosecution	Elements of Abuse of Process
<ul style="list-style-type: none"><li>• Initiation or continuation of legal proceedings</li><li>• Lack of probable cause</li><li>• Malice</li><li>• Favorable termination</li><li>• Damages</li></ul>	<ul style="list-style-type: none"><li>• Improper use of process</li><li>• Ulterior motive</li><li>• Harm</li></ul>

- “The legal theories underlying the two actions parallel one another to a substantial degree, and ***often the facts of a case would support a claim under either theory.*** The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued.” *Fox v. City of Greensboro*, 886 S.E.2d 270 (N.C. 2021).
- Plaintiffs initiating these claims against an adverse party from a related case sometimes name opposing counsel as co-defendants.

# Malicious Prosecution/Abuse of Process

- The malice required to support a malicious prosecution action against an attorney differs from the malice required on the part of a non-attorney defendant; the test to establish malice on the part of an attorney depends on whether the attorney acted upon a statement of facts provided by the client, or whether the attorney obtained the information acted upon. *Shiddell v. Bar Plan Mut.*, 385 S.W.3d 478, 484 (Mo. App. W.D. 2012).
- “An improper purpose of the accuser in initiating or continuing the proceeding is not evidence that he did not have probable cause to do so.” See RESTATEMENT (SECOND) OF TORTS § 669A (1977).
- Majority view: if a claim survives summary judgment or directed verdict, then there is necessarily probable cause to bring the claim, defeating a subsequent malicious prosecution action. See, e.g., *Parrish v. Latham & Watkins*, 400 P.3d 1 (Cal. 2017); *Havilah Real Prop. Servs., LLC v. Early*, 88 A.3d 875 (Md. App. 2014); *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077 (8th Cir.1999). But see *Wolfinger v. Cheche*, 80 P.3d 783 (Ariz. App. 2003); *Schnelle v. Cantafio*, 548 P.3d 1171 (Colo. App. 2024) (denial of summary judgment or directed verdict is not dispositive of probable cause).

# RICO and State Equivalents

- Claims against lawyers alleging involvement in broad conspiracies or racketeering enterprises
- Commonly seen in alleged ponzi schemes and alleged investor scams
- General elements:
  - (1) commission of two or more predicate acts (2) which constitute a pattern (3) of racketeering activity (4) directly or indirectly conducted or participated in (5) an enterprise and (6) the plaintiff was injured in its business or property by reason of such conduct
- Outsiders cannot be liable unless they participate in the operation or management of the alleged enterprise. *In re Sender*, 423 F. Supp. 2d 1155, 1177 (D. Colo. 2006) (citing *Reeves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (analysis under RICO)).
- Legal advice and representation is, by itself, insufficient to justify liability.



# Asset Protection or Creditor Frustration

- Uniform Fraudulent Transfers Act (UFTA) – adopted by most states, amended in 2014 and renamed to Uniform Voidable Transactions Act (UVTA), to ensure creditors can recover improperly transferred assets.
- *Black's Law Dictionary* defines “fraudulent conveyance” as: “A transfer of an interest in property for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the property beyond the creditor's reach.” (12<sup>th</sup> Ed. 2024).
- Implicates asset protection, entity formation, and estate planning.
- Most jurisdictions do not allow for liability to be imposed on non-transferees for aiding and abetting or conspiring to effect fraudulent transfers, but some do. See *Chepstow Ltd. v. Hunt*, 381 F.3d 1077 (11th Cir. 2004) (applying Georgia law); *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140 (Colo. App. 2003); *McElhanon v. Hing*, 728 P.2d 273 (Ariz. 1986); *In re Rest. Dev. Grp., Inc.*, 397 B.R. 891 (Bankr.N.D.Ill. 2008); *Banco Popular N. Am. v. Gandi*, 876 A.2d 253 (N.J. 2005); *Dalton v. Meister*, 239 N.W.2d 9 (Wis. 1976).

