CHAPTER 15

PROFESSIONAL LIABILITY

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I. PHYSICIANS AND PRACTITIONERS OF OTHER HEALING ARTS

A. MALPRACTICE

15:1 ELEMENTS OF LIABILITY

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

Notes on Use

1. When there is sufficient evidence supporting a claim for malpractice based on negligence against a physician or professional practitioner of another healing art, Instruction 9:1 or 9:22 should be given, together with such other instructions contained in Chapters 9 and 15 as would be appropriate in light of the evidence in the case. For example, as to when the doctrine of res ipsa loquitur may be applicable in a malpractice case, see the cases cited in the Notes on Use to Instruction 9:17.

2. For the standard of care required of nonspecialists, see the Source and Authority to Instruction 15:2 and, for specialists, see the Source and Authority to Instruction 15:3. *See* **Dotson v. Bernstein**, 207 P.3d 911, 913 (Colo. App. 2009) ("The distinction between an ordinary negligence claim and a medical negligence claim is that, in the latter, the duty is breached when a physician's treatment falls below the applicable standard of care.").

3. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). For a discussion as to the statutory requirements for designating a nonparty professional at fault in tort litigation, see **Redden v. SCI Colorado Funeral Services, Inc.**, 38 P.3d 75 (Colo. 2001) (interpreting section 13-21-111.5(3)(b) (designation of nonparties), and section 13-20-602, C.R.S. (certificate of review)). *See also* Source and Authority to Instruction 15:21, notes 2 & 3 (discussing certificate of review).

Source and Authority

1. This instruction is supported by **Day v. Johnson**, 255 P.3d 1064 (Colo. 2011) (listing the elements of a medical malpractice claim); **HealthONE v. Rodriguez ex rel. Rodriguez**, 50 P.3d 879 (Colo. 2002) (listing the elements of a medical malpractice claim); **Dotson**, 207 P.3d at 913 (listing the elements of a medical malpractice claim).

Medical Malpractice Claim

2. "A medical malpractice action is a particular type of negligence action." **Day**, 255 P.3d at 1068 (citing **Greenberg v. Perkins**, 845 P.2d 530 (Colo. 1993)). "Like other negligence actions, the plaintiff must show a legal duty of care on the defendant's part, breach of that duty, injury to the plaintiff, and that the defendant's breach caused the plaintiff's injury." *Id.* at 1068-69. "The duty of care on which a medical malpractice action is predicated arises out of the professional relationship between physician and patient." **Greenberg**, 845 P.2d at 534.

3. "To establish a breach of the duty of care in a medical malpractice action, the plaintiff must show that the defendant failed to conform to the standard of care ordinarily possessed and exercised by members of the same school of medicine practiced by the defendant." **Day**, 255 P.3d at 1069 (citing **Melville v. Southward**, 791 P.2d 383 (Colo. 1990)). "That standard of care is measured by whether a reasonably careful physician of the same school of medicine as the defendant would have acted in the same manner as did the defendant in treating and caring for the patient. Thus, the standard of care for medical malpractice is an objective one." *Id.* (citing **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Greenberg**, 845 P.2d at 534-35; **Melville**, 791 P.2d at 387); *see also* Notes on Use and Source and Authority to Instructions 15:2 & 15:3.

4. To prove causation in a medical malpractice action, "the plaintiff must show by a preponderance of the evidence that the injury would not have occurred but for the defendant's negligent conduct." **Kaiser Found. Health Plan of Colo. v. Sharp**, 741 P.2d 714, 719 (Colo. 1987). "The existence of a causative link between the plaintiff's injuries and the defendant's negligence is a question of fact, and it is within the province of the fact-finder to determine the relationship between the defendant's negligence and the plaintiff's condition, as long as the evidence establishes such facts and circumstances as would indicate with reasonable probability that causation exists. To create a triable issue of fact regarding causation in a medical malpractice case, the plaintiff need not prove with absolute certainty that the defendant's conduct caused the plaintiff's harm, or establish that the defendant's negligence was the only cause of the injury suffered. However, the plaintiff must establish causation beyond mere possibility or speculation." *Id.* (citations omitted).

5. The court of appeals is split on whether Colorado allows recovery of damages for increased risk of harm or loss of chance. In **Sharp v. Kaiser Foundation Health Plan of Colorado**, 710 P.2d 1153 (Colo. App. 1985), *aff'd*, 741 P.2d 714 (Colo. 1987), the court of appeals held that damages may be recovered for increased risk of harm or, conversely, the loss of chance for recovery. The court rejected the requirement that a prima facie case requires evidence that the chance of avoiding the harm, absent the defendant's negligence, was greater than 50%. Although the supreme court affirmed the result, it did so expressly without adopting loss of chance or increased risk of harm theory. **Kaiser Found. Health Plan of Colo.**, 741 P.2d at 718. However, in **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011), the court of appeals rejected the increased risk of harm or loss of chance theory of recovery as inconsistent with the requirement that a plaintiff must prove "but-for" causation and "inconsistent with Colorado Supreme Court precedent." *Id.* at 987; *see also* **Lorenzen v. Pinnacol Assurance**, 2019 COA 54, ¶¶ 27-30 (criticizing the court of appeals' decision in **Sharp** and explaining that but-for causation is a prerequisite to establishing the substantial factor test).

6. Colorado recognizes a medical malpractice claim for "wrongful pregnancy," a claim that a physician negligently failed to terminate the mother's pregnancy. **Dotson**, 207 P.3d at 914 (economic and noneconomic damages, including medical expenses and pain and suffering associated with labor, delivery, and subsequent medical complications from the birth, were recoverable as consequential damages). Colorado also recognizes parents' medical malpractice claim for "wrongful birth," a claim that they would not have had the child or would have terminated the pregnancy had they been properly advised of the risks of impairment or birth defects. **Lininger v. Eisenbaum**, 764 P.2d 1202 (Colo. 1988) (entitled to recover those extraordinary medical and education expenses occasioned by the child's blindness). However,

Colorado does not recognize the child's separate claim for "wrongful life," a claim brought by an impaired child under the theory that, but for the doctor's negligence, the child would not have been born to suffer the impairment. *Id.* at 1210.

7. Traditional negligence principles are applicable to "fear of cancer" claims in medical malpractice actions. **Boryla v. Pash**, 960 P.2d 123 (Colo. 1998). In **Boryla**, the plaintiff sought noneconomic damages for emotional distress including the fear of an increased risk of the recurrence of her cancer as a result of her physician's failure to promptly diagnose her breast cancer. *Id.* at 125. The supreme court stated, "In cases where the plaintiff demonstrates that her cancerous condition physically worsened as a result of the delayed diagnosis, the plaintiff has demonstrated a sufficient physical injury to permit the recovery of emotional distress damages." *Id*. at 129. Thus, the court concluded that "traditional negligence principles which focus on proximate cause as well as the reasonableness of the plaintiff's fear are sufficient to evaluate fear of cancer claims in medical malpractice claims." *Id.*

8. In **Danko v. Conyers**, 2018 COA 14, ¶¶ 20-22, 432 P.3d 958, the court of appeals held that a defendant does not have to designate a nonparty under section 13-21-111.5(3)(b) to assert a causation defense that someone else's action or inaction was the sole cause of the injury. Specifically, a "defendant may always attempt to interpose a complete defense that his acts or omissions were not the cause of the plaintiff's injuries" because "[a] defense that the defendant did not cause the plaintiff's injuries is not equivalent to the designation of a non-party because it cannot result in apportionment of liability, but rather is a complete defense if successful." *Id.* at ¶ 21 (quoting **Redden**, 38 P.3d at 81). However, under RESTATEMENT (SECOND) OF TORTS § 457 (1965), an original tortfeasor is liable for any additional bodily harm caused by subsequent medical care reasonably required by the original injury, regardless of whether the subsequent medical care was done properly or negligently. **Danko**, ¶¶ 27-30, 432 P.3d at 964; *see also* **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); **Powell v. Brady**, 30 Colo. App. 406, 496 P.2d 328, (1972), *aff'd sub nom.* **Brady v. City & Cty. of Denver**, 181 Colo. 218, 508 P.2d 1254 (1973). The only exception is if the subsequent medical care constitutes extraordinary misconduct or supervening cause. **Danko**, ¶ 31, 432 P.3d at 965.

Expert Testimony

9. "Unless the subject matter of a medical malpractice action lies within the ambit of common knowledge or experience of ordinary persons, the plaintiff must establish the controlling standard of care, as well as the defendant's failure to adhere to that standard, by expert opinion testimony." **Melville**, 791 P.2d at 387. "The reason for the requirement of expert opinion testimony in most medical malpractice cases is obvious: matters relating to medical diagnosis and treatment ordinarily involve a level of technical knowledge and skill beyond the realm of lay knowledge and experience. Without expert opinion testimony in such cases, the trier of fact would be left with no standard at all against which to evaluate the defendant's conduct." *Id.*; *see, e.g.*, **Gorab**, 943 P.2d at 427 (requiring expert testimony to lack of informed consent cases); **Espander v. Cramer**, 903 P.2d 1171, 1174 (Colo. App. 1995) ("even the determination whether the consent given [by a patient] was misinformed or given on the basis of incomplete or misleading disclosure concerning the degree of risk would require expert testimony"); **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (expert testimony required to prove that a physician did not properly perform surgery); **Smith v. Curran**, 28 Colo. App. 358, 472 P.2d 769 (1970) (expert testimony required to prove the causes of infection or its source).

10. Similarly, expert testimony is generally required to prove causation in medical malpractice cases. **Conrad v. Imatani**, 724 P.2d 89 (Colo. App. 1986) (granting defendant summary judgment on medical malpractice negligence claim because plaintiff failed to present any expert testimony that her pain was caused by defendant's negligence); **Smith**, 28 Colo. App. at 363, 472 P.2d at 770-71 (upholding directed verdict for defendant in medical malpractice case where plaintiff failed to present any expert testimony on issue of the cause or source of a post-operative infection, because those "are matters within the field of medical experts"); **Williams v. Boyle**, 72 P.3d 392, 398 (Colo. App. 2003) (concluding expert testimony was necessary to establish that prescribed medication caused plaintiff's kidney damage, because "relationship between the kidney damage and the prescribed medication is not so clear that a lay person would be able to conclude that the medication caused the damage without expert testimony").

11. The Health Care Availability Act includes a statute governing the qualification of expert witnesses. Section 13-64-401, C.R.S. provides that in any medical malpractice action against a physician, no person shall be qualified to testify as an expert witness concerning issues of negligence unless he or she is not only is a licensed physician but can demonstrate that he or she has a substantial familiarity with applicable standards of care and practice that are the subject matter of the action. "The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar." *Id.*; *see* **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). However, these limitations do not apply to expert witnesses testifying as to the degree or permanency of medical or physical impairment. § 13-64-401.

Certificate of Review

12. A certificate of review is required in all professional negligence cases where expert testimony is required to establish a prima facie cause of action. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992). A certificate of review is required for a lack of informed consent claim. **Williams**, 72 P.3d at 396; **Espander**, 903 P.2d at 1174. Similarly, a medical malpractice claim based upon the statute for deceptive trade practices requires a certificate of review. **Teiken v. Reynolds**, 904 P.2d 1387 (Colo. App. 1995); **Williams**, 72 P.3d at 399-401 (requiring a certificate of review for fraudulent nondisclosure, fraudulent misrepresentation, and defamation claims against a physician). However, a certificate is not necessary if the case is one that does not require expert testimony, such as a negligence claim based upon res ipsa loquitur. **Shelton v. Penrose/St. Francis Healthcare System**, 984 P.2d 623 (Colo. 1999); **Bilawsky v. Faseehudin**, 916 P.2d 586 (Colo. App. 1995).

13. Section 13-20-602(1), C.R.S. requires a plaintiff to file a certificate of review within sixty days of the service of the complaint. **Shelton**, 984 P.2d at 626; **Yadon v. Southward**, 64 P.3d 909 (Colo. App. 2002) (finding that the certificate of review statute applies to pro se plaintiffs as well as plaintiffs represented by counsel). The certificate must include a declaration by the plaintiff's attorney that he or she consulted with an appropriately licensed and qualified medical professional who, after reviewing relevant known facts, concluded that the claim "does not lack substantial justification." § 13-20-602(3)(a)(II); *see* **Redden**, 38 P.3d at 82; **Teiken**, 904 P.2d at 1388-89. When a certificate of review is required, the failure to file one in accordance with the statute requires dismissal of the complaint. § 13-20-602(4); **Giron v. Koktavy**, 124 P.3d 821 (Colo. App. 2005).

14. If a party wishes to file a certificate of review beyond the 60-day time period, good cause must be established for the late filing. § 13-20-602(1)(a). In determining whether good cause has been shown, the court must consider the following: (1) whether the neglect that resulted in the failure to file was excusable; (2) whether the moving party alleged a meritorious defense or claim; and (3) whether relief from the challenged order would be consistent with equitable considerations, such as whether any prejudice would accrue to the nonmoving party. **RMB Servs., Inc. v. Truhlar**, 151 P.3d 673 (Colo. App. 2006); **Ehrlich Feedlot, Inc. v. Oldenburg**, 140 P.3d 265 (Colo. App. 2006); **Williams**, 72 P.3d at 396. Although a court may decline to accept a late certificate if the plaintiff fails to satisfy any of these three criteria, the court must consider all of them because evidence relating to one factor might shed light upon another. **RMB Servs., Inc.**, 151 P.3d at 676; **Yadon**, 64 P.3d at 913. In determining whether good cause exists, the court should be guided by the general rule favoring resolution of disputes on their merits. **RMB Servs., Inc.**, 151 P.3d at 676.

