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OPENING THE DOOR: *CROWE V. TULL* AND THE APPLICATION OF THE COLORADO CONSUMER PROTECTION ACT TO ATTORNEYS

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In Crowe v. Tull, *the Colorado Supreme Court held that the Colorado Consumer Protection Act ("CCPA") applies to attorneys. Putting consumers of legal services on par with consumers in other industries, the decision opened a new avenue of recovery in attorney-client disputes. This Note explores the ramifications of* Crowe *for attorneys and their clients. Specifically, the Note analyzes the elements of a CCPA claim and their interpretation by the courts and argues that in most cases, a client will not be able to successfully pursue a CCPA claim against his or her attorney. Particularly, a client will have difficulty proving a deceptive trade practice, the public impact of that trade practice, and the causal connection between the deceptive trade practice and the alleged injury. However, where available, a CCPA suit will be more advantageous for the client than claims under other theories available in attorney-client disputes. In light of the difficulties clients will face pursuing CCPA claims, the statute's effectiveness in deterring attorneys from engaging in deceptive trade practices will depend on the judicial interpretation of CCPA claim elements in the attorney-client setting.*

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INTRODUCTION

Like thousands of Coloradans, Richard Crowe had seen many television commercials that portrayed attorney Frank Azar as a "strong arm" who muscled insurance companies into paying accident victims.[1] Impressed by slogans such as "In a wreck, get a check" or "I can get you more money," Crowe retained Azar's law firm, Franklin D. Azar & Associates P.C. ("Azar" or "Azar firm"), when he was seriously injured in a car accident caused by another driver.[2] Much to Crowe's surprise, the Azar firm did not obtain a generous award for him.[3] Instead, it advised Crowe to settle for a fraction of the expenses he had already incurred, despite the fact that Crowe had still not fully recovered from the accident.[4] Crowe followed the firm's advice and settled.[5]

Dissatisfied, Crowe later retained another attorney and sued the Azar firm and the attorney who had represented him.[6] Among other allegations, Crowe maintained that the Azar firm had engaged in misleading advertising and therefore had violated the Colorado Consumer Protection Act ("CCPA").[7] Because the CCPA does not expressly state whether it applies to legal services, the trial court dismissed Crowe's CCPA claim as duplicative of his legal malpractice claim.[8] Crowe then petitioned the Colorado Supreme Court to exercise its original jurisdiction over the issue of whether Crowe may sue the Azar firm under the CCPA.[9] The Colorado Supreme Court held that the CCPA applies to attorneys and permitted Crowe to proceed with his CCPA claim.[10] Crowe's lawsuit is pending in the El Paso District Court.[11]

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1. *See* Crowe v. Tull, 126 P.3d 196, 200 (Colo. 2006).
2. *Id.*
3. *See id.*
4. *Id.*
5. *Id.*
6. *See id.* at 200–01.
7. COLO. REV. STAT. §§ 6-1-101 to -115 (2006).
8. *Crowe*, 126 P.3d at 201.
9. *Id.* at 199, 201.
10. *Id.* at 205, 211.
11. *See* Crowe v. Tull, No. 2004CV768 (Colo. Dist. Ct. filed Feb. 26, 2004). According to the El Paso Dist. Court clerk's office, the case was pending as of November 1, 2007. Telephone Interview with El Paso District Court Clerk's Office, in Colorado Springs, Colo. (Nov. 1, 2007).

By concluding that attorneys may be held liable for CCPA violations, the Colorado Supreme Court opened the door to new litigation brought by dissatisfied clients against their attorneys. At first glance, a client has several incentives to sue under the CCPA rather than to pursue other causes of action usually available when the attorney-client relationship sours.[12] The CCPA provides for a longer statute of limitations, mandates treble damages in certain circumstances, and allows a successful plaintiff to recover both the costs of the action and attorney fees.[13]

To prevail in a CCPA suit, however, the client has several significant hurdles to overcome. Specifically, the client has to show that the attorney engaged in a deceptive trade practice as defined by the CCPA—typically false representation, misrepresentation by omission, or misleading advertising.[14] More importantly, the client must also prove that the allegedly deceptive conduct had a significant impact on the consumer public.[15] Because the deceptive trade practice and public impact requirements are difficult to satisfy, CCPA claims will not become a standard way to recover in attorney-client disputes. However, where the attorney's conduct meets the stringent requirements of the CCPA, the client will have the benefit of a CCPA action just like any other consumer. Since the CCPA has become available to clients only recently, whether it will become an effective tool to protect clients against deceptive trade practices in the field of legal services will depend on judicial interpretation of the requisite elements of a CCPA claim in the attorney-client setting.

Part I of this Note discusses the history and purpose of the CCPA. An explanation of the *Crowe* decision and its reasoning follows in Part II. Looking both at the language of the CCPA and relevant case law, Part III examines what a plaintiff must prove in order to succeed with a CCPA claim. Finally, Part IV turns to the practical consequences of *Crowe* for attorneys and their clients. Specifically, it analyzes the elements of a CCPA claim that may be hard to prove in an attorney-client setting—

12. Typically, legal malpractice, breach of contract, or breach of fiduciary duty.

13. COLO. REV. STAT. § 6-1-113(2)(a)(III), (b) (2006).

14. § 6-1-105(1)(e), (g), (i), (u). *See infra* Part III.B.1.

15. *See* Hall v. Walter, 969 P.2d 224, 231 (Colo. 1998). *See also infra* Part III.B.3.

deceptive conduct, public impact, and causation. Since suits under the CCPA may, in limited circumstances, accompany traditional malpractice suits, Part IV also compares recovery available under the CCPA with recovery in malpractice actions, concluding that where available, a suit under the CCPA will be more advantageous for the client.

I. HISTORY AND PURPOSE OF THE CCPA

The first Colorado statute protecting consumers against false and misleading advertising was enacted in 1915.[16] Because the Colorado legislature failed to amend the statute in the following decades to keep up with new "trends" in deceptive advertising, the statute fell behind in effectively protecting the consumer public.[17] Nevertheless, it remained in effect until 1969, when the General Assembly adopted the CCPA.[18]

Surprisingly, there is no record of the legislative history surrounding the enactment of the CCPA.[19] Since the CCPA also does not contain any legislative declaration, no direct explanation of the legislative purpose is available.[20] Based on the language of the statute, courts have often noted that the CCPA was enacted to protect the public from unfair or deceptive practices that by "their nature may prove injurious, offensive, or dangerous to the public."[21] To achieve this goal, the CCPA authorizes both enforcement by the state attorney general and district attorneys,[22] and private suits by injured consumers.[23]

16. CONSUMER PROBLEMS IN COLORADO, LEGISLATIVE COUNCIL REPORT TO THE COLORADO GENERAL ASSEMBLY No. 112, at xvii (Colo. 1966). This statute was based on a model prepared by Printer's Ink, an advertising journal, in 1911. Crowe v. Tull, 126 P.3d 196, 202 n.5 (Colo. 2006).

17. *See* CONSUMER PROBLEMS IN COLORADO, *supra* note 16, at xviii. For example, the statute did not protect against "bait and switch" practices and "phony price comparisons" advertisements. *Id.*

18. *Crowe*, 126 P.3d at 202.

19. David B. Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora's Box*, 70 DENV. U. L. REV. 141, 148 (1992) ("[T]he legislative history of the Act was not memorialized in any way.").

20. *See id.*

21. Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146 (Colo. 2003) [hereinafter *Rhino Linings*] (quoting People *ex rel.* Dunbar v. Gym of Am., Inc., 493 P.2d 660, 667 (Colo. 1972)).

22. COLO. REV. STAT. § 6-1-103 (2006). If the attorney general or district attorney succeeds in a suit against the alleged wrongdoer, the court may impose civil penalties on the wrongdoer for each separate violation of the statute. § 6-1-

For the first twenty years after it was enacted, the CCPA was not widely used.[24] However, since the 1990s, litigation under the CCPA has been much more common.[25] At the same time, the number of cases brought by private parties rather than the attorney general or a district attorney has also increased substantially.[26] The surge in CCPA litigation required courts to interpret various provisions of the statute.

The Colorado Supreme Court has taken "[a]n expansive approach . . . in interpreting the CCPA by reading and considering the CCPA in its entirety and interpreting the meaning of any one section by considering the overall legislative purpose."[27] Indeed, in questions about whether certain conduct falls within the scope of the CCPA, the Colorado Supreme Court has stopped just short of creating a presumption of inclusion.[28]

The scope of the CCPA is defined primarily in section 6-1-105, which lists deceptive practices proscribed by the statute.[29]

112(1). The penalty may not exceed $2,000 for each violation of the CCPA. *Id.* Misconduct with respect to each consumer or each transaction involved is considered a separate violation. *Id.* The maximum penalty for a related series of violations may not exceed $100,000. *Id.* The penalty is to be paid into the general fund of the state of Colorado. § 6-1-112(2), (3). Section 6-1-112(2) authorizes courts to impose penalties for violations of court orders and injunctions, and subsection (3) permits increased penalties for CCPA violations committed against the elderly. *See id.* Since the purpose of the civil penalties is to punish the wrongdoer and deter deceptive trade practices rather than make the injured party whole, the penalties may be imposed regardless of whether actual injury or loss to a consumer occurred. May Dep't Stores Co. v. State *ex rel.* Woodard, 863 P.2d 967, 972–73 (Colo. 1993).

23. § 6-1-113(1). If the consumer prevails, the CCPA authorizes an award of attorney fees and costs of the action, and, in certain circumstances, treble damages. § 6-1-113(2)(a)(III), (2)(b). Section 6-1-113(2)(a)(III) defines treble damages as "three times the amount of actual damages sustained." The court will award the treble damages if the consumer proves by clear and convincing evidence that the wrongdoer engaged in bad faith conduct. *See* § 6-1-113(2)(a)(III). "Bad faith conduct" means "fraudulent, willful, knowing, or intentional conduct that causes injury." § 6-1-113(2.3).