# Consumer Protection Statutes

- Most states create a private right of action for consumer protection claims based upon allegedly deceptive or deceitful trade practices.
- General elements (each statute is unique)
  - (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury.
- Attorneys may be held liable for violations of the CCPA. A private claim for relief under the CCPA against an attorney must allege that the attorney or law firm knowingly engaged in a deceptive trade practice, which occurred in the course of the attorney or firm's business, vocation, or occupation, significantly impacting the public as actual or potential consumers of legal services, and causing injury in fact to a legally protected interest of the plaintiff. *Crowe v. Tull*, 126 P.3d 196, 201 (Colo. 2006)

# Fund Transfer Fraud

- Attorneys who handle funds on behalf of their clients for purposes of settlement or commercial transactions sometimes receive fake wire instructions from a third party posing as the payee. See, e.g., *Erie Ins. Co. v. WAWGD, Inc.*, No. EA-22-1783, 2024 WL 1856155 (D. Md., Apr. 29, 2024) (counsel for settling party); *Hoffman v. Atlas Title Sols., Ltd.*, 214 N.E.3d 1271 (Ohio App. Div. 2023) (title company in real estate transaction).
- Courts have found an exception to the general rule that attorneys owe no duty to non-clients where the non-client was the intended beneficiary of the attorney's services. See, e.g., *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995) (gifts *causa mortis* attorney's failure to deliver gifts).
- Note: E&O/malpractice insurers may deny coverage for such conduct where policies contain a "paymaster exclusion."
- Attorneys' duty of loyalty is to their clients, lack the independence to act as true escrow agents. See *Weigel v. Hardesty*, 549 P.2d 1335 (Colo. App. 1976); *BMF Advance, LLC v. Litiscape LLC*, 637 F. Supp.3d 1272 (D. Utah 2022).

# Data Breach

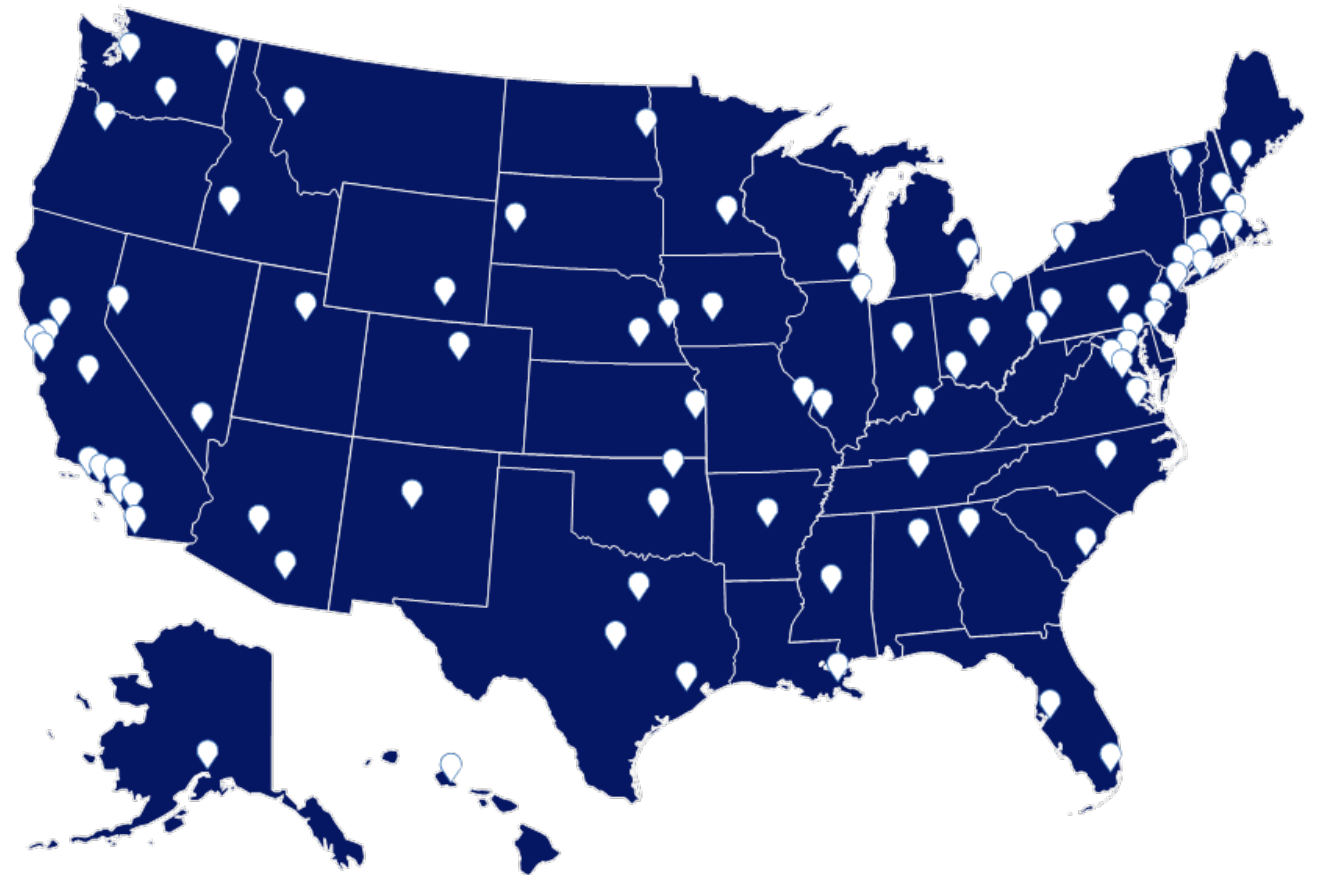
- Law firms are susceptible to data breaches like everyone else. Alicia Hope, *Over 3.4 Million People Affected by Law Firm Wolf Haldenstein Data Breach*, CPO MAGAZINE (Jan. 27, 2025), <https://www.cpomagazine.com/cyber-security/over-3-4-million-people-affected-by-law-firm-wolf-haldenstein-data-breach/>.
- Law firms often have nonclients' personal information from financial disclosures, etc.
- Courts generally agree that cases involving allegations 1) targeted breaches, 2) fraud-sensitive data, and 2) actual misuse meet the Article III standing requirement. See, e.g., *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365 (1st Cir. 2023); *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016); *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017) (no standing where no targeted breach, sensitive data, or actual misuse).
- Case law is evolving here, particularly over the “actual misuse” factor, i.e. “whether there is already actual misuse of the data (fairly traceable to the data breach), or instead only a risk of future misuse (i.e., only intangible harm).” *Maser v. Commonspirit Health*, No. 23-cv-01073-RM-SBP, 2024 WL 2863579, \*5 (D. Colo. Apr. 16, 2024).