Corporate Practice of Medicine

15. The corporate practice of medicine doctrine is a common law principle that recognizes "it is impossible for a fictional entity, a corporation, to perform medical actions or be licensed to practice medicine." **Estate of Harper v. Denver Health & Hosp. Auth.**, 140 P.3d 273, 275 (Colo. App. 2006) (quoting **Pediatric Neurosurgery, P.C. v. Russell**, 44 P.3d 1063, 1067 (Colo. 2002)). Under this doctrine, a corporation may not practice medicine or interfere with a physician's independent medical judgment. *Id.*; **Lufti v. Brighton Cmty. Hosp. Ass'n**, 40 P.3d 51 (Colo. App. 2001); *see also* §§ 12-36-134(7), 25-3-103.7, C.R.S. Thus, entities such as hospitals or other medical facilities cannot be held liable for a doctor's negligence based on respondeat superior. **Hall**, 190 P.3d at 861 (discussing policy considerations underlying prohibition); **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007) (hospital); **Estate of Harper**, 140 P.3d at 278 (hospital); **Daly v. Aspen Ctr. for Women's Health, Inc.**, 134 P.3d 450 (Colo. App. 2005) (corporate midwife facility). However, the doctrine has not been extended to bar a hospital's vicarious liability for the negligence of "other employees, such as nurses." **Nieto v. State**, 952 P.2d 834, 840-41 (Colo. App. 1997) (citing **Bernardi v. Cmty. Hosp. Ass'n**, 166 Colo. 280, 443 P.2d 708 (1968)), *aff'd in part, rev'd in part on other grounds*, 993 P.2d 493 (Colo. 2000).

16. The supreme court interpreted section 12-36-134 to create an exception to the common-law rule by allowing doctors to form professional service corporations for the practice of medicine. **Russell**, 44 P.3d at 1067-71. However, by expressly disagreeing with that opinion and revising the statute to assure that professional service corporations "shall not practice medicine," the legislature has decided that a physician's employment under the statute is "not [to] be considered the corporate practice of medicine." § 12-36-134(7), C.R.S. *See* **Estate of Harper**, 140 P.3d at 276 (interpreting statute). Nor does the Governmental Immunity Act's provision that a public entity is responsible for paying costs, judgments, and settlements of its public employees, § 24-10-110(1)(a), C.R.S., create any statutory exception to the doctrine. **Villalpando**, 181 P.3d at 364.

Captain of the Ship

17. "The captain of the ship doctrine, which is grounded in respondeat superior, imposes vicarious liability on a surgeon for the negligence of hospital employees under the surgeon's control and supervision during surgery." **Ochoa v. Vered**, 212 P.3d 963, 966 (Colo. App. 2009)

(citing **Beadles v. Metayka**, 135 Colo. 366, 370-71, 311 P.2d 711, 713-14 (1957); **Young v. Carpenter**, 694 P.2d 861 (Colo. App. 1984)). "A licensed physician is the principal or master while performing medical services within a hospital, rather than an agent or a servant." **O'Connell v. Biomet, Inc.**, 250 P.3d 1278, 1283 (Colo. App. 2010). Thus, hospital personnel assisting under the physician's control and supervision "are borrowed servants, and the physician is liable for their acts of negligence." *Id.* In those cases, use the instructions from Chapter 8 (liability based on agency and respondeat superior) that are appropriate based on the facts. *See* **Ochoa**, 212 P.3d at 967 (citing this note on use and approving prior version of Instruction 8:21 (formerly Instruction 8:2)).

18. The captain of the ship doctrine has been limited to medical care in the operating room. *See* **Settle v. Basinger**, 2013 COA 18, ¶ 44, 411 P.3d 717, 725 (observing that "no Colorado appellate court has applied the captain of the ship doctrine to render a non-surgeon vicariously liable for the negligence of another providing medical care outside an operating room"); **Colo. Med. Soc. v. Hickenlooper**, 2012 COA 121, ¶ 53, 353 P.3d 396, 404 (noting that the captain of the ship doctrine "only applies when the surgeon has the right to supervise and control other personnel who are present in the operating room"), *aff'd on other grounds*, 2015 CO 41, 349 P.3d 1133; **O'Connell**, 250 P.3d at 1283 (doctrine is not limited to hospital employees and applies to nonmedical persons in operating room); **Nieto**, 952 P.2d at 840-41 (hospital liable for negligence of nurse where "captain of the ship" doctrine not applicable); **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992) (trial court properly rejected a "captain of the ship" instruction where there was no evidence of negligence by hospital employees under the defendant doctor's supervision nor evidence that doctor was negligent in the selection or supervision of assistants); **Krane v. Saint Anthony Hosp. Sys.**, 738 P.2d 75 (Colo. App. 1987) (hospital as employer not liable for negligence of nurse while nurse acting under operating surgeon's supervision in operating room).

Joint and Several Liability

19. Section 13-21-111.5, which abolished the common law rule of joint and several liability, was enacted in Colorado in 1986 as part of comprehensive tort reform. Its adoption had "the effect of eliminating liability of a physician for the negligent acts of another physician absent a showing that the physicians 'acted in concert,' as provided in § 13-21-111.5(4), or that the physicians were in an employment, partnership, or joint venture relationship with one another." **Freyer v. Albin**, 5 P.3d 329, 331 (Colo. App. 1999). If the plaintiff is claiming that the defendant and the "actively" negligent physician had a relationship that would support vicarious liability on one of these other bases, e.g., a partnership, use the appropriate instructions from Chapters 7 or 8. *See* **Hall**, 190 P.3d at 860 (where evidence is sufficient to establish agency relationship between surgeon or "attending physician" and his colleague, as "cover physician," rejecting argument that former could not be vicariously liable for latter).

Statutory Duty/Immunity

20. The Colorado Professional Review Act, §§ 12-36.5-101 to -203, C.R.S., immunizes hospitals and health care facilities that comply with the Act "from damages in any civil action brought against [them] with respect to [their] participation in a professional peer review proceeding." **Kauntz v. HCA-HealthONE, LLC**, 174 P.3d 813, 817 (Colo. App. 2007); *see* § 12-36.5-203(1), C.R.S. However, the Professional Review Act no longer bars an action against hospitals and health care facilities credentialing a physician who is alleged to have been

negligent in performing a medical procedure. **Hickman v. Catholic Health Initiatives**, 2013 COA 129, ¶ 1, 328 P.3d 266. Specifically, the 2012 amendment provides: "[N]othing in this article relieves . . . a health care facility licensed or certified pursuant to [the Act] of liability to an injured person or wrongful death claimant for the facility's independent negligence in the credentialing or privileging process for a person licensed [under the Act]." § 12-36.5-203(2)(a).

21. For a discussion as to the duty of a mental health care provider to warn against violent behavior of a mental health patient, see **McCarty v. Kaiser-Hill Co.**, 15 P.3d 1122 (Colo. App. 2000); **Sheron v. Lutheran Medical Center**, 18 P.3d 796 (Colo. App. 2000); and **Halverson v. Pikes Peak Family Counseling & Mental Health Center, Inc.**, 795 P.2d 1352 (Colo. App. 1990). *See also* **Halverson v. Pikes Peak Family Counseling & Mental Health Ctr., Inc.**, 851 P.2d 233 (Colo. App. 1992) (construing section 13-21-117, C.R.S.).

22. Physicians and other healthcare professionals, inter alia, who also have a duty to report suspected child abuse or neglect to local authorities, § 19-3-304(1), C.R.S., are entitled to immunity from liability for any good-faith participation in providing those reports, § 19-3-309, C.R.S.; **Credit Serv. Co. v. Dauwe**, 134 P.3d 444 (Colo. App. 2005); **Montoya v. Bebensee**, 761 P.2d 285 (Colo. App. 1988), unless the plaintiff presents evidence that would show that the defendant's conduct was "willful, wanton, and malicious." § 19-3-309; **Dauwe**, 134 P.3d at 447; *see* **Montoya**, 761 P.2d at 289 (decided under prior statute); **Martin v. Weld County**, 43 Colo. App. 49, 598 P.2d 532 (1979).

23. Under the Good Samaritan statute, a physician, a surgeon, or any other person who in good faith renders emergency care or assistance without compensation at the scene of an emergency or accident is not liable for damages resulting from any good faith act or omission. § 13-21-108(1), C.R.S. However, it does not apply to "any person who renders such emergency care or emergency assistance to a patient he or she is otherwise obligated to cover." *Id.* This immunity extends to employers of such "Good Samaritans," as long as the care in question was provided during the course of the employee's employment and the employee was personally exempt under the statute. § 13-21-108(5). Similarly, those health-care providers who provide emergency care or emergency assistance to individuals who need it and who are engaged in a competitive sport have the same type of immunity. § 13-21-108.2, C.R.S.

24. Under the Volunteer Service Act, any volunteer, including a licensed physician, a licensed physician assistant, a licensed anesthesiologist assistant, a licensed nurse, a registered advance practice nurse, a certified nurse aide, or other health care professional designated in the Act, who offers medical care or treatment as a volunteer for a nonprofit organization, a nonprofit corporation, a governmental entity, or a hospital has immunity from civil liability if: (I) the volunteer is immune from liability for the act or omission under the federal "Volunteer Protection Act of 1997", as from time to time may be amended, codified at 42 U.S.C. § 14501 to -505 (2018); and (II) the damage or injury was not caused by misconduct or other circumstances that would preclude immunity for such volunteer under the federal law. § 13-21-115.5(4), C.R.S. Additionally, a nonprofit organization, nonprofit corporation, governmental entity, or hospital that is formed for the sole purpose of facilitating the volunteer provision of health care is immune from liability arising out of an act or omission of a volunteer who is immune from liability. § 13-21-115.5(4)(b)(II).

25. Health-care professionals and institutions cannot be liable for birth-related injuries or injuries resulting from genetic disease or disorder, or other natural causes, that could not have been prevented or avoided by the exercise of ordinary care. § 13-64-502(1), C.R.S.

15:2 NEGLIGENCE — NONSPECIALIST — DEFINED

A physician is negligent when the physician (does an act that reasonably careful physicians would not do) (or) (fails to do an act that reasonably careful physicians would do).

To determine whether a physician's conduct was negligent, you must compare that conduct with what a physician having and using the knowledge and skill of physicians practicing in the same field of practice, in the same or similar locality, at the same time, would or would not have done under the same or similar circumstances.

Notes on Use

1. See Notes on Use to Instruction 15:1. Use whichever parenthesized words are appropriate.

2. This instruction is generally applicable to members of other healing arts. In such cases, a more appropriate word describing the defendant's profession, e.g., "surgeon," "dentist," "chiropractor," should be substituted for the word "physician." For the standard of care required of practitioners of professions other than the healing arts, see Instructions 15:18 and 15:25.

3. If there is a dispute as to which standard — the "local" standard of this instruction or the "specialty" standard of Instruction 15:3 — is applicable, and there is sufficient evidence supporting each, both instructions should be given with appropriate modifications being made if necessary to avoid confusion for the jury. **Short v. Kinkade**, 685 P.2d 210 (Colo. App. 1983); *see* **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). *But see* **Jordan v. Bogner**, 844 P.2d 664 (Colo. 1993) (error to give local standard instruction if undisputed evidence established that defendant physician was a specialist in family practice).

4. This instruction applies only if the standard of care applicable to the allegedly negligent act is a professional one. *See, e.g.*, **Myers v. Woodall**, 42 Colo. App. 44, 592 P.2d 1343 (1978); *see also* **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001) (claims against a professional that do not allege any type of professional negligence do not fall under the certificate of review statute, § 13-20-602, C.R.S., and do not require standard of care to be established by expert testimony).

5. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself deficient, this instruction must be modified to inform the jury that evidence of the physician's compliance with the community standard of care is some evidence that the physician was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana**, 827 P.2d 509 (Colo. 1992).

6. As to the personal or vicarious liability of a "licensed physician, nurse, prehospital emergency medical personnel, or health care institution . . . for any act or omission resulting from the administration of services by a [direct-entry midwifery] registrant," see section 12-37-109(1)(a), C.R.S. When, in light of the evidence in the case, provisions of this section might be

applicable, this instruction must be appropriately modified, or one or more instructions based on section 12-37-109(1)(a) should be given.

Source and Authority

1. This instruction is supported by **Larson v. Lindahl**, 167 Colo. 409, 450 P.2d 77 (1968) (physician properly found negligent on basis of "community" standard); **Klimkiewicz v. Karnick**, 150 Colo. 267, 372 P.2d 736 (1962) (chiropractor); **Foose v. Haymond**, 135 Colo. 275, 310 P.2d 722 (1957) (physician); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934) (dentist); and **Caro v. Bumpus**, 30 Colo. App. 144, 491 P.2d 606 (1971) ("same field of practice" rule applied). *See also* **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997) (discussing negligence of physician); **Melville v. Southward**, 791 P.2d 383 (Colo. 1990) (podiatrist; qualifications of an expert witness trained in one "school" or field of practice to testify as to the standards of another); **Hall**, 190 P.3d at 858-59 (discussing appropriateness of allowing expert physicians in various specialties to testify as to general standard of care common to medical profession and applicable to any physician or fourth-year medical student); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000) (psychiatrist); **DeCordova v. State**, 878 P.2d 73 (Colo. App. 1994) (discussing the "reasonably careful pharmacist" standard); **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975).

2. For a discussion as to the duty of a physician retained by the defendant in a personal injury action to use due care in subjecting the plaintiff to medical tests, see **Greenberg v. Perkins**, 845 P.2d 530 (Colo. 1993). *See also* **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000); **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998) (physician retained by insurer to conduct medical examination of insured owed no duty of care to insured to use reasonable care in preparing and making report to insurer regarding insured's medical condition); **Dalton v. Miller**, 984 P.2d 666 (Colo. App. 1999).