24. Lee, *supra* note 19, at 149.

25. *See* Catherine A. Tallerico, *The Colorado Consumer Protection Act: An Update*, 29 COLO. LAW. 37, Jan. 2000, at 37.

26. *See id.*

27. *May Dep't Stores Co.*, 863 P.2d at 973 n.10.

28. *See* Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 53 (Colo. 2001) ("[I]n determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct. That assumption is appropriate because of the strong and sweeping remedial purposes of the CCPA.").

29. COLO. REV. STAT. § 6-1-105 (2006).

On the other hand, the CCPA expressly excludes certain practices and industries from its purview.[30] Professional services, including legal services, are mentioned neither in section 6-1-105, which describes deceptive trade practices, nor in section 6-1-106, which exempts certain conduct and industries from the CCPA.[31] Since it was not clear whether the CCPA applied to attorneys, the Colorado Supreme Court addressed this issue in *Crowe v. Tull*.[32]

II. THE *CROWE* DECISION

In *Crowe*, a client brought a CCPA action against his former attorney, alleging that the attorney engaged in false and misleading advertising.[33] Ruling on the issue of whether the CCPA applies to attorneys, the Colorado Supreme Court unanimously concluded that attorneys may be held liable for CCPA violations.[34] The court rejected "the argument that attorneys are exempt from the CCPA" and declined to adopt a special test for CCPA liability of attorneys.[35] Noting that Crowe will have to allege sufficient facts to support his CCPA claim, the court concluded that Crowe may proceed with that claim.[36] This part of the Note analyzes the *Crowe* decision and explains the court's reasoning.

Richard Crowe was injured in a car accident.[37] The accident was caused by another driver who, according to the police report, ran a stop sign and collided with Crowe's car.[38] Crowe sustained multiple injuries with possible long-term consequences, and his car was severely damaged.[39] Crowe wanted to pursue a personal injury claim against the other driver, and retained Marc Tull, an attorney with the Azar firm, to represent him.[40] After Tull began representing Crowe, the other

30. § 6-1-106.
31. §§ 6-1-105, -106.
32. Crowe v. Tull, 126 P.3d 196, 201 (Colo. 2006).
33. *See id.*
34. *Id.* at 205.
35. *Id.* at 200.
36. *Id.* at 211.
37. *Id.* at 200.
38. *Id.*
39. *Id.*
40. *Id.*

driver offered Crowe $4,000 to settle his claim.[41] Tull advised Crowe to accept the offer, which Crowe did.[42]

However, Crowe was not satisfied with the settlement. He later retained new counsel and brought a suit against Tull and Azar. In his complaint, Crowe alleged professional negligence (legal malpractice) and breach of fiduciary duty.[43] He also maintained that Tull and Azar had violated the CCPA.[44] Specifically, Crowe argued that the Azar firm engaged in false and misleading advertising, on which he relied when he retained the firm.[45] Since the firm did not perform as Crowe expected based on that advertising, Crowe alleged that he suffered financial injury.[46]

The Azar firm had used a statewide advertising campaign targeting personal injury victims.[47] In television commercials, the firm presented itself as a skillful negotiator with insurance companies as well as a "strong arm" that could recover generous damages awards.[48] The firm claimed that it would "obtain as much as we can, as fast as we can."[49] Another slogan urged, "In a wreck, get a check."[50] Crowe alleged that—despite this portrayal of the firm in the media—Tull advised him to settle for $4,000 when Crowe's claim was not yet ready for settlement.[51] At the time Crowe settled, he had already incurred $17,000 in medical expenses and lost over $7,000 in wages.[52] Additionally, Crowe maintained that he had not yet fully recovered from his injuries, and therefore the full extent of his damages was still unknown.[53] Consequently, Crowe lost an "undetermined [amount of] damages [based on] future lost wages and rehabilitation costs."[54]

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41. *Id.*
42. *Id.*
43. The court did not explain the bases of these claims. Presumably, they stemmed from Crowe's dissatisfaction with Tull's services. *See id.* at 200–01. Crowe later attempted to add claims for negligent and fraudulent misrepresentation but the trial court did not permit him to do so. *Id.* at 201.
44. *Id.* at 200.
45. *Id.* at 199.
46. *See id.*
47. *See id.* at 200.
48. *Id.*
49. *Crowe*, 126 P.3d at 200.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

Crowe further argued that the Azar firm used premature settlement tactics as part of its business model and that the firm was a "personal injury mill."[55] Specifically, he alleged that the firm took in a large number of cases—"more cases than it could reasonably expect to litigate"[56]—and then pressured clients to settle early to maintain cash flow. In so doing, the firm expended only minimal effort and resources[57] and did not take into account whether its clients' claims were in fact appropriate for settlement.[58] Consequently, Crowe maintained, the Azar firm perpetrated "an illegal scheme . . . on the public."[59]

The trial court dismissed Crowe's CCPA claim for several reasons. First, it concluded that the CCPA claim was duplicative of Crowe's malpractice claim because Crowe was, in effect, arguing that he received poor legal services from Tull.[60] Second, a claim against an attorney was not within the scope of the CCPA since "the 'actual practice of law' was not a commercial activity regulated by the CCPA."[61] Third, the trial court reasoned, "while the Azar firm's commercials may have lured Crowe to retain [the firm, they] did not cause Crowe's alleged financial injuries."[62] The trial court also granted Azar's request for a protective order which shielded the firm from Crowe's discovery of its business practices.[63] Crowe subsequently petitioned the Colorado Supreme Court to exercise its original jurisdiction and grant Crowe relief from the trial court's dismissal of the CCPA claim.[64]

55. *Id.*

56. *Id.*

57. *Id.* at 199.

58. *See id.* at 210.

59. *Id.* at 199.

60. *Id.* at 201. For the same reason, the court also "dismissed the breach of fiduciary obligation claim without prejudice," noting that Crowe could pursue the claim if he made "separate and further allegations." *Crowe*, 126 P.3d at 201 n.3. Crowe subsequently sought to replead the breach of fiduciary duty claim and to add claims for negligent and fraudulent misrepresentation. *Id.* at 201. Nevertheless, the trial court denied Crowe's request to amend because it found the additional claims duplicative either of the malpractice claim or of the previously dismissed claims. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See Crowe*, 126 P.3d at 199. Specifically, Crowe filed a petition for a rule to show cause why he should not be granted relief from the trial court's order. *Id.* Under Colorado Appellate Rule 21, the petition is filed directly with the Colorado

The Colorado Supreme Court overturned the trial court's dismissal of Crowe's CCPA claim.[65] In a thorough opinion, the court held that "attorneys may be held liable for violations of the CCPA."[66] Concluding that the CCPA applied to the practice of law, the court rejected Tull and Azar's argument that the practice of law was not a commercial activity and was therefore outside of the scope of the CCPA.[67] Instead, the court noted that the purposes of the act "must be applied to an ever-evolving commercial marketplace."[68] Since attorneys may advertise, and indeed do advertise widely through various media outlets, they have the opportunity to deceive the public.[69] Because section 6-1-105 applies to deceptive trade practices employed in one's "business, vocation, and occupation," the court reasoned that the General Assembly did not intend to exempt professionals from the reach of the CCPA.[70] Moreover, the fact that a specific industry is not mentioned in the CCPA "was not determinative of whether that industry was covered by the [statute]."[71]

In its analysis of whether the CCPA applied to legal services, the court rejected the distinction between the "actual practice" of law and the "entrepreneurial aspects" of legal practice.[72] The dichotomy originated from *Short v. Demopolis*, a case decided by the Washington Supreme Court.[73] In *Demopolis*, the Washington Supreme Court interpreted the Washington Consumer Protection Act ("WCPA"), which defined "trade or commerce" as the "sale of assets or services."[74] The *Demopolis* Court concluded that when attorneys engaged in the entrepreneurial aspects of attorneys' activities, which include rates and billing, as well as obtaining, maintaining, and dismissing

Supreme Court. *See* COLO. R. APP. P. 21. Relief under Rule 21 is extraordinary and is entirely within the Colorado Supreme Court's discretion. *See id.*

65. *Crowe*, 126 P.3d at 200.
66. *Id.*
67. *Id.* at 201.
68. *Id.* at 202.
69. *See id.*
70. *Id.*
71. *Id.* at 203.
72. *Id.* at 203–05.
73. Short v. Demopolis, 691 P.2d 163, 165–68 (Wash. 1984).
74. *Id.* While the CCPA does not define its scope using the "trade and commerce" concept, it requires that the wrongdoer engage in the deceptive practices in the course of his "business, vocation, or occupation." COLO. REV. STAT. § 6-1-105 (2006).

clients, the WCPA applied to their conduct.[75] In contrast, the "actual practice of law" concerned the "competence of and strategy employed by . . . lawyers," and therefore did not constitute sale of assets or services.[76] Consequently, the WCPA did not apply to claims concerning the "actual practice of law," such as malpractice and attorney negligence.[77] Both parties in *Crowe* relied on *Demopolis* in their arguments.[78]

The Colorado Supreme Court concluded that the language of the CCPA did not warrant the distinction between the "actual practice" of law and its "entrepreneurial aspects."[79] Unlike the WCPA, the CCPA "does not contain a broad 'trade or commerce' provision."[80] In contrast, the court explained, the CCPA defines various deceptive practices and requires that the perpetrator knowingly engages in the proscribed conduct.[81] By requiring intent, the CCPA prevents malpractice claims, which are based on negligence, from being fashioned into CCPA claims.[82] Thus, it was not necessary to insulate malpractice-like claims from the reach of the CCPA by means of the *Demopolis* test.[83] Additionally, the court noted, the "actual practice" of law dichotomy might shield deceptive practices from CCPA claims "when an aspect of the 'actual practice' of law contributes to a [deceptive] scheme."[84]

To further support its conclusion that the CCPA applies to attorneys, the court emphasized that attorneys' deceptive conduct may have significant public impact.[85] The court rejected the argument that the practice of law is always based on a private relationship that has no effect on the public.[86] Indeed, the court noted, the current practice of law, which in many ways resembles a business, warranted extension of the CCPA to attorneys to protect the public.[87] Modern law firms use a wide array of advertising media and thus have the opportunity to

75. *Demopolis*, 691 P.2d at 168.
76. *Id.*
77. *Crowe*, 126 P.3d at 204.
78. *Id.* at 203.
79. *Id.* at 204.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 205.
85. *Id.* at 208–09.
86. *Id.* at 208.
87. *Id.* at 209.

engage in deceptive practices the CCPA seeks to prevent.[88] Moreover, average consumers are unlikely to have the specialized knowledge necessary to recognize deceptive marketing practices; on the contrary, they will rely on the firm's representation of its abilities.[89] As a result, deceptive practices in attorney advertising will have the biggest impact on unsophisticated individual consumers.[90] Protecting such consumers is, in turn, fully within the purpose of the CCPA.[91] At the same time, the public impact requirement ensures that claims against attorneys under the CCPA will not become a standard companion to malpractice claims.[92]

Next, the court turned to the causation requirement of the CCPA, concluding that there may be a sufficient connection between Azar's commercials and Crowe's injury.[93] Crowe's reliance on the Azar firm's advertising, the court explained, was "the first link in a chain of causation that led to the undervalued settlement," and the chain of causation was "not too attenuated to submit to a fact-finder."[94] The court rejected the argument that Crowe would only be able to show causation through a professional negligence claim as well as the argument that it was the legal advice and not the advertisement that caused Crowe's injury.[95]

In conclusion, the Colorado Supreme Court "decline[d] to bar Crowe from making a CCPA claim against his former at-

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 208.

92. *Id.*

93. *Id.* at 210.

94. *Id.*

95. *Crowe*, 126 P.3d at 210. Finally, the court rejected an argument that the application of the CCPA to attorneys violated the separation of powers. *Id.* at 205–08. Its analysis rested on the premise that no separation of powers issue exists where "the powers exercised by different branches of government necessarily overlap." *Id.* at 205–06 (quoting Dee Enter. v. Indus. Claim Appeals Office, 89 P.3d 430, 430 (Colo. App. 2003)). The court held that the CCPA was not "manifestly [inconsistent with] the attorney regulation system." *Id.* at 207. The relevant provisions of the CCPA and the Rules of Professional Conduct did not conflict, and the CCPA and the attorney regulation rules provided for different remedies. *Id.* Because the overlap of the exclusive power of the judicial branch to regulate and discipline attorneys and the reach of the legislative branch through the CCPA did not create a substantial conflict, it was constitutionally permissible. *See id.* at 207–08. Therefore, the court's power to regulate attorneys did not preempt the CCPA as applied to the practice of law. *See id.* at 205–08.

torneys."[96] The court "direct[ed] the trial court to permit Crowe to replead his CCPA claim," and Crowe subsequently resumed the action in El Paso District Court.[97]

Since the *Crowe* decision merely extended the application of the CCPA to attorneys and did not address the substance of Crowe's claim, the practicalities of CCPA claims against attorneys were left for future decisions. This Note proceeds to explain the elements of a CCPA claim brought by a consumer and then analyzes these elements in the context of an action by a client against the client's attorney.

III. PRIVATE SUITS UNDER THE CCPA

A. *Standing*

"Any person" may bring a private suit under the CCPA.[98] However, the plaintiff must fall within one of the categories described in section 6-1-113. Specifically, the plaintiff must be: (1) "an actual or potential consumer of the defendant's goods [or] services, . . . injured as a result of [the defendant's] deceptive trade practice"; (2) a "successor in interest to [a] . . . consumer who purchased the defendant's goods [or] services"; or (3) a person injured "[i]n the course of the [plaintiff's] business or occupation . . . as a result of [a] deceptive trade practice."[99] Thus, the plaintiff or his predecessor must be a consumer or have a business relationship with the defendant.

Prior to 1999, the availability of a CCPA action was not restricted by these categories. The General Assembly added them in 1999 in reaction to the Colorado Supreme Court's deci-

96. *Id.* at 211.

97. *Id.* The court noted that in order to succeed, Crowe would have to plead all requisite elements of a CCPA claim, which his original complaint lacked. *Id.* Specifically, the complaint did not allege facts "sufficient to support the inference that Tull and Azar knowingly engaged in a deceptive trade practice which Crowe relied upon," and facts establishing public impact. *Id.* (citing Martinez v. Lewis, 969 P.2d 213, 220–22 (Colo. 1998)). According to the El Paso District Court clerk's office, Crowe's case was pending as of November 1, 2007. Telephone Interview with El Paso Dist. Court Clerk's Office, *supra* note 11.

98. COLO. REV. STAT. § 6-1-113(1) (2006). The CCPA defines a person as "an individual, corporation, business trust, estate, trust, partnership, unincorporated association, or two or more thereof having a joint or common interest, or any other legal or commercial entity." § 6-1-102(6).

99. § 6-1-113(1)(a)–(c).

sion in *Hall v. Walter.*[100] In *Hall*, the court held that a third party non-consumer who was injured as a result of deceptive trade practices which targeted the consumer public had standing to sue under the CCPA.[101] The Colorado General Assembly subsequently amended the CCPA to require a "more direct relationship between the plaintiff and defendant."[102] Thus, a person who is a mere "bystander" rather than the target of the defendant's deceptive practices does not have standing to sue under the CCPA even if the person suffers injury resulting from the deceptive practices.[103]

B. Elements of a CCPA Claim

The Colorado Supreme Court first articulated the elements of a CCPA claim in *Hall* in 1998.[104] According to *Hall*, the plaintiff must establish that: (1) "the defendant engaged in [a] . . . deceptive trade practice"; (2) "the challenged practice occurred in the course of defendant's business, vocation, or occupation"; (3) the challenged practice "significantly impact[ed] 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."[105] Since *Hall*, the jurisprudence of the Colorado Supreme Court and the Colorado Court of Appeals has, to a varying degree, shaped each of the five elements.

100. *See* Hall v. Walter, 969 P.2d 224, 234–35 (Colo. 1998); *see also* Tallerico, *supra* note 25, at 37.

101. *See Hall*, 969 P.2d at 234–35. The defendants in *Hall* offered lots for sale to the general public. *Id.* at 227. When discussing the property with prospective purchasers, the defendants stated that there were two access roads. *Id.* In fact, one of the roads was a private road across the plaintiff's property. *Id.* As a result of the misrepresentation, "actual and prospective purchasers used the [plaintiff's] road to access the [property]." *Id.* at 228.

102. Tallerico, *supra* note 25, at 38–39.

103. *See id.* at 39.

104. *Hall*, 969 P.2d at 234–35.

105. *Id.*

1. Deceptive Trade Practices

Section 6-1-105 defines deceptive trade practices.[106] Originally, the CCPA described deceptive practices in general terms.[107] Proscribed conduct included making false representations as to various facts or characteristics in the sales of goods and services, false advertising, door-to-door sales, and pyramid schemes.[108] Courts have applied these provisions to sales of goods, construction matters, real estate transactions, and insurance.[109] Later amendments to the CCPA included industry-specific provisions.[110] Thus, section 6-1-105 also expressly applies to motor vehicle sales and rentals, telemarketing, sweepstakes and awards, radon test results, charitable solicitations, mortgage lending, advertising by notaries, and other specific activities.[111] Of the large number of deceptive practices listed in section 6-1-105, only a few are relevant for legal services. Those practices include false representation, misrepresentation by omission, and misleading advertising.[112] This section of this Note discusses them in turn.

False representation is prohibited by section 6-1-105(1)(e), which provides that a person engages in a deceptive trade practice when he "knowingly makes a false representation as to the characteristics . . . [of the] services."[113] The Colorado Supreme Court defined false representation in *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*[114] According to the court, a plaintiff may establish false representation under section 6-1-105(1)(e) by showing either a knowing misrepresentation or a false representation with the capacity to deceive.[115] To establish a knowing misrepresentation, the plaintiff must demonstrate that the defendant "either with knowledge of its

106. COLO. REV. STAT. § 6-1-105 (2006). This section contains a list of practices and conduct that constitute deceptive trade practices under the CCPA. *Id.*

107. Tallerico, *supra* note 25, at 37.

108. *See* § 6-1-105.

109. *See, e.g.*, Coors v. Sec. Life of Denver Ins. Co., 112 P.3d 59 (Colo. 2005); Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47 (Colo. 2001); *Hall*, 969 P.2d at 224; May Dep't Stores Co. v. State *ex rel.* Woodard, 863 P.2d 967 (Colo. 1993); Anson v. Trujillo, 56 P.3d 114 (Colo. App. 2002).

110. Tallerico, *supra* note 25, at 37.

111. *See* § 6-1-105.

112. § 6-1-105(1)(e), (g), (i), (u).

113. § 6-1-105 (1)(e).

114. 62 P.3d 142, 147 (Colo. 2003).

115. *Id.* at 148.

untruth, or recklessly and willfully . . . without regard to its consequences, and with an intent to mislead and deceive the plaintiff" made a false representation which, in fact, induced the plaintiff to act or to refrain from acting.[116] Alternatively, the plaintiff may offer proof that the defendant's false representation had "the tendency or capacity to attract consumers" and deceive them.[117] Although *Rhino Linings* did not state so expressly, the language of section 6-1-105(1)(e) requires that the second type of false representation is also made "knowingly."[118] The defendant's knowledge and intent when making the representation distinguish false representation from breach of contract,[119] because "[a] promise cannot constitute a misrepresentation unless the promisor did not intend to honor it at the time it was made."[120] Thus, "[a] breach of contract claim, without additional conduct, [does not amount to] an actionable claim under the CCPA."[121]

Another deceptive practice which may be relevant to a CCPA claim involving legal services is misrepresentation by omission. Section 6-1-105(1)(u) states that a defendant engages in a deceptive trade practice if he "[f]ails to disclose material information concerning goods [or] services . . . which [] was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction."[122] Although several cases have involved claims under section 6-1-105(1)(u), no decision has squarely addressed its reach.[123] The language of sec-

116. *Id.* at 147 (quoting Parks v. Bucy, 211 P. 638, 639 (Colo. 1922)).

117. *Id.* (quoting People *ex rel.* Dunbar v. Gym of Am., Inc., 493 P.2d 660, 668 (Colo. 1972)).

118. *See* § 6-1-105(1)(e); *Rhino Linings*, 62 P.3d at 147. The conduct that constitutes false representation under the CCPA may also give rise to a common law fraud claim. *See infra* note 124.

119. *Rhino Linings*, 62 P.3d at 148.

120. *Id.* (citing Brody v. Bock, 897 P.2d 769, 776 (Colo. 1995); Ballow v. PHICO Ins. Co., 875 P.2d 1354, 1362 (Colo. 1993)).

121. *Id.*

122. § 6-1-105(1)(u). Advertisement is defined as "the attempt by publication, dissemination, solicitation, or circulation, visual, oral, or written, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any property." § 6-1-102(1).

123. *See* May Dep't Stores Co. v. State *ex rel.* Woodard, 863 P.2d 967, 971–72 (Colo. 1993) (noting that the trial court had found a violation of section 6-1-105(1)(u), but focusing on the interpretation of the civil penalties provision of the CCPA); Park Rise Homeowners Ass'n v. Res. Constr. Co., 155 P.3d 427, 436–37 (Colo. App. 2006), *cert. denied*, No. 06SC485, 2007 WL 93091 (dismissing plain-

tion 6-1-105(1)(u) suggests that its application would be fairly narrow; the omission must be "material," the defendant must omit the information knowingly, and the defendant must intend, by omitting the information, "to induce the consumer to enter into the transaction."[124] Additionally, unlike the other deceptive practices pertinent to the provision of legal services, misrepresentation by omission must occur "at the time of an advertisement or sale."[125] Thus, misrepresentation by omission does not apply to post-advertisement or post-sale conduct.[126]

The provisions concerning misleading advertising may also apply to attorneys. First, advertising with intent not to sell services as advertised gives rise to liability under section 6-1-105(1)(i).[127] As with false representation and misrepresentation by omission, the applicability of section 6-1-105(1)(i) is limited by the requirement of intent to deceive.[128] Second, section

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tiff's claim under section 6-1-105(1)(u) for lack of public impact) (Colo. Jan. 16, 2007); Mangone v. U-Haul Int'l, Inc., 7 P.3d 189 (Colo. App. 1999) (not addressing the substance of the plaintiff's claim under section 6-1-105(1)(u)).

124. *See* § 6-1-105(1)(u); Tallerico, *supra* note 25, at 37. A plaintiff who establishes false representation or misrepresentation by omission under the CCPA may also have an independent cause of action for fraud or fraudulent concealment.

> To establish a prima facie case of fraud, a plaintiff must present evidence that the defendant made a false representation of a material fact; that the party making the representation knew it was false; that the party to whom the representation was made did not know of the falsity; that the representation was made with the intent that it be acted upon; and that the representation resulted in damages.

Brody v. Bock, 897 P.2d 769, 775–76 (Colo. 1995). To succeed with a fraudulent concealment claim, the plaintiff must show:

> (1) [C]oncealment of a material existing fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.

Kopeikin v. Merch. Mortgage and Trust Corp., 679 P.2d 599, 601 (Colo. 1984) (citing Morrison v. Goodspeed, 68 P.2d 458 (1937)). However, a plaintiff suing under the CCPA will have the benefit of the CCPA remedies. *See infra* Part III.C.

125. *See* § 6-1-105(1)(u); Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 58 (Colo. 2001) (noting that section 6-1-105(1)(u) contains a temporal limitation).

126. *See Showpiece Homes*, 38 P.3d at 58.

127. § 6-1-105(1)(i). A person engages in a deceptive trade practice when the person "advertises goods [or] services . . . with intent not to sell them as advertised." *Id.* The *Crowe* Court referred to section 6-1-105(1)(g) and (i) in its analysis. *See* Crowe v. Tull, 126 P.3d 196, 204 (Colo. 2006).

128. § 6-1-105(1)(i).

6-1-105(1)(g) proscribes an advertiser from representing that services are of a particular quality when he knows or should know that they are in fact of another quality.[129] However, the requisite mental state required by section 6-1-105(1)(g) is unclear. The *Crowe* decision clearly stated that the CCPA, including section 6-1-105(1)(g), always requires intent.[130] Specifically, the court noted: "Liability . . . is dependent upon knowledge or intent existing at the time of the advertising conduct . . . . The CCPA does not create liability for those who intend to live up to the pronouncements of their advertisements, but are negligent in action despite those intentions."[131] Yet, the plain language of section 6-1-105(1)(g) and some court decisions suggest that negligence may suffice.[132]

Finally, the CCPA may arguably impose liability for conduct not specifically defined in section 6-1-105. The Colorado Supreme Court noted in *Showpiece Homes Corporation v. Assurance Company of America* that the list of deceptive practices is not exhaustive and explained that the General Assembly could not have "enumerated all, or even most, of the practices that the CCPA was intended to cover."[133] However, the Colorado Court of Appeals attempted to limit this conclusion in *Coors v. Security Life of Denver Ins. Co.*[134] The *Coors* court pointed out that the damages provision of the CCPA allows claims against a person who "engaged in . . . any deceptive trade practice listed in this article."[135] Since the analysis in *Showpiece Homes* focused on the issue of whether the insurance industry fell within the scope of the CCPA, the *Coors* court concluded that "*Showpiece Homes* did not hold that other conduct not enumerated in section 6-1-105 may constitute a de-

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129. § 6-1-105(1)(g). A person engages in deceptive trade practice when the person "represents that goods [or] services . . . are of particular standard [or] quality . . . if he knows or should know that they are of another." *Id.*

130. *See Crowe*, 126 P.3d at 204 ("A CCPA claim will only lie if the plaintiff can show that the defendant knowingly engaged in a deceptive trade practice."); Lee, *supra* note 19, at 154–55.

131. *Crowe*, 126 P.3d at 204.

132. *See* § 6-1-105(1)(g) (imposing liability where a person "*knows or should know*" that goods are of different quality than represented) (emphasis added); *see also* Anderson v. State Farm Mut. Auto. Ins. Co., 416 F.3d 1143, 1149 (10th Cir. 2005) (concluding that since the defendant's conduct in question was "reasonable," the defendant did not violate section 6-1-105(1)(g)).

133. 38 P.3d 47, 54 (Colo. 2001).

134. 91 P.3d 393, 401 (Colo. App. 2003), *aff'd on other grounds, rev'd on other grounds*, 112 P.3d 59, 59 (Colo. 2005).

135. *Coors*, 91 P.3d at 400.

ceptive trade practice under the CCPA."[136] The Colorado Supreme Court has not addressed this question since *Showpiece Homes*, and the applicability of the CCPA to deceptive practices not described in the statute remains unclear.

2. In the Course of Defendant's Business, Vocation, or Occupation

Section 6-1-105 also requires that the deceptive practice occur in the course of the defendant's business, vocation, or occupation.[137] Thus, a plaintiff who was injured by misrepresentation made in the course of a purely private, non-commercial relationship may not sue under the CCPA.[138] Nevertheless, the "business, vocation, or occupation" language is sufficiently broad to encompass the majority of scenarios which would give rise to a CCPA suit. As a result, most plaintiffs easily satisfy this requirement, and courts have not addressed it at any length.[139] Indeed, most borderline cases are unsuccessful due to the lack of public impact rather than a failure to satisfy the "business or occupation" requirement.

3. Public Impact

The CCPA does not contain any provision that explicitly requires that the challenged practice have public impact. Instead, the Colorado Supreme Court, relying on the statute's purpose to protect the public, interpreted the CCPA to impose the public impact requirement.[140] To meet this requirement,

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136. *Id.* at 401; *accord* Nauert v. Ace Properties & Cas. Ins. Co., No. 104CV02547WYDBNB, 2005 WL 2085544, at *5 (D. Colo. Aug. 27, 2005) (recognizing the limitation of the *Coors* holding).

137. § 6-1-105(1).

138. *See, e.g.*, Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146 (Colo. 2003) (noting that "[t]he CCPA was enacted to regulate commercial activities and practices.").

139. *See, e.g.*, Park Rise Homeowners Ass'n v. Res. Constr. Co., 155 P.3d 427, 434–37 (Colo. App. 2006), *cert. denied*, No. 06SC485, 2007 WL 93091 (Colo. Jan. 16, 2007) (not addressing the second element of the CCPA claim); Curragh Queensland Min. Ltd. v. Dresser Indus., Inc., 55 P.3d 235, 240–41 (Colo. App. 2002) (not addressing the second element of the CCPA claim).

140. Hall v. Walter, 969 P.2d 224, 234 (Colo. 1998). The court noted that the CCPA was enacted to protect against practices that "because of their nature, may prove injurious, offensive, or dangerous to the public." *Id.* (quotation omitted); Bradley A. Levin & Laura E. Schwartz, *The Significant Public Impact Requirement in Colorado Consumer Protection Act Claims Following* Coors v. Sec. Life of

"the challenged practice must significantly impact the public as actual or potential consumers of the defendant's goods [or] services."[141] Thus, a plaintiff may not sue under the CCPA to remedy a private wrong.[142]

In determining whether the questioned practices have had a public impact, the Colorado Supreme Court in *Martinez v. Lewis* developed a three-part test.[143] Under this test, courts evaluate (1) "the number of consumers directly affected by the challenged practice," (2) "the relative sophistication and bargaining power of the consumers affected by the challenged practice," and (3) "evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future."[144]

First, even though neither *Hall* nor *Martinez* requires it, courts typically evaluate the number of affected consumers in proportion to the size of the relevant consumer pool.[145] Thus, in *Rhino Linings*, the Colorado Supreme Court held that a misrepresentation which affected three dealers out of 550 dealers worldwide did not sufficiently impact the public.[146] Similarly, in *Coors*, a misprint in an insurance policy affecting approximately 200 out of 20,000 policyholders did not satisfy the public impact requirement.[147] Finally, the court in *Curragh Queensland Mining Ltd. v. Dresser Industries, Inc.* found no public impact where 3,000 mining companies received advertisements

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Denver Insurance Company, TRIAL TALK 22, Aug/Sept. 2005, at 20–21.

141. *Hall*, 969 P.2d at 234.

142. *Rhino Linings*, 62 P.3d at 149 (citing Martinez v. Lewis, 969 P.2d 213, 222-23 (Colo. 1998)).

143. *Martinez*, 969 P.2d at 222–23.

144. *Rhino Linings*, 62 P.3d at 149 (citing *Martinez*, 969 P.2d at 222–23).

145. The *Hall* court, which first set out the elements of a CCPA claim and thus imposed the public impact requirement, did not compare the number of affected consumers with the consumer pool. *Hall*, 969 P.2d at 235. Instead, the court merely stated that because "the misrepresentations were directed to the market generally, taking the form of widespread advertisement and deception of actual and prospective purchasers," the public impact requirement was clearly met. *Id.*

146. *Rhino Linings*, 62 P.3d at 150.

147. Coors v. Sec. Life of Denver Ins. Co., 91 P.3d 393, 399 (Colo. App. 2003), *aff'd on other grounds, rev'd on other grounds*, 112 P.3d 59, 59 (Colo. 2005). However, the court reasoned that the trial court did not make specific findings about how the public was impacted and did not determine whether 200 policyholders was a significant enough number to warrant a finding of public impact. *See id.* The Colorado Supreme Court granted certiorari. *See Coors*, 112 P.3d at 59. Since one justice did not participate, and the remaining justices were equally divided on the issue of whether there was sufficient public impact, the decision of the court of appeals stood affirmed. *Id.*; COLO. R. APP. P. 35(e).

for a machine that cost $38 million.[148] Since very few of those companies could afford to buy the machine, the advertisement did not have a sufficient public impact.[149] However, Colorado courts have never articulated a bright-line test to determine what number or percentage of affected consumers constitutes sufficient public impact.[150] Indeed, such a mechanical approach would negate the CCPA's broad remedial purpose.[151]

Second, courts consider "the relative sophistication and bargaining power of the consumers affected by the challenged practice."[152] Under this part of the test, courts look at the consumers' access to relevant information and their ability to evaluate that information, and consider whether the consumer was represented by counsel in the transaction at issue.[153]

Third, courts assess whether "the challenged practice has previously impacted other consumers or has the significant potential to do so in the future."[154] Thus, courts inquire whether "similarly situated customers will be subjected to misleading information in the future."[155] In doing so, courts are likely to consider the nature of the deceptive practice and the means of disseminating the deceptive information.[156] So far, courts have been strict in their interpretation and application of the public impact requirement, and, as a result, this element of a CCPA claim is difficult to satisfy.[157]

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148. Curragh Queensland Min. Ltd. v. Dresser Indus., Inc., 55 P.3d 235, 240–41 (Colo. App. 2002).

149. *See id.*

150. *See* Levin & Schwartz, *supra* note 140, at 21.

151. *Id.*

152. *Rhino Linings*, 62 P.3d at 149.

153. Crowe v. Tull, 126 P.3d 196, 209 (Colo. 2006); *Rhino Linings*, 62 P.3d at 150.

154. *Rhino Linings*, 62 P.3d at 149.

155. Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co., 373 F.3d 1100, 1114 (10th Cir. 2004).

156. *Rhino Linings*, 62 P.3d at 150 (noting that in *Hall*, the court found public impact because the "defendants' widespread advertisements" communicated to the public "important facts . . . which were untrue").

157. *See, e.g., id.*; Martinez v. Lewis, 969 P.2d 213, 223 (Colo. 1998); Park Rise Homeowners Ass'n v. Res. Constr. Co., 155 P.3d 427, 437 (Colo. App. 2006), *cert. denied*, No. 06SC485, 2007 WL 93091 (Colo. Jan. 16, 2007); Coors v. Security Life of Denver Ins. Co., 91 P.3d 393, 399 (Colo. App. 2003), *aff'd on other grounds, rev'd on other grounds*, 112 P.3d 59, 59 (Colo. 2005); *see also* Levin & Schwartz, *supra* note 140, at 23.

4. Injury in Fact to a Legally Protected Interest

The fourth element of a CCPA action is injury in fact to a legally protected interest.[158] However, the CCPA does not describe injuries it seeks to prevent.[159] In line with the CCPA's broad purpose, the Colorado Supreme Court has construed "injury in fact" expansively.[160] Specifically, the court refused to limit "legally protected interests" to those defined in the CCPA because such a construction would make the CCPA's damages provisions inoperable and would be contrary to the broad protective purpose of the CCPA.[161]

Because CCPA claims often fail to satisfy the deceptive trade practice and the public impact requirements, and courts therefore do not proceed to address injury in fact, there is very little guidance on this element.[162] It is clear, however, that property falls within a "legally protected interest" and therefore physical and economic damage to property satisfies the injury in fact requirement.[163] Similarly, a plaintiff can recover under the CCPA if he suffered a business loss.[164]

5. Causation

Finally, the plaintiff must show causation.[165] The plaintiff satisfies this requirement if he proves that the alleged decep-

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158. Hall v. Walter, 969 P.2d 224, 234–35 (Colo. 1998). Specifically, this requirement ensures that the plaintiff has standing under the analysis used by Colorado courts. *Id.* (explaining that the standing analysis articulated in *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977), requires a plaintiff to show injury in fact to a legally protected interest). This requirement applies only to a private action under the CCPA and does not affect enforcement of the CCPA by the attorney general or a district attorney. *See* COLO. REV. STAT. § 6-1-113(1) (2006); *Hall*, 969 P.2d at 235 nn.9 & 10.

159. Crowe v. Tull, 126 P.3d 196, 209 (Colo. 2006) (citing *Hall*, 969 P.2d at 236).

160. *Hall*, 969 P.2d at 236.

161. *Id.*

162. *See, e.g.*, *Rhino Lining*, 62 P.3d at 149–51; *Park Rise Homeowners Ass'n*, 155 P.3d at 434–37. In those cases, the plaintiff failed to prove deceptive trade practices and public impact.

163. *See Hall*, 969 P.2d at 237.

164. Full Draw Prod. v. Easton Sports, Inc., 85 F. Supp. 2d 1001, 1007–08 (D. Colo. 2000).

165. COLO. REV. STAT. § 6-1-113(1) (2006); *Hall*, 969 P.2d at 235. Like the injury in fact requirement, the causation element is related to the general requirement of standing. "[A]lthough causation is not part of a threshold standing analysis, it is necessary to establish liability in a private cause of action." *Hall*, 969

tive practice caused the injury to his legally protected interest.[166] Since CCPA claims typically fail for lack of deceptive trade practices or public impact, there is almost no judicial interpretation of this element.[167]

C. Remedies

In an individual private action for a violation of the CCPA, the court may award damages to the injured consumer.[168] Generally, the damage award is the greater of the amount of actually sustained damages or five hundred dollars.[169] The plaintiff must show that the alleged deceptive trade practice has causal connection to the amount of damages he seeks.[170] In cases where the plaintiff can prove by clear and convincing evidence that the defendant acted fraudulently, willfully, knowingly, or intentionally, the court must award treble damages.[171] Finally, a successful plaintiff will have costs and attorney fees paid by the defendant.[172]

However, the plaintiff may not recover twice for the same injury.[173] Thus, a plaintiff who alleges several theories of recovery, for example common law fraud and a violation of the CCPA, based on the same conduct, may only collect one damage award. This rule applies both to actual damages and to deterrent damages—specifically punitive damages under section 13-21-102[174] and treble damages under the CCPA. Because

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P.2d at 235. Therefore, this requirement only applies to private actions under the CCPA.

166. *Hall,* 969 P.2d at 237.

167. *See supra* note 162.

168. § 6-1-113.

169. *Id.* Section 6-1-113(2), which prescribes the amount of damages a plaintiff may recover, does not apply to class actions. *Id.*

170. Witters v. Daniels Motors, Inc., 524 P.2d 632, 635 (Colo. 1974).

171. § 6-1-113(2)(a)(III) ("[A]ny person who, in a private civil action, is found to have engaged in . . . any deceptive trade practice . . . *shall be liable* in an amount equal to the sum of . . . [t]hree times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct . . . .") (emphasis added).

172. § 6-1-113(2)(b).

173. Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819, 822 (Colo. 1992).

174. COLO. REV. STAT. § 13-21-102 (2006); *Lexton-Ancira Real Estate Fund,* 826 P.2d at 822. Section 13-21-102 provides that in a civil action for injury to a person or personal or real property the jury may award exemplary damages if the plaintiff proves beyond a reasonable doubt that there is a circumstance of fraud, malice, or willful or wanton conduct. *See* § 13-21-102; Tri-Aspen Constr. Co v. Johnson, 714 P.2d 484, 486 (Colo. 1986). The exemplary damages may not exceed

punitive damages under section 13-21-102 and treble damages under the CCPA serve the same deterrent purpose,[175] a plaintiff who recovers treble damages under the CCPA may not also obtain punitive damages under section 13-21-102.

IV. WHAT DOES *CROWE* MEAN FOR ATTORNEYS AND CLIENTS?

Since the *Crowe* court did not rule on the merits of the CCPA claim at issue, the practical consequences of the decision for attorneys and clients are not yet clear. Unfortunately, Colorado CCPA cases provide little guidance on how the CCPA may be applied to attorneys. Only a few cases have addressed the CCPA in the context of professional services, and those cases are not helpful in assessing the consequences of *Crowe*.[176]

This part of the Note discusses the effect the *Crowe* decision will likely have on attorneys and their clients. Section A analyzes which elements of a CCPA claim will be the most problematic in an attorney-client setting and concludes that clients may have difficulty proving deceptive trade practices, public impact, and possibly causation. Since legal malpractice claims will likely remain the primary cause of action for clients, an evaluation of whether it would be more advantageous for a client to bring a malpractice claim or a CCPA claim follows in Section B.

A. CCPA Cause of Action in an Attorney-Client Setting

In an attorney-client dispute, the client likely will find it difficult to prove deceptive trade practices, public impact, and possibly causation. This section explains the obstacles a client will face with respect to each of these elements.

the amount of actual damages awarded. *See* § 13-21-102.

175. *Lexton-Ancira Real Estate Fund*, 826 P.2d at 822.

176. Several cases have dealt with the CCPA and medical services. These cases are the closest to attorney-client situations. In *Martinez v. Lewis*, a patient sued a physician who misrepresented his qualifications to an insurance company that hired him to evaluate the patient's insurance claim. 969 P.2d 213, 215–16, 221 (Colo. 1998). Because the only person affected by the physician's misrepresentation was the insurance company, the patient's claim failed for lack of a public impact. *Id.* at 222. In *Teiken v. Reynolds*, the court dismissed a patient's CCPA claim arising out of a misrepresentation of the qualities, characteristics, and suitability of breast implants because the patient failed to file a certificate of review. 904 P.2d 1387, 1389–90 (Colo. App. 1995). There are no Colorado cases applying the CCPA to other professionals, such as accountants or auditors.

1. Deceptive Trade Practices in the Practice of Law

Section 6-1-105 provides a long list of deceptive trade practices of which only a handful may potentially apply to attorneys—in particular false representation, misrepresentation by omission, and misleading advertising. The most obvious instance of a potential deceptive trade practice is misleading advertising, which *Crowe* discussed at length. However, the *Crowe* holding is not limited to that practice. There may be a variety of other situations where an attorney publicly offers his services or describes his background in a way which would fall within the scope of the CCPA. To name a few, an attorney may exaggerate his experience, overstate his qualifications, or misstate billing rates. Such conduct could occur on the firm's website, in a client newsletter, or in a public speech. Depending on the circumstances, such conduct may fall within the definition of misrepresentation by omission, false representation, or misleading advertising.

However, not every overstatement will trigger liability under the CCPA because courts distinguish between actionable representations of fact and mere statements of opinion, or puffery, that do not constitute deceptive trade practices under the CCPA.[177] In *Park Rise Homeowners Association v. Resource Construction Company*, a developer boasted in its sales literature about the "quality construction" it offered, while, in fact, it knew of defects in its recent construction project.[178] The Colorado Court of Appeals held that the statements did not amount to false representation or misrepresentation by omission under the CCPA.[179] While the court conceded that there is no "bright line test to distinguish puffery from a deceptive trade practice," the court's reasoning emphasized the well-settled distinction between a general statement of opinion and a specific representation of fact.[180] The court explained that the term "quality construction" was not a "specific representation of fact subject to measure or calibration," but rather "a statement of opinion, the meaning of which would depend on the speaker's frame of

177. Park Rise Homeowners Ass'n v. Res. Constr. Co., 155 P.3d 427, 435 (Colo. App. 2006), *cert. denied*, No. 06SC485, 2007 WL 93091 (Colo. Jan. 16, 2007).

178. *Id.*

179. *Id.* at 436–37.

180. *Id.* at 435.

reference."[181] Noting that "quality construction" was an "extremely general" term, the court concluded that in the context of the transaction, "quality construction" was obvious "sales talk."[182]

In the field of legal services, distinguishing between general statements of opinion or puffery and false representation may be difficult. The nature of attorneys' work often requires them to make statements concerning the speed of handling client matters, the efficiency of the representation, and the quality of service. Under the *Park Rise Homeowners* reasoning, general statements of opinion about such matters would not constitute a deceptive trade practice under the CCPA. To amount to false representation under the CCPA, the attorney's statements would have to be very factually specific and "subject to measure or calibration."[183] Express comparisons with other attorneys, definitive statements as to the amount of recovery or settlement, or statements describing the attorney's services or qualifications in detail or with respect to a particular case might meet the high threshold of specificity set out by *Park Rise Homeowners.* However, despite their specificity, such statements will be prone to an attorney's argument that he was merely expressing his opinion rather than making a representation of fact.

The *Park Rise Homeowners'* reference to "sales talk" in "the context of the transaction" may add another layer to the CCPA analysis and require industry-specific inquiry. Thus, courts may have to determine what constitutes mere "sales talk" in the context of the legal profession. This determination may be dispositive to the effectiveness of the CCPA as a cause of action against attorneys because statements falling within the "sales talk" category will not be actionable. However, the *Crowe* Court's concern for the protection of unsophisticated consumers suggests that subsequent decisions dealing with "sales talk" relative to legal services may define it narrowly, thus allowing strict application of the CCPA against attorneys. In any event, the distinction between general statement of opinion—or puffery—and false representation will likely limit the potential liability of attorneys under the CCPA.

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181. *Id.* at 436.
182. *Id.* (citations omitted).
183. *Park Rise Homeowners Ass'n*, 155 P.3d at 436.

Statements that would give rise to a CCPA claim by a client are most likely to occur during client acquisition. When an attorney advertises in order to acquire new clients or communicates with a potential client about the possibility of representing him, the attorney will inevitably make statements about his skills, qualification, and experience. If such statements are intentionally deceptive, they may give rise to liability under the CCPA. However, the CCPA also applies to conduct that occurs in the course of an attorney-client relationship. In *Showpiece Homes*, the Colorado Supreme Court held that the CCPA applied to the "post-sale unfair or bad faith conduct" of an insurance company.[184] The court reasoned that while some of the deceptive practices listed in section 6-1-105 included a temporal limitation that restricted their applicability to the time of sale or advertisement of the goods or services, most deceptive practices did not include such a limitation.[185] Thus, to the extent the definition of a deceptive trade practice does not contain a temporal limitation, it applies to "post-sale" conduct.[186]

Of the deceptive practices potentially applicable in an attorney-client context, only misrepresentation by omission contains a temporal limitation and thus does not apply to "post-sale" conduct. In contrast, an attorney's actions may constitute false representation or misleading advertising even if they occur in the course of the attorney-client relationship—that is "post-sale" or "post-advertising." Although the attorney-client relationship is heavily regulated by the Rules of Professional Conduct, and the client may also have a malpractice claim in such circumstances, the generous recovery provisions of the CCPA will give him an incentive to pursue a CCPA claim. However, as with all CCPA actions, the client may have difficulty establishing the requisite public impact.[187] Given the variety of possible circumstances in each client's case, it will be more challenging to show the requisite public impact in post-sale conduct than in a client acquisition situation.

184. Showpiece Homes Corp. v. Assurance Co. of Am., 38 P.3d 47, 58 (Colo. 2001).

185. *Id.*

186. *See id.*

187. Arguably, in the context of class action, deceptive conduct by class counsel toward class members may fall within the scope of the CCPA. However, it will also depend on how broadly the court would define the relevant consumer pool.

Proving that an attorney engaged in a deceptive trade practice is further complicated by the intent requirement. While not all subsections of section 6-1-105 expressly require that the wrongdoer engaged in the deceptive trade practice "knowingly" or "intentionally," *Crowe* strongly suggests that courts will require intent to deceive when applying section 6-1-105 to attorneys.[188] Based on that premise, an attorney cannot be liable if he makes a good faith statement about the nature of his services, qualifications, or other matters. Even if subsequent events prove the attorney's statements to be untrue and the client feels misled, the client would not succeed with a CCPA claim. Indeed, the client would have to show that at the time the attorney made the statement he knew of its untruth and intended to mislead or deceive the client, or, alternatively, knowingly made a false representation that had "the tendency or capacity to attract consumers" and also to deceive them.[189]

In order to prove intentional deception, the client would likely have to gain knowledge of the attorney's business practices through discovery.[190] The attorney, in turn, may seek a protective order and argue that such information is a trade secret.[191] The court may issue a protective order "upon a showing of good cause that a trade secret . . . will be misused or disclosed to the public if such an order is not entered."[192] To determine whether good cause exists, the court will balance "the need to limit disclosure of the confidential information against the need of the opposing party to have access to the information."[193] Thus, the outcome of the discovery dispute will depend on the facts of the case.[194]

188. Crowe v. Tull, 126 P.3d 196, 204 (Colo. 2006) ("Liability . . . is dependent upon knowledge or intent existing at the time of the advertising conduct and the remediable damage that results from that conduct. The CCPA does not create liability for those who intend to live up to the pronouncements of their advertisements but are negligent in action despite those intentions.").

189. Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 147 (Colo. 2003).

190. Crowe sought discovery of the Azar firm's advertising, operations, other cases handled by the firm and information on settlement of those cases, details of current or former clients, marketing practices, financial and cash flow information, and accounting practices. *See* Petitioner's Reply to Respondents Answer at 12–14, Crowe v. Tull, 126 P.3d 196 (Colo. 2006) (No. 04SA385) [hereinafter Crowe's Reply Brief].

191. *See* COLO. R. CIV. P. 26(c)(7); *cf.* Crowe's Reply Brief at 14.

192. Direct Sales Tire Co. v. Dist. Ct., 686 P.2d 1316, 1319 (Colo. 1984).

193. *Id.* The *Crowe* Court recognized that discovery of Azar's business practices is crucial for Crowe's claim and directed the trial court to "reconsider the

While proving intent may be difficult, evidence of intent may not be required in all circumstances. Despite the sweeping statements in *Crowe* concerning the intent requirement, the language of section 6-1-105(g) suggests that mere negligence, rather than knowledge or intent, may suffice for liability under that subsection. Thus, an attorney could be liable for false representation even if he did not intend to mislead the client as long as the client proves that a reasonable person in the attorney's position would have known that the standard or quality of the legal services is different from the one represented. While it is possible that the *Crowe* Court purposely stated that intent was always required to prevent such a result, that statement is nevertheless dictum.

Finally, there is a remote possibility that attorneys could be liable for deceptive conduct not specifically defined in section 6-1-105. Given the broad remedial purpose of the CCPA and the courts' view that the CCPA should be invoked where the trade practices have "a *tendency or capacity to attract customers* through deceptive trade practices,"[195] it is possible that courts will follow the *Showpiece Homes* dicta and expand the reach of the CCPA to deceptive practices not specifically mentioned in the statute. Since the majority of the deceptive trade practices described in section 6-1-105 require intent and *Crowe* stated that "[CCPA] liability . . . is dependent upon knowledge or intent,"[196] deceptive practices that are not listed in the statute would likely have to be intentional in order to fall within the purview of the CCPA. Although such an extension of the CCPA would be a leap from current case law, in theory, an attorney could be liable for a violation of the CCPA by engaging in a deceptive practice not expressly defined by section 6-1-105, as long as the challenged practice entails intentional deception.

In sum, while there may be numerous situations where an attorney could engage in deceptive trade practices, the intent requirement and the distinction between puffery and false rep-

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protective order which shut down discovery related to the Azar firm's advertising and marketing practices, including the production of its television and radio advertisements, and certain of its operations and practices in serving past clients." *Crowe*, 126 P.3d at 211.

194. It is also likely that the attorney would assert attorney-client privilege with respect to information concerning other clients.

195. *Rhino Linings*, 62 P.3d at 147 (quoting People *ex rel.* Dunbar v. Gym of Am., Inc., 493 P.2d 660, 668 (Colo. 1972)).

196. *Crowe*, 126 P.3d at 204.

resentation substantially curbs attorneys' potential liability under the CCPA.

2. Public Impact

A client bringing a CCPA claim will also have to show that the attorney's conduct had a significant impact on the public. Although the Colorado Supreme Court has developed a three-part test,[197] assessing public impact is a very fact-intensive inquiry. The first part of the test focuses on the number of consumers affected by the challenged practice. There is no bright-line rule setting out the number or percentage of consumers that would satisfy the public impact requirement.[198] Since the CCPA is not available to remedy a purely private wrong,[199] the client will have to show a large number of affected consumers constituting a significant percentage of a substantial consumer pool.[200]

In determining the consumer pool, the court is likely to take into account the nature of the deceptive practice. Thus, a court may require a different number of directly affected consumers depending on how the misleading information was communicated. If an attorney uses television commercials, the consumer pool will be large because television is a broad-reaching medium. Therefore, the court will likely require a relatively high number of directly affected consumers. Similarly, posting deceptive information on the attorney's website will likely result in a large consumer pool and thus the need for a substantial number of directly affected consumers. In contrast, if the attorney employs a more discreet method of making the deceptive statements, such as a newsletter sent to existing clients, the court may be more willing to permit recovery even if the number of directly affected consumers is relatively low. Thus, the client's ability to show requisite public impact will depend on how the attorney communicates the misleading information as well as the size of the relevant consumer pool.

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197. *See supra* Part III.B.3.

198. *See supra* Part III.B.3.

199. *Rhino Linings*, 62 P.3d at 149.

200. A court may find no public impact where the absolute number of affected consumers is considerable, but very small compared to the size of the consumer pool. *See supra* text accompanying note 147 (discussing *Coors*, 91 P.3d 393, 399 (Colo. App. 2003), *aff'd on other grounds, rev'd on other grounds*, 112 P.3d 59, 59 (Colo. 2005)).

The second part of the test, evaluating "the relative sophistication and bargaining power of the consumers affected by the challenged practice,"[201] will weigh heavily in favor of clients. Setting aside large institutional clients, an attorney will almost always be more sophisticated and will have more bargaining power than the client. The *Crowe* Court recognized that legal services are a highly specialized arena, and "information that allows the average [client] to discriminate among different legal service providers is limited."[202] For that reason, clients may have difficulty evaluating the attorney's statements.[203] Moreover, "[i]n many cases, the unsophisticated [client] will have only [the] attorney's . . . own representations of the quality of services with which to decide whether . . . to retain [him]."[204] Since the disparity between the client's and the attorney's sophistication and bargaining power will usually be significant, the client will likely prevail on this part of the test.

Turning to the third part of the public impact test, courts assess whether "the challenged practice has previously impacted other consumers or has the significant potential to do so in the future."[205] Similarly to the first part—the number of directly affected consumers—the outcome of this inquiry will depend on the facts of the case, and in particular on the nature of the deceptive practice. Specifically, the court will have to determine whether the deceptive trade practice was a one-time-only occurrence, or whether it had happened in the past or may occur again in the future.[206] In cases involving broad advertising campaigns, as in *Crowe*, it may not be difficult to prove the previous or future impact of the conduct because the advertisements usually air on television or are printed repeatedly over a long period of time. Similarly, if the attorney publishes deceptive statements on a website, such conduct is likely to satisfy the "past or future impact" requirement of the public impact test as long as the statements in question are posted for some period of time. Showing the past or future impact will be much harder, however, where the misrepresentation or decep-

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201. *Rhino Linings*, 62 P.3d at 149.

202. Crowe v. Tull, 126 P.3d 196, 209 (Colo. 2006).

203. *Id.*

204. *Id.*

205. *Rhino Linings*, 62 P.3d at 149.

206. *See* Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co., 373 F.3d 1100, 1114 (10th Cir. 2004).

tion is less public and occurs only on one or a few occasions. For example, statements made in a letter to current clients may be too isolated to satisfy this part of the test.

Overall, it will be very difficult for clients to prove significant public impact. Courts will likely require a large number of actually affected clients. Although the disparity of bargaining power and sophistication will favor clients, that itself will not suffice to satisfy the public impact element of a CCPA claim. Finally, the method of communicating the deceptive statement may preclude the client from showing that the challenged practice affected other clients previously or that it has the potential to do so in the future.

3. Causation

Causation is the last significant hurdle a client will have to overcome in proving his CCPA claim. Specifically, the client must show that the deceptive practice, rather than the legal advice the client received, caused his injury. In practice, distinguishing between the two may be quite difficult. The *Crowe* decision suggested a liberal approach to the causation issue, noting that showing reliance on the deceptive statement may suffice as "the first link in [the] chain of causation."[207] As long as the chain of causation asserted by the plaintiff is not "too attenuated," courts should allow the plaintiff to submit the issue to the jury.[208]

However, it may be more challenging to satisfy the causation requirement where the client is relatively sophisticated. The more sophisticated the client is, the less susceptible he will be to an attorney's deception. Consequently, even if the attorney does engage in a deceptive trade practice, it will be more difficult for the sophisticated client to show that he was in fact deceived and that the alleged deception caused the injury. Finally, to the extent courts may read the deceptive trade practice and the public impact requirements broadly to afford CCPA protection to clients, causation may become a limiting factor preventing recovery under weak CCPA claims.

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207. *Crowe*, 126 P.3d at 210.
208. *Id.*

4. Looking Ahead

In sum, clients will have difficulty proving the elements of a CCPA claim against their attorneys. Specifically, a client may not be able to prove that the attorney intentionally engaged in a deceptive trade practice—usually false representation, misrepresentation by omission, or misleading advertising. Moreover, the attorney's actions may not rise to the requisite level of public impact. Finally, the client will have to show that the attorney's deceptive conduct caused the client's injury.

This is also true in Crowe's case. Although Azar's advertisements are extreme in their aggressiveness and reach, Crowe may not be able to prove deceptive trade practices and public impact. Since most of Azar's statements were rather general, a court might conclude that they were mere statements of opinion, or puffery, rather than actionable representations of fact. However, Azar's pledge to "obtain as much as we can, as fast as we can," may be a closer call. Because these statements arguably provide measurable reference points and are rather specific, a court might view them as representations of fact. Even if Crowe overcomes this hurdle, he will have to show that when Azar made the statements in question, he acted with intent to deceive. Whether Crowe will be able to meet his burden of proof will depend on information he obtains through discovery.

Proving public impact will be also challenging. First, Crowe will have to show a sufficient number of actually affected consumers. Specifically, Crowe will have to find out whether and how many other consumers hired the Azar firm based on the television commercials. That will likely be the most difficult aspect of proving the requisite public impact and will depend largely on the outcome of discovery. Second, the disparity in bargaining power and sophistication of the Azar firm and Crowe will strongly favor Crowe. Nothing in the facts of the case suggests that Crowe had any experience in selecting an attorney; to the contrary, his knowledge of the Azar firm allegedly came solely from the advertisements.[209] Moreover, when he retained the firm, Crowe likely acted under financial pressure and other difficulties caused by the car accident, which may have made him even more susceptible to Azar's ad-

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209. *See id.* at 200.

vertising. Third, since Azar's commercials aired on television, Crowe should be able to prove that they either affected the consumer public in the past or had significant potential to do so in the future. However, similar to establishing the number of directly affected consumers, proving past or potential future impact will also depend on the outcome of discovery. Thus, while the second part of the public impact test favors Crowe, it may be challenging to satisfy the first and the third part—the sufficient number of directly affected consumers and the past and potential future impact of the commercials. In sum, although Crowe's case appears to present an ideal set of facts for an attorney-client CCPA claim, it is not at all certain that Crowe will ultimately succeed.

The analysis of the elements of a CCPA claim and the brief look at Crowe's case underscore an inherent tension present in the CCPA that will affect attorney-client suits under the statute. "On the one hand, the CCPA is to be liberally construed to effect its remedial purpose, . . . on the other, if a wrong is private in nature, and does not affect the public, the claim is not actionable under the CCPA."[210] In the context of attorney-client disputes, courts will have to weigh the interest in protecting unsophisticated clients from attorneys' deceptive practices against the need to limit client CCPA claims so that they do not replace malpractice actions. Because meeting the deceptive trade practice and the public impact requirements, as currently shaped by the statute and case law, may be difficult for clients even where the nature of the attorney's conduct appears to fall within the purview of the CCPA, the courts' interpretation of these elements in the attorney-client setting may have to shift slightly in order to fulfill the CCPA's broad protective purpose. Yet, an overbroad interpretation may result in clients pursuing CCPA claims where relief under the more usual claims—legal malpractice, breach of fiduciary duty, or fraud—would be appropriate.[211]

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210. *Dean Witter Reynolds Inc.*, 373 F.3d at 1113.

211. However, as the *Crowe* court noted:

> [T]he CCPA will not regularly accompany an attorney malpractice claim, because those cases in which a lawyer's actions will have an impact beyond the private contract with the client will be few and far between. In fact, the elements of malpractice are only incidental to liability under the CCPA, because liability under the consumer act originates from fraudulent misrepresentations of ability or quality of services, not the failure to perform legal services with a standard of care 'ordinarily possessed by

As the law stands now, the CCPA will protect clients against broadly sweeping deceptive practices. However, in most cases, a client harmed by an attorney's wrongdoing will have better prospects of recovering under the theories of legal malpractice, breach of fiduciary duty, or fraud.

B. *Comparison of Recovery in a CCPA Action and in a Malpractice Action*

Since proving all elements of a CCPA claim in an attorney-client setting will be difficult, legal malpractice suits will remain a common form of recovery against attorneys. Given the differences between the purpose and elements of a CCPA claim and a malpractice claim, it is unlikely that the same conduct would enable a client to pursue both claims. In the rare situation where a client would be able to do so, he would eventually have to choose under which theory he wishes to recover in order to prevent double recovery.[212]

In order to establish a legal malpractice claim, the client-plaintiff must prove that (1) "the attorney owed a duty of care to the plaintiff," (2) "the attorney breached that duty," and (3) "the attorney proximately caused damage to the plaintiff."[213]

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members of the legal profession.'"
Crowe, 126 P.3d at 208.

212. *See* Lexton-Ancira Real Estate Fund v. Heller, 826 P.2d 819, 822 (Colo. 1992).

213. Bebo Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78, 83 (Colo. 1999) (citations omitted). Typically, legal malpractice actions are based on negligence. Other theories of malpractice include breach of contract, breach of fiduciary duty, and fraud. When providing legal services to a client, the attorney must employ the "degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client." Stone v. Satriana, 41 P.3d 705, 712 (Colo. 2002) (quoting *Bebo Constr. Co.*, 990 P.2d at 83). The level of care is measured against that provided by "ordinary members of the profession." *Id.* An attorney's conduct is assessed as of the time the action rather than in hindsight. *Id.* Thus, if an attorney made a mistake, but nevertheless complied with the standard of "ordinary members of the legal profession," the client-plaintiff will not prevail on a legal malpractice claim. To prove causation, the client must show that but for the attorney's alleged misconduct, the client would not have suffered the injury. *See Bebo Constr. Co.*, 990 P.2d at 83. Additionally, the client typically must prove the "case within a case" and show that the claim underlying the malpractice action would have succeeded but for the attorney's failure to comply with his duties. *Id.* (citation omitted). However, proving the "case within a case" may be quite difficult. The client must address not only elements of the underlying claim but also, depending on the specifics of the case, the statute of limitations, the client's ability to collect the judgment, and other issues that might have barred him from recovery. Lawson v. Sigfrid, 262 P. 1018, 1018–19

In legal malpractice actions, a two-year statute of limitations applies.[214]

A client who prevails in a malpractice action may recover actual damages and, under certain circumstances, punitive damages as well.[215] Actual damages are measured by comparing the client's current position with the position in which he would have been but for the attorney's negligence.[216] Thus, the client must demonstrate what amount he would have recovered or would not have lost with respect to the underlying claim if the attorney had not been negligent.

To receive punitive damages, the plaintiff must prove beyond a reasonable doubt that "the injury . . . [was] attended by circumstances of fraud, malice, or willful and wanton conduct . . . ."[217] The amount of punitive damages may not exceed the amount of actual damages awarded by the jury.[218] Thus, where the conditions for an award of punitive damages are met, the statute effectively permits double damages. In limited circumstances, where a defendant continues to act in a willful or wanton manner during the pendency of the case, the court may increase the amount of punitive damages to "a sum not to exceed three times the amount of actual damages."[219] In contrast, where the award of punitive damages does not serve the

(Colo. 1927).

214. COLO. REV. STAT. § 13-80-102(1) (2006). A negligence action must be brought within two years from the date when the plaintiff knows or should have known through reasonable diligence of both the injury and its cause. §§ 13-80-102(1), to -108(1).

215. Punitive damages are available in actions at law. Peterson v. McMahon, 99 P.3d 594, 597 (Colo. 2004).

216. *See generally* Peltz v. Shidler, 952 P.2d 793, 796 (Colo. App. 1997) (illustrating how actual damages are measured in a malpractice action); Myers v. Beem, 712 P.2d 1092, 1093 (Colo. App. 1985); Deaton v. Mason, 616 P.2d 994, 995–96 (Colo. App. 1980).

217. *See* COLO. REV. STAT. §§ 13-25-127(2),13-21-102(1)(a) (2006).

218. § 13-21-102(1)(a).

219. § 13-21-102(3). Specifically, the court may increase the amount of punitive damages if:

> [T]he defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case [or if] [t]he defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

§ 13-21-102(3)(a), (b).

deterrent purpose, the court may reduce or disallow punitive damages completely.[220]

When deciding whether to pursue a CCPA claim or a legal malpractice claim, the client would likely consider several factors. First, the CCPA provides a three-year statute of limitations,[221] as compared to a two-year statute of limitations applicable to malpractice actions.[222] Thus, a client who would have been barred from bringing a malpractice action may still recover under the CCPA.

Second, and more importantly, in a CCPA action, if the client proves by clear and convincing evidence that the attorney acted in bad faith—that is fraudulently, willfully, knowingly, or intentionally—the court *must* assess treble damages.[223] As most deceptive practices under the CCPA require intent,[224] a plaintiff will have to prove intent by a preponderance of evidence irrespective of whether he wishes to receive treble damages.[225] Depending on the facts of the case, proving essentially the same thing—fraudulent, willful, knowing, or intentional conduct—by clear and convincing evidence may not be substantially more difficult.

In contrast, the statute governing punitive damages otherwise available in civil actions permits a punitive damages award up to the amount of actual damages.[226] Thus, a successful plaintiff in a malpractice action may recover double the amount of actual damages rather than the treble damages available under the CCPA. Notably, the amount of the punitive damages award is left to the discretion of the court or the jury, with section 13-21-102 merely setting the ceiling.

Third, a plaintiff seeking punitive damages must satisfy a higher burden of proof than a plaintiff seeking treble damages under the CCPA. Section 13-25-127 requires that a plaintiff

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220. § 13-21-102(2). Specifically, the court may reduce or disallow punitive damages if (1) "[t]he deterrent effect . . . has been accomplished," (2) the conduct in question has ceased, or (3) "the purpose of [the] damages has otherwise been served." *Id.*

221. COLO. REV. STAT. § 6-1-115 (2006). The limitations period starts running from the date on which the deceptive practice, or the last occurrence in a series of such conduct, occurred or the date when the consumer discovered or should have discovered the deceptive practice. *Id.*

222. COLO. REV. STAT. § 13-80-102(1) (2006).

223. § 6-1-113(2)(a)(III).

224. *See supra* Part III.B.1.

225. *Id.*

226. § 6-1-113(2).

prove fraud, malice, or willful and wanton conduct beyond a reasonable doubt.[227] The CCPA, on the other hand, requires proof of fraudulent, willful, knowing, or intentional conduct by clear and convincing evidence.[228] The "clear and convincing evidence" standard is "less rigorous in the degree of probability it demands than proof 'beyond a reasonable doubt.'"[229]

Fourth, each party to a suit typically bears its own attorney fees and costs.[230] In contrast, the CCPA allows a successful plaintiff to recover attorney fees and costs of litigation.[231]

In sum, the CCPA provides for a longer statute of limitations, in certain circumstances mandates treble damages, and permits the award of the treble damages upon proof by clear and convincing evidence. Additionally, the CCPA allows a successful plaintiff to recover attorney fees and costs. Therefore, if a client could successfully prove both a malpractice claim and a CCPA claim, he would likely choose to recover under the CCPA.

CONCLUSION

As legal services are becoming highly commercialized, and attorneys provide information about their services through various media outlets, including the Internet, radio, and television broadcasting, it is necessary to protect the public from deceptive practices that may occur in the course of such communication. The Colorado Supreme Court recognized this need, and its decision in *Crowe v. Tull* put the consumers of legal services on par with consumers in other industries.

Nevertheless, while the consumer public may be excited about a new and more favorable way to recover in attorney-client disputes and attorneys may fear new liability, *Crowe* is unlikely to radically change the usual remedies in attorney-client conflicts. Because the CCPA is intended to prevent the deception of the consumer public and does not provide a remedy for a purely private wrong, a client will only rarely be able

227. COLO. REV. STAT. § 13-25-127(2) (2006).

228. § 6-1-113(2)(a)(III).

229. People v. Distel, 759 P.2d 654, 661 (Colo. 1988) (quotation omitted).

230. *See* Smith v. Mehaffy, 30 P.3d 727, 732 (Colo. App. 2000) ("Colorado follows the American rule which holds that, absent statutory authority, an express contractual provision, or a court rule, the parties in a lawsuit are required to bear their own legal expenses.").

231. § 6-1-113(2)(b).

to prove all the requisite elements of a CCPA claim. First, a client may not be able to show that the attorney intentionally engaged in a deceptive trade practice as defined by the CCPA—usually false representation, misrepresentation by omission, or misleading advertising. Second, it may be difficult to prove that the attorney's conduct had the requisite public impact. Third, the client will have to demonstrate that the attorney's deceptive conduct caused the client's injury. Conversely, attorneys do not have to fear new liability unless they intentionally misrepresent facts or knowingly deceive their clients, or, alternatively, unless courts take the unlikely view that some provisions of the CCPA impose liability for negligent conduct.

It is too early to assess the effect of *Crowe* on attorney-client disputes. Although the Colorado Supreme Court opened the door to CCPA claims against attorneys, the CCPA's effectiveness in deterring attorneys from engaging in misleading advertising and other deceptive trade practices will depend on judicial interpretation of the elements of a CCPA claim in the attorney-client setting. By interpreting deceptive trade practices, public impact, and causation restrictively, courts could ultimately render the extension of the CCPA to attorneys effectively meaningless. Since several lawsuits brought by clients against attorneys under the CCPA are currently pending, the scope of the CCPA protection of clients may soon become more defined.