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"All animals are equal, but some animals are more equal than others."[1]

The criminal law has never doubted the guilt of the driver of the getaway car. He can be, and often is, convicted of offenses that were actually committed by his partners in crime.[2] Or, if his role in the criminal enterprise was limited, he might instead be charged with what is commonly known as "aiding and abetting" his cohorts in their criminal conduct.[3] There is nothing novel or troubling about the latter possibility. To the contrary, "[a]iding and abetting is an ancient criminal law doctrine."[4] Indeed, for almost a century, a federal statute has provided that those who give knowing aid to a person committing a federal crime, with the intent of facilitating that crime, may themselves be charged as criminal principals.[5]

In view of the many parallels between criminal and tort law, one might reasonably assume that the concept of aiding and abetting has an equally hoary pedigree on the civil side of the legal ledger. But it does not. As recently as 1983, the U.S. Court of Appeals for the D.C. Circuit, after scouring the books

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1. GEORGE ORWELL, ANIMAL FARM 133 (New American Library 1996) (1946).

2. *See, e.g.*, Cantrell v. State, 498 S.E.2d 90 (Ga. Ct. App. 1998) (affirming driver's conviction for armed robbery).

3. *See, e.g.*, United States v. Gilliard, No. 06-1711, 2007 WL 2815593 (3d Cir. Sept. 28, 2007).

4. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994). *See generally* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (tracing the history of the crime to the fourteenth century); 21 AM. JUR. 2D *Criminal Law* §§ 162-76 (2008).

5. Act of Mar. 4, 1909, ch. 321, 35 Stat. 1152, § 332 (1909).

for precedent, was forced to conclude that civil liability for aiding and abetting "is largely confined to isolated acts of adolescents in rural society."[6] That has changed, and changed dramatically. In the twenty-five years since those words were written, courts across the country have been flooded with cases seeking to impose civil liability on persons alleged to have aided and abetted the wrongdoing of others, and in almost every one of those cases, they have recognized the viability of this theory of liability.[7]

This torrent of litigation has, understandably, attracted the attention of lawyers and legal commentators and triggered a vigorous debate over both the theoretical underpinnings and the proper contours of civil aiding and abetting liability.[8] This article is a contribution to that discussion. It is only indirectly

6. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983). *See also Central Bank*, 511 U.S. at 181-82.

7. *See* Stanley Pietrusiak, Jr., *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 239-40 (1996). *See, e.g.*, Dale v. Ala Acquisitions, 203 F. Supp. 2d 694, 700-01 n.5 (S.D. Miss. 2002) (listing twenty-eight states that have recognized civil aiding and abetting liability since the D.C. Circuit's decision in *Halberstam*). Almost all of the states not listed in *Dale* have now recognized civil aiding and abetting liability, at least in some context. *See* Benton v. Merrill Lynch & Co., 524 F.3d 866, 871-72 (8th Cir. 2008); Reis v. Barley, Snyder, Senft & Cohen, LLC, 484 F. Supp. 2d 337, 350-52 (E.D. Pa. 2007); Farm Bureau Life Ins. Co. v. Am. Nat. Ins. Co., 505 F. Supp. 2d 1178, 1189 (D. Utah 2007); Television Events & Mktg., Inc. v. Amcon Distrib. Co., 488 F. Supp. 2d 1071, 1075-77 (D. Haw. 2006); Ellison v. Plumbers & Steam Fitters Union Local 375, 118 P.3d 1070, 1077 (Alaska 2005); Walls v. Moreland Altobelli Assoc., 659 S.E.2d 418, 421 (Ga. Ct. App. 2008); Highland Enters. v. Barker, 986 P.2d 996, 1008 (Idaho 1999); Hellums v. Raber, 853 N.E.2d 143, 146-47 (Ind. Ct. App. 2006); Steelvest, Inc. v. Scansteel Serv. Cent., 807 S.W.2d 476, 485 (Ky. 1991); Prime Fin. Servs. v. Vinton, No. 273264, 2008 WL 2262185 (Mich. Ct. App. June 3, 2008); Sloan v. Fauque, 784 P.2d 895, 896 (Mont. 1989); Bergman *ex rel.* Harre v. Anderson, 411 N.W.2d 336, 339-40 (Neb. 1987); Ward v. Bullis, 748 N.W.2d 397, 407-08 (N.D. 2008); Chem-Age Indus. v. Glover, 652 N.W.2d 756, 773-75 (S.D. 2002); Juhl v. Airington, 936 S.W.2d 640, 643-44 (Tex. 1996); Halifax Corp. v. Wachovia Bank, 604 S.E.2d 403, 411-12 (Va. 2004); Cooper v. Cooper, 783 A.2d 430, 443 (Vt. 2001); Martin v. Abbott Labs., 689 P.2d 368, 377-78 (Wash. 1984).

8. *See, e.g.*, Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (May 2006); Pietrusiak, *supra* note 7; Taurie M. Zeitzer, *In Central Bank's Wake, RICO's Voice Resonates: Are Civil Aiding and Abetting Claims Still Tenable?*, 29 COLUM. J.L. & SOC. PROBS. 551 (1996). The role of criminal aiding and abetting liability has been the subject of recent debate as well. *See* Adam H. Kurland, *To "Aid, Abet, Counsel, Command, Induce or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. Rev. 85 (2005).

concerned, however, with the general principles of civil aiding and abetting liability. Rather, its focus is on how this theory of liability has been, and should be, applied in suits against a particular type of defendants—lawyers themselves.[9]

It might further, and equally reasonably, be assumed that the decisions in such cases would reflect the principle, articulated in the Restatement (Third) of the Law Governing Lawyers, that "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances."[10] And in a number of cases, this assumption has proved sound, as courts have applied civil aiding and abetting principles to lawyers in much the same way that they are applied to everyone else.[11]

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9. I limit my focus to judicial decisions because, as far as I am aware, only one state (California) has attempted to address the civil aiding and abetting liability of lawyers through legislation. I discuss that statute (briefly) below. *See infra* text accompanying notes 263-79.

10. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 (2000).

11. *See, e.g.*, Hefferman v. Bass, 467 F.3d 596, 601 (7th Cir. 2006) (reversing dismissal of claim against lawyer under Illinois law for aiding and abetting a breach of fiduciary duty); Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 414-15 (3d Cir. 2003) (reversing dismissal of claims under New Jersey law against lawyers for civil conspiracy and aiding and abetting a fraud); Albright v. Attorneys' Title Ins. Fund, No. 2:03CV517, 2008 WL 2952260, at *12 (D. Utah July 28, 2008) (granting summary judgment to attorneys alleged to have aided and abetted a conversion); Sender v. Mann, 423 F. Supp. 2d 1155, 1175-76 (D. Colo. 2006) (recognizing viability under Colorado law of claims against lawyers for aiding and abetting fraud and breach of fiduciary duty but granting summary judgment to the lawyers on those claims); *In re* Ticketplanet.com, 313 B.R. 46, 64 (Bankr. S.D.N.Y. 2004) (dismissing as inadequately pled complaint against lawyers for aiding and abetting fraud and breach of fiduciary duty); Anstine v. Alexander, 128 P.3d 249, 255-56 (Colo. Ct. App. 2005), *rev'd on other grounds*, 152 P.3d 497 (Colo. 2007) (approving aiding and abetting claim against attorneys); Holmes v. Young, 885 P.2d 305, 308-09 (Colo. Ct. App. 1994) (affirming judgment for lawyers following bench trial on claim for aiding and abetting a breach of fiduciary duty); Williams Mgmt. Enters. v. Buonauro, 489 So. 2d 160, 168 (Fla. Dist. Ct. App. 1986) (recognizing viability of claim against attorney for aiding and abetting a breach of fiduciary duty); Int'l Cmty. Corp. v. Young, 486 So. 2d 629, 630 (Fla. Dist. Ct. App. 1986) (reversing grant of summary judgment to attorney on claim of aiding and abetting a breach of fiduciary duty); Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 767-69 (Ill. App. Ct. 2003) (reversing dismissal of aiding and abetting claims against lawyers); Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 654-56 (Iowa 1979) (affirming judgment against lawyer for aiding and abetting a breach of fiduciary duty); Spinner v. Nutt, 631 N.E.2d 542, 546 (Mass. 1994) (accepting in theory claim against lawyers for aiding and abetting a breach of fiduciary duty but finding complaint's allegations inadequate); Kurker v. Hill, 689 N.E.2d 833, 836-37 (Mass. App. Ct. 1998) (reversing dismissal of claim against lawyers for aiding and abetting a breach of fiduciary duty);

Three recent cases, however, herald the birth of a nascent counter-trend.[12] The courts in those cases have concluded that exposing lawyers to civil aiding and abetting liability is inappropriate and unwise. Instead, they have bestowed on lawyers special "privileges" designed to shield them from this form of liability. All three cases involved claims that lawyers aided and abetted their clients' breaches of fiduciary duty, but each of the opinions contains language reflecting judicial support for a far more sweeping principle, one that would immunize lawyers—and lawyers alone—from almost any civil liability for aiding and abetting.[13]

These decisions are bad law and worse policy. They cannot be squared with the Restatement's command that lawyers' civil liability should generally track that of non-lawyers. But they are problematic for many other reasons as well. First, while the courts have articulated a variety of reasons for rejecting the civil aiding and abetting liability of lawyers, none of those reasons withstand careful scrutiny.[14] Arguments against such liability have also been advanced by legal commentators, but they are no more persuasive than those articulated by the courts.[15] Second, neither the courts nor the commentators appear to have recognized that insulating lawyers, and lawyers alone, from civil aiding and abetting liability introduces irreconcilable in-

Eurycleia Partners, LP v. Seward & Kissel, LLP, 849 N.Y.S.2d 510, 512 (App. Div. 2007) (recognizing theoretical viability of claims against lawyers for aiding and abetting a breach of fiduciary duty but finding complaint's factual allegations insufficient); Agostini v. Sobol, 757 N.Y.S.2d 555, 557 (App. Div. 2003) (accepting theoretical validity of claims against lawyers but finding allegations insufficient); *Chem-Age Indus.*, 652 N.W.2d at 773-75 (reversing grant of summary judgment to lawyer on claim for aiding and abetting a breach of fiduciary duty); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472-73 (Tex. App. 1985) (affirming jury verdict against lawyer for civil conspiracy to defraud). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. h, Reporter's Note, § 94 cmt. g., Reporter's Note (2000).

12. Durham v. Guest, 171 P.3d 756 (N.M. Ct. App. 2007), *cert. granted*, 172 P.3d 1286 (N.M. 2007); Reynolds v. Schrock, 142 P.3d 1062 (Or. 2006); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App. 2005).

13. The impact of these decisions has been substantial enough that one state appellate court recently certified for decision to its supreme court the question of whether attorneys can be liable for aiding and abetting a breach of fiduciary duty on the ground that there is now a split in authority on this issue. *See* Tensfeldt v. Haberman, No. 2007AP1638, 2008 WL 889558 (Wis. Ct. App. Apr. 3, 2008).

14. *See infra* Parts II.A.1, II.B.1.

15. *See infra* Part III.

consistencies in the way that the law is applied in similar situations—inconsistencies that are bound to bedevil courts and commentators in the future.[16] Third, the rulings bestowing special privileges on lawyers will surely encourage the perception in the general public that lawyers are unfairly gaming the legal system to provide for themselves protections that are not available to non-lawyers. In the long run, such rulings will inevitably diminish respect for the legal system as a whole.

None of these undesirable consequences are necessary. There is plenty of room within the existing structure of aiding and abetting law for courts to take into account the particular role that lawyers play in our society and to reach decisions that will not inhibit them from providing legal services by exposing them to unwarranted civil liability for aiding and abetting.[17] The essential thrust of this paper is to expose the flaws in the catalogue of reasons that have been advanced in support of the claim that lawyers need special protection against civil aiding and abetting liability and, in the process, to demonstrate that the existing principles of aiding and abetting liability provide lawyers with all the protection they need to do their jobs properly and well.

To fully understand these issues, one needs a working understanding of the basics of civil aiding and abetting liability. Accordingly, in the first section of this article I outline the history and structure of this form of liability. I also describe the general principles governing the civil liability of lawyers and identify the cases in which courts have applied standard civil aiding and abetting principles to lawyers. In the second section, I discuss in detail the three recent decisions granting lawyers special privileges to aid and abet the wrongdoing of others and expose the flaws in the reasons that the courts gave for reaching those decisions. In the third section, I explain why those decisions create a number of irreconcilable inconsistencies in the way the law is applied to those in similar circumstances. In the fourth and final section, I show why granting lawyers special privileges is not necessary in the first place and why even the scenarios that are the source of the greatest concern among

16. *See infra* Part III.
17. *See infra* Part IV.

those opposed to lawyers' aiding and abetting liability are adequately addressed within the existing framework of civil aiding and abetting law.

I. The Basic Principles of Civil Aiding and Abetting Law and the General Law of Lawyers' Civil Liability

A. *Civil Aiding and Abetting Liability*

The concept of a "joint tort" was originally conceived to cover the situation in which two or more persons acted together pursuant to a common tortious design.[18] The idea, as a leading authority explained it, was that if a group of "highwaymen" collaborated to accost a victim, it was fair to make each of them legally responsible for anything the others did, even though "'one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons.'"[19]

In time, courts were called on to consider a range of variations on this theme. There were, for example, cases in which the relationship among the participants in wrongdoing was less clear and others in which the role of one or more of the participants was less substantial.[20] Ultimately, two distinct theories of liability evolved: the first was the concept of civil conspiracy, and the second came to be known as "participation" or "aiding and abetting" liability.[21] "The prime distinction between civil conspiracies and aiding-abetting," as the D.C. Circuit explained, "is that a conspiracy involves an agreement to participate in a wrongful activity. Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who

18. Halberstam v. Welch, 705 F.2d 472, 476 (D.C. Cir. 1983).

19. *Id.* at 476-77 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 46 (4th ed. 1971)). *Halberstam* itself was a fascinating (and tragic) case. Michael Halberstam was killed by Bernard Welch while Welch was robbing Halberstam's house. *Id.* at 474-76. Halberstam's personal representative then sued Welch and his live-in girlfriend, Linda Hamilton. *Id.* The appeal to the D.C. Circuit was taken by Hamilton from a judgment finding her civilly responsible for Halberstam's death as a result of the five years that she spent living with Welch, assisting him in disposing of the fruits of his numerous burglaries, and helping him spend the proceeds of that criminal enterprise. *Id.* at 472. The court affirmed the judgment against Hamilton, finding itself "satisfied that the district court's factual findings and inferences fit into existing concepts of civil liability for concerted tortious actions through conspiracy and aiding-abetting." *Id.* at 489.

20. *Id.* at 477.