15:3 NEGLIGENCE — SPECIALIST OR ONE WHO HAS OR CLAIMS TO HAVE SPECIAL SKILL — DEFINED

A physician (who holds himself or herself out as a specialist in a particular field of medicine) (or) ([who has] [or] [who holds himself or herself out as having] special skill and knowledge to perform a particular [diagnosis] [operation] [treatment] [or] [procedure]) is negligent if that physician (does an act that reasonably careful physicians [acting as such specialists] [or] [possessing such special skill and knowledge] would not do) (or) (fails to do an act that reasonably careful physicians [acting as such specialists] [or] [possessing such special skill and knowledge] would do).

To determine whether such a physician's conduct was negligent, you must compare that conduct with what a physician having and using the knowledge and skill of physicians (practicing in the same specialty) (or) ([who have] [or] [who hold themselves out as having] the same special skill and knowledge), at the same time, would or would not have done under the same or similar circumstances.

Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate, and substitute other words, e.g., "dentist" for "physician" and "field of dentistry" for "field of medicine," if appropriate.

2. This instruction should be used rather than Instruction 15:2 when (1) the defendant has held himself or herself out as being a specialist in an area commonly recognized as such in his or her profession, or (2) the defendant has held him or herself out as having special skill and knowledge not commonly possessed by others in his or her profession, or (3) there is sufficient evidence that the defendant did in fact have that special skill or knowledge. **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). If there is a dispute as to which standard — the "local" standard of 15:2 or the "specialty" standard of this instruction — is applicable, and there is sufficient evidence supporting each, both instructions should be given, with appropriate modifications being made, if necessary, to avoid confusion for the jury. **Gambrell v. Ravin**, 764 P.2d 362 (Colo. App. 1988), *aff'd on other grounds*, 788 P.2d 817 (Colo. 1990); **Short v. Kinkade**, 685 P.2d 210 (Colo. App. 1983); *see* **Hall**, 190 P.3d at 858 (although trial court allowed experts in various specialties to testify as to general standard of care for matters common to medical profession, it properly instructed jury under Instruction 15:3, and surgeon could not have been prejudiced if jury held him to less stringent standard of care). *But see* **Jordan v. Bogner**, 844 P.2d 664 (Colo. 1993) (error to give local standard instruction if undisputed evidence established that defendant physician was a specialist in family practice).

3. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself deficient, this instruction must be modified to inform the jury that evidence of the specialist's compliance with the community standard of care is some evidence that the physician was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana**, 827 P.2d 509 (Colo. 1992).

Source and Authority

1. This instruction is supported by **Short**, 685 P.2d at 212; and **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (in malpractice action against specialist plaintiff must prove defendant failed to meet the standard of care of physicians practicing in same specialty). *See also* **Jordan**, 844 P.2d at 667-68; **Hall**, 190 P.3d at 858; **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992); **Songer v. Bowman**, 804 P.2d 261 (Colo. App. 1990) (specialist is required to exercise degree of care and to possess degree of knowledge and skill ordinarily possessed by persons practicing within that specialty), *overruled on other grounds by* **People v. Ramirez**, 155 P.3d 371 (Colo. 2007); RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1965).

2. This instruction is also impliedly supported by several other Colorado cases. *See, e.g.*, **Artist v. Butterweck**, 162 Colo. 365, 426 P.2d 559 (1967); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934); **Bonnet v. Foote**, 47 Colo. 282, 107 P. 252 (1910).

3. The generally accepted standard of care by a specialist cannot be determined simply by counting how many physicians follow a particular practice. **State Bd. of Med. Exam'rs v. McCroskey**, 880 P.2d 1188 (Colo. 1994); **Wallbank v. Rothenberg**, 74 P.3d 413 (Colo. App. 2003). Nor may the relevant standard of care be established by testimony concerning the personal practices of expert witnesses. **Wallbank**, 74 P.3d at 416 (after expert testifies concerning standard of care, testimony regarding that expert's personal practices may then help jurors understand why that standard of care is followed by that expert or others).

15:4 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME

(Unless a [physician] [nurse] states or agrees otherwise, a) (A) [physician] [nurse] does not guarantee or promise a successful outcome by simply treating or agreeing to treat a patient.

(An unsuccessful outcome does not, by itself, mean that a [physician] [nurse] was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a [physician] [nurse] was negligent.)

Notes on Use

1. The Notes on Use to Instructions 15:1 and 15:2 are also applicable to this instruction.

2. This cautionary instruction should be given in conjunction with Instruction 15:2 or 15:3 when the evidence of malpractice includes an unsuccessful outcome. **Schuessler v. Wolter**, 2012 COA 86, ¶¶ 8, 28, 310 P.3d 151 (rejecting claim that instruction simply creates rebuttable presumption).

3. This instruction, in the discretion of the trial court, may be applied to nurses. In such circumstances, the bracketed word "nurse" should be used. **Gasteazoro ex rel. Eder v. Catholic Health Initiatives Colo.**, 2014 COA 134, ¶ 35, 408 P.3d 874.

4. Use whichever parenthesized words are appropriate. Omit the first parenthesized clause unless there has been some evidence that the defendant may have so stated or agreed. If there is sufficient evidence that the defendant may have warranted or promised a cure, instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, for example, negligent malpractice or battery, depending on the evidence in the case.

Source and Authority

This instruction is supported by **Day v. Johnson**, 255 P.3d 1064 (Colo. 2011) (supporting third parenthetical phrase of instruction); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934); **Locke v. Van Wyke**, 91 Colo. 14, 11 P.2d 563 (1932) (supporting first and second parenthetical phrases of instruction); **Craghead v. McCullough**, 58 Colo. 485, 146 P. 235 (1915); **Bonnet v. Foote**, 47 Colo. 282, 107 P. 252 (1910); **Schuessler**, 2012 COA 86, ¶ 29 (supporting second parenthetical phrase of instruction); **Gasteazoro ex rel. Eder v. Catholic Health Initiatives Colo.**, 2014 COA 134, ¶ 35 (supporting a modified instruction that includes nurses).

15:5 REFERRAL OF PATIENT TO ANOTHER PHYSICIAN

A (physician) (surgeon) who refers a patient to another (physician) (surgeon) for *(insert appropriate description, e.g., "diagnosis," "treatment," "care," etc.)* **is not responsible for any negligence on the part of the other (physician) (surgeon). A referring (physician) (surgeon) who fails to exercise reasonable care in selecting the other (physician) (surgeon) may be held responsible for (his) (her) own negligence.**

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. This instruction should not be given, or must be appropriately modified, if there is a basis in the evidence in the case for imposing vicarious liability on the professional person because the other professional person is an agent, employee, or partner. *See* **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008) (where evidence was sufficient to establish agency relationship, attending surgeon could be held vicariously liable for his negligent colleague who covered for him).

3. If there is any other personal basis for imposing liability on the professional person making the reference, such as personal negligence in giving incorrect information to the other professional person, this instruction must also be appropriately modified.

4. This instruction, with any necessary modifications, may also be applicable in uninformed consent cases (Instruction 15:10).

5. In cases alleging a negligent referral, use Instruction 9:1 or 9:22.

Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases from other jurisdictions that do so. *See* W.R. Habeeb, Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (1962); *see also* Source and Authority to Instruction 15:1.

15:6 CONTRIBUTORY NEGLIGENCE OF PATIENT — DEFINED

A patient is negligent when the patient fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect himself or herself from (new) (or) (additional) (injuries) (damages) (losses).

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. When there is sufficient evidence that a patient may have been negligent, but negligent only with regard to the services being rendered by the defendant, for example, the failure of a patient to follow a physician's advice, then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22.

3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the plaintiff's treatment should be viewed as a matter of contributory negligence, to be governed by this instruction, Instruction 9:22, and the appropriate comparative negligence instructions in Chapter 9, or as a matter of failure to mitigate damages, to be governed by Instruction 5:2. If necessary, the court by special instructions or through the use of special interrogatories should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages caused by a prior-occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries. *See* Instruction 9:6.

4. The defense of comparative negligence is not available when the allegedly negligent conduct of the patient created the need for medical treatment in the first place, but did not contribute to the injuries directly resulting from the negligent medical treatment itself. **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1996).

5. The defense of comparative negligence is not available when a patient attempts to commit suicide at a secure psychiatric unit because the hospital, by admitting a known suicidal patient to an inpatient psychiatric unit, assumed an affirmative duty to prevent the patient's self-destructive behavior and that duty subsumed the patient's own duty of self-care. **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 25, 364 P.3d 891. The court cautioned that the "holding is limited by the factual situation presented here" where the hospital had knowledge that the patient was actively suicidal and, with this knowledge, the hospital admitted the patient to its secure mental health unit and placed him under "high suicide precautions" for the purpose of

preventing the patient from attempting suicide. *Id.* at ¶ 27. *But see* **Sheron v. Lutheran Med. Ctr.**, 18 P.3d 796 (Colo. App. 2000) (patient who is treated by health care providers at the hospital for suicidal ideations, and who later commits suicide a day after being discharged from the hospital may be found comparatively negligent).

Source and Authority

This instruction is supported by **Sheron**, 18 P.3d at 799; **Songer v. Bowman**, 804 P.2d 261 (Colo. App. 1990), *overruled on other grounds by* **People v. Ramirez**, 155 P.3d 371 (Colo. 2007); and **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); Source and Authority to Instruction 9:6. For a discussion of the failure of a patient to follow a physician's advice as constituting contributory negligence, see **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912). *See also* **Hanley**, 108 Colo. at 187, 115 P.2d at 400; **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); **Sheron**, 18 P.3d at 801.

B. BATTERY

15:7 OPERATION OR TREATMENT WITHOUT CONSENT OF PATIENT

Unless the patient consents, any (operation on) (or) (procedure involving contact with) a patient's body is a battery, even when appropriate skill is used in the (operation) (procedure) (or) (treatment).

(If a patient consents to a certain [operation] [procedure] [or] [treatment], and the physician performs a different [operation] [procedure] [or] [treatment] without the patient's consent, the physician commits a battery and is responsible to the patient for the damages, if any, caused by the [operation] [procedure] [or] [treatment]).

Notes on Use

1. "The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13]." **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985); *see also* **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). Consequently, if the plaintiff is making a claim only on the basis of the lack of "informed consent," the instructions in subpart C of this Part I should be used rather than this instruction. If the plaintiff is making a claim on the basis of no consent as well as one based on lack of "informed consent" (and there is sufficient evidence supporting each claim), the instructions in subpart C of this Part I should be given as well as this instruction.

2. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction.

3. When an emergency is asserted, and there is sufficient evidence to support it, Instruction 15:9 should also be given with this instruction.

4. Use whichever parenthesized words are appropriate. Omit all parenthesized or bracketed portions of this instruction, including the entire second paragraph, if inapplicable.

5. This instruction must be appropriately modified in situations covered by section 13-21-108, C.R.S. ("Good Samaritan" statute), or other similar statutes.

Source and Authority

This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982); **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954); and **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995).

15:8 AFFIRMATIVE DEFENSE — CONSENT, EXPRESS OR IMPLIED

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of battery if the affirmative defense of consent is proved. This defense is proved if you find the plaintiff gave express or implied consent to the (operation) (treatment) that was performed.**

Express consent may be given orally or in writing. Implied consent means words or conduct of the plaintiff that led the defendant reasonably to believe that the plaintiff was consenting to the (operation) (treatment).

Notes on Use

1. In certain cases involving minors, *see* §§ 13-22-101 to -106, 13-20-403, C.R.S., this instruction may require modifications.

2. Use whichever parenthesized words or phrases are appropriate.

3. This instruction must be appropriately modified if there is a dispute as to whether any operation or treatment had been performed, or whether it had been performed by the person to, or for whom, consent had been given.

Source and Authority

This instruction is supported by **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954).

15:9 AFFIRMATIVE DEFENSE — IMPLIED CONSENT BASED ON EMERGENCY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of battery if the affirmative defense of implied consent based on an emergency is proved. This defense is proved if you find all of the following:**

1. At the time the defendant treated the plaintiff, the defendant reasonably believed the plaintiff's life or health was in such danger that to delay (surgery) (treatment) would further endanger the plaintiff's life or health;

2. Under the same or similar circumstances, a reasonably careful physician would have believed the same thing; and

3. The plaintiff was in a mental or physical condition that prevented (him) (her) from being able to indicate (his) (her) consent or lack of consent.

Notes on Use

1. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction.

2. Use whichever parenthesized words are most appropriate.

3. The rule stated in this instruction applies to claims based on lack of "informed consent" (Instruction 15:10) and battery claims generally, but not to other malpractice claims.

4. In cases governed by section 13-21-108, C.R.S. ("Good Samaritan" statute), or any similar statute, an instruction based on the particular statute should be given in lieu of this instruction. In certain cases, however, it is possible that both a statute and the rule stated in this instruction may be applicable.

5. The rule of this instruction does not apply if the physician knows or reasonably should have known the patient would not have consented to the operation or treatment had the patient been in a position to indicate his or her desires. *See* RESTATEMENT (SECOND) OF TORTS § 892D (1979).

6. This instruction must be appropriately modified if another person was authorized by the plaintiff or by operation of law to give or withhold consent on the plaintiff's behalf in such circumstances.

Source and Authority

This instruction is supported by **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988) (citing with approval prior version of this instruction). *See also* RESTATEMENT § 892D.

C. UNINFORMED CONSENT

15:10 UNINFORMED CONSENT — ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) claim of negligence based on lack of informed consent, you must find all of the following have been proved by a preponderance of the evidence:**

1. The defendant *(insert an appropriate description of the procedure, treatment, surgery, tests, etc., that the plaintiff claims the defendant performed or prescribed)* **(on) (for) the plaintiff;**

2. The defendant negligently failed to obtain the plaintiff's informed consent before *(insert appropriate description of procedure, etc., as above)***;**

3. A reasonable person in the same or similar circumstances as the plaintiff would not have consented to *(insert appropriate description)* **had (he) (she) been given the information required for informed consent; and**

4. The defendant's negligent failure caused the plaintiff (additional) (injuries) (damages) (losses).

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified

as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

5. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction. Whenever this instruction is given, Instruction 15:11 and, if otherwise applicable, Instructions 15:12 and 15:13 must also be given. For the general definition of "negligence" as used in this instruction, use the first paragraph of Instruction 15:2. The applicable standard for determining such negligence, "national" or "local," is covered in Instruction 15:11.

6. The appropriate instruction relating to causation in Chapter 9 should also be given with this instruction.

7. "The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13]." **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985); *see also* **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). Consequently, if the plaintiff is making a claim only on the basis of the lack of "informed consent," the instructions in subpart C of this Part I should be used. If the plaintiff is making a claim on the basis of no consent as well as one on the basis of lack of "informed consent" (and there is sufficient evidence supporting each claim), applicable instructions in subparts B and C of this Part I should be given, appropriately modified as may be necessary.

8. The third numbered paragraph of the instruction incorporates an objective standard; however, subjective testimony of what the patient would have done is some evidence of what a reasonable person in the patient's position would have done. **Holley v. Huang,** 284 P.3d 81 (Colo. App. 2011).

9. When supported by sufficient evidence, Instruction 15:9 (emergencies) should be given with this instruction.

10. If the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:22, and that instruction should then be used in accord with its Notes on Use.

11. With regard to electroconvulsive treatment, an appropriate instruction based on sections 13-20-401 to -403, C.R.S., should be used rather than this instruction.

Source and Authority

1. This instruction is supported by **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Mallett v. Pirkey**, 171 Colo. 271, 466 P.2d 466 (1970); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975); **Martin v. Bralliar**, 36 Colo. App. 254, 540 P.2d 1118 (1975) (disclosure of general risks does not discharge the duty to disclose substantial or specific risks); and **Stauffer v.**

Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971) (citing with approval what is now the third paragraph of Instruction 15:11; once there is evidence that the patient was uninformed when "consent" was given due to a failure to disclose, the physician must go forward with evidence showing that the failure to disclose conformed with community standards or, if applicable, national standards). *See also* **Mudd v. Dorr**, 40 Colo. App. 74, 574 P.2d 97 (1977).

2. Generally, it is the treating physician or surgeon and not a hospital that has the legal obligation to obtain the informed consent of the patient prior to surgery. **Krane v. Saint Anthony Hosp. Sys.**, 738 P.2d 75 (Colo. App. 1987). *See* **Garhart v. Columbia/HealthONE, L.L.C**, 95 P.3d 571 (Colo. 2004) (generally, doctor has duty to obtain patient's informed consent to perform proposed medical procedure, and hospital presented sufficient evidence to show that doctors were negligent in failing to inform plaintiff of risks associated with vaginal delivery).

3. A claim for lack of informed consent is based on information communicated by a physician to a patient before treatment is commenced and, in the absence of a significant change in the patient's condition that would cause a risk to become substantial, a physician has no duty to continue warning the patient during the course of that treatment. However, where a new, previously undisclosed and substantial risk arises during the course of medical treatment, there may be an additional duty on the part of the physician to warn the patient of that risk. **Gorab**, 943 P.2d at 430.

4. "Informed consent claims typically arise out of a substantial risk associated with a competently performed procedure." **Hall v. Frankel**, 190 P.3d 852, 864 (Colo. App. 2008). For purposes of informed consent, a physician has no duty to disclose risks of diagnostic errors or the availability of other procedures that the physician has determined are not medically indicated, as those kinds of errors are adequately covered by claims of negligence. *Id*. (claims for failure to properly diagnose or to order appropriate tests are generally litigated under negligence theory). *See* Instructions 15:2 and 15:3.

5. Although doctors typically obtain their patients' consent in writing, "[a] doctor may employ any means of communication—such as conversation, writings, video, and audio recordings, or some combination of these—that will yield a properly informed consent." **Holley**, 284 P.3d at 83; *see* **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954).

15:11 INFORMATION REQUIRED

A physician must obtain the patient's informed consent before (treating) (operating on) (or) (performing a procedure on) the patient.

For a patient's consent to be an informed consent, a physician must have informed the patient of the following:

1. The nature of the (illness) (injury) (or) (medical condition);

2. The nature of the (operation) (procedure) (or) (treatment);

3. The alternative treatments available, if any; and

4. The substantial risks, if any, involved in undergoing the (operation) (procedure) (or) (treatment), and the substantial risks, if any, of the alternative treatments.

A physician must inform a patient of the above *(insert number)* **items to the extent a reasonable physician practicing in the same field of practice (as a general practitioner in the same or similar locality) (as a specialist), at the same time, would have under the same or similar circumstances. The failure to do so is negligence.**

Notes on Use

1. See the Notes on Use to Instruction 15:10.

2. The last paragraph of Instruction 15:8 may be given with this instruction to explain what is meant by "express or implied" consent.

3. Use whichever parenthesized words are appropriate. In the last paragraph, if there is a dispute as to which standard is applicable in light of the evidence in the case, both parenthetical clauses should be given in the alternative, with another instruction, based on the first clause of the first paragraph of Instruction 15:3, explaining to the jury how they should determine whether the defendant should be considered a "general practitioner" or a "specialist." Expert testimony is necessary to establish the precise scope of a physician's duty of disclosure, and therefore, a claim based on lack of informed consent is properly dismissed where plaintiff fails to file a certificate of review pursuant to section 13-20-602, C.R.S. **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995); *see also* **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003).

4. If numbered paragraph 4 of this instruction is given, Instruction 15:12, defining "substantial risk," must also be given.

Source and Authority

1. This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982); and **Miller v. Van Newkirk**, 628 P.2d 143 (Colo. App. 1980).

2. If the plaintiff shows that a physician failed to inform of any risks of a medical procedure, that element of a prima facie case is met, and the burden shifts to the defendant to establish that nondisclosure conformed to the applicable standard. **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997). However, if the plaintiff claims that the disclosure was simply incomplete or that a specific risk was assessed incorrectly, then the plaintiff has the burden of showing that the specific risk was substantial and should have been disclosed in conformity with the applicable standard. **Williams**, 72 P.3d at 399.

15:12 SUBSTANTIAL RISK — DEFINED

A substantial risk is one that a physician knows or that a reasonably careful physician should know would be important to the patient in deciding whether to submit to a particular (operation) (treatment) (or) (procedure).

Notes on Use

1. This instruction must be given whenever numbered paragraph 4 of Instruction 15:11 is given.

2. Use whichever parenthesized words are appropriate.

Source and Authority

This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). *See also* **Gorab v. Zook**, 943 P.2d 423, 427 (Colo. 1997) (recognizing that a substantial risk is "one that would be medically significant to the patient's decision, and the risk is known or ought to be known by the physician").

15:13 PROOF OF NEGLIGENT FAILURE TO OBTAIN INFORMED CONSENT

If you find the defendant, *(name)***,** *(insert appropriate description of the procedure, etc., as in numbered paragraph 1 of Instruction 15:10)***, (on) (for) the plaintiff, (name), and the plaintiff had (injuries) (damages) (losses) because of a risk associated with that** *(insert appropriate description, e.g., "treatment," "procedure," "test," etc.)***, and the defendant did not inform the plaintiff of that risk, then you must find that the defendant negligently failed to obtain the plaintiff's informed consent.**

Notes on Use

1. This instruction should not be given unless (1) there is sufficient evidence of the basic facts on which the mandatory inference of negligence depends, and (2) there is no or insufficient evidence in the case rebutting that same inference. If there is sufficient evidence rebutting the inference of negligence in not obtaining the plaintiff's informed consent, that is, the burden of going forward with the evidence has been met, this instruction should not be given. The reason for not giving the instruction in the latter circumstance is that the rule set out in the instruction functions in the same manner as a presumption that shifts only a burden of going forward with the evidence and that "disappears" from the case if there is sufficient evidence in the case rebutting the "inferred" or "presumed" fact of negligence. *See* Source and Authority to Instruction 15:10; Notes on Use to Instruction 3:5 (discussing procedural effects of such presumptions).

2. "The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13]." **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985); *see also* **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). This Instruction 15:13, therefore, should not be given in conjunction with Instruction 15:7, but rather should be given only with Instruction 15:10 when otherwise appropriate.

3. For a discussion of the shifting burdens of proof involved in a claim for lack of informed consent, see **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997).

Source and Authority

This instruction is supported by **Gorab**, 943 P.2d at 427. *See also* **Blades**, 666 P.2d at 1129-30; Source and Authority to Instruction 15:10.

D. DAMAGES INSTRUCTIONS AND SPECIAL VERDICTS IN ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS

15:14 SPECIAL VERDICT — MECHANICS FOR SUBMITTING — TORT ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)?**

2. Was the defendant, *(name of first or only defendant)***, negligent?**

3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

4. Was the defendant, *(name of second defendant)***, negligent?**

5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

If you find that the plaintiff, *(name)***, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants were) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.**

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer questions 1 through *(insert the figure "3" or "5" depending on whether there is one defendant or there are two defendants)* **as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and he or she and all jurors will sign it.**

6. Was *(name or other appropriate description of designated nonparty)* **negligent or at fault?**

7. Was the negligence or fault, if any, of *(name or other appropriate description of designated nonparty)* **a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

8. Was the plaintiff, *(name)***, negligent?**

9. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?

10. and 11. State your answers to numbered questions 10 and 11 as they appear on Special Verdict Form B relating to the damages the plaintiff had that were caused by the negligence of the (defendant) (one or more of the defendants) and the negligence, if any, of the plaintiff and of the nonparty, *(name or other appropriate description)***.**

12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty you find were negligent or at fault and whose negligence or fault was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any, was that of the defendant, *(name of first or only defendant)***, of the defendant,** *(name of second defendant)***, of the plaintiff,** *(name)***, and of the nonparty,** *(name or other appropriate description)***?**

You must enter the figure of zero, "0," for the nonparty and any party you decide was not negligent or at fault or whose negligence or fault you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

Notes on Use

1. Under the Health Care Availability Act (HCAA), the instructions in this subpart D, if otherwise applicable, should be used in "any civil action for damages in tort brought against a [licensed] health care professional or [licensed and certified] health care institution." § 13-64-203, C.R.S. For the definitions of these persons and institutions, see section 13-64-202(3) and (4), C.R.S. *See also* **Scholz v. Metro. Pathologists, P.C.**, 851 P.2d 901 (Colo. 1993) (unlicensed, nonprofessional lab employee of "health care professional" was covered by HCAA), *superseded in part by* § 13-64-302(2), C.R.S.; **Chavez v. Parkview Episcopal Med. Ctr.**, 32 P.3d 609 (Colo. App. 2001) (cap on noneconomic damages under section 13-64-302(1), not applicable to manufacturer of health care equipment); *cf.* **Moffett v. Life Care Ctrs. of Am.**, 187 P.3d 1140 (Colo. App. 2008) (under durable power-of-attorney statute and definition of "medical treatment," § 15-14-505(7), C.R.S., decision to admit patient to nursing home constitutes "medical treatment decision"), *aff'd on other grounds*, 219 P.3d 1068 (Colo. 2009).

2. This instruction and Instruction 15:15, which must be given with this instruction, have been drafted to cover what are likely to be the most extensive, yet typical, circumstances to which they might apply. These instructions, therefore, must be appropriately modified in any of the following circumstances:

a. There is sufficient evidence that the tort involved is one other than malpractice in the form of professional negligence, e.g., battery;

b. There is more than one plaintiff;

c. There is only one defendant or more than two defendants;

d. No defense of contributory negligence has been raised or there is insufficient evidence to support the defense;

e. No nonparty has been designated under the provisions of section 13-21-111.5(3)(b), C.R.S., or there is no or insufficient evidence of any tortious conduct on the part of a properly designated nonparty or that such conduct was a cause of any of the plaintiff's claimed injuries; or

f. The claim against one or more defendants is based only on the vicarious liability of that defendant for the tortious conduct of another defendant or person who has not been joined as a party.

3. When appropriate to the evidence in the case, Instructions 15:16 and 15:17 should also be given with this instruction.

4. Use whichever parenthesized words and phrases are appropriate.

5. If this instruction is otherwise applicable, none of the instructions in Chapter 9 concerning comparative negligence or several liability should be given except that, if otherwise appropriate, Instructions 9:28 (comparative negligence) and 9:24 (affirmative defense — negligence or fault of designated nonparty) should be given with this instruction.

6. This instruction has been drafted to allow the court to apply the limitations on damages set out in section 13-64-302, and also the limitations set in section 13-21-102.5, C.R.S., to the extent those limitations may be applicable in cases in which the acts or omissions occurred before July 1, 2003. For that reason, when otherwise applicable, this instruction should be used rather than Instruction 6:1A. *See also* **Preston v. Dupont**, 35 P.3d 433 (Colo. 2001) (damages for physical impairment or disfigurement are not precluded by HCAA, and are not subject to cap on noneconomic damages; this latter holding was legislatively overruled by § 13-64-302(1)(b) for acts or omissions occurring after July 1, 2003); **Chavez**, 32 P.3d at 612-13 (noneconomic damages award against hospital should not be reduced to statutory limit for health care institutions before apportioning damages between hospital and defendant that was not health care professional or institution).

7. Delete any reference to Question 11 if there is insufficient evidence of any future damages. *See* **Wallbank v. Rothenberg**, 74 P.3d 413 (Colo. App. 2003) (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred); *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (trial court did not abuse discretion in remitting damages awarded for plaintiff's future medical expenses).

8. Insert in this instruction and Instruction 15:15 any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

9. For special procedural and substantive limitations that are, or may be, applicable when a claim for punitive damages is based on a negligence claim against a "health care professional," see section 13-64-302.5, C.R.S., and **Sheron v. Lutheran Medical Center**, 18 P.3d 796 (Colo. App. 2000) (under statute, request for punitive damages may not be included in initial claim for relief, though after parties have substantially completed discovery, plaintiff may amend

pleadings to assert claim, provided plaintiff establishes prima facie proof of triable issue). To the extent any provisions of this section are applicable, appropriate modifications may be required in this instruction. *See, e.g.*, § 13-64-302.5(4), (5). The legislature has made it clear that noneconomic damages and, therefore, any limitation on them, do not include punitive damages. § 13-64-302(1)(a)(I).

Source and Authority

1. This instruction is supported by sections 13-64-203 to -205, C.R.S. *See also* § 13-64-102(2), C.R.S. (legislative declaration); **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002); **Preston**, 35 P.3d at 438; and **Garhart v. Columbia/HealthONE L.L.C.**, 168 P.3d 512 (Colo. App. 2007).

2. The damages caps imposed by the HCAA apply to any prefiling prejudgment interest to which the plaintiff would be entitled. § 13-64-302(2) (legislatively overruling, in part, **Scholz**, 851 P.2d 901); **Morris v. Goodwin**, 185 P.3d 777 (Colo. 2008); **Wallbank**, 74 P.3d at 420. Prejudgment interest is to be calculated on the amount of the reduced award, after application of any HCAA damages caps, regardless of the amount awarded by the jury. **Morris**, 185 P.3d at 780.

3. For a discussion of the constitutionality of the HCAA, see **Garhart v. Columbia/HealthONE, L.L.C.**, 95 P.3d 571 (Colo. 2004) (reaffirming **Scholz,** rejecting various constitutional attacks, and upholding constitutionality of damages cap); **Rodriguez**, 50 P.3d at 896 (HCAA section barring incapacitated person from electing to receive lump-sum payment of future damages did not violate equal protection); **Scholz**, 851 P.2d at 907 (upholding constitutionality of damages cap).

4. Under section 13-64-207(1), C.R.S., the trial court has discretion in determining the form and distribution of periodic payments. **Rodriguez**, 50 P.3d at 896; **Garhart**, 168 P.3d at 518.

15:15 SPECIAL VERDICT FORMS — TORT ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS — FORMS A AND B

FORM A

IN THE _____ COURT IN AND FOR THE COUNTY OF _____, STATE OF COLORADO

Civil Action No. _____

_____ Plaintiff,	**)**	
v.	**)**	**SPECIAL VERDICT**
_____ Defendant(s).	**)**	**FORM A**

DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)? (Yes or No)**

ANSWER:_____

2. Was the defendant, *(name of first or only defendant)***, negligent? (Yes or No)**

ANSWER:_____

3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER:_____

4. Was the defendant, *(name of second defendant)***, negligent? (Yes or No)**

ANSWER:_____

5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER:_____

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

_____ _____

_____ _____

_____ _____

Foreperson

FORM B

IN THE _____ COURT IN AND FOR THE COUNTY OF _____, STATE OF COLORADO

Civil Action No. _____

_____	**)**	
Plaintiff,	**)**	
	)	
v.	**)**	**SPECIAL VERDICT**
	)	**FORM B**
_____	**)**	
Defendant(s).	**)**	

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, *(name)***, have (injuries) (damages) (losses)? (Yes or No)**

ANSWER:_____

2. Was the defendant, *(name of first or only defendant)***, negligent? (Yes or No)**

ANSWER:_____

3. Was the negligence, if any, of the defendant, *(name of first or only defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER:_____

4. Was the defendant, *(name of second defendant)***, negligent? (Yes or No)**

ANSWER:_____

5. Was the negligence, if any, of the defendant, *(name of second defendant)***, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER:_____

If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent, and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:

6. Was *(name or other appropriate description of designated nonparty)* **negligent or at fault? (Yes or No)**

ANSWER:_____

7. Was the negligence or fault, if any, of *(name or other appropriate description of designated nonparty)* **a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

ANSWER:_____

8. Was the plaintiff, *(name)***, negligent? (Yes or No)**

ANSWER:_____

9. Was the negligence, if any, of the plaintiff a cause of (his) (her) claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER:_____

State your answers to the following questions numbered 10 and 11 relating to the damages the plaintiff had that were caused by the negligence of the (plaintiff) (defendant) (one or more of the defendants) and the negligence, if any, of the nonparty *(name or other appropriate description)***:**

10. Damages to the present: What is the total amount of (injuries) (damages) (losses) that the plaintiff has had to the present in each of the following categories? Enter the figure

zero, "0," for any category if you determine there were no (injuries) (damages) (losses) in that category.

a. Medical and other health care expenses: **$____**
b. Lost earnings (and lost earning capacity): **$____**
c. Other economic losses than those included immediately above in a. and b.: **$____**
d. Non-economic losses, including pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and *(insert any other recoverable non-economic loss of which there is sufficient evidence)***:** **$____**

11. Future damages: What is the present value of the total amount of (injuries) (damages) (losses) that the plaintiff will probably have in the future in each of the following categories? Enter the figure zero, "0," for any category, if you determine that the plaintiff will probably have no future (injuries) (damages) (losses) in that category. For each category in which you determine the plaintiff will probably have future (injuries) (damages) (losses), you must also indicate the period of time that plaintiff will probably have those future (injuries) (damages) (losses).

a. Medical and other health care expenses: **$_____**

Duration of injuries, damages, losses: **From _____ To _____**

b. Lost earnings (and lost earning capacity): **$_____**

Duration of injuries, damages, losses: **From _____ To _____**

c. Other economic losses than those included immediately above in a. and b.: $_____

Duration of injuries, damages, losses: **From _____ To _____**

d. Non-economic losses, including pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and *(insert any other recoverable non-economic loss of which there is sufficient evidence)***:** **$_____**

Duration of injuries, damages, losses: **From _____ To _____**

12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty you find were negligent or at fault and whose negligence or fault was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any, was that of the defendant, *(name of first or only defendant)***, of the defendant,** *(name of second defendant)***, of the plaintiff,** *(name)***, and of the nonparty,** *(name or other appropriate description)***?**

You must enter the figure of zero, "0," for the nonparty and any party you decide was not negligent or at fault or whose negligence or fault you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

ANSWER: _____

Percentage charged to *(name of first or only defendant)***:** **_____ %**
Percentage charged to *(name of second defendant)***:** **_____ %**
Percentage charged to *(name or other appropriate description of nonparty)***:** **_____ %**
Percentage charged to *(name of plaintiff)***:** **_____ %**

MUST TOTAL: 100% **_____%**

_____ _____

_____ _____

_____ _____
Foreperson

Notes on Use

1. The Notes on Use to Instruction 15:14 also apply to this instruction.

2. Use whichever parenthesized words are appropriate.

3. Delete any category of damages if there is insufficient evidence of any damages in that category. *See* **Wallbank v. Rothenberg,** 74 P.3d 413 (Colo. App. 2003) (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred).

Source and Authority

1. This instruction is supported by sections 13-64-204 and 13-64-205(1)(d), C.R.S.; **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002); **Preston v. Dupont**, 35 P.3d 433 (Colo. 2001); and **Garhart v. Columbia/HealthONE L.L.C.**, 168 P.3d 512 (Colo. App. 2007).

2. As to how the court should use the various findings of the jury, see sections 13-21-102.5, and 13-64-201 to -213, C.R.S. As to the limitations on the total damages for personal injuries in actions against a health care professional or institution, see section 13-64-302(1)(b), C.R.S. In addition, as to limitations on the recovery of damages for noneconomic loss or injury in cases in which the acts or omissions occurred before July 1, 2003, see section 13-21-

102.5(3)(a). For the limitations on such damages both before and after that date in actions involving "medical malpractice," see also sections 13-64-102 and 13-64-302(1).

3. The Health Care Availability Act (HCAA) contains several caps on damages. Recovery against all health care professionals and institutions, as defined in the statute, is limited to a total of $1.0 million, including punitive damages. §§ 13-64-202(6), 13-64-302(1)(b), C.R.S. Within the $1.0 million limit, noneconomic losses, including physical impairment and disfigurement damages, are subject to a limit of $300,000. §§ 13-64-102(2)(b), 13-64-302(1)(b) & (c), C.R.S. However, the court may enter judgment in excess of the $1.0 million recovery cap upon good cause shown, as detailed in the statute—that is, if the present value of past and future economic damages would exceed the limitations, such that it would be unfair to limit a plaintiff's recovery. § 13-64-302(1)(b); *see also* **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶ 10; **Vitetta v. Corrigan**, 240 P.3d 322 (Colo. App. 2009); **Wallbank v. Rothenberg**, 140 P.3d 177 (Colo. App. 2006) (decided under former version of statute). Any prefiling prejudgment interest, which begins when the action accrues and ends when the lawsuit is filed, is subject to the $1.0 million and $300,000 limits. § 13-64-302(2); **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009); **Wallbank**, 74 P.3d at 419.

4. Unlike the statutory caps on recovery of tort damages generally and for wrongful death, the caps under the HCAA are not adjusted for inflation. § 13-64-302; *see also* 7 JOHN W. GRUND, ET AL., COLO. PRAC. SERIES: PERSONAL INJURY PRACTICE — TORTS AND INSURANCE § 21.37 (3d ed. 2012).

5. Although the jury will issue its findings, the HCAA requires that a plaintiff prove both that good cause exists to support such an award, and that applying the total damages limit under the Act would be unfair. § 13-64-302(1)(b); **Vitetta**, 240 P.3d at 329; **Wallbank**, 140 P.3d at 179 (decided under former version of statute). This statute does not specify what factors a trial court should consider in assessing whether a plaintiff has met the burden of proving "good cause" and "unfairness," and the trial court must exercise discretion in considering the totality of the circumstances, i.e., those factors that it deems relevant under the circumstances of any particular case. **Wallbank**, 140 P.3d at 180-81 (trial court did not abuse discretion in considering relevant factors not expressly specified in the statute); **Vitetta**, 240 P.3d at 329 ("In making findings as to 'good cause' and 'unfairness' (which essentially are different ways of saying the same thing), trial courts must consider the 'totality of circumstances.'"). However, "the contract exception to the collateral source statute, § 13-21-111.6, is applicable in post-verdict proceedings to reduce damages . . . under the HCAA," and the court should not consider "Medicaid payments (and private insurance) in determining whether to exceed the HCAA's $1,000,000 limitation on damages." **Pressey**, 2017 COA 28, ¶ 22.

6. In **Garhart v. Columbia/HealthONE, L.L.C.,** 95 P.3d 571 (Colo. 2004), the supreme court held that the HCAA allows a total recovery of the cap amount against all defendants, and that statutory cap applies to both defendants and designated nonparty health care tortfeasors; thus, a trial court must first apply the HCAA cap to the jury's noneconomic damages award, and then apportion those damages according to the jury's allocation of fault among any health care defendants and nonparty tortfeasors. For a case involving apportionment among health care tortfeasors and non-health care tortfeasors, see **Chavez v. Parkview Episcopal Medical Center**, 32 P. 3d 609 (Colo. App. 2001).

15:16 DETERMINING PRESENT VALUE OF FUTURE DAMAGES

If you determine the plaintiff, *(name)*, will probably have future damages in any one or more of the categories set out in Question 11 of Special Verdict Form B, then the amount of any damages you determine for each category must be stated in terms of its "present value."

To state any future damages in any category in terms of their present value, you must:

1. Determine the total damages for the (injuries) (damages) (losses) the plaintiff will have in each category in the future, for the period of time plaintiff will probably have those (injuries) (damages) (losses); and

2. Discount the damages in each category to today's value, using a reasonable commercial rate.

Notes on Use

1. This instruction must be given with Instructions 15:14 and 15:15 whenever those instructions are given and any category of future damages is included in Question 11 of Instruction 15:15.

2. Use whichever parenthesized words are appropriate.

Source and Authority

1. This instruction is supported by section 13-64-202(7), C.R.S. (defining "present value" applicable when jury determines future damages under section 13-64-205(1)(d), C.R.S.). *See* **Garhart v. Columbia/HealthONE, L.L.C.**, 168 P.3d 512 (Colo. App. 2007); **Dupont v. Preston**, 9 P.3d 1193 (Colo. App. 2000) (section 13-64-205(1)(d) mandates that all future damages be discounted to present value), *aff'd on other grounds*, 35 P.3d 433 (Colo. 2001). In **Garhart**, 168 P.3d at 517-18, the court upheld an order requiring the future payments to be funded with the full amount of the jury's calculation of the present value, and not with an annuity in a lesser amount that defendant's expert projected would pay out plaintiff's gross future damages. *See also* **Brady v. Burlington N. R.R.**, 752 P.2d 592 (Colo. App. 1988) (discussing the various methods of calculating present value in the context of a FELA case, and recognizing the propriety of including an adjustment for inflation when determining total future damages, if there is sufficient evidence of an appropriate inflation rate). Expert testimony is not required to determine present value. **Dupont**, 9 P.3d at 1200.

2. The Health Care Availability Act provides that, if a plaintiff's future damages exceed $150,000, the award "be paid by periodic payments rather than by a lump-sum payment." § 13-64-203(1), C.R.S. However, some plaintiffs could "elect to receive the immediate payment of the present value of the future damage award in a lump-sum amount in lieu of periodic payments" under certain circumstances outlined in section 13-64-205(1)(f), C.R.S. *See also* **Vitetta v. Corrigan**, 240 P.3d 322 (Colo. App. 2009).

15:17 DETERMINING LIFELONG FUTURE DAMAGES — SHORTENED LIFE EXPECTANCY

If you determine that the plaintiff's, *(name's)***, life expectancy has been shortened because of the negligence or fault, if any, of (one or more of) the defendant(s),** *(name[s])***, and that the plaintiff will probably have future damages in any one or more of the categories set out in Question 11 of Special Verdict Form B, and that those damages will probably continue until the end of (his) (her) life, then in determining the amount of damages in any category, you must apply the following rule(s):**

(1. Any damages for lost earnings or earning capacity are to be calculated on the basis of what the plaintiff would or could probably have earned had [he] [she] not been injured by the negligence or fault of [one or more of] the defendant[s]); (and)

(2. Any damages for [medical and other health care expenses] [or] [other economic losses than medical and health care expenses] [or] [any noneconomic losses] are to be calculated on the basis of what the plaintiff's shortened life expectancy is now).

Notes on Use

1. When appropriate to the evidence in the case, this instruction should be given with Instructions 15:19 and 15:20, using whichever parenthesized and bracketed portions are appropriate.

2. If there is sufficient evidence that the tort involved is other than malpractice in the form of a professional negligence, e.g., battery, this instruction must be appropriately modified.

Source and Authority

This instruction is supported by section 13-64-204(2), C.R.S (setting out life expectancy rules).

II. ATTORNEYS — MALPRACTICE

15:18 ELEMENTS OF LIABILITY OF ATTORNEYS — NOT INVOLVING AN UNDERLYING CLAIM OR CASE

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

Notes on Use

1. When there is sufficient evidence supporting a claim for malpractice based on negligence against an attorney, Instruction 9:1 or 9:22 and Instruction 15:21 should be given, together with such other instructions contained in this Chapter, as well as such other instructions in Chapter 9 as would be appropriate in light of the evidence in the case. *See* **Rantz v. Kaufman**, 109 P.3d 132 (Colo. 2005) (to establish legal malpractice claim, plaintiff must prove that: (1) the attorney owed a duty of care to the plaintiff; (2) the attorney breached that duty; and (3) damages to the plaintiff were proximately caused by the attorney's breach of duty); **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002) (same); **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 27, 412 P.3d 751 (same); **Schultz v. Stanton**, 198 P.3d 1253 (Colo. App. 2009*)* (same), *aff'd on other grounds*, 222 P.3d 303 (Colo. 2010); **Luttgen v. Fischer**, 107 P.3d 1152 (Colo. App. 2005) (same). For a discussion as to the distinctions between legal malpractice claims based on (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence, see **General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP**, 230 P.3d 1275 (Colo. App. 2010) (discussing contract and negligence claims); **Aller v. Law Office of Carole C. Schriefer, P.C.**, 140 P.3d 23 (Colo. App. 2005) (discussing latter two claims); **Smith v. Mehaffy**, 30 P.3d 727 (Colo. App. 2000) (discussing all three claims). The court of appeals has also discussed the distinction between what must be proven to establish a claim for legal malpractice and a claim against an attorney for aiding and abetting a non-client's breach of fiduciary duty, *see* **Anstine v. Alexander**, 128 P.3d 249 (Colo. App. 2005), *vacated in part and rev'd in part on other grounds*, 152 P.3d 497 (Colo. 2007); however, any precedential value of that discussion is questionable because the supreme court vacated that portion of the lower court opinion that addressed the latter claim.

2. This instruction should not be used when the claim against the attorney involves the handling of an underlying matter that can be characterized as a "case within a case." For such situations, Instructions 15:19 and 15:20 should be used.

Source and Authority

1. Use of Instruction 9:1 or 9:22 is supported by **Fleming v. Lentz, Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); and **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990).

Standard of Care

2. An attorney owes a client a duty to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in representing the client.

Hopp & Flesch, LLC v. Backstreet, 123 P.3d 1176 (Colo. 2005); **Rantz**, 109 P.3d at 139; **Stone**, 41 P.3d at 712; **Bebo Constr. Co. v. Mattox & O'Brien**, **P.C.**, 990 P.2d 78 (Colo. 1999); **Anstine**, 128 P.3d at 255; **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000).

Attorney-Client Relationship

3. Generally, there can be no legal malpractice claim without an attorney-client relationship, **Allen v. Steele**, 252 P.3d 476 (Colo. 2011); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995), as a non-client has no standing to maintain a legal malpractice action. *See, e.g.*, **Brown v. Silvern**, 45 P.3d 749 (Colo. App. 2001) (an attorney who ceased to represent client and was replaced by other counsel before statute of limitations had run on client's action could not be held liable for failing to timely file action); **Peltz v. Shidler**, 952 P.2d 793 (Colo. App. 1997) (client who filed petition in bankruptcy was not "real party in interest" in legal malpractice action and, therefore, lacked standing to bring action); **Gavend v. Malman**, 946 P.2d 558 (Colo. App. 1997) (same); **Glover v. Southard**, 894 P.2d 21, 24 (Colo. App. 1994) (a nonclient/testamentary beneficiary has no standing to bring a malpractice claim for attorney's "alleged negligence in drafting a valid testamentary instrument so long as the document accurately reflects the testator's intent"); **Shriners Hosp. for Crippled Children, Inc. v. Southard**, 892 P.2d 417 (Colo. App. 1994); **Hill v. Boatright**, 890 P.2d 180 (Colo. App. 1994) (plaintiff, in her capacity as beneficiary of the estate, as distinct from her capacity as personal representative, had no standing to bring claim of legal malpractice against attorney who assisted personal representative in sale of property owned by estate), *aff'd in part, rev'd in part on other grounds sub nom.* **Boatright v. Derr**, 919 P.2d 221 (Colo. 1996); **Klancke v. Smith**, 829 P.2d 464 (Colo. App. 1991) (decedent's children had no attorney-client relationship with attorney who distributed wrongful death proceeds to decedent's spouse and had no duty to ensure that proceeds were shared with or paid to children).

4. The attorney-client relationship involves a fiduciary relationship as a matter of law. **Accident & Injury Med. Specialists, P.C. v. Mintz**, 2012 CO 50, ¶ 25, 279 P.3d 658; **Olsen & Brown v. City of Englewood**, 889 P.2d 673 (Colo. 1995). Nonetheless, where the same operative facts support claims for both legal malpractice and breach of fiduciary duty, the latter claim should be dismissed as duplicative. **Aller**, 140 P.3d at 27; **Moguls of Aspen, Inc. v. Faegre & Benson**, 956 P.2d 618 (Colo. App. 1997). The court of appeals has held that when different facts support each theory, recovery may be allowed for each. **Boyd**, 9 P.3d at 1163 (permitting separate claims for professional negligence and for breach of fiduciary duty where claims were based on different factual allegations); **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008) (discussing as different claim, one defendant attorney's failure to aid former client after she was charged with criminal fraud for transaction in which she claimed he advised her). The court of appeals clarified that "where . . . an attorney makes a decision based on professional judgment pertaining to the representation of a client, the cause of action is indistinguishable from one for professional negligence." **Aller**, 140 P.3d at 28 (suggesting that an independent claim for breach of fiduciary duty is not apt to survive absent allegations of "an intentional tort or a breach of trust involving matters of moral turpitude"). In **Hartman v. Community Responsibility Center, Inc.**, 87 P.3d 202 (Colo. App. 2003), a case that did not involve an attorney-client relationship, the court of appeals noted another important distinction between claims for breach of fiduciary duty and those for malpractice: in a professional negligence claim, the standards of care involved are established by expert witnesses, while the nature and scope of the duties owed by a fiduciary are issues of law to be determined by the court.

5. A law firm does not owe a fiduciary duty to a client to disclose information related to an attorney's past disciplinary history, mental illness, alcoholism, or arrests where such problems did not materially affect the attorney's performance. **Moye White LLP v. Beren**, 2013 COA 89, ¶¶ 26-29, 320 P.3d 373.

6. An attorney-client relationship is based on contract that may be express or implied by the conduct of the parties. **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998); **Klancke**, 829 P.2d at 466. Irrespective of whether an attorney-client relationship is express or implied, the parties must agree on all essential contractual terms. **Schmidt v. Frankewich**, 819 P.2d 1074 (Colo. App. 1991). If the parties fail to agree on sufficiently definite and certain terms, no valid agreement is formed. *Id*. The payment of attorney fees on behalf of a client, does not, in and of itself, establish an attorney-client relationship. **Turkey Creek, LLC**, 953 P.2d at 1312. To establish an attorney-client relationship by the conduct of the parties, it must be shown that the person sought and received legal advice from the attorney concerning the legal consequences of that person's past or contemplated action. *Id.*

7. Where the client is a business entity, the attorney-client relationship is typically considered to be between the attorney and the entity and not the entity's individual members. **Zimmerman v. Dan Kamphausen Co.**, 971 P.2d 236 (Colo. App. 1998) (when attorney represents partnership, attorney does not necessarily have attorney-client relationship with each of the partners); **Turkey Creek, LLC**, 953 P.2d at 1311 (no attorney-client relationship existed between joint venturer and attorneys for co-venturer); **Schmidt**, 819 P.2d at 1079 (attorneys for corporation could not be held liable to shareholders asserting third-party beneficiary claim).

Liability to Non-Clients

8. A non-client may assert a claim against an attorney only in limited circumstances: when the attorney's conduct is alleged to have been willful and wanton, fraudulent or malicious, **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 235; **Turman v. Castle Law Firm, LLC**, 129 P.3d 1103 (Colo. App. 2006); **Zimmerman**, 971 P.2d at 242; **Holmes v. Young**, 885 P.2d 305 (Colo. App. 1994), or when the claim is for negligent misrepresentation, **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 236; **Zimmerman**, 971 P.2d at 242. *See also* **Mintz**, 2012 CO 50, ¶ 32 (holding that an attorney did not owe fiduciary duty to non-client third parties who were entitled to funds from the Colorado Lawyer Trust Account Foundation trust accounts); **State Farm Fire & Cas. Co. v. Weiss**, 194 P.3d 1063 (Colo. App. 2008) (equitable subrogation claim of insurer based on alleged attorney malpractice in representation of insured properly dismissed on public-policy grounds).

9. In **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 35, 364 P.3d 872, 879, and **Bewley v. Semler**, 2018 CO 79, ¶ 25, 432 P.3d 582, 588, the supreme court affirmed the strict privity rule that "an attorney's liability to a non-client is limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation." In **Baker**, the court concluded that dissatisfied beneficiaries of a testator's estate (non-clients) did not have standing to bring legal malpractice or contract claims against the attorney who drafted the testator's estate planning documents because of the strict privity rule. 2016 CO 5, ¶¶ 1-2, 364 P.3d at 874. In **Bewley**, the court concluded that a member of the condominium association (a non-client) who was a third-party beneficiary to the

agreement between the condominium association and the law firm could not bring a breach of contract claim against the law firm because of the strict privity rule. 2018 CO 79, ¶¶ 25, 30, 432 P.3d at 588-89.

10. The supreme court has "save[d] for another day the question of whether an attorney can ever be liable for aiding and abetting a breach of fiduciary duty to a non-client." **Alexander v. Anstine**, 152 P.3d 497, 503 (Colo. 2007). In **Anstine**, 128 P.3d at 255, the court of appeals upheld a finding that attorneys who were found not to have been professionally negligent with respect to their corporate client could nonetheless be held liable for aiding and abetting the breach of fiduciary duty that the client's president owed to the corporation; "the attorneys could conceivably fulfill their duty to their client . . . while lending assistance to and aiding and abetting the president's breach of a separate duty to [the corporation] and to third parties," even though the only client to whom the attorneys owed any professional duty was the corporation. As noted above, however, because the supreme court vacated that portion of the **Anstine** opinion, the lower court's decision on this issue is not binding precedent. *But see* **Holmes**, 885 P.2d at 308-09 (suggesting that an attorney could be liable for aiding and abetting in breach of fiduciary duty); **Semler v. Hellerstein**, 2016 COA 143, ¶ 41, 428 P.3d 555 (plaintiff's aiding and abetting breach of fiduciary duty claim against a lawyer failed as a matter of law because the client did not owe fiduciary duty to the plaintiff), *rev'd on other grounds sub nom.* **Bewley v. Semler**, 2018 CO 79, 432 P.3d 582.

11. A litigation privilege protects a lawyer from civil liability for statements made in the course of a judicial proceeding if the statements are related to the litigation. *See* **Begley v. Ireson**, 2017 COA 3, ¶ 13, 399 P.3d 777; **Buckhannon v. U.S. W. Commc'ns, Inc.**, 928 P.2d 1331 (Colo. App. 1996); **Club Valencia Homeowners Ass'n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985). However, only a qualified litigation privilege applies to prelitigation statements. For a litigation privilege to apply to an attorney's prelitigation statement, the prelitigation statement must be (1) related to prospective litigation, and (2) the prospective litigation must be contemplated in good faith. **Begley**, 2017 COA 3, ¶ 17; *see also* **Merrick v. Burns, Wall, Smith & Mueller, P.C.**, 43 P.3d 712 (Colo. App. 2001).

Causation

12. In **Boulders at Escalante LLC**, 2015 COA 85, ¶ 35, the court of appeals held that "not every legal malpractice case requires proof of a case within a case" to establish causation. "[W]hen the injury claimed does not depend on the merits of the underlying action or matter, the plaintiff does not need to prove a case within a case." *Id.* at ¶ 49. "Rather, the plaintiff must prove that the attorney's negligent acts or omissions caused him or her to suffer some financial loss or harm by applying the generally applicable test for cause in fact in negligence actions: that the plaintiff would not have suffered the harm but for the attorney's negligence." *Id.*; *see also* Source and Authority for Instruction 15:19.

Emotional Distress Damages

13. Damages for emotional distress or other noneconomic damages resulting solely from pecuniary loss are not recoverable in a legal malpractice action based on negligence. **Aller**, 140 P.3d at 26-30; **Gavend**, 946 P.2d 562-63.

Colorado Consumer Protection Act

14. In **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006), the supreme court held that attorneys may be held liable for violations of the Colorado Consumer Protection Act (CCPA) where a plaintiff shows that an attorney or law firm knowingly engaged in a deceptive trade practice that occurred in the course of the attorney's or firm's business, that significantly impacted the public as actual or potential consumers of legal services, and that caused an injury in fact to some legally protected interest of the plaintiff. *Id.* The enhanced damages available act as an incentive for the injured party and as a deterrent to fraudulent behavior. *Id.* Further, the court held that there was no conflict between the CCPA and the Rules of Professional Conduct in the type of conduct that they proscribe, and that the CCPA complements rather than contradicts, the court's implementation of professional rules. *Id.* Where an attorney's conduct is proven to constitute a violation of the CCPA, attorney fees may be recovered, § 6-1-113(2)(b), C.R.S., and if "bad faith conduct" is established by clear and convincing evidence, treble damages may also be awarded. § 6-1-113(2). The CCPA defines "bad faith conduct" as "fraudulent, willful, knowing, or intentional conduct that causes injury." § 6-1-113(2.3).

Statute of Limitations

15. For a discussion as to when the statute of limitations commences to run in a legal malpractice action, see **Morrison v. Goff**, 91 P.3d 1050 (Colo. 2004); **Torrez v. Edwards**, 107 P.3d 1110 (Colo. App. 2004); and **Broker House International, Ltd. v. Bendelow**, 952 P.2d 860 (Colo. App. 1998). *See also* **Allen**, 203 P.3d at 557; **Peltz**, 952 P.2d at 796; **Gavend**, 946 P.2d at 563. In **Morrison**, 91 P.3d 1050, the supreme court held that a criminal defendant must file and preserve any legal malpractice claim by filing it within the two-year statute of limitations even though the criminal defendant may still be pursuing an appeal of the underlying conviction or seeking other post-conviction relief; however, the court did indicate that the claimant could seek a stay of the civil action until the criminal case was resolved. *But see* **Wallin v. McCabe**, 293 P.3d 81 (Colo. App. 2011) (trial court did not err in denying motion to stay civil case pending resolution of post-conviction motion where plaintiff did not make specific showing of hardship, delays, or prejudice).

15:19 ELEMENTS OF LIABILITY OF ATTORNEYS — INVOLVING AN UNDERLYING MATTER (CASE-WITHIN-A-CASE)

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) (its) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:**

1. The plaintiff should have prevailed (in the underlying case) (on the underlying claim);

2. The plaintiff did not prevail because the defendant was negligent in handling that matter; and

3. The defendant's negligence caused the plaintiff to have (injuries) (damages) (losses).

If you find that any one or more of these *(number)* **statements, or any part of them, has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. When this instruction is used, Instructions 15:20 and 15:21 must also be given.

2. Use whichever parenthesized words and phrases are appropriate.

3. In cases alleging transactional malpractice against attorneys, the Committee recommends that Instruction 15:27 be considered and, if necessary, modified to fit the circumstances of the case. In **Gibbons v. Ludlow**, 2013 CO 49, ¶ 16, 304 P.3d 239, the supreme court, borrowing from the "case-within-a-case" framework applicable to legal malpractice cases, held that to establish causation against a transactional broker, a plaintiff must prove that, but for the broker's negligence, he or she either (1) would have been able to obtain a better deal in the underlying transaction; or (2) would have been better off by walking away from the underlying transaction. *See also* **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 46, 412 P.3d 751 (stating that the case within a case framework

applies to legal malpractice actions when the claimed injury relates to an unfavorable business transaction).

Source and Authority

1. This instruction is supported by **Rantz v. Kaufman**, 109 P.3d 132 (Colo. 2005); **Bebo Construction Co. v. Mattox & O'Brien**, **P.C.**, 990 P.2d 78 (Colo. 1999); **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008); **Bristol Co. v. Osman**, 190 P.3d 752 (Colo. App. 2007); **Giron v. Koktavy**, 124 P.3d 821 (Colo. App. 2005); **Luttgen v. Fischer**, 107 P.3d 1152 (Colo. App. 2005); **Brown v. Silvern**, 45 P.3d 749 (Colo. App. 2001); **Tripp v. Borchard**, 29 P.3d 345 (Colo. App. 2001); and **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995).

2. Proof of negligence and causation in a legal malpractice claim arising out of an underlying case or claim requires proof that the plaintiff should have prevailed in the underlying claim. **Stanton v. Schultz**, 222 P.3d 303 (Colo. 2010); **Rantz**, 109 P.3d at 136; **Bebo Constr. Co.**, 990 P.2d at 83; **Allen**, 203 P.3d at 557; **Giron**, 124 P.3d at 824; **Luttgen**, 107 P.3d at 1154; **Brown**, 45 P.3d at 751; **Fleming v. Lentz, Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990). To establish proximate cause, plaintiff must show, first, that the injury would not have occurred but for the attorney's actions, and second, that the claim underlying the malpractice action should have been successful if the attorney had acted in accordance with his or her duty. **Stanton**, 222 P.3d at 307; **Rantz**, 109 P.3d at 136; **Bristol Co.**, 190 P.3d at 755; **Brown**, 45 P.3d at 751; *see* **Aller v. Law Office of Carole C. Schriefer, PC**, 140 P.3d 23 (Colo. App. 2005) (plaintiff's damages claim failed where settled underlying matter and attorney's conduct did not cause her any pecuniary loss as matter of law). Accordingly, in order to determine whether the plaintiff should have prevailed on the underlying claim, "the case-within-a-case," the jury must also be instructed on the law applicable to the underlying claim. **Miller**, 916 P.2d at 579.

3. In the event that the plaintiff did prevail in the underlying matter, and the plaintiff's claim concerns the limited nature of the plaintiff's success in the earlier case or claim, then this instruction should be modified accordingly. This instruction should also be used, with appropriate modification, in situations where the underlying case settled, but the plaintiff alleges that the settlement was as a result of the attorney's negligence. *See* **White v. Jungbauer**, 128 P.3d 263 (Colo. App. 2005) (notwithstanding public policy considerations encouraging settlement, litigant may bring legal malpractice suit against his or her attorney even though underlying action settled); *cf.* **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006) (client claiming that law firm engaged in false or misleading advertising to public and that it relied for its profitability on quick settlements of cases with minimal expenditure of effort and resources, constituting illegal scheme perpetrated on public, sufficiently alleged claim under Colorado Consumer Protection Act, and Act's application did not conflict with Rules of Professional Conduct).

4. For a discussion of when a plaintiff must prove "a case within a case" in legal malpractice cases, see **Boulders at Escalante LLC**, 2015 COA 85, ¶¶ 36-49. There, the Colorado Court of Appeals explained that "[t]he case within a case requirement makes eminent sense when the claimed injury relates to the lawyer's representation of a client in litigation." *Id.* at ¶ 45. Specifically, "[w]hen the lawyer acts negligently with respect to the litigation, the only way to determine if the negligence caused the harm claimed by the client is to compare what

actually happened with what would have happened had the negligence not occurred: the case within a case requirement." *Id.* However, "when the injury claimed does not depend on the merits of the underlying action or matter, the plaintiff does not need to prove a case within a case." *Id.* at ¶ 49.

15:20 ELEMENTS OF LIABILITY OF ATTORNEYS — INVOLVING AN UNDERLYING MATTER (CASE-WITHIN-A-CASE) — DETERMINING WHETHER PLAINTIFF SHOULD HAVE PREVAILED IN THE UNDERLYING MATTER

In determining whether the plaintiff should have prevailed (in the underlying case) (on the underlying claim), you must follow instructions A through ___ attached to this instruction.

(Attach all instructions that defendant, if he or she had acted in accordance with his or her duty, should have asserted, including theories of liability. Also attach instructions concerning defenses available, comparative fault and nonparty fault, causation, the measure of damages, and any other instructions that should have been given in the underlying matter).

Notes on Use

1. This instruction should usually be given with Instruction 15:19 when the malpractice asserted is negligence in handling an underlying claim or case. *But see* **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008) (in malpractice action following underlying guilty plea, as to claim for breach of fiduciary duty against former counsel, necessary evidence for causation would have included expert testimony regarding how prosecutor likely would have responded had counsel responded differently).

2. To determine whether the plaintiff should have prevailed on the underlying claim, "the case-within-a-case," the jury must also be instructed on the law applicable to the underlying claim. Accordingly, a separate set of instructions concerning the underlying case or claim must be given to the jury. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); *see also* R. MALLEN, LEGAL MALPRACTICE § 37:153 (2018).

3. The goal of trying the case-within-a-case is to decide what the result of the underlying proceeding or matter should have been according to an objective standard. Recreating the underlying matter generally requires calling and examining those persons who would have been witnesses and presenting the demonstrative and documentary evidence that would have been presented but for the attorney's negligence. *See* LEGAL MALPRACTICE, *supra*, § 37:87. However, where legal questions are central to the underlying case, expert testimony may well be required to establish causation. **Allen**, 203 P.3d at 569.

4. "[P]roving the case within a case in an attorney malpractice suit includes resolving the question of whether the judgment in the underlying case would have been collectible." **LeHouillier v. Gallegos**, 2019 CO 8, ¶ 20, 434 P.3d 156, 160 (citing **Lawson v. Sigfrid**, 83 Colo. 116, 262 P. 1018 (1927)). The supreme court held that because "the collectibility of the underlying judgment is essential to the causation and damages elements of a client's professional negligence claim against her attorney, . . . the client-plaintiff bears the burden to prove that the underlying judgment was collectible." *Id.* at ¶ 22, 434 P.3d at 160.

Source and Authority

This instruction is supported by **Miller**, 916 P.2d at 573.

15:21 NEGLIGENCE — ATTORNEYS — DEFINED

An attorney is negligent when (he) (she) (does an act that reasonably careful attorneys would not do) (or) (fails to do an act that reasonably careful attorneys would do).

To determine whether an attorney's conduct is negligent, you must compare that conduct with what an attorney, having and using that knowledge and skill of attorneys practicing law at the same time, would or would not have done under the same or similar circumstances.

Notes on Use

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:1, 9:22, or 15:19, whichever is appropriate, when there is sufficient evidence that the defendant, while acting as an attorney, may have been negligent, and that negligence may have caused the plaintiff compensable harm.

2. Use whichever parenthesized words and phrases are appropriate.

Source and Authority

1. This instruction is supported by **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002); **Bebo Construction Co. v. Mattox & O'Brien, P.C.**, 990 P.2d 78 (Colo. 1999); **Aller v. Law Office of Carole C. Schriefer, PC**, 140 P.3d 23 (Colo. App. 2005); **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000); **Fleming v. Lentz, Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); **Temple Hoyne Buell Foundation v. Holland & Hart**, 851 P.2d 192 (Colo. App. 1992); **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990); **Boigegrain v. Gilbert**, 784 P.2d 849 (Colo. App. 1989); and **Myers v. Beem**, 712 P.2d 1092 (Colo. App. 1985).

2. The provisions of sections 13-20-601 and 13-20-602, C.R.S., requiring that a "certificate of review" be filed in negligence actions against licensed professionals, are not limited to negligence claims; rather, they are implicated in every claim against such professionals that requires the use of expert testimony to establish the applicable standard of professional care. **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001); **RMB Servs., Inc. v. Truhlar**, 151 P.3d 673 (Colo. App. 2006); **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000). Therefore, some breach of fiduciary duty and breach of contract claims against professionals may require the filing of a certificate of review. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992); **Ehrlich Feedlot, Inc. v. Oldenburg**, 140 P.3d 265 (Colo. App. 2006); **Kelton v. Ramsey**, 961 P.2d 569 (Colo. App. 1998); **McLister v. Epstein & Lawrence, P.C**., 934 P.2d 844 (Colo. App. 1996); **Crystal Homes, Inc. v. Radetsky**, 895 P.2d 1179 (Colo. App. 1995). Where expert testimony is required to establish a claim of professional liability against an attorney based on negligent misrepresentation, a certificate of review is required. **RMB Servs.**, 151 P.3d at 676-77.

3. The filing of a certificate of review is not a jurisdictional requirement. **Miller v. Rowtech, LLC**, 3 P.3d 492 (Colo. App. 2000). However, because expert testimony is necessary

in all but the clearest of legal malpractice cases to establish the standards of acceptable professional conduct, *see* **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009); **Giron v. Koktavy**, 124 P.3d 821 (Colo. App. 2005); **Kelton**, 961 P.2d at 571; **Boigegrain**, 784 P.2d at 850, a plaintiff's failure to file a certificate of review may result in dismissal of the case. **Kelton**, 961 P.2d at 571; **Rosenberg v. Grady**, 843 P.2d 25 (Colo. App. 1992). A claimant is not required to file separate certificates of review for an attorney and his law firm. **RMB Servs.**, 151 P.3d at 676 (single certificate as to both satisfied statutory requirement). A plaintiff is not required to file a certificate of review when alleging that an attorney failed to file an action within the applicable statute of limitations or to show the existence of an attorney-client relationship. **Giron**, 124 P.3d at 825-26.

4. A claim for negligent misrepresentation stated against an attorney by a non-client is not a claim for professional negligence. *See* **Allen v. Steele**, 252 P.3d 476 (Colo. 2011); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995) (attorney may be liable to one other than his or her client for tort of negligent misrepresentation only when attorney knows or should reasonably foresee that the third person will rely on information provided by attorney). Accordingly, this instruction should not be given in that situation. See Instruction 9:4 and the Notes on Use to that instruction. An attorney does not owe any duty to non-clients to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the profession. **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 240; **Anstine v. Alexander**, 128 P.3d 249 (Colo. App. 2005), *vacated in part and rev'd in part on other grounds*, 152 P.3d 497 (Colo. 2007).

15:22 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME

(Unless the attorney states or agrees otherwise, an) (An) attorney does not guarantee or promise success simply by agreeing to provide professional services.

(An unsuccessful outcome does not, by itself, mean that an attorney was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that an attorney was negligent.)

Notes on Use

1. Use whichever parenthetical words are appropriate.

2. This cautionary instruction is comparable to the rule that the happening of an accident is not alone sufficient to presume negligence, *see* Instruction 9:12, and may be given in conjunction with Instruction 15:21 when the evidence of malpractice includes lack of success.

3. If there is sufficient evidence that the defendant may have warranted or promised success, instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, such as legal malpractice, depending on the evidence in the case.

Source and Authority

1. This instruction is supported by **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996) (dicta); and **Myers v. Beem**, 712 P.2d 1092 (Colo. App. 1985) (making a mistake is not necessarily negligence).

2. The fact that the client ultimately prevailed in litigation concerning a document drafted by the lawyer does not mean that the lawyer cannot be held liable for professional malpractice. "One . . . obligation [an attorney owes his or her client] is anticipating reasonably foreseeable risks." **Temple Hoyne Buell Found. v. Holland & Hart**, 851 P.2d 192, 198 (Colo. App. 1992); *see also* **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993).

15:23 REFERRAL OF CLIENT TO ANOTHER ATTORNEY

An attorney who refers a client to another attorney for legal services is not responsible for any negligence on the part of the other attorney. However, a referring attorney who fails to exercise reasonable care in selecting another attorney may be held responsible for (his) (her) own negligence.

Notes on Use

1. The Notes on Use to Instruction 15:5 are also applicable to this instruction.

2. Use whichever parenthesized word is appropriate.

Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases involving physicians that support it. *See* Source and Authority to Instruction 15:5.

15:24 CONTRIBUTORY NEGLIGENCE OF CLIENT — DEFINED

A client is negligent when the client fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect (himself) (herself) (itself) from (new) (or) (additional) (injuries) (damages) (losses).

Notes on Use

1. Use whichever parenthetical words are appropriate.

2. When there is sufficient evidence that a client may have been negligent, but negligent only with regard to the services being rendered by the defendant (for example, the failure of a client to make a timely return of signed documents after having been properly instructed and warned), then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22 or Instructions 15:19 and 15:20. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22. However, in either event, for the doctrine of contributory or comparative negligence to apply, the client's alleged negligence must be causally related or linked to the attorney's representation. **Smith v. Mehaffy**, 30 P.3d 727 (Colo. App. 2000) (conduct of client that occurred before client had consulted defendant attorney could not provide basis for comparative negligence defense in legal malpractice action); **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996) (plaintiff employer's failure to obtain workers' compensation insurance did not support comparative negligence instruction where defendants knew that plaintiff was uninsured before they agreed to represent plaintiff in workers' compensation proceedings).

3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the matters about which the plaintiff has sought professional services should be viewed as a matter of contributory negligence (to be governed by this instruction and Instruction 9:22, and the appropriate comparative negligence instructions in Chapter 9), or as a matter of failure to mitigate damages to be governed by Instruction 5:2. If necessary, the court by special instructions, or through the use of special interrogatories, should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages caused by a prior-occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or losses or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries or losses. *See* Instruction 9:6.

Source and Authority

1. This instruction is supported by **Scognamillo v. Olsen**, 795 P.2d 1357 (Colo. App. 1990); **Smith**, 30 P.3d at 731 (Colorado has recognized the defense of comparative negligence in

legal malpractice claims where the client's alleged negligence must have related both to the injury alleged to have been caused by the attorney's negligence and to the attorney's representation); and **McLister**, 934 P.2d at 846 (same).

2. For a discussion of the failure of a patient to follow a physician's advice as constituting contributory negligence, see **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); **Scognamillo**, 795 P.2d at 1363 (jury could reasonably infer that client's failure to settle case resulted in part from client's own negligence); Source and Authority to Instruction 9:6.

III. OTHER PROFESSIONAL MALPRACTICE (ACCOUNTANTS, ARCHITECTS, ETC.)

15:25 ELEMENTS OF LIABILITY — ACCOUNTANTS, ARCHITECTS, ETC.

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

Notes on Use

1. See Notes on Use for Instruction 15:18.

2. When there is sufficient evidence of a claim for relief for malpractice based on negligence against a practitioner of a profession, for example, an architect or accountant, Instruction 9:1 or 9:22 and Instruction 15:26 should be given, together with any other instructions contained in Chapter 9 and in Chapter 15, as would be appropriate in light of the evidence in the case. *See, e.g.*, **Gibbons v. Ludlow**, 2013 CO 49, ¶¶ 12-17, 304 P.3d 239 (noting similarity of elements of negligence and professional negligence); **Scognamillo v. Olsen**, 795 P.2d 1357 (Colo. App. 1990) (rejecting defendants' arguments that legal malpractice action was different from other negligence cases and required a causation instruction different from Instruction 9:28).

Source and Authority

1. Use of Instruction 9:1 or 9:22 is supported by **Kellogg v. Pizza Oven, Inc.**, 157 Colo. 295, 402 P.2d 633 (1965) (architect); **Gibbons**, 2013 CO 49, ¶¶ 14-16 (real estate brokers); and **Rian v. Imperial Municipal Services Group, Inc.**, 768 P.2d 1260 (Colo. App. 1988) (architect).

2. There is no tort of "educational malpractice." **Tolman v. CenCor Career Colls., Inc.**, 851 P.2d 203 (Colo. App. 1992), *aff'd on other grounds*, 868 P.2d 396 (Colo. 1994). Likewise, the supreme court has repeatedly rejected claims for clergy malpractice, although it recognizes claims against clergy and religious organizations for breach of fiduciary duty, negligent hiring, and negligent supervision. *See, e.g.*, **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988).

3. While the Colorado Supreme Court in **Moses** and **Destefano** distinguished claims of negligence against religious leaders and organizations from claims for breach of fiduciary duty, the court of appeals held that a claim for breach of fiduciary duty was properly dismissed as duplicative of the negligence claim. *See* **Moguls of Aspen, Inc. v. Faegre & Benson**, 956 P.2d 618 (Colo. App. 1997); *see also* **Awai v. Kotin**, 872 P.2d 1332 (Colo. App. 1993) (quasi-judicial immunity did not protect a psychologist who, in addition to performing a court-ordered evaluation of a child and the parents, also undertook to treat the parents and was thereafter sued for negligent treatment by the child's father). However, where the claims for professional negligence and for breach of fiduciary duty are based on different factual allegations, instructions on both claims are proper. *See* **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000). In **Hartman v.**

Community Responsibility Center, Inc., 87 P.3d 202 (Colo. App. 2003), the court of appeals noted an important distinction between claims for breach of fiduciary duty and those for malpractice: in a professional negligence claim, the standards of care involved are established by expert witnesses, while the nature and scope of the duties owed by a fiduciary are issues of law to be determined by the court.

4. For the standard of professional care required of practitioners of professions other than one of the healing arts, see Source and Authority to Instruction 15:26.

15:26 NEGLIGENCE — OTHER PROFESSIONALS — DEFINED

(A) (An) *(insert appropriate description, e.g., "architect," "accountant," etc.)* **is negligent when (he) (she) (does an act that reasonably careful** *[insert pluralized version of appropriate description, e.g., "accountants"]* **would not do) (or) (fails to do an act that reasonably careful** *[insert pluralized version of appropriate description]* **would do).**

To determine whether (a) (an) *(insert appropriate description, e.g., "architect," "accountant," etc.)***'s conduct is negligent, you must compare that conduct with what (a) (an)** *(insert appropriate description, e.g., "architect," "accountant," etc.)* **having and using that knowledge and skill of** *(insert pluralized version of appropriate description, e.g., "architects")* **practicing** *(insert appropriate description, e.g., "architecture," "accountancy," etc.)***, at the same time, would or would not have done under the same or similar circumstances.**

Notes on Use

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:1 or 9:22, whichever is appropriate, when there is sufficient evidence that the defendant, while acting as a professional may have been negligent, and that negligence may have caused the plaintiff compensable harm.

2. Use whichever parenthesized words are appropriate.

Source and Authority

1. This instruction is supported by **Wheeler & Lewis v. Slifer**, 195 Colo. 291, 577 P.2d 1092 (1978) (architect); **Kellogg v. Pizza Oven, Inc.**, 157 Colo. 295, 402 P.2d 633 (1965) (architect); **Rian v. Imperial Municipal Services Group, Inc.**, 768 P.2d 1260 (Colo. App. 1988) (architect). For a general discussion of the standard of care to be applied in negligence cases against members of a profession, see RESTATEMENT (SECOND) OF TORTS § 299A (1965).

2. The provisions of sections 13-20-60 and 13-20-602, C.R.S., requiring that a "certificate of review" be filed in negligence actions against licensed professionals are not limited to negligence claims, but rather encompass every claim against such professionals that requires the use of expert testimony to establish the applicable standard of professional care. *See* **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000). Therefore, some breach of fiduciary duty and contract claims against such professionals may require the filing of a certificate of review. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992); **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996); **Crystal Homes, Inc. v. Radetsky**, 895 P.2d 1179 (Colo. App. 1995).

3. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself deficient, this instruction must be modified to inform the jury that evidence of the professional's compliance with the community standard of

care is some evidence that the professional was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana,** 827 P.2d 509 (Colo. 1992).

4. In **Corcoran v. Sanner**, 854 P.2d 1376, 1379 (Colo. App. 1993), the court rejected the "locality rule" in a malpractice suit against an architect stating that: "[a]lthough we recognize that, in certain situations, the standard of care applicable to Colorado architects may be affected by local standards, we hold that statewide standards must be applied in determining an architect's duty to his or her client and whether an architect has breached that duty."

5. In some instances, the standard of care may be established by regulatory standards. *See, e.g.*, **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009) (observing that the Division of Real Estate adopted the Uniform Standards of Professional Appraisal Practice as generally accepted standards of professional appraisal practice).

15:27 CAUSATION — REAL ESTATE BROKERS — TRANSACTIONAL MALPRACTICE — DEFINED

To determine whether the defendant(s)'s negligence was a cause of the plaintiff(s)'s (injuries) (damages) (losses), you must determine whether, had the defendant(s) not been negligent, the plaintiff(s) (would have obtained a better deal in the transaction) (would have been better off by walking away from the transaction).

Notes on Use

1. This instruction should be used in conjunction with Instruction 9:1, 9:18, 9:20, or 9:22, whichever is appropriate, when the plaintiff asserts the defendant was negligent in handling an underlying transaction.

2. Use whichever parenthesized phrases are appropriate.

3. This instruction should be given in cases involving circumstances similar to **Gibbons v. Ludlow**, 2013 CO 49, ¶ 16, 304 P.3d 239. In cases different from **Gibbons**, the last two parenthesized phrases should be modified to fit the facts of the case.

Source and Authority

This instruction is supported by **Gibbons**, 2013 CO 49, ¶ 16. Where the claim of professional negligence against a real estate broker involves allegations of transactional malpractice, the plaintiff must prove causation by showing that, but for the broker's negligence, the plaintiff would have achieved a more favorable result in the underlying transaction. *Id.*; **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 46, 412 P.3d 751.

15:28 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME — OTHER PROFESSIONALS

(Unless [a] [an] *[insert appropriate description, e.g., "architect," "accountant," etc.]* **states or agrees otherwise, [a] [an]) (A) (An)** *(insert appropriate description)* **does not guarantee or promise success simply by agreeing to provide professional services.**

(An unsuccessful outcome does not, by itself, mean that [a] [an] *[insert appropriate description, e.g., "architect," etc.]* **was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that [a] [an]** *[insert appropriate description, e.g., "architect," etc.]* **was negligent.)**

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. Omit the first parenthesized clause unless there has been some evidence that the defendant may have so stated or agreed, in which event instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, e.g., professional negligence, depending on the evidence in the case.

Source and Authority

This instruction sets out the same principles that are applicable to physicians and practitioners of the other healing arts. See Instruction 15:4 and the Source and Authority to that instruction.

15:29 REFERRAL OF CLIENT TO ANOTHER PROFESSIONAL PERSON

(A) (An) *(insert appropriate description, e.g., "architect," "accountant," etc.)* **who agrees to provide professional services to a client and refers the client to another professional person for professional services is not responsible for any negligence of the other professional person, unless the person making the referral as (a) (an)** *(insert appropriate description, e.g., "architect," etc.)* **has failed to exercise reasonable care in selecting the other professional person.**

Notes on Use

1. Use whichever parenthesized words are appropriate.

2. This instruction should not be given, or must be appropriately modified, if there is a basis in the evidence in the case for imposing liability vicariously on the professional person because the other professional person is an agent, employee, or partner, etc. In such cases, for appropriate vicarious liability instructions, see the instructions in Chapter 8.

3. If there is any other personal basis for imposing liability on the professional person making the reference, e.g., personal negligence in giving incorrect information to the other professional person, this instruction must also be appropriately modified.

Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases from other jurisdictions. *See, e.g.*, W.R. Habeeb, Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (1962).

15:30 CONTRIBUTORY NEGLIGENCE OF CLIENT — DEFINED

A client is negligent when the client fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect (himself) (herself) (itself) from (new) (or) (additional) (injuries) (damages) (losses).

Notes on Use

1. Use whichever parenthetical words are appropriate.

2. When there is sufficient evidence that a client may have been negligent, but negligent only with regard to the services being rendered by the defendant, for example, the failure of a client to make a timely return of signed documents after having been properly instructed and warned, then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22.

3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the matters about which the plaintiff has sought professional services should be viewed as a matter of contributory negligence, to be governed by this instruction, Instruction 9:22, and the appropriate comparative negligence instructions, *see* Chapter 9, or as a matter of failure to mitigate damages, to be governed by Instruction 5:2. If necessary, the court by special instructions, or through the use of special interrogatories, should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages caused by a prior occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or losses, or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries or losses. *See* Instruction 9:6.

Source and Authority

This instruction is supported by **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912) (discussing the failure of a patient to follow a physician's advice as constituting contributory negligence). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); Source and Authority to Instruction 9:6.