# Questions?

# YOUR 50 STATE LAW FIRM™

Recognized among the 15 largest law firms, with more than 1,600 lawyers in all 50 states, Gordon Rees Scully Mansukhani provides full-service representation seamlessly across the United States.

As the first law firm with offices and attorneys in all 50 states, we deliver maximum value to our clients by combining the resources of a full-service national firm with the local knowledge of a regional firm.





# Fast Facts

- Founded in 1974 in San Francisco; San Diego was the firm's second office in 1989.
- Became the first law firm with offices & licensed attorneys in all 50 states in April 2019.
- This milestone was the culmination of more than three decades of sustained growth efforts.
- Enables us to seamlessly provide our clients with nationwide service and handle complex matters on a national scale.

TOP  
15

**Largest Law  
Firms by U.S.  
Headcount**

Law360

TOP  
75

**Largest Law  
Firms by Global  
Headcount**

American Lawyer

1,600+

**Attorneys  
Across the  
Nation**

80+

**Offices and  
continuing  
to grow**

# Diversity and Inclusion

TOP  
10

**Female  
Attorneys**

Law360

TOP  
70

**Diverse  
Attorneys**

Law360

100%

**Rating for  
LGBTQ+ Attorneys**

Human Rights Campaign

- Ranked among Top 10 on the Law360 Report on Best Law Firms for Women.
- Ranked among Top 70 on the Law360 Report on Best Law Firms for Diverse Attorneys.
- Received a perfect score of 100 on the Corporate Equality Index (CEI) since 2016. CEI has designated the firm as a “Best Place to Work for LGBTQ Equality.”

# The “*LEAD*” Program

- The firm’s Leadership Equality and Diversity (“LEAD”) Program is part of the firm’s ongoing commitment to recruit, retain, and promote female and diverse attorneys to the highest positions of management and ownership at the firm.
- Key elements of the program include:
  - Focused and deliberate diverse recruiting practices
  - Targeted mentoring of attorneys
  - Incorporating diversity into business development
  - Maximizing internal diverse leadership roles
  - Rewarding successful advancement of program goals
  - Extends to administrative and professional staff





[grsm.com](http://grsm.com)