21. *Id.* at 476-77.

performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct."[22] This distinction is well-settled, at least conceptually, as these theories of liability have been reflected in sections 876 (a) and (b) of the Restatement (Second) of Torts since 1939.[23]

At least a half-dozen other sections of three Restatements provide conceptual support for the theories of joint liability reflected in section 876. The most direct support is found in two provisions linking those theories to breaches of fiduciary duty. A comment to section 874 of the Restatement (Second) of Torts refers specifically to section 876 and provides that "[a] person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused."[24] Along the same lines, section 326 of the Restatement (Second) of Trusts provides that "[a] third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust."[25]

Several sections of the Restatement (Second) of Agency provide more generic support. A comment to section 343 of that Restatement also references section 876 of the Restatement (Second) of Torts and provides that "[a]n agent who assists another agent or the principal to commit a tort is normally himself

22. *Id.* at 478. *See also* Neilson v. Union Bank of California, 290 F. Supp. 2d 1101, 1133-35 (C.D. Cal. 2003); Pietrusiak, *supra* note 7, at 229-32.

23. *Halberstam*, 705 F.2d at 476-77. Section 876 provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (1979). While there are many decisions citing sections (a) and (b), the theory of liability set forth in section (c) has been something of a dead letter, presumably because when the defendant's conduct violates a direct duty, it is easier and more advantageous for the plaintiff to sue for that violation. Whatever the reason, published decisions citing section 876(c) are few and far between. *But see* Gervais v. Foehrenbach, 181 A.2d 253 (Conn. 1962); Larsen v. Philadelphia Newspapers, Inc., 602 A.2d 324 (Pa. Super. Ct. 1991).

24. RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979).

25. RESTATEMENT (SECOND) OF TRUSTS § 326 (1959).

liable as a joint tort feasor for the entire damage."[26] In a somewhat narrower vein, the Restatement (Second) of Agency adds that "[a] person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal"[27] and that "[a]n agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal."[28] Other sections of the Restatement (Second) of Agency provide further, but less direct, conceptual support for civil aiding and abetting liability.[29]

Courts and commentators have often blurred the line between the distinct theories of liability reflected in section 876.[30] Problems have resulted from differences in the way the theories are applied in the civil context and their criminal counterparts.[31] Confusion has also arisen because the courts, perhaps reluctant to impose liability on the basis of mere "assistance," have at times stretched the facts of a case to infer an "agreement" to participate in tortious conduct when there really was none.[32] Forcing a "substantial assistance" case into the "civil conspiracy" mold just creates a different problem anyway, as the latter concept is no model of legal clarity.[33]

For present purposes, however, the more significant point is that, as late as 1983, aiding and abetting was a neglected

26. RESTATEMENT (SECOND) OF AGENCY § 343 cmt. d (1958).

27. *Id.* § 312.

28. *Id*. § 348.

29. *See id.* §§ 257, 344; Pietrusiak, *supra* note 7, at 231 n.57.

30. Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983).

31. *See, e.g.*, Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 415 n.3 (3d Cir. 2003) (noting that, in New Jersey, shared intent is required to impose criminal, but not civil, aiding and abetting liability); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 84 n.33 (1993); Jerry Whitson, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. REV. 921, 921-27 (1979); Zeitzer, *supra* note 8, at 560-62.

32. *Halberstam*, 705 F.2d at 478.

33. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 732 (1966) ("The tort of 'conspiracy' is poorly defined, and highly susceptible to judicial expansion; its relatively brief history is colored by use as a weapon against the developing labor movement."). For a discussion of the history of civil conspiracy, see Whitson, *supra* note 31.

theory of civil liability.[34] Likely as a result of its lack of use, it had been recognized only in an odd patchwork of cases. The first group, as the D.C. Circuit noted, was a scattering of tort cases arising out of the "isolated acts of adolescents in rural society."[35] Another was the limited employment of the concept of civil conspiracy, mostly in the labor law arena.[36]

A third area was the law of securities fraud, where aiding and abetting actually became an important form of liability.[37] This particular use of civil aiding and abetting liability was substantially curtailed in 1994, however, when the Supreme Court, in *Central Bank of Denver v. First Interstate Bank of Denver*,[38] held that it was not authorized by section 10(b) of the Securities Exchange Act of 1934.[39] Congress restored aiding and abetting liability to section 10(b), but only in cases brought by the Securities and Exchange Commission.[40] Private securities plaintiffs adapted to the *Central Bank* decision by making a greater effort to establish that alleged wrongdoers are primary violators, rather than aiders and abettors, and by making more use of

34. By now, the careful reader will have noticed that, beginning with the title to this article, I have used the shorthand reference "aiding and abetting" to describe what are really three distinct, albeit closely-related, types of liability, even though that name properly belongs to just one of them. One could—and some have—criticized such sloppiness. *See* Langevoort, *supra* note 31, at 84 n.33 (suggesting that in light of the inexact parallel between the civil and criminal law, "[m]uch confusion could have been avoided if the SEC and the early courts used the phrase 'substantial assistance' in naming the doctrine rather than 'aiding and abetting.'"). Nevertheless, for two reasons I have decided to sacrifice linguistic precision for ease of understanding. Imprecise though it is, "aiding and abetting" is the phrase that is almost always employed by courts and commentators to describe this general form of liability. Moreover, the terminology issue is substantively important only in distinguishing among the three theories of liability articulated in RESTATEMENT (SECOND) OF TORTS § 876 (1979), and that is not my focus here. So, other than in a couple of places in which I discuss separately the ways this theory of liability is applied to lawyers, I shall employ the familiar shorthand reference "aiding and abetting" to describe collectively all of the theories of liability reflected in section 876.

35. *Halberstam*, 705 F.2d at 489.

36. *See United Mine Workers*, 383 U.S. at 732.

37. *See generally* William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws—Aiding and Abetting Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313 (1989).

38. 511 U.S. 164 (1994).

39. *See id.* at 191.

40. 15 U.S.C. § 78t(e) (1995). *See also* Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 768-69 (2008).

other sections of the securities laws.[41] In addition, and of more direct relevance here, they put more emphasis on claims of aiding and abetting common law fraud and breach of fiduciary duty, which were unaffected by the decision in *Central Bank*.[42]

A fourth traditional use of civil aiding and abetting liability was in the law of trusts. The Supreme Court recently observed "that 'knowing participation' liability on the part of *both* co-trustees *and* third persons was well established under the common law of trusts."[43] In fact, this principle was so firmly established that, almost a century ago, Professor Austin Wakeman Scott was able to begin an article in the *Harvard Law Review* with the pronouncement that "[a]nyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the *cestui que trust*."[44] Indeed, the common law has historically been so protective of trust beneficiaries that the liability of those who participate in a breach of trust approaches strict liability.[45]

Thus, in the early 1980s, the basic contours of aiding and abetting law were rather peculiar. On the criminal side of the law, the concept had been recognized and applied for centuries. On the civil side, the concept certainly existed in theory, as it was reflected in a number of sections of the Restatements of Torts, Trusts, and Agency. In practice, however, its use was most prominent in two substantive areas—securities regulation and labor law—in which common law theories of civil liability had been largely usurped by federal statutory regulation. In non-statutory cases, the doctrine was largely confined to cases alleging a breach of trust and a handful of tort cases with minimal relevance to modern commercial society.

41. *See, e.g.*, *In re* Parmalat Sec. Litig., 376 F. Supp. 2d 472, 498-503 (S.D.N.Y. 2005) (discussing these developments).

42. *See, e.g.*, YF Trust v. JP Morgan Chase Bank, No. CV 07-567-PHX-MHM, 2008 WL 821856 (D. Ariz. Mar. 26, 2008).

43. Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (citations omitted). *See* RESTATEMENT (SECOND) OF TRUSTS § 326 (1959).

44. Austin Wakeman Scott, *Participation in a Breach of Trust*, 34 HARV. L. REV. 454, 454 (1921).

45. Peter T. Wendel, *The Evolution of the Law of Trustee's Powers and Third Party Liability for Participating in a Breach of Trust: An Economic Analysis*, 35 SETON HALL L. REV. 971, 972 (2005).

The flood of civil aiding and abetting cases in the last quarter century has, therefore, forced the courts to confront many issues that they are now working through. For example, there is considerable disagreement as to whether substantial assistance and civil conspiracy are torts in and of themselves or just forms of vicarious liability.[46] There are also questions about the nature of the distinction between the two theories and how and where to draw a line between them.[47]

While these issues have some relevance here, they are not the principal focus of this article, because they affect *all* civil aiding and abetting claims, not just those filed against lawyers. Questions about how to distinguish among the types of aiding and abetting liability, whether they are independent torts or just forms of vicarious liability, or even whether there ought to be civil aiding and abetting liability in the first place, are independent of the question whether, if such liability exists, lawyers should be exposed to it in the same manner as everyone else. Before turning to this question, however, it will be helpful to sketch briefly the history of lawyers' civil liability.

B. *The General Law of Lawyers' Civil Liability*

It was not too long ago that almost nobody had the temerity to sue a lawyer. In the preface to the 2008 edition of their leading treatise on the liability of lawyers, Ronald Mallen and Jeffrey Smith observe that the first edition of the treatise, published in 1977, "examined about 800 decisions, most of which did not involve claims for legal malpractice but concerned ethics or professional responsibility issues."[48] The 2008 edition, by contrast, "examines over 17,000 decisions."[49] The recent explosion of civil litigation against lawyers therefore parallels almost exactly the explosion of civil aiding and abetting cases.

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46. *See* Eastern Trading Co. v. Refco, Inc., 229 F.3d 617, 623-24 (7th Cir. 2000); Neilson v. Union Bank of California, 290 F. Supp. 2d 1101, 1133-35 (C.D. Cal. 2003); WILLIAM L. PROSSER & ROBERT E. KEATON, THE LAW OF TORTS 324 (5th ed. 2001); Pietrusiak, *supra* note 7, at 241; Whitson, *supra* note 31.

47. Even though criminal aiding and abetting is far more firmly established than its civil counterpart, its proper contours are no less the subject of debate. *See, e.g.*, Kurland, *supra* note 8.

48. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE ix (2008).

49. *Id.*

There are, of course, different ways in which one might categorize the suits that are filed against lawyers, but the most basic distinction is between those filed by clients and those filed by non-clients. Clients have long had the right to sue their lawyers for wrongdoing in connection with the representation, even if that right was, until recently, rarely exercised. These suits traditionally were styled in tort as claims for legal malpractice, but they often included claims for breach of contract or fiduciary duty.[50] There is substantial overlap among these theories, and the courts have had some difficulty deciding which ones to apply to particular types of lawyer misconduct.[51] The cause of action for breach of fiduciary duty has been particularly controversial, as courts have wrestled with the argument that such claims simply—and therefore unnecessarily—duplicate legal malpractice claims.[52]

These difficulties, however, pale beside those that have confronted the courts in their struggle to delineate the contours of lawyers' liability to non-clients. In 1880, the Supreme Court held that lawyers had no liability to anyone other than their clients for professional negligence,[53] and well into the second half of the twentieth century, this privity-based bar operated to completely preclude almost all civil suits against lawyers by non-clients. The only exceptions were a few theories of liability that were available to non-clients in limited situations. For instance, lawyers have always been exposed to suits for malicious prosecution and abuse of process, though such claims have generally met little success.[54] In addition, lawyers could always be sued when they committed ordinary torts—most commonly fraud,[55] but occasionally others as well.[56] And lawyers have,

50. Roy R. Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 235 (1994).

51. *Id.* at 235-37. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. c (2000) ("Many claims brought by clients against lawyers can reasonably be classified either as for breach of fiduciary-duty or for negligence without any difference in result.").

52. *See generally* Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 695-700 (2006).

53. Nat'l Sav. Bank v. Ward, 100 U.S. 195 (1880).

54. MALLEN & SMITH, *supra* note 48, §§ 6.8-6.24; J. Randolph Evans & Ida Patterson Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability,* 45 S.C. L. REV. 803, 805-09 (1994).

55. MALLEN & SMITH, *supra* note 48, § 6.7.

from time to time, been subject to suits for certain statutory violations, most notably claims brought under the securities laws.[57] For a long while, that was about the extent of lawyers' (largely theoretical) civil liability to non-clients.

But as the privity bar began to break down in other areas of the law, so too did it begin to crumble in suits against lawyers.[58] In a development generally traced to the California Supreme Court's decisions in *Biakanja v. Irving*[59] and *Lucas v. Hamm*,[60] courts began to hold that non-clients could bring routine malpractice suits against lawyers using one of two theories. The first class of cases were those in which the non-client could show that he or she was an intended beneficiary of the lawyer's services, with suits brought by persons who lost an inheritance due to a lawyer's alleged negligence in drafting or probating a will being the paradigm.[61] Courts also began to approve lawyers' liability to non-clients when it could be shown that a lawyer had voluntarily assumed duties to non-clients knowing that they were likely relying on his or her services, such as transactions in which a lawyer issued an opinion letter.[62]

The recognition in the legal community that lawyers are vulnerable to being sued civilly got a big boost in the fallout from the savings and loan crisis in the late 1980s and early 1990s. After being forced to take over a number of failed savings and loans, federal regulators filed a series of well-publi-

56. *Id.* §§ 6.25-6.30.

57. Schatz v. Rosenberg, 943 F.2d 485, 495-97 (4th Cir. 1991); Wenneman v. Brown, 49 F. Supp. 2d 1283 (D. Utah 1999). *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmts. i & j (2000); MALLEN & SMITH, *supra* note 48, § 13.20; Marc I. Steinberg, *Attorney Liability for Client Fraud,* 1991 COLUM. BUS. L. REV. 1, 11-12 (1991); Lora C. Siegler, Annotation, *Attorney's Liability for Nondisclosure or Misrepresentation to Third-party Nonclients in Private Civil Actions Under Federal Securities Laws*, 112 A.L.R. FED. 141 (1993).

58. MALLEN & SMITH, *supra* note 48, § 6.1 (In 2008, "[n]onclients bring over 20% of all claims against attorneys that arise out of the rendition of legal services.") (footnote omitted).

59. 320 P.2d 16 (Cal. 1958).

60. 364 P.2d 685 (Cal. 1961).

61. *See generally* Langevoort, *supra* note 31, at 89-90; Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 903-04 (1994); John Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4TH 615 (1988).

62. Teshima, *supra* note 61, § 14(a).

cized suits in an effort to recoup the losses suffered by the S&Ls. Those suits often included claims against the outside lawyers for the entities—claims that attracted considerable attention (and no little consternation) in the legal community for the aggressiveness and creativity of the government's efforts to impose on lawyers liability for the conduct of the business executives.[63]

In framing its arguments in those cases, the government often alleged that the lawyers had "aided and abetted" breaches of fiduciary duty committed by the officers and directors, terminology that was then mimicked by the courts and the media.[64] There is, however, a fundamental difference between those claims and the aiding and abetting claims that are the focus of this article. Because the government had stepped into the shoes of the savings and loans, and filed suit in its capacity as receiver, it was effectively suing the lawyers as their client.[65] Accordingly, those suits are conceptually distinct from the claims which are the focus of this article—claims in which nonclient third parties charge lawyers with aiding and abetting wrongdoing by the lawyers' clients.

C. *Aiding and Abetting Cases Against Lawyers*

It was inevitable that the parallel explosions of civil aiding and abetting lawsuits and civil suits filed against lawyers would intersect, and the law anticipated this development. Section 94 of the Restatement (Third) of the Law Governing Lawyers expressly contemplates civil aiding and abetting claims against lawyers and directs that they be handled under sections

63. *See generally* Evans & Dorvee, *supra* note 54, at 804; Christopher G. Sablich, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517 (1992).

64. *See, e.g.*, FDIC v. Nathan, 804 F. Supp. 888, 896 (S.D. Tex. 1992) ("The complaint alleges that the attorney Defendants knowingly aided [the savings and loan's executives] in breaching their fiduciary duties by structuring, documenting, and closing fraudulent loans and failed to warn any nonculpable party of the illegal transactions.").

65. Evans & Dorvee, *supra* note 54, at 823-35. In some cases, the government also alleged that the lawyers breached independent duties to the government or the taxpayers. *See* Pietrusiak, *supra* note 7, at 245-54. Those claims were not aiding and abetting claims at all.

51, 56 and 57 of that Restatement.[66] Section 56 (the section referenced at the outset of this article) in turn articulates the general command that lawyers' liability should track that of nonlawyers, and its official comments cross-reference both section 876 of the Restatement (Second) of Torts[67] and section 326 of the Restatement (Second) of Trusts.[68] Nothing in the text of any of these sections, or in their official comments, suggests that lawyers are meant to receive special immunity against aiding and abetting claims.

At least initially, the courts saw things the same way. There are, for example, plenty of cases in which courts upheld the viability of claims charging lawyers with participating in a fraud.[69] It also seems to have always been accepted that lawyers could be sued for assisting a breach of trust; in his treatise, Professor Scott observed that attorneys are liable to the beneficiaries of the trust in such cases on the same terms as anyone else.[70] The courts agreed, and there are a fair number of cases holding lawyers liable for aiding and abetting a breach of trust.[71] More recently, a handful of courts have also recognized that lawyers can also be sued for aiding and abetting their clients' breaches of fiduciary duty not involving trusts.[72] Perhaps the leading case of this type, and certainly a representative ex-

66. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(l)(a) (2000) ("A lawyer who counsels or assists a client to engage in conduct that violates the rights of a third person is subject to liability . . . to the third person to the extent stated in §§ 51 and 56-57 . . . .").

67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. c.

68. *Id.* § 56 cmt. h.

69. *See, e.g.*, *id.* § 56, cmt. f, Reporter's Note.

70. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 326.4, at 310 (4th ed. 1989) ("If a trustee in the administration of the trust employs an attorney or other agent, and the trustee commits a breach of trust, the agent is not under a liability to the beneficiaries of the trust for participation in the trust, unless he knew or should have known that he was assisting the trustee to commit a breach of trust. Even if he knows or has reason to know that the trustee is committing a breach of trust, he is not liable unless he assists the trustee in such a way that he as well as the trustee should be held responsible for the breach of trust.") (footnote omitted). *See also* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 901 (2d ed. 1995).

71. *See, e.g.*, Thornton v. Evans, 692 F.2d 1064, 1082-83 (7th Cir. 1982); SCOTT & FRATCHER, *supra* note 70, § 326.4 (collecting cases).

72. *See* cases cited *supra* note 11.

ample of the genre, is the Oregon Supreme Court's decision in *Granewich v. Harding*.[73]

William R. Granewich II, Ben Harding, and Jeannie Alexander-Hergert each owned one-third of the stock in Founders Funding Group, Inc. ("FFG") and were officers, directors and employees of the company.[74] As often happens in close corporations, a schism developed, leading two of the principals (Harding and Alexander-Hergert) to try and force the third (Granewich) out of the business.[75] After informing Granewich that he had been ousted as a director, Harding and Alexander-Hergert relieved him of his executive position and fired him as an employee.[76] When Granewich protested that the scheme to force him out was a breach of the fiduciary duties that Harding and Alexander-Hergert owed him as fellow shareholders and directors, Harding and Alexander-Hergert hired Michael J. Farrell, of the law firm Martin, Bischoff, Templeton, Langslet & Hoffman, ostensibly to represent *the corporation's* interest in the dispute.[77]

Granewich then sued Harding and Alexander-Hergert for breach of fiduciary duty and Farrell and his firm for aiding and abetting that breach.[78] He alleged that the lawyers had assisted Harding and Alexander-Hergert in their scheme to oust him from the corporation by sending him letters containing false statements about the legal effect of the efforts to remove him.[79] The lawyers were also alleged to have furthered those efforts "by calling special meetings, amending corporate bylaws, removing plaintiff as a director, and taking other actions to dilute the value of plaintiff's FFG stock."[80] Granewich alleged that Farrell and his firm did all of this even though FFG had no legitimate interest in resolving the dispute in a way that would benefit two of its principals at the expense of the third.[81]

73. 985 P.2d 788 (Or. 1999).

74. *Id.* at 791.

75. *Id.*

76. *Id.*

77. *Id.* This fact would become important down the road. *See infra* text accompanying note 93.

78. *Granewich*, 985 P.2d at 791.

79. *Id.*

80. *Id.* at 791-92.

81. *Id.*

Granewich settled with Harding and Alexander-Hergert, leaving Oregon's appellate courts to consider only his claims against Farrell and the Martin law firm.[82] The Oregon Court of Appeals affirmed the trial court's dismissal of those claims, holding essentially that the lawyers had no liability to Granewich because they did not represent him and therefore owed him no direct fiduciary duty.[83]

The Oregon Supreme Court reversed.[84] The court began its analysis by adopting the basic theory of liability contained in the Restatement (Second) of Torts, holding that "persons acting in concert may be liable jointly for one another's torts under any one of the three theories identified in Restatement section 876."[85] The fact that Granewich's claim was for participation in a breach of fiduciary duty posed no problem, because the legal authorities "virtually are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby."[86] "Indeed," the court observed, "it especially would be odd for the law to afford beneficiaries of *fiduciary* relationships less protection from the malfeasance of third parties than would be available to the victims of other kinds of tortious conduct."[87] Besides, the court held, the principle of liability for participation in a breach of fiduciary duty "readily extends to lawyers."[88]

The Oregon Court of Appeals had concluded that a lawyer cannot be liable to a non-client in a case like *Granewich*, "because the tort of breach of a fiduciary duty depends on a duty that the law implies from a fiduciary relationship between the parties, [and] it necessarily follows that a fiduciary relationship must exist between the plaintiff and all joint tortfeasors."[89] The Oregon Supreme Court rejected this reasoning as "erroneously fus[ing] together" the liability established by subsection 876(c) of the Restatement, which applies to those whose "own conduct, separately considered, constitutes a breach of duty to the third

82. *Id.* at 790.
83. Granewich v. Harding, 945 P.2d 1067 (Or. Ct. App. 1997).
84. *Granewich*, 985 P.2d at 796.
85. *Id.* at 793 (alteration in original) (footnote omitted).
86. *Id.* at 793-94.
87. *Id.* at 794.
88. *Id.* (footnote omitted).
89. Granewich v. Harding, 945 P.2d 1067, 1071 (Or. Ct. App. 1997).

person," and section 876(a), which imposes liability on persons whose actions were not independently wrongful.[90] Under section 876(a), the court recognized, liability can be imposed even on those who did not themselves commit a tort.[91]

The Oregon Supreme Court acknowledged the Court of Appeals' concern that "it unduly would interfere with lawyer-client relations if lawyers could be held liable for actions performed on behalf of their clients that only indirectly result in their clients' breach of their fiduciary duties."[92] This concern was not implicated, the court concluded, because Farrell and his firm represented only the corporation, and it had no interest in which of its shareholders came out on top in their internecine dispute. Accordingly, "the lawyers stand in no different position in relation to plaintiff than anyone else, and their status as lawyers is irrelevant."[93]

Granewich was an undeniable victory for the principle that lawyers have the same aiding and abetting liability as anyone else. At the same time, however, the Court of Appeals' ruling that *Granewich* overturned marked an undercurrent of discontent with that premise which had begun to percolate in the legal community. At about the same time, for example, the South Dakota Supreme Court stated that "[h]olding attorneys liable for aiding and abetting the breach of fiduciary duty in rendering professional services poses both a hazard and a quandary for the legal profession. . . . [O]verbroad liability might diminish the quality of legal services, since it would impose 'self-protective reservations' in the attorney-client relationship."[94] Notwithstanding this concern, the court did not find it necessary to reject such claims; lawyers would be adequately protected, it

90. *Granewich*, 985 P.2d at 794.

91. *Id.*

92. *Id.* at 795.

93. *Id.* To this statement, the court appended a footnote that would become important seven years later: "We do not suggest, by drawing this distinction," the court cautioned, "that it necessarily matters that the corporation, rather than Harding and Alexander-Hergert, was the client. We note only that, on these allegations, the dilemma posed by the Court of Appeals is not presented." *Id.* at 795 n.7. *See infra* Part II.A.

94. Chem-Age Indus. v. Glover, 652 N.W.2d 756, 774 (S.D. 2002) (quoting Goodman v. Kennedy, 556 P.2d 737, 743 (Cal. 1976)).

concluded, if "courts strictly interpret[ed] the common law elements of aiding and abetting the breach of a fiduciary duty."[95]

Arguments against imposing civil aiding and abetting liability on lawyers also began to appear in legal publications.[96] One commentator criticized the Oregon Supreme Court's ruling in *Granewich*, albeit more because of the potential burdens that it placed on attorneys called on to advise the shareholders of close corporations on how to resolve disagreements with one another than because of its application of civil aiding and abetting principles to lawyers.[97] The growing undercurrent of discontent would ultimately manifest itself in the decisions that are the focus of this article.

II. The Cases Rejecting Lawyers' Civil Liability for Aiding and Abetting

A. *Reynolds v. Schrock*

Seven years after it decided *Granewich*, the Oregon Supreme Court sharply reversed course. In *Reynolds v. Schrock*,[98] the court held that lawyers have a "qualified privilege" to aid and abet their clients' breaches of fiduciary duty.[99] In fact, as will become clear, the privilege that the court announced in *Reynolds* is anything but "qualified," as it appears to leave lawyers completely free to provide almost any help their clients need in order to breach their fiduciary duties.

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95. *Id.* (citing Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186-87 (Minn. 1999)).

96. *See, e.g.*, Bryan C. Barksdale, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 WASH. & LEE L. REV. 551 (2001); Katerina P. Lewinbuk, *Let's Sue all the Lawyers: The Rise of Claims against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 141 (2008) (labeling the theory of civil aiding and abetting against lawyers as "alarming to the legal profession"); Jessica Palvino, *Aiding-and-Abetting Liability: Is Privity Making a Comeback?*, 70 TEX. B. J. 52, 53 (2007) (criticizing aiding and abetting cases because a lawyer "should not be held liable merely for doing his job"); Pietrusiak, *supra* note 7, at 216 (labeling aiding and abetting as an "ominous new form of attorney liability"); Douglas R. Richmond, *Lawyer Liability For Aiding and Abetting Clients' Misconduct Under State Law*, 75 DEF. COUNS. J. 130, 131 (2008) (warning that aiding and abetting liability "risks diminishing the quality of legal services"); Tuttle, *supra* note 61.

97. Barksdale, *supra* note 9, at 554.

98. 142 P.3d 1062 (Or. 2006).

99. *Id.* at 1071.

Clyde Reynolds was a naturopathic physician and Donna Schrock was one of his patients.[100] Together, doctor and patient bought two parcels of land. After their relationship fell apart, Schrock sued Reynolds to settle title to the land.[101] Assisted by their lawyers, the parties negotiated a settlement.[102] The settlement agreement (drafted by the lawyers) provided that Reynolds would transfer his interest in one parcel (the "lodge property") to Schrock, and that they would jointly sell the second parcel (the "timber property"), with its proceeds going to Reynolds.[103] They agreed that if the timber property sold for less than $500,000, Schrock would pay Reynolds the difference, and that she would give him a security interest in the lodge property to secure that payment.[104] If the timber property sold for more than $500,000, Schrock would owe Reynolds nothing further.[105]

Schrock's lawyer, Charles Markley, then advised her that the settlement agreement did not require her to retain the lodge property in order to secure the payment to Reynolds, and he helped her quietly sell that property.[106] He also advised her that she was free to revoke her consent to the joint sale of the timber property, and he helped her do that, too.[107] Not surprisingly, Reynolds was upset when he learned of these actions and he sued Schrock and Markley.[108] He alleged that he and Schrock had been joint venturers, and therefore fiduciaries of one another, and that they retained that status during the winding-up of the joint venture.[109] He claimed that Markley had given Schrock "substantial assistance and encouragement" in her breach of fiduciary duty or, alternatively, that he had acted "in concert with [her] pursuant to a common design."[110]

Like Granewich, Reynolds settled with the primary wrongdoer (Schrock), leaving Oregon's appellate courts to consider

100. *Id.* at 1063.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1064.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

only the claims against the lawyer charged with participating in the breach of fiduciary duty (Markley).[111] The trial court granted Markley summary judgment, but the Oregon Court of Appeals reversed.[112] Because Markley's advice and assistance had unquestionably been rendered to a client, the court recognized that it had to confront the question that the Oregon Supreme Court had left open in *Granewich*—whether a lawyer can be held liable for aiding and abetting his own client's breach of fiduciary duty.[113]

Though it feared that its decision would have "serious implications for attorneys," the Court of Appeals reluctantly concluded that lawyers can be held liable to the injured third party in this situation.[114] It expressed concern that such liability could undermine the attorney-client relationship by requiring attorneys to monitor their clients' conduct to prevent them from using the lawyer's advice to guide a breach of fiduciary duty and worried that attorneys facing such liability might need to disclose confidential communications in order to defend themselves in a lawsuit.[115] These undesirable consequences could be adequately mitigated, the court nevertheless concluded, by strictly interpreting the elements of aiding and abetting liability, such as the requirement that liability be imposed only in cases of "substantial" assistance or encouragement of a tortious act.[116]

Markley appealed, and the Oregon Supreme Court reversed.[117] The court began its analysis with its decision in *Granewich*, which it characterized as "a reasonable starting point because it involved claims for breach of fiduciary duty, including a claim against a lawyer for assisting others in breaching fiduciary duties that they owed to the plaintiff."[118] *Granewich* did establish, the court recognized, that section 876 of the Restatement (Second) of Torts set the basic framework for analyzing such cases. Nevertheless, it continued:

111. *Id.*
112. *Id.*
113. Reynolds v. Schrock, 107 P.3d 52, 57 (Or. Ct. App. 2005).
114. *Id.* at 58.
115. *Id.* at 59.
116. *Id*.
117. *Reynolds*, 142 P.3d at 1072.
118. *Id.* at 1065.

> *Granewich* does not provide a complete answer to the questions that this case raises. . . .
>
> . . . [because in that case] this court did not consider or answer the question that is at the core of this case: whether, and under what circumstances, a third party may assert a claim against a lawyer, acting in a professional capacity, for assisting a *client* in breaching the client's fiduciary duty.[119]

As the Oregon Supreme Court framed it, therefore, the issue in *Reynolds* was whether conduct that would expose a lawyer to liability for aiding and abetting a breach of fiduciary duty by a *non*-client would become permissible if the breaching party *was* the lawyer's client.[120]

Citing section 890 of the Restatement (Second) of Torts, the court noted that "[t]he *Restatement* labels any such exemption from liability that the law otherwise would impose as a 'privilege.'"[121] After acknowledging that it had never before considered what kind of "privilege" might protect a lawyer from liability for aiding and abetting a breach of fiduciary duty, the court found support for one in a line of cases holding that agents are in some circumstances "privileged" to advise persons or entities to breach their contracts.[122] Although none of the Oregon cases of this type had involved lawyers, the court noted that courts in other states had applied this rule to lawyers.[123]

The Oregon Supreme Court teased out of these cases the principle that "for individuals and corporations to obtain the advice and assistance that they must receive from their agents, the agents must have some protection from tort liability to third parties . . . ."[124] It leavened this principle with a caution that the protection was not without limits: "Not every relationship between a person who breaches a contract or a fiduciary duty and one who substantially assists in such a breach necessarily justifies recognition of a privilege against liability."[125] "How-

119. *Id.*
120. *Id.* at 1069-71.
121. *Id.* at 1066 (citing RESTATEMENT (SECOND) OF TORTS § 890 (1979)).
122. *Id.* at 1067-68.
123. *Id.* at 1068 n.11.
124. *Id.* at 1068.
125. *Id.*

ever," the court concluded, "we think that the lawyer-client relationship is one that does."[126]

The court then identified three policy justifications in support of its ruling. First, it asserted that "safeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself."[127] This is so, the court continued, because:

> Myriad business transactions, as well as civil, criminal, and administrative proceedings, require that the client have the assistance of a lawyer. And a variety of doctrines, from the rules against conflicts of interest to the confidential nature of lawyer-client communications, demonstrate the ways in which the legal system protects the lawyer-client relationship.[128]

Second, the court believed that "[a] lawyer who is sued for substantially assisting a client's breach of fiduciary duty becomes subject to divided loyalties."[129] Finally, echoing the Court of Appeals' concern, the court noted that "allowing a claim against the lawyer may raise issues of lawyer-client privilege, if the preparation of an adequate defense for the lawyer would require the disclosure of privileged communications."[130]

On the basis of these observations, the court announced a rule that "a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by . . . a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party."[131] It then went on to clarify and emphasize two features of its new rule. First, it placed the burden of establishing that the lawyer was acting outside the scope of the lawyer-client relationship on the plaintiff.[132] Second, it stressed that the rule protects only permissible lawyer activities and not conduct unrelated to the provision of legal services.[133] "Because such unrelated conduct is,

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1069.
131. *Id.*
132. *Id.* at 1071.
133. *Id.* at 1069.

by definition, outside the scope of the lawyer-client relationship, no important public interest would be served by extending the qualified privilege to cover it."[134]

Its holding, the court asserted, was consistent with rulings in which other courts had limited the scope of lawyers' aiding and abetting liability, albeit by strictly interpreting the elements of aiding and abetting rather than establishing a privilege to aid and abet.[135] The court suggested that its rule would often lead to the same result that other courts would reach within the established framework, but that it would do so:

> [I]n a more predictable and useful way, because it focuses on the scope of the lawyer-client relationship—and the legal rules . . . that help define that scope—rather than on the fine line between "advice" and "assistance" or between "substantial assistance" and other assistance. We acknowledge that the test does not identify a bright line between liability and immunity, but it nevertheless uses concepts tied directly to the lawyer's role in representing the client and existing sources of law regarding the scope of that role.[136]

Applying its new rule did not take long. The court quickly concluded that Markley's conduct had been within the scope of his lawyer-client relationship with Schrock, and that he was therefore entitled "to assess [her] legal problems . . . [and] discuss the full range of available solutions."[137] He was also entitled "to assist [her] in implementing those solutions, to the extent that that assistance falls within the legitimate scope of the lawyer-client relationship."[138] Accordingly, the court held, the trial court had correctly granted Markley's motion for summary judgment, and the Court of Appeals had erred in reversing that ruling.

134. *Id.*
135. *Id.* at 1070.
136. *Id.* at 1071 (citation omitted).
137. *Id.*
138. *Id.*

1. The Flaws in the *Reynolds* Court's Arguments Against Aiding and Abetting Liability for Lawyers

There are deep flaws in each of the reasons that the *Reynolds* court gave for granting lawyers a special "privilege" to aid and abet their clients' breaches of fiduciary duty.

i. *The Inapt Analogy to Tortious Interference Cases*

In *Granewich*, the Oregon Supreme Court had held that liability may be imposed on those who substantially assist a breach of fiduciary duty, and in *Reynolds*, the court framed the issue as whether that rule should not apply when the assistance was being provided by a lawyer to a client. Thus, it was perfectly natural for the court to begin its analysis in the latter case with section 890 of the Restatement (Second) of Torts, which "labels any such exemption from liability that the law otherwise would impose as a 'privilege.'"[139]

Because it had not previously considered what "privileges" might be available to those who assist others in a breach of fiduciary duty, the court had to look elsewhere for guidance. It found some in cases granting advisors and other agents, including lawyers, a "privilege" to advise their principals to breach a contract.[140] The court found these cases instructive because "they involve claims against a person for actions on behalf of a client or principal that allegedly harmed a third party."[141] What the court overlooked in drawing this analogy is that the law views the "harm" that flows from a breach of contract far differently than it does the "harm" that arises from a breach of fiduciary duty. As one court succinctly put it, "a breach of contract is not considered wrongful activity in the sense that a tort or a crime is wrongful."[142]

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139. *Id.* at 1066.

140. *Id.* at 1067.

141. *Id.*

142. Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 389 (7th Cir. 2002). *See also* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note (1981) (discussing remedies); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1550, 1559-60 (1995). *But see id.* at 1562, 1565-66 (constructing an argument that torts and most other civil wrongs are not sufficiently different from breaches of contract to support a meaningful distinction in this context).

This difference underlies the difficulties that courts and commentators have faced when they have attempted to delineate the liability of those who induce others to breach their contracts.[143] These difficulties are reflected in section 766 of the Restatement (Second) of Torts, which provides that:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.[144]

The key to the operation of the tort lies in the context given to the word "improperly." For guidance in this endeavor, the Restatement directs courts to consider the seven factors listed in section 767.[145] While those factors are often labeled "privileges"—indeed, the Restatement itself uses this terminology[146]—the drafters also caution:

> [T]his branch of tort law has not developed a crystallized set of definite rules as to the existence or nonexistence of a privilege to act in the manner stated in §§ 766, 766A or 766B. Because of this fact, [section 767] is expressed in terms of whether the interference is improper or not, rather than whether there was a privilege to act in the manner specified.[147]

Thus, the analysis called for by section 767 is fact-specific, and courts faced with tortious interference claims must attempt to balance a number of competing interests as well as accommodate the different policies that underlie tort and contract law. The "privilege" that protects those who advise or assist others to breach a contract is, necessarily, equally contextual, suggesting that it is not easily exported outside the law of tortious interference.

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143. *See, e.g.*, Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982).

144. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1979).

145. *Id.* ch. 37, introductory note.

146. *See id.*

147. *Id.* § 767 cmt. b.

The inadvisability of attempting to export this privilege is confirmed by the structure and the text of the Restatement. To begin with, section 890 (the section referenced by the *Reynolds* court) does not itself create any "privileges"; that term is actually defined in section 10 of the Restatement.[148] Together, these two sections establish that the meaning given to the term "privilege" by tort law is highly dependent on the context in which it is used.[149]

The specific "privilege" to advise others to breach a contract is found in section 772 of the Restatement. It provides that "[o]ne who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving . . . (b) honest advice within the scope of a request for the advice."[150] Aside from the fact that this rule is, by its terms, highly contextual, the critical point is that it is expressly intended to be applied in the same way to everyone: "the rule protects the amateur as well as the professional adviser," because "the lawyer, the doctor, the clergyman, the banker, the investment, marriage or other counselor, and the efficiency expert need this protection for the performance of their tasks."[151] Thus, section 772 has been applied to lawyers, but only in the same manner and to the same extent as it has been applied to other professionals.[152] Similarly, nothing in either the text of section 876 or its official commentary purports to insulate lawyers from liability that would be imposed on nonlawyers; indeed, the opposite is true.[153]

The Restatement (Third) of the Law Governing Lawyers likewise recognizes that lawyers are permitted to advise their clients not to enter into contracts or to breach their existing con-

148. *See id.* § 890.

149. *Id.* § 890 cmt. a.

150. *Id.* § 772. *See generally* J.D. Edwards & Co. v. Podany, 168 F.3d 1020, 1022-25 (7th Cir. 1999).

151. RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1979).

152. *See, e.g.*, Joseph P. Caulfield & Assocs. v. Litho Prods., 155 F.3d 883, 890 (7th Cir. 1998); Binns v. Flaster Greenberg, P.C., 480 F. Supp. 2d 773, 780 (E.D. Pa. 2007); Cavicchi v. Koski, 855 N.E.2d 1137, 1144 (Mass. App. Ct. 2006).

153. RESTATEMENT (SECOND) OF TORTS § 876 cmt. e; Evans & Dorvee, *supra* note 54, at 809-11; Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 680-81 (1981); Pepper, *supra* note 142, at 1597 n.117.

tracts.[154] Significantly, this Restatement takes care to point out that lawyers' protection from such liability is based in the law of tortious interference.[155] It also recognizes that, for this reason, the same protection is available to "other advisors," not just to lawyers,[156] and that a lawyer's liability for assisting a client's breach of fiduciary duties is an entirely different matter.[157]

Thus, the *Reynolds* court made two fundamental errors in relying on the cases and authorities recognizing a "privilege" to advise others to breach a contract. It failed to recognize that, substantively, the "privilege" to advise or assist others to breach a contract without incurring tort liability is inextricably intertwined with the law of tortious interference itself, and so it is not readily exportable to advice or assistance in other contexts. More importantly, the court converted a general privilege that is available equally to all advisors into one that protects only lawyers.

ii. *Lawyers' Fear of Civil Liability*

The Oregon Supreme Court's second reason for granting lawyers a "privilege" to aid their clients' breaches of fiduciary duty was the fear that doing otherwise would leave lawyers subject to "divided loyalties."[158] Lawyers, the court asserted, "cannot serve their clients adequately when their own self-interest— . . . the need to protect themselves from potential tort claims by third parties—pulls in the opposite direction."[159] This is a problem, the court wrote, because legal advice is necessary in connection with "myriad" business transactions, as well as civil, criminal, and administrative proceedings.[160] The court be-

154. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 cmt. g (2000) ("As with other advisors to a contracting party, lawyers are protected against liability for interfering with contracts or with prospective contractual relations or business relationships. . . . Thus a lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing contract. A lawyer may also assist such a breach, for example by sending a letter stating the client's intention not to perform, or by negotiating and drafting a contract, with someone else that is inconsistent with the client's other contractual obligations.").

155. *Id.*

156. *Id.*

157. *Id*.

158. Reynolds v. Schrock, 142 P.3d 1062, 1068 (Or. 2006).

159. *Id.*

160. *Id.*

lieved that protecting lawyers from civil liability for aiding and abetting would mesh with various doctrines—"from the rules against conflicts of interest to the confidential nature of lawyer-client communications"—that have been developed in order to "safeguard" the lawyer-client relationship.[161] There are a host of flaws in this reasoning.

To begin with, while it is undeniably true that lawyers perform their jobs in "myriad" situations, this hardly makes them unique.[162] Doctors, to cite only the most obvious example, must apply their expertise in connection with a bewildering variety of illnesses and medical procedures. More to the point here, bankers and accountants (among others) also face liability for advising and assisting fiduciaries with tasks across a wide spectrum of transactions. Indeed, it seems safe to say that one of the characteristics that marks a person as a "professional" is that he or she provides services in "myriad" circumstances. There is, therefore, no logic in protecting lawyers for this reason, but not bankers, accountants, and other professionals who must deal with similar complexities.

Nor is immunity from aiding and abetting liability necessary in order to protect lawyers' ability to give advice in complex situations. If the complexity of a given situation makes the proper course of action unclear, the lawyer's advice need only reflect that fact and be tailored to accommodate those ambiguities. If the goal is—as it should be—to encourage lawyers to give careful, properly qualified advice, giving them immunity from liability is hardly the way to go about it. To the contrary, a grant of immunity is likely to have the opposite effect and encourage careless or even reckless advice. Moreover, immunity, like that granted in *Reynolds*, protects lawyers even when they give advice in situations that are not complex.

Neither is it significant that lawyers are "necessary" to many activities.[163] While it is certainly true that clients need

161. *Id.*

162. *See* Barksdale, *supra* note 96, at 565-66 ("Given the highly contextual nature of a fiduciary's responsibilities to a beneficiary . . . . the line between appropriate conduct and breaching conduct is less clear in the close corporation setting.").

163. Echoing and amplifying the *Reynolds* court's concern, one commentator has opined that "[a] particularly disturbing facet of the extension of liability for aiding and abetting the breach of fiduciary duty into the corporate squeeze-out

the services of an attorney in an endless variety of situations, it is hard to give this fact any more significance than your average lawyer would give to a surgeon's plea that doctors should not be liable for botching an operation because their services are "necessary" to anyone needing surgery. Absent evidence that lawyers are refusing to provide legal services in certain situations because they are afraid of aiding and abetting liability, this concern is premature at best.

And while it is surely true that various doctrines have been developed to govern the lawyer-client relationship, it is not true that the purpose of all or even most of those doctrines is to "safeguard" that relationship in the way the court meant it in *Reynolds*—so as to protect lawyers from exposure to liability that might inhibit their willingness to give advice. The very doctrines that the *Reynolds* court cites—the rules against conflicts of interest and the confidential nature of lawyer-client communications—make the point nicely. The latter doctrine is not intended to protect lawyers from liability but to facilitate the free flow of information between lawyer and client, while the former is a direct restriction on lawyers' unfettered freedom to practice their profession as they see fit and, more importantly, one that can itself be an independent basis of lawyers' liability.

One commentator frets that aiding and abetting liability will result in a lawyer being held liable for "merely carrying out her client's wishes" and that "[t]he mere threat of an aiding-and-abetting claim is enough to create pause in an attorney's zealous representation of her client and force her to consider her own self-interests—resulting in a damned-if-you-do/damned-if-you-don't situation."[164] This is surely true, if the client's "wish" is to commit a tort or breach a fiduciary duty. But why in that situation *shouldn't* lawyers pause to consider their own potential liability? Or, more importantly, why shouldn't such a lawyer pause to contemplate—and discuss with his or her client—*the client's* potential liability, because of course an attorney only has something to worry about if his or her client does too. If, after the lawyer has explained the risks, the client

context stems from the necessity of attorney involvement in that type of transaction." *Id.* at 577.

164. Palvino, *supra* note 96, at 52.

decides to go ahead and commit a tort or breach of fiduciary duty, and the lawyer signs on as an aider and abettor, why shouldn't they *both* be exposed to liability?

Lawyers neither need nor receive absolute protection from liability in order to "safeguard" their relationship with their clients. They have always faced liability to non-clients in certain situations and to their clients for legal malpractice, breach of contract, and breach of fiduciary duty.[165] There is no readily apparent reason why liability in any of these circumstances is inherently more intrusive on the lawyer-client relationship than is liability for aiding and abetting. Thus, insulating lawyers from aiding and abetting liability—even completely insulating them—will hardly leave them free to advise their clients without worrying about being sued.

iii. *The Disclosure of Privileged Communications*

The Oregon Supreme Court also feared that "allowing a claim against the lawyer may raise issues of lawyer-client privilege, if the preparation of an adequate defense for the lawyer would require the disclosure of privileged communications."[166] Because aiding and abetting suits against lawyers inevitably focus on the lawyers' interaction with their clients, the court was surely correct that such cases will often implicate privileged attorney-client communications. There are, however, several reasons to believe that this is not a sufficiently serious problem to warrant the entire elimination of lawyers' liability for aiding and abetting.

First, aiding and abetting liability is often premised, at least in part, on *conduct* that is not protected by the attorney-client privilege. *Granewich* and *Reynolds* are both good examples. In each of those cases, the aiding and abetting claims

165. *See* MALLEN & SMITH, *supra* note 48, ch. 6.

166. *Reynolds*, 142 P.3d at 1069. Here, the court echoed the opinion of the appellate court in *Granewich v. Harding*, which rejected aiding and abetting liability for lawyers partly because it believed that "litigation of the 'knowledge' element of section 876(b) may require clients and their attorneys to disclose confidential communications in defense of claims made against them." 945 P.2d 1067, 1074 (Or. Ct. App. 1997).

against the lawyers were based largely (albeit not completely) on things the lawyers did, not on advice they gave.[167]

Second, in many aiding and abetting cases, the attorney-client privilege will not be a problem because the client will *want* to disclose the otherwise privileged communications. Aiding and abetting cases are, by definition, cases in which a client is charged with committing some misconduct against a third party that the lawyer is alleged to have assisted. If the lawyer's advice to the client beforehand was that the acts in question were legally permissible, the client will likely want to disclose that advice in an effort to reduce or even eliminate his or her own culpability. Because the attorney-client privilege belongs to the client and not the lawyer, the client would unquestionably have the power to waive the privilege in these circumstances. Indeed, the Restatement (Third) of the Law Governing Lawyers goes even further, providing that the privilege is waived *as a matter of law* "if the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct . . . ."[168]

Nevertheless, there will unquestionably be aiding and abetting cases in which the client will assert the attorney-client privilege, while the lawyer will want to make the privileged communications public, perhaps because he or she counseled against the client's actions, perhaps for some other reason. This divergence is not a problem when a lawyer is sued by his or her client, because by filing suit the client voluntarily waives the attorney-client privilege with respect to the matters at issue.[169] The situation is different when the lawyer is sued by a third party, because there the client cannot be said to have waived the privilege.

It is, however, important to remember that the question of whether a lawyer defending a suit brought by a third party may disclose privileged attorney-client communications against his or her client's wishes is not unique to aiding and abetting cases. Rule 1.6(b)(5) of the Model Rules of Professional Conduct pro-

167. *See* Granewich v. Harding, 985 P.2d 788, 791-92 (Or. 1999); *Reynolds*, 142 P.3d at 1064.

168. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 (2000).

169. *See, e.g.*, *id.* § 80(b); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (1983).

vides that lawyers "may reveal information relating to the representation of a client to the extent the lawyer reasonably believes [that disclosure is] necessary . . . to establish a defense to a . . . civil claim against the lawyer based upon conduct in which the client was involved . . . ."[170] The comments to the rule make clear that it applies to civil aiding and abetting claims.[171]

As two commentators have pointed out, when this issue arises in litigation, the risks involved in the potential disclosure of privileged communications are limited, because the process is subject to judicial supervision.[172] The cases suggest that courts are acutely sensitive to the need to weigh the competing interests involved in these situations.[173] While courts have, in some cases, authorized lawyers to disclose attorney-client communications in an effort to defend themselves against suits brought by third parties,[174] they have also limited disclosure of the communications to those necessary to enable the attorney to mount a defense.[175] Courts have also recognized that if they forbid lawyers from disclosing privileged communications, they must exercise their discretion to protect the lawyers from any unduly harsh consequences of that ruling. In one case, for instance, a court held that a law firm was sufficiently prejudiced by its inability to use the privileged communications to defend itself

170. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5). The "information relating to the representation of the client" referenced by this Rule encompasses more information than is protected by the attorney-client privilege. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 94 (6th ed. 2007).

171. CTR. FOR PROF'L RESPONSIBILITY, *supra* note 170, at 91 (Lawyers are permitted to disclose information relating to the representation in cases "based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.").

172. *See generally* Joseph M. McMonigle & Ronald E. Mallen, *The Attorney's Dilemma in Defending Third Party Lawsuits: Disclosure of the Client's Confidences or Personal Liability?*, 14 WILLAMETTE L.J. 355 (1978).

173. *See generally id.*

174. *See, e.g.*, Children First Found. v. Martinez, No. 1:04-CV-0927, 2007 WL 4344915, at *17-18 (N.D.N.Y. Dec. 10, 2007); Apex Mun. Fund v. N-Group Sec., 841 F. Supp. 1423, 1430 (S.D. Tex. 1993); PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9.56 (2d ed. 2007).

175. *See, e.g.*, *Children First Found.*, 2007 WL 4344915, at *18; *Apex Mun. Fund*, 841 F. Supp. at 1430.

that the suit against it had to be dismissed.[176] The Model Rules give lawyers further protection in this situation, permitting them to disclose such information in some circumstances even before a suit is filed.[177]

The issue boils down to whether it is preferable for the courts to continue balancing the competing interests involved in these privilege situations on a case-by-case basis or to follow the lead of the Oregon Supreme Court and adopt a bright-line rule that eliminates the need for such balancing. Because of the extent to which the bright-line rule is both over-inclusive and under-inclusive, it seems clear that the former course is preferable. The bright-line rule protects attorney-client communications in numerous cases in which protection is not necessary, such as those in which lawyers are charged with aiding and abetting through conduct and those in which their clients will be waiving the privilege anyway.[178] In addition, because the issue of whether and how to protect attorney-client information may arise in any case in which a lawyer is sued by a third party, not just those charging the lawyer with aiding and abetting, the bright-line rule solves the problem of whether to permit disclosure of privileged communications in only a fraction of the cases in which it arises.[179]

176. McDermott, Will & Emery v. Super. Ct. of Los Angeles County, 99 Cal. Rptr. 2d 622 (Ct. App. 2000). *But see* Los Angeles County Bar Assoc. Comm. on Prof'l Responsibility and Ethics, Op. 519 (2007), *available at* http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Eth519_2-26-07.pdf (ruling that there is *not* a self-defense exception to an attorney's duty to protect and preserve confidential client information in order to permit the attorney to defend against third party claims).

177. CTR. FOR PROF'L RESPONSIBILITY, *supra* note 170, at 91-92 (Rule 1.6(b)(5) "does not require the lawyer to await the commencement of an action or proceeding that charges such complicity [in client wrongdoing], so that the defense may be established by responding directly to a third party who has made such an assertion.").

178. While the Oregon Supreme Court did not mention them, it is worth pointing out that there are also likely to be cases in which a plaintiff third party seeks to discover the privileged communications, and the defendant lawyer is indifferent to the disclosure, but the client does not waive the privilege. If, in that situation, the court refuses to order disclosure of the information, the plaintiff will simply be left to decide whether to proceed with the suit without the privileged information.

179. Lawyers' liability in connection with their legal work is, of course, all that matters here. The Oregon Supreme Court was quick to note that its prohibition against aiding and abetting liability "protects lawyers only for actions of the

The downside inherent in a bright-line rule might be tolerable if the costs to the judicial system of engaging in balancing the competing interests were high, but there is little reason to believe that they are. Privilege issues in general, and attorney-client privilege issues in particular, arise all the time in litigation, and they are the kinds of issues that courts are institutionally well-qualified to address.[180] There is, therefore, no need to entirely bar aiding and abetting claims against lawyers in order to protect the attorney-client privilege.

2. The Distinction Between *Reynolds* and *Granewich*

One last issue remains, and that is to consider the distinction that, according to the Oregon Supreme Court, justified the different outcomes in *Reynolds* and *Granewich*: the fact that the lawyers in *Granewich* were subject to liability for aiding and abetting a breach of fiduciary duty because their client was not the party alleged to have breached a fiduciary duty, whereas in *Reynolds*, the person alleged to have breached a fiduciary duty *was* the lawyer's client.

What the court overlooked in drawing this distinction is that all of the considerations that led it to its holding in *Reynolds*—the analogy to tortious interference cases and the perceived need to protect attorney-client communications and lawyers' freedom to do their jobs without fear of liability—were just as present in *Granewich* as they were in *Reynolds*. Even accepting the premise that the lawyers in *Granewich* were being sued because of legal work they performed for FFG, the corporation had the same incentives that any client would have had to maintain the confidentiality of its communications with its attorneys.[181] And the lawyers had no less reason to fear a

kind that permissibly may be taken by lawyers in the course of representing their clients. It does not protect lawyer conduct that is unrelated to the representation of a client, even if the conduct involves a person who is a client." Reynolds v. Schrock, 142 P.3d 1062, 1069 (Or. 2006).

180. Privilege issues do not, of course, arise only in suits against lawyers. Doctors and accountants, to name just two obvious examples, also have privileges with their clients that may impede the discovery of information in litigation.

181. There is another possibility. In view of the Oregon Supreme Court's observation that the corporation had no stake in the dispute between its shareholders, there appears to be a serious question whether the lawyers in *Granewich* actually represented the two shareholders, Harding and Alexander-Hergert, instead of—or, at least, in addition to—the corporation. *See* Granewich v. Harding,

suit for aiding and abetting a breach of fiduciary duty just because their client technically was not the party committing the breach.

Looking at the issue in this way demonstrates how little is left of the *Granewich* rule, following the decision in *Reynolds*. For there are likely to be very few situations in which a lawyer will know that legal work he or she is performing for a client is at the same time substantially assisting some *other* person or entity to breach a duty to a third party. The result, therefore, will surely be that the exception will swallow the rule and (in Oregon at least) lawyers will almost never be exposed to civil liability for aiding and abetting.

B. Alpert v. Crain Caton *and its Progeny*

The Oregon Supreme Court is not the only court to reject aiding and abetting liability for lawyers. In *Alpert v. Crain, Caton & James, P.C.*,[182] the Texas Court of Appeals likewise rejected such liability, although it reached that conclusion by a different route.[183] As a result of this difference in approach, the Texas court offered different reasons for rejecting the imposition of aiding and abetting liability on lawyers.[184] Those reasons, however, have no more merit than those articulated by the *Reynolds* court. The Texas experience is important for a second reason as well. While *Alpert*, like *Reynolds*, involved a claim of aiding and abetting a breach of fiduciary duty,[185] later cases leave no doubt that the Texas courts intend to expand lawyers' immunity to aiding and abetting liability well beyond that limited class of cases.

The *Alpert* case arose out of a dispute between a man (Robert Alpert) and his lawyer (Mark Riley).[186] Their falling-out led

985 P.2d 788, 795 (Or. 1999). The question of who a lawyer represents in such situations is often complex. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983); MALLEN & SMITH, *supra* note 48, § 33.10; Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Tuttle, *supra* note 61. If, in fact, the lawyers *did* represent the shareholders, either instead of or in addition to the corporation, the distinction that the court articulated in *Reynolds* evaporates entirely.

182. 178 S.W.3d 398 (Tex. App. 2005).

183. *Id.* at 402, 408.

184. *Id.* at 408.

185. *Id.* at 406-07.

186. *Id.* at 402.

to litigation between them in which Riley was represented by Crain, Caton & James, P.C. ("Crain Caton").[187] Alpert then sued Crain Caton, making rambling allegations that it had aided and abetted Riley's breach of fiduciary duty to him by a host of activities.[188] He accused the firm of helping Riley use privileged information to report him to the Internal Revenue Service and other governmental entities, making misrepresentations in connection with Riley's former activities as his trustee, diverting to Riley and the firm money that the IRS intended for his trusts, and representing Riley in litigation with him and his trusts.[189] Alpert did not name Riley as a defendant in the case, but did refer to him as a co-conspirator.[190] The trial court dismissed the suit,[191] and the issue on appeal was whether Alpert stated a cause of action against Crain Caton either for aiding and abetting Riley's breach of fiduciary duty or for civil conspiracy.[192]

The Texas Court of Appeals approached these issues from the perspective of privity. It observed that Texas courts had historically adhered to the common law rule that attorneys are not liable to non-client third parties for malpractice.[193] Texas courts viewed the privity rule as necessary to ensure both that clients did not "lose control over the attorney-client relationship" and that lawyers would not be "subject to almost unlimited liability."[194] The *Alpert* court was quick to add that the privity rule was not absolute.[195] For example, it noted, the Texas Supreme Court had recently held that attorneys, like other professionals, could be sued by non-clients for negligent misrepresentation under section 552 of the Restatement (Second) of Torts.[196]

187. *Id.*
188. *Id.* at 403.
189. *Id.* at 403-04.
190. *Id.* at 402.
191. *Id.*
192. *Id.* at 404-05.
193. *Id.* at 405.
194. McCamish, Martin, Brown & Loeffler v. Appling Interests, 991 S.W.2d 787, 793 (Tex. 1999) (quoting Barcelo v. Elliot, 923 S.W.2d 575, 577 (Tex. 1996)).
195. *Alpert*, 178 S.W.3d at 405 ("The common law [privity] rule does not apply to all causes of action against an attorney.").
196. *McCamish*, 991 S.W.2d at 793. A number of other courts have similarly held that lawyers may be sued under section 552. *See, e.g.*, RX USA Int'l, Inc. v.

Continuing, the court found two other lines of precedent relevant to the case before it. First, it noted that Texas courts had granted lawyers qualified immunity against suits by non-client third parties for their actions while representing their clients in litigation.[197] The court reasoned that this protection was meant "to promote zealous representation" and that it applied even to conduct that might be considered "wrongful in the context of the underlying lawsuit."[198] On the other hand, the court observed, a second line of cases held that lawyers could be sued by non-clients for fraud, even if their actions took place within the scope of the attorney-client relationship.[199] In an effort to fit his claims within these lines of precedent, Alpert argued that he stated a cause of action either on the theory "that Crain Caton committed wrongful acts outside of litigation" or because he alleged acts that "constitute fraud or a conspiracy to commit fraud or breach of fiduciary duty."[200]

The Court of Appeals disagreed.[201] Turning first to the "aiding and abetting" (here used in its more technically precise sense) claim, the court observed that "the majority of Alpert's petition alleges that Riley had breached his fiduciary duty and that Crain Caton had assisted him in doing so."[202] Having reframed the question in this manner, the court had little difficulty "declin[ing] Alpert's invitation to expand Texas law" by creating another exception to the privity limitation, one that would "allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based upon the rendition of legal advice to an alleged tortfeasor client."[203] Accord-

Super. Pharm. Co., No. CV 04-5074, 2005 WL 3333843, at *1 (E.D.N.Y. Dec. 7, 2005); Gerhardt v. Harris, 934 P.2d 976 (Kan. 1997); Akins v. Edmondson, 207 S.W.3d 300 (Tenn. Ct. App. 2006). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. e (2000) (providing for liability for negligent misrepresentation and noting that "[t]he cause of action [against a lawyer] ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance.").

197. *Alpert*, 178 S.W.3d at 405-06.

198. *Id.* at 405.

199. *Id.* at 406 ("A lawyer thus cannot shield his own willful and premeditated fraudulent actions from liability simply on the ground that he is an agent of his client." (citing Poole v. Houston & T.C. Ry., 58 Tex. 134, 137 (1882))).

200. *Id.*

201. *Id.* at 413.

202. *Id.*

203. *Id.* at 407.

ingly, the court held, "[a]bsent any allegation that Crain Caton committed an independent tortious act or misrepresentation," the firm could have no possible liability for aiding and abetting a breach of fiduciary duty because everything it was accused of doing had taken place during its representation of Riley.[204]

The court then addressed Alpert's alternative claim that Crain Caton's conduct amounted to a civil conspiracy.[205] Here, it was confronted with its own decision in *Likover v. Sunflower Terrace II, Ltd*.[206] In that case, a jury found that Likover, an attorney, had conspired with his clients to commit fraud in connection with the purchase of an apartment building.[207] On the advice of Likover, his clients had refused to execute a deed to the property that they had previously agreed to execute, in an effort to exercise what the jury found to be unlawful economic duress.[208] The court affirmed the verdict against Likover, rejecting his argument that, as an attorney representing his client, he owed no duty to non-client third parties.[209] While lawyers have no general duties to non-clients, the *Likover* court had held, they could be exposed to suit for participating in a fraud without hampering their ability to practice their profession because "where a lawyer acting for his client participates in fraudulent activities, his action in so doing is 'foreign to the duties of an attorney.'"[210]

Applying this holding to Alpert's allegations, the Texas Court of Appeals noted that all of Crain Caton's acts about which he was complaining—"the filing of lawsuits and pleadings, the providing of legal advice upon which the client acted, and awareness of settlement negotiations"—were the kind of tasks that lawyers are typically hired to perform.[211] As none of these acts were "foreign to the duties of an attorney," the court held that Crain Caton could not be liable for civil conspiracy either.[212]

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204. *Id.*
205. *Id.* at 407-08.
206. 696 S.W.2d 468 (Tex. App. 1985).
207. *Id.*
208. *Id.* at 472.
209. *Id.*
210. *Id.* (quoting Poole v. Houston & T.C. Ry., 58 Tex. 134, 137 (1882)).
211. *Alpert*, 178 S.W.3d at 408.
212. *Id.*

In two cases following *Alpert*, Texas courts applied its principles to expand even further lawyers' protection against claims for aiding and abetting their clients' misconduct. The first, *Dixon Financial Services, Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*,[213] was a case in which the Texas Court of Appeals considered claims that lawyers from two law firms, Greenberg, Peden, Siegmyer & Oshman, P.C. and Johnson, Burnett & Chang, participated with their clients in a conspiracy to commit fraud.[214] Led by attorney James Chang, the lawyers had handled an arbitration against a securities broker, Michael Watts, and his employer, Dixon Financial, in which the arbitrators awarded their clients stock in a company called Hyperdynamics.[215] The lawyers sued to confirm the arbitration award and, while the suit was pending, made representations to Hyperdynamics and its stock transfer agent that allegedly inhibited the transfer of other shares of Hyperdynamics owned by Dixon Financial.[216] Dixon Financial and Hyperdynamics then sued the lawyers and their clients, charging them with various torts, including conversion, abuse of process, tortious interference, and fraud and alleging that they were all jointly and severally liable on theories of conspiracy, agency, and concert of action.[217] The trial court granted summary judgment in favor of the lawyers,[218] and the Texas Court of Appeals affirmed.[219]

The court's decision was ostensibly based on a principle that the *Alpert* court had acknowledged but found unnecessary to apply: that lawyers are generally immune to suits brought by third parties (typically their clients' adversaries) for their conduct during litigation.[220] Though the attorneys in *Dixon Finan-*

213. No. 01-06-00696-CV, 2008 WL 746548 (Tex. App. Mar. 20, 2008) (Mem. Op. on Reh'g).

214. *Id.* at *1.

215. *Id.*

216. *Id.*

217. *Id.* at *5.

218. *Id.* at *1.

219. *Id.* at *7-9.

220. The principle that lawyers are generally immune to suits by third parties for their handling of litigation is not unique to Texas. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57(1)-(2) (2000). The protection is not absolute as lawyers have some exposure to suits for malicious prosecution and abuse of process. *Id.* cmt. b. *See also* MALLEN & SMITH, *supra* note 48, §§ 6.8-6.24. And, of course, the fact that litigators' exposure to civil suits is limited does not leave them free to act with impunity, as courts can and do sanction lawyers for egregious con-

cial had communicated with the stock transfer agent outside of the suit to confirm the arbitration award, the court viewed that conduct as "part of post-arbitration proceedings, an adversarial process similar to litigation."[221] Thus, the court was able to distinguish *Likover* as a case that "did not involve conduct taken in the context of litigation or another adversarial proceeding."[222]

Significantly, however, the court did not (as it could have) end its analysis there. Instead, it went on to suggest that rather than simply enforcing the settled protection that lawyers have for their conduct in litigation, it was actually extending the broader principles announced in *Alpert* to the litigation context.[223] The court did this by declining to address separately each of the different torts and forms of participation liability alleged by the plaintiffs.[224] Instead, it swept them all into the same corner, holding that in order "[t]o determine whether Chang's conduct (and therefore Greenberg Peden's) was privileged, we focus on whether the conduct concerned the discharge of Chang's duties to his client."[225] From this starting point, it was no great leap at all to conclude that "[c]haracterizing an attorney's action in advancing his client's rights as fraudulent does not change the rule that an attorney cannot be held liable for discharging his duties to his client."[226]

A federal district court then took the step that was presaged in *Dixon Financial*.[227] In another case arising out of their personal dispute, Alpert sued Riley and other defendants over Riley's alleged wrongful provision of information to the Internal

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duct in the course of litigation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 cmt. b.

221. *Dixon Fin.*, 2008 WL 746548, at *9.

222. *Id.* (citing *Miller v. Stonehenge/Fasa-Texas, JDC*, 993 F. Supp. 461, 465 (N.D. Tex. 1998)).

223. *See id.*

224. The only theory of liability that the court addressed specifically was the claim under section 552 of the RESTATEMENT (SECOND) OF TORTS. In light of the Texas Supreme Court's holding in *McCamish*, the court was obliged to consider (and reject) that claim on the merits. *See id. at* *10-11.

225. *Id.* at *8.

226. *Id.* at *9.

227. *See* Alpert v. Riley, No. H-04-CV-3774, 2008 WL 304742, at *1 (S.D. Tex. Jan. 31, 2008). The reported decision in *Dixon Financial* was issued on March 20, 2008, after *Alpert* was decided, but it is actually a modified opinion on rehearing that replaced an earlier decision that was issued before the federal court issued its ruling in *Alpert*.

Revenue Service about Alpert and three of his trusts that were not at issue in the state court case.[228] Included among the defendants in this second case were two lawyers that Riley had retained to represent him in connection with his agreement to provide the IRS with information about Alpert.[229] Alpert charged these lawyers with aiding and abetting Riley's breach of fiduciary duty to him and his trusts.[230]

The court cited *Alpert* for the extremely broad proposition that "[u]nder Texas law, attorneys are generally not liable to a third party for actions taken in connection with representing a client."[231] Although the court noted that most of the Texas cases applying this principle arose in the litigation context, it reasoned that "Texas cases do not limit an attorney's protection against liability to actions taken in the course of representing a client in litigation and the basis for the decisions applies to the provision of legal services outside the litigation context."[232] As a result, the court concluded, the fact that the lawyers being sued in the case at issue had not been representing Riley in litigation "does not defeat the application of the Texas 'qualified immunity' rule."[233]

Taken as a group, *Alpert* and the two later cases applying its holding significantly expand the settled, but limited, principle that lawyers are protected against suits by their clients' adversaries for their handling of litigation into a far more sweeping rule that gives lawyers almost total immunity to third party suits for aiding and abetting the misconduct of their clients. The somewhat different reasons that the *Alpert* court gave for its linchpin holding fare no better in the face of careful scrutiny than those the Oregon Supreme Court articulated in *Reynolds*.

228. *Id.*
229. *Id.*
230. *Id.* at *2.
231. *Id.* at *14 (citing Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406 (Tex. App. 2005)).
232. *Id.* at *17.
233. *Id.*

1. The Flaws in the *Alpert* Court's Reasons for Rejecting Aiding and Abetting Liability for Lawyers

On the aiding and abetting (§ 876(b)-type substantial assistance) claim, the *Alpert* court missed the point of the Texas Supreme Court's ruling in *McCamish*, *Martin, Brown & Loeffler v. Appling Interests*,[234] likely because of a critical difference in the way the courts framed the issues in the two cases. Required to decide whether attorneys could be held liable under section 552 of the Restatement (Second) of Torts for making a negligent misrepresentation, the *McCamish* court could have framed that issue as whether to create another exception to the general rule that lawyers have no liability to persons not in privity with them. Instead, the court approached the issue from the opposite direction, recognizing that the question was really whether lawyers should be *exempted* from a theory of liability that was intended to apply to all professionals.[235] After framing the question this way, the *McCamish* court had no difficulty concluding that "[w]e perceive no reason why section 552 should not apply to attorneys."[236]

The Texas Court of Appeals reversed this approach in *Alpert*. Instead of asking whether there was a reason to exempt lawyers from a theory of liability (aiding and abetting) that otherwise applied to any professional, it framed the question as whether there was cause to create a "new" exception to the common law rule that lawyers had no liability to persons who were not in privity with them.[237]

Likely for this reason, the *Alpert* court missed a passage in which the *McCamish* court specifically addressed the policy considerations underlying the privity rule and explained why exposing lawyers to section 552 liability would not cause clients to "lose control over the attorney-client relationship" or lawyers to be "subject to almost unlimited liability."[238] The *McCamish* court pointed out that clients would not lose control over the

234. 991 S.W.2d 787, 791 (Tex. 1999).

235. *Id.* at 795.

236. *Id.* at 791.

237. Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 404-05 (Tex. App. 2005).

238. *McCamish*, 991 S.W.2d at 793 (quoting Barcelo v. Elliot, 923 S.W.2d 575, 577 (Tex. 1996)).

relationship because before making statements that could form the basis of a negligent misrepresentation suit, lawyers are obligated to explain the potential ramifications of the statements—including the possibility that the lawyer, the client, or both of them might be exposed to a suit by the third party if the statements proved false—and the potential impact of such a suit on the client's ability to claim the attorney-client privilege.[239] The client can then decide whether to run these risks by having the lawyer make the statements in question, avoid the risks entirely by directing the lawyer not to make the statements, or reduce the risks by directing the lawyer to modify the statements before making them.[240]

From the lawyer's perspective, the *McCamish* court pointed out, liability under section 552 is hardly "unlimited"; it exists only when a lawyer has provided information to a non-client with the intent that the third party rely on that information, and the third party has justifiably relied on the lawyer's statement.[241] The lawyer can control the liability by limiting the list of persons who may permissibly rely on his or her statements, by crafting appropriate disclaimers to the statements, or by simply declining to make them in the first place.[242] Nowhere is it written that lawyers must expose themselves to liability by making written representations just because their clients ask them to do so.

For the same reasons, exposing lawyers to aiding and abetting liability would not cause clients to "'lose control over the attorney-client relationship'" . . . or lawyers to be "'subject to almost unlimited liability.'"[243] Indeed, in at least two ways exposure to aiding and abetting liability is even less risky (from the lawyer's perspective) than exposure to section 552 liability. First, aiding and abetting liability is imposed only for knowing and intentional conduct, while section 552 liability can be imposed even for statements made negligently. Second, aiding and abetting liability requires *substantial* assistance to a

239. *Id.*

240. *Id.*

241. RESTATEMENT (SECOND) OF TORTS § 552 (1977); *McCamish*, 991 S.W.2d at 793-94.

242. *McCamish*, 991 S.W.2d at 794.

243. *Id.* at 793 (quoting Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996)).

wrongdoer. At the end of the day, however, lawyers worried about aiding and abetting liability, like lawyers worried about section 552 liability, can always "just say 'no.'"

The *Alpert* court's reason for rejecting the civil conspiracy claim against the law firm is equally flawed. Distinguishing the holding in *Likover*, that lawyers may be sued for their participation in fraud because fraudulent conduct is "foreign to the duties of an attorney," the court observed that there was nothing "foreign" in the Crain Caton firm's filing of court papers or giving legal advice to its client.[244] What the court overlooked is that the lawyer in *Likover* had done nothing other than give legal advice either. The key, as the *Likover* court recognized but the *Alpert* court did not, is that a lawyer's conduct, whether giving legal advice or preparing court papers or other legal documents, is almost always neutral when analyzed in the abstract, divorced from its purpose or context. It is only by examining conduct in context that one can assess whether it is "foreign to the duties of an attorney."[245] The driver of the getaway car is, after all, only operating an automobile, and no one would excuse his conduct just because he had a valid driver's license and obeyed the traffic laws.

C. Durham v. Guest

In *Durham v. Guest*,[246] the New Mexico Court of Appeals became the third court to reject, on policy grounds, a claim against a lawyer for aiding and abetting a breach of fiduciary duty.[247] The lawyer in that case, Suzanne Guest, had been hired by Allstate Insurance Company to represent its interests in a claim made by Jamie and Travis Durham for compensation under the uninsured motorist provisions of their automobile insurance policy.[248] The Durhams rejected Allstate's offer of $13,300, and the claim proceeded to an arbitration in which Guest represented Allstate.[249] After the arbitrators awarded

244. Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 408 (Tex. App. 2005).

245. *Id.*

246. 171 P.3d 756 (N.M. Ct. App. 2007), *cert. granted*, 172 P.3d 1286 (N.M. 2007).

247. *Id.*

248. *Id.* at 819-20.

249. *Id.* at 819.

the Durhams $45,000, they sued Allstate and Guest, alleging various causes of action arising out of the handling of their claim prior to and during the arbitration.[250]

The district court dismissed all the claims against Guest, and the Court of Appeals focused principally on the claim charging her with aiding and abetting Allstate's alleged breach of fiduciary duty.[251] Because it read the Durhams' complaint to challenge only Guest's conduct after they demanded arbitration,[252] the court could simply have held that she was protected by the lawyer's traditional litigation immunity. Instead, it deployed a much wider pen.

The court relied heavily on several sections of the Restatement (Third) of the Law Governing Lawyers.[253] It cited section 51(4) for the proposition that lawyers who represent fiduciaries have no duty to the beneficiaries of those fiduciaries, a puzzling citation since Guest was charged with aiding and abetting, not a direct breach of duty.[254] The court also cited section 56 for the proposition that lawyers are not liable to non-clients for advising their clients about the legality of their conduct or for counseling them to break contracts, though neither of these propositions was implicated by the facts of the case.[255] The court then pointed out that the plaintiffs' allegations did not bring the case within the crime-fraud exception to the attorney-client privilege, even though that had nothing to do with the case either.[256] Finally, the court cited *Reynolds* for the proposition that courts in other jurisdictions "hold that an attorney is not liable for activities conducted in the course of representation but is liable when acting outside the scope of representation."[257]

The court did not cite section 57 of the Restatement (the provision containing the litigation privilege). Indeed, it was almost as an afterthought that the court added that "Plaintiffs do not allege actions on the part of Defendant that would fall

250. *Id.* at 758.
251. *See id.*
252. *Id.* at 761.
253. *Id.* at 822.
254. *Id.* at 823.
255. *Id.* at 762.
256. *Id.* at 763.
257. *Id.* at 762.

outside of a qualified litigation privilege."[258] Had the court confined its analysis to this principle, its holding would have been unexceptional. Instead, the decision is noteworthy because the court so clearly meant to grant lawyers broad protection against lawsuits charging them with aiding and abetting their clients' misconduct.[259]

D. *The California Cases*

The California courts have undoubtedly written more opinions addressing aiding and abetting claims against attorneys than the courts of any other state, and there is a perception in some quarters that they too are hostile to such claims.[260] Because that perception is erroneous and the California courts have actually accepted in principle the idea that lawyers can be liable for aiding and abetting wrongdoing by their clients, discussion of those cases might be seen as unnecessary here.

Nevertheless, a brief detour to consider the California case seems justified for two reasons. First, there is something to be said for setting the record straight, particularly in view of the large number of California cases that are out there. Second, a commentator recently proposed California's approach as a good model for addressing aiding and abetting claims against lawyers, and it is worth evaluating the merits of that proposal.

California's experience with aiding and abetting claims is generally traced to *Wolfrich Corp. v. United Services Automobile Association*,[261] a case in which the California Court of Appeal held that attorneys representing an insurance company could be sued for conspiring with their client to violate a California statute regulating the processing of insurance claims.[262] The *Wolfrich* decision apparently triggered so many similar claims against attorneys that the California legislature felt

258. *Id.* at 763.

259. The New Mexico Supreme Court granted the Durhams' petition for certiorari, and the case is now pending in that court. *See* Durham v. Guest, 172 P.3d 1286 (N.M. 2007).

260. *See, e.g.*, Barksdale, *supra* note 96, at 587-98 (discussing the principle of "attorney non-accountability" (citing Doctors' Co. v. Super. Ct., 775 P.2d 508 (Cal. 1989); Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991))).

261. 197 Cal. Rptr. 446 (Ct. App. 1983).

262. *Id.* at 447.

obliged to enact a statute limiting them. The resulting statute, section 1714.10 of the California Civil Code, barred plaintiffs from filing such a suit against an attorney until a court made a preliminary finding that the claim had a reasonable chance of succeeding.[263]

Shortly after the legislature acted, the California Supreme Court decided *Doctors' Co. v. Superior Court*.[264] In *Doctors' Co.*, the court overruled *Wolfrich*, holding that conspiracy is not an independent tort and that attorneys cannot be sued for conspiracy unless they owe an independent duty to the plaintiff or act for their personal gain.[265] The legislature responded to the *Doctors' Co.* decision by amending section 1714.10 to limit its application to suits arising out of an attorney's involvement in an attempt to contest or settle a claim and by codifying the two *Doctors' Co.* exceptions.[266] The California courts subsequently concluded that the amendment rendered the statute essentially pointless, as its "gatekeeper" function now precludes only suits that would not be viable under *Doctors' Co*. anyway.[267]

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263. *See* Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 334 (Ct. App. 2005); Barksdale, *supra* note 96, at 593-94.

264. 775 P.2d 508 (Cal. 1989).

265. *Id.* at 509-12. Although the defendants in *Doctors' Co*. happened to be attorneys, the court's rationale clearly applied to any agent sued for conspiracy.

266. *Berg & Berg*, 32 Cal. Rptr. 3d at 335. In its current form, section 1714.10(a) provides:

> No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.

CAL. CIV. CODE § 1714.10(a) (2008). Section 1714.10(c) provides:

> This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.

Id. § 1714.10(c).

267. *Berg & Berg*, 32 Cal. Rptr. 3d at 335. This history is exhaustively chronicled in Pavicich v. Santucci, 102 Cal. Rptr. 2d 125 (Ct. App. 2000). *See also* Evans & Dorvee, *supra* note 54, at 811-15.

Presumably as a result of this history, the California courts appear to be confronted with more civil conspiracy claims than the courts of other states.[268] The California courts also recognize claims alleging substantial assistance ("aiding and abetting" in the precise, technical sense).[269] And it appears to be an open question in California whether the latter claims are within the scope of section 1714.10.[270]

The important point here, however, is that *Doctors' Co.* and its progeny have been cited as evidence that California courts have developed special rules limiting aiding and abetting claims against lawyers.[271] This is not a correct reading of these cases. The suit in *Doctors' Co.* was brought against attorneys, and the ruling in that case does circumscribe the availability of civil conspiracy claims, at least, and perhaps aiding and abetting claims, as well.[272] But the court's rationale was not that there is anything special or unique about the status of attorneys.[273] Rather, the decision was based on the nature of civil conspiracy itself.[274] There is no reason to believe that the court's holding—that, with two exceptions, agents cannot conspire with their principals—would have been any different even if the agent in that case had been someone other than an attorney.

Nevertheless, section 1714.10 does establish a special rule for handling civil conspiracy cases brought against attorneys, and a commentator recently suggested that this approach is one that other states ought to emulate.[275] The problem with this suggestion is that because the California statute is strictly procedural, it would not provide anything near the protection desired by those who would limit aiding and abetting claims against attorneys. Substantively, section 1714.10 only codifies

268. *See, e.g.*, Mills v. Ramona Tire, Inc., No. 07-CV-0052-H, 2007 WL 2775127, at *1 (S.D. Cal. Sept. 20, 2007); Panoutsopoulos v. Chambliss, 68 Cal. Rptr. 3d 647 (Ct. App. 2007); *Berg & Berg*, 32 Cal. Rptr. 3d at 325; *Pavicich*, 102 Cal. Rptr. 2d at 125.

269. *See, e.g.*, Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1133-36 (C.D. Cal. 2003); *Berg & Berg*, 32 Cal. Rptr. 3d at 340 n.10; Casey v. U.S. Bank Nat'l Ass'n, 26 Cal. Rptr. 3d 401, 405-06 (Ct. App. 2005).

270. *Berg & Berg*, 32 Cal. Rptr. 3d at 340 n.10.

271. *See supra* note 261.

272. Doctors' Co. v. Superior Court, 775 P.2d 508, 509-10 (Cal. 1989).

273. *See id.*

274. *Id.* at 510-11.

275. Lewinbuk, *supra* note 96, at 171-72.

the rule of general application articulated in *Doctors' Co*., under which the merits of claims against lawyers are treated just as they would be if anyone else was the defendant.[276] And because the statute applies only to one very limited type of claim (civil conspiracy claims against lawyers), the impact of its replication in other jurisdictions would be quite limited. The statute's scope could, of course, be expanded, but how? To include "aiding and abetting"[277] claims against lawyers? But what makes that the right place to draw the line? Why not *all* civil suits filed against lawyers? Or all civil conspiracy or aiding and abetting claims against *any* defendant?

More importantly, no great benefit would be likely to result from burdening the courts with the procedural duty to conduct a special "pre-screening" of certain cases filed against lawyers. Because it only "pre-screens" out cases that would not be viable anyway, the California statue is now seen as essentially pointless in California itself.[278] Moreover, the courts have already demonstrated that they are perfectly capable of disposing of meritless civil conspiracy or aiding and abetting claims against lawyers through the procedural devices (motions to dismiss and for summary judgment) that they use to weed out such claims against other defendants.[279]

III. Inconsistencies that Result from Excusing Lawyers from Liability for Aiding and Abetting

There are serious problems with the decisions rejecting lawyers' liability for aiding and abetting that go beyond the flaws in the reasons that courts have given for reaching those decisions. The rulings also create inconsistencies in the way that the law is applied in similar situations. The most fundamental inconsistency, one that is likely to bedevil courts in future cases, centers on which claims against lawyers would be barred at the courthouse doors. More specifically, the question is whether decisions immunizing lawyers against civil aiding and abetting liability could be limited to cases charging lawyers

276. *See* CAL. CIV. CODE § 1714.10 (2008).

277. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

278. *See supra* text accompanying note 267.

279. *See* cases cited *supra* note 11 and *infra* notes 349 & 373.

with aiding and abetting a breach of fiduciary duty or to some other subset of aiding and abetting cases.

A. *Limiting the Lawyers' Privilege to Aid and Abet to Breach of Fiduciary Duty Cases*

Each of the decisions rejecting lawyer liability for aiding and abetting (*Durham*, *Reynolds*, and *Alpert*) did so in the context of a claim that a lawyer aided and abetted a client's breach of fiduciary duty.[280] It therefore makes sense to ask whether a ban on civil aiding and abetting claims against lawyers could or should be limited to claims alleging that the lawyer aided and abetted a breach of fiduciary duty, or whether there is some other place where courts could feasibly draw a line between the cases in which lawyers face civil liability for aiding and abetting and those in which they do not.

In thinking about this question, it is helpful to consider the types of aiding and abetting claims that might be filed against lawyers. While there do not appear to be any reliable statistics on this issue, the nature of a lawyer's role suggests, and the reported decisions cited in the footnotes of this article confirm, that—statutory claims aside—the vast majority of civil suits charging lawyers with aiding and abetting involve claims that a lawyer aided and abetted either (a) a fraud, (b) a breach of trust or (c) a breach of fiduciary duty.

1. Aiding and Abetting Fraud

No one disputes the principle that lawyers may not aid their clients' frauds. Rule 1.2(d) of the Model Rules of Professional Conduct mandates that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[281] Supporting this rule is Rule 4.1, which bars lawyers from making "a false statement of material fact or law to a third person"[282] and from "fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a

280. *See* Durham v. Guest, 172 P.3d 1286 (N.M. 2007); Reynolds v. Schrock, 142 P.3d 1062 (Or. 2006); Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App. 2005).

281. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983).

282. *Id.* R. 4.1(a).

client . . . ."[283] In 2003, Rule 1.6 was amended to add subsections (b)(2) and (3), which authorize lawyers to disclose even privileged information to prevent client fraud and to make the disclosure before the fraud has even occurred, if disclosure might prevent it.[284]

Disdain for lawyer-aided fraud is just as easy to find in the civil litigation arena. The disciplinary rules mirror the widely-accepted evidentiary rule known as the "crime-fraud" exception to the attorney-client privilege.[285] More to the point, there are plenty of cases in which courts have upheld claims against lawyers for aiding and abetting fraud.[286] Many of these cases arise in the securities context, but the complaints often contain common law counts in addition to the statutory claims (especially since the *Central Bank* decision).[287] Even the Texas courts permit attorneys to be sued for aiding and abetting fraud.[288] It therefore seems fair to say, as one commentator has, that "an attorney's loyalty is subject to the overriding general norm, in both ethics and law, that lawyers must not knowingly give substantial assistance to client fraud."[289]

A court holding that lawyers are privileged to aid and abet a breach of fiduciary duty must therefore be prepared to explain how such conduct differs from aiding and abetting a fraud. In *Alpert*, the Texas Court of Appeals attempted to do so by asserting that a lawyer who participates in fraudulent activities may be held liable to a non-client because "his action is 'foreign to the duties of an attorney.'"[290] But the court did not say why it is

283. *Id.* R. 4.1(b).

284. *Id.* R. 1.6(b)(2)-(3).

285. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000). *See generally* David J. Fried, *Too High a Price for the Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986); Earl J. Silbert, *The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, the Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusations of Wrongful Conduct*, 23 AM. CRI. L. REV. 351 (1986); Marjorie A. Shields, Annotation, *Crime-Fraud Exception to Attorney-Client Privilege in State Courts—Contemplated Crime*, 9 A.L.R. 6th 363 (2005).

286. *See supra* notes 57 & 69.

287. They also frequently contain claims alleging breach of fiduciary duty, a subject addressed in the next section.

288. *See supra* text accompanying note 206.

289. Langevoort, *supra* note 31, at 78.

290. Alpert v. Crain, Caton & Jones, P.C., 178 S.W.3d 398, 406 (Tex. App. 2005) (quoting Poole v. Houston & T.C. Ry., 58 Tex. 134, 137 (1882)).

not equally "foreign" for an attorney (or anyone else, for that matter) to aid and abet a breach of fiduciary duty.[291] No other court appears to have made this distinction, and many recognize both causes of action, typically in the same opinion.[292] So what arguments might be made in support of a distinction between fraud and breach of fiduciary duty in this context?

A distinction based on the required level of assistance would not go very far. In *Likover*, the Texas Court of Appeals held that lawyers may be held liable when they "participate" in a fraud,[293] and it might be posited that such "participation" requires more lawyer involvement than would be required to prove that a lawyer "aided and abetted" a breach of fiduciary duty. But even if courts were to hold that lawyers had no liability for aiding and abetting a breach of fiduciary duty unless their conduct rose above "substantial assistance" to a level that might be labeled "participation," that would be a far cry from saying that they have no liability at all.[294]

A second possible basis of distinction is to point out that fraud is a tort while a breach of fiduciary duty is something else. But what is it? It is generally agreed that the concept of a "fiduciary" originated in the law of trusts and that it has since

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291. As noted earlier, the Oregon Supreme Court expressly rejected this contention in *Granewich*. *See supra* text accompanying notes 89-91.

292. *See, e.g.*, Hefferman v. Bass, 467 F.3d 596, 601 (7th Cir. 2006) (recognizing both claims under Illinois law); Mazzaro De Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381, 387-94 (S.D.N.Y. 2007) (recognizing the existence and thoroughly analyzing the elements of aiding and abetting fraud and aiding and abetting a breach of fiduciary duty under New York law); Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., 446 F. Supp. 2d 163, 201-04 (S.D.N.Y. 2006) (same); Sender v. Mann, 423 F. Supp. 2d 1155, 1166 (D. Colo. 2006) (recognizing both claims under Colorado law); World Health Alternatives, Inc. v. McDonald (*In re* World Health Alternatives, Inc.), 385 B.R. 576, 594 (Bankr. D. Del. 2008) (recognizing both claims under Florida law). The Georgia courts, curiously, have recognized a cause of action for aiding and abetting a breach of fiduciary duty but not (at least not yet) one for aiding and abetting fraud. *See* BMC-The Benchmark Mgmt. Co. v. Ceebraid-Signal Corp., No. 1:05-CV-1149-WSD, 2007 WL 2126272, at *11 (N.D. Ga. July 23, 2007) (declining to recognize claim for aiding and abetting fraud under Georgia law); Insight Tech., Inc. v. Freightcheck, LLC, 633 S.E.2d 373, 378-79 (Ga. Ct. App. 2006) (approving claim for aiding and abetting a breach of fiduciary duty).

293. *See* Likover, 696 S.W.2d at 472.

294. There is, in any event, no reason to believe that the Texas courts intended to make this distinction. *See, e.g.*, Palvino, *supra* note 96, at 52 n.1 ("As a practical matter, any distinctions between 'participating' and 'aiding and abetting' are irrelevant when it comes to this type of non-client claim.").

evolved to cover a number of different situations in which one party reposes trust and confidence in another.[295] But diving any deeper than this leads quickly to a quagmire, because "[f]iduciary obligation is one of the most elusive concepts in Anglo-American law."[296] Any effort to sketch the contours of that concept in a way that would advance the analysis here would be both difficult and unlikely to result in conclusions that would be universally accepted.[297]

One could sidestep this quagmire (albeit not in a way that would support those who oppose applying aiding and abetting liability to lawyers) by pointing out that the Restatement (Second) of Torts places fiduciaries under the tort law umbrella.[298] The fit is not exact, however, as the Restatement acknowledges, for instance, that the measure of damages may be less in a case of aiding and abetting a breach of fiduciary duty than it would be in a case of aiding and abetting a tort.[299] Moreover, the Restatement's treatment of breaches of fiduciary duty as a species of tort has not been uniformly accepted,[300] and there is also the

295. Anderson & Steele, *supra* note 50, at 239-43; Tuttle, *supra* note 61, at 896.

296. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (1988). *See also* Barksdale, *supra* note 96, at 556.

297. *See, e.g.*, Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983) ("The twentieth century is witnessing an unprecedented expansion and development of the fiduciary law."); Anderson & Steele, *supra* note 50, at 242 ("The jurisprudential underpinnings of fiduciary obligation have never been mapped successfully.").

298. RESTATEMENT (SECOND) OF TORTS § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."); *Id.* cmt. c ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused."). *See also* AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) ("[T]he majority of case law . . . recognizes a cause of action for aiding and abetting common law torts, such as breach of fiduciary duty.").

299. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (suggesting that it may not be appropriate to impose on an aider and abettor the fiduciary's liability to disgorge any profit he made on an improper transaction); Barksdale, *supra* note 96, at 559.

300. *See, e.g.*, Roemmich v. Eagle Eye Dev., 526 F.3d 343, 350 (8th Cir. 2008) ("[B]reaches of fiduciary duty are sometimes conceptualized as sounding in tort."); Tobacco Tech., Inc. v. Taiga Int'l, N.V., No. CCB-06-0563, 2007 WL 644463, at *6-7 (D. Md. Feb. 26, 2007) (noting that Maryland does not recognize a cause of action for breach of fiduciary duty, but treats such claims as a form of negligence); Kinzer v. City of Chicago, 539 N.E.2d 1216, 1220 (Ill. 1989) ("This court has not accepted the Restatement (Second) of Torts view but has regarded breach of fiduciary duty

tricky matter of trustees, who the Restatements treat separately.[301]

It has been suggested that fraud by its nature involves complex "schemes" perpetrated by a group of persons in circumstances that make it difficult to single out one of those participants as the primary wrongdoer and the others as mere "assistants" or "aiders and abettors."[302] Judge Posner has asserted that when it comes to fraud there is no need for aiding and abetting liability at all because those involved will always have primary liability.[303] But, of course, breaches of fiduciary duty can be just as complex as frauds. Indeed, the inherent complexity of fiduciary roles and obligations, and the difficulties lawyers face when they try to give clients guidance about that nebulous concept and its attendant duties, has been cited as a reason lawyers should not face liability for aiding and abetting breaches of fiduciary duty.[304]

But there is one significant difference between fraud and breach of fiduciary duty for purposes of aiding and abetting liability. Aiding and abetting liability is often redundant and therefore unnecessary in the fraud context because the lawyer can usually (always, if Judge Posner is correct) be charged with the underlying tort. But the opposite is true for breaches of fiduciary duty, because, most of the time at least, those alleged to have aided and abetted a breach of fiduciary duty are not them-

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as controlled by the substantive laws of agency, contract and equity.") (citations omitted); Mack v. Am. Fletcher Nat'l Bank & Trust Co., 510 N.E.2d 725, 738 (Ind. Ct. App. 1987) ("[T]he trend in jurisdictions which have confronted the matter head-on . . . is to declare that a breach of fiduciary duty is a tort"); Anderson & Steele, *supra* note 50 (discussing the differences between negligence and breach of fiduciary duty claims against lawyers).

301. *See infra* text accompanying note 353.

302. Langevoort, *supra* note 31, at 95.

303. *See, e.g.*, Eastern Trading Co. v. Refco, Inc., 229 F.3d 617, 624 (7th Cir. 2000) (Posner, J.) ("Law should be kept as simple as possible. One who aids and abets a fraud is guilty of the tort of fraud (sometimes called deceit); nothing is added by saying that he is guilty of the tort of aiding and abetting as well or instead."). Plaintiffs have an incentive to charge lawyers with aiding and abetting rather than fraud, however, because professional malpractice insurance policies often have exclusions for fraudulent conduct that may not apply if the lawyer is charged only with aiding and abetting. *See* Pietrusiak, *supra* note 7, at 255-56.

304. Barksdale, *supra* note 96, at 565-66; Pietrusiak, *supra* note 7, at 235-39.

selves fiduciaries of the injured party.[305] They therefore cannot be charged as principal wrongdoers, and their liability, if it exists at all, must be as an aider and abettor. It makes little sense for the law to permit lawyers to be sued as aiders and abettors in cases where the theory is usually cumulative but not in cases in which there can be no liability other than by way of aiding and abetting.

In this connection, it might be pointed out that the Model Rules of Professional Conduct specifically prohibit lawyers from participating in "crimes" and "fraud" but not breaches of fiduciary duty.[306] And at least one commentator has suggested that lawyers should not be exposed to civil liability for conduct that is not a discipline issue.[307] This argument ignores the distinction between discipline and civil liability.[308] More importantly, the Rules do not say, and there is no reason to believe, that their failure to prohibit lawyer participation in breaches of fiduciary duty was meant as an implicit sanction of such conduct any more than their failure to mention, for example, breaches of trust was intended to bless lawyer involvement in that or any other form of wrongdoing.[309] The Restatement (Third) of the Law Governing Lawyers, which does address civil liability, specifically contemplates that "[l]awyers are also liable to nonclients for knowingly participating in their clients' breach of fiduciary duties owed by clients to nonclients."[310]

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305. It might be argued that aiding and abetting liability is not necessary in this context, because a beneficiary injured by a breach of fiduciary duty is a client who can sue the attorney directly. There is some, but only some, merit in this observation. The question of whether a lawyer hired to represent a fiduciary also represents the fiduciary's beneficiaries has been the subject of considerable debate. *See, e.g.*, MALLEN & SMITH, *supra* note 48, § 33.10; Hazard, *supra* note 153; Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319 (1994); Tuttle, *supra* note 61. When the lawyer *does* represent the beneficiaries as well as the fiduciary, the beneficiaries would of course become a client entitled to sue the lawyer directly.

306. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1983).

307. Barksdale, *supra* note 96, at 582-83.

308. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(2) & cmt. c (2000); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 5.14 (3d ed. 2001).

309. *See generally* MODEL RULES OF PROF'L CONDUCT.

310. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. h. The Restatement also provides that a lawyer owes a duty of care to non-clients when:

> [T]he lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rec-

There is, therefore, no readily apparent principle around which to construct an argument that fraud is different from, or more serious than, a breach of fiduciary duty in a way that would justify exposing lawyers to liability for assisting the former but not the latter. If anything, the opposite is true.[311] But perhaps things would look differently if the issue was approached from the opposite direction.

2. Aiding and Abetting a Breach of Trust

Consider the following case. A woman named Evah establishes a trust that is to end five years after her death, at which time the assets are to be divided between her children, George and Susan, unless either of them dies during the five-year period, in which case that child's share passes to his or her issue. Evah dies and George becomes the trustee of her trust. George, who is very ill, wishes to disinherit his children from his first marriage, including Kenton. He hires an attorney, Shaw, and gives her a copy of Evah's trust. Shaw then drafts two documents reflecting an agreement by George and Susan to immediately terminate their mother's trust and distribute its assets. George forwards the documents to the brokerage firm holding the trust's assets, and it distributes those assets to him and Susan. George dies within five years of Evah's death, and his will does not leave any of the proceeds of her trust to Kenton, who then sues Shaw for drafting the documents terminating his grandmother's trust early, thereby depriving him of assets that would otherwise have passed to him on his father's death.

These are the facts of *Moore v. Shaw*.[312] It is a case in which the attorney, Shaw, performed one simple act of classic legal services: she drafted two documents reflecting the agree-

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tify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime of fraud or (ii) the lawyer has assisted or is assisting the breach.

Id. § 51(4)(b). Direct duties are of course different than liability for aiding and abetting, but this section provides at least mild support for the argument that lawyers may be sued for aiding and abetting a breach of fiduciary duty.

311. *See, e.g.*, Granewich v. Harding, 985 P.2d 788, 794 (Or. 1999) ("[I]t especially would be odd for the law to afford beneficiaries of *fiduciary* relationships less protection from the malfeasance of third parties than would be available to the victims of other kinds of tortious conduct.").

312. 10 Cal. Rptr. 3d 154 (Ct. App. 2004).

ment between two trust beneficiaries to terminate the trust and distribute its assets. She did not have a financial stake in the transaction beyond her legal fees. She had no direct duty to Kenton.[313] There was no fraud involved (at least not in the classic sense of a misrepresentation made by George on which Kenton relied to his detriment), nor was there any apparent need for Kenton to discover any confidential communications that Shaw may have had with her client, George. Yet, despite all this, the court had no difficulty concluding that Kenton had a viable aiding and abetting claim against Shaw.[314] The interesting question is "why?"

The answer is that Kenton Moore styled his claim as one for aiding and abetting a breach of trust instead of aiding and abetting a breach of fiduciary duty. As a result, the court cited section 326 of the Restatement (Second) of Trusts and several other authorities for the principle that those who participate with a trustee in a breach of trust are liable to the beneficiaries for any loss caused thereby.[315] This included Shaw, as it has been generally accepted for a long time that lawyers are no different than anyone else when it comes to liability for participating in a breach of trust.[316] All of which neatly frames the question of whether *Moore*, and the well-established line of cases that it represents, can be reconciled with cases holding that lawyers may aid and abet their clients' breaches of fiduciary duty.[317]

313. This appears to be the law in California. *See* Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 342 (Ct. App. 2005). Other states might see it differently. *See supra* note 305.

314. The case arose in an unusual procedural posture that is irrelevant for present purposes. What the appellate court actually concluded was that "Kenton established a probability of prevailing on his causes of action against Nancy Shaw for intentional and negligent participation in a breach of trust." *Moore*, 10 Cal. Rptr. 3d at 165 (footnote omitted).

315. *Id.* at 164-65.

316. *See supra* note 70 and accompanying text.

317. It does appear that the California courts have applied the ruling in *Doctors' Co.* to claims of participation in a breach of trust. *See* Wolf v. Mitchell, Silberberg & Knupp, 90 Cal. Rptr. 2d 792, 797-98 (Ct. App. 1999); Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 243 (Ct. App. 1991). Thus, although the court in *Moore* did not address the issue, there is reason to question whether Shaw would ultimately be held liable to Moore, as there is nothing in the facts set forth in the court's opinion to indicate that either of the *Doctors' Co.* exceptions was implicated.

Here too one could argue that section 326 of the Restatement (Second) of Trusts, which imposes liability on those who "participate" in a breach of trust, sets the "involvement" bar higher than the "substantial assistance" requirement in section 876 of the Restatement (Second) of Torts. But no one has attempted to make this case and, again, saying that lawyers should not face liability for aiding and abetting a breach of fiduciary duty unless their conduct meets some higher "participation" standard is entirely different from saying that they should have no liability at all.

Another possible distinction might, of course, be to argue that all fiduciaries are not created equal. One could posit that trustees are not just any old fiduciaries but the *quintessential* fiduciaries and that this fact justifies a more stringent prohibition against aiding and abetting in the trust context. On the surface, section 51(4) the Restatement (Third) of the Law Governing Lawyers provides support for such a distinction. It imposes on lawyers a duty to non-clients to avoid assisting their clients' breaches of fiduciary duty when those breaches constitute crimes or frauds and, by its terms, applies only to lawyers whose "client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient . . . ."[318] A comment explains that the limitation to certain types of fiduciaries was meant to make clear that the duty that this section imposes on lawyers does not extend to situations involving fiduciary clients like "a partner in a business partnership, a corporate officer or director, or a controlling stockholder" where the lawyer is more likely "to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only part of a broader role."[319]

The problem is that it is one thing to impose affirmative duties on lawyers who represent certain kinds of fiduciaries and quite another to restrict their civil liability for aiding and abetting fiduciary misconduct.[320] Nothing in the Restatement provides, or even suggests, that lawyers' civil liability for aiding

318. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4)(a) (2000).

319. *Id.* § 51 cmt h.

320. *See, e.g.*, GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 4-32 (3d ed. Supp. 2002) (noting the difference between a lawyer's af-

and abetting should be limited to situations in which they have assisted one of the fiduciaries listed in section 51(4); indeed, it says the opposite.[321]

The absence of a workable distinction between trustees and other kinds of fiduciaries, at least for present purposes, is reinforced by the fact that when courts have been called upon to consider claims of aiding and abetting a breach of trust or a breach of some other fiduciary duty, they often use the terms "breach of trust" and "breach of fiduciary duty" as if they were synonyms, and they rely on breach of trust authorities in breach of fiduciary cases and vice versa.[322] The Restatements and the commentators do the same.[323]

There is, therefore, no readily apparent basis, either in theory or in practice, for concluding that breaches of trust (in the classic, technical sense) are so different from other breaches of fiduciary duty that lawyers should be permitted to aid their clients with the latter but not the former.

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firmative duty to act to protect third parties and the duty to refrain from aiding a client in legally wrongful conduct).

321. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. h (2000).

322. *See, e.g.*, Javitch v. Prudential Sec., No. 3:02 CV 7072, 2003 WL 21204049, at *4 (N.D. Ohio May 13, 2003) (noting that the same principles apply to breach of trust and breach of fiduciary duty). *See also* Diduck v. Kaszycki & Sons Contractors, 974 F.2d 270, 283-84 (2d Cir. 1992); Whitfield v. Lindemann, 853 F.2d 1298, 1302-03 (5th Cir. 1988); Thornton v. Evans, 692 F.2d 1064, 1082-83 (7th Cir. 1982); *In re* Transcon. Energy Corp., 683 F.2d 326, 328 (9th Cir. 1982); Lawyers Title Ins. Corp. v. United Am. Bank of Memphis, 21 F. Supp. 2d 785, 795-801 (W.D. Tenn. 1998); Weingarten v. Warren, 753 F. Supp. 491, 495-96 (S.D.N.Y. 1990); Benvenuto v. Schneider, 678 F. Supp. 51, 54 (E.D.N.Y. 1988); Berg & Berg Enters. v. Sherwood Partners, 32 Cal. Rptr. 3d 325, 341-44 (Ct. App. 2005); Williams Mgmt. Enters. v. Buonauro, 489 So. 2d 160, 168 (Fla. Dist. Ct. App. 1986); Spinner v. Nutt, 631 N.E.2d 542, 556-57 (Mass. 1994); Granewich v. Harding, 985 P.2d 788, 794 n.5 (Or. 1999).

323. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. h (2000) ("Lawyers are also liable to nonclients for knowingly participating in their clients' breach of fiduciary duties owed by clients to nonclients." (citing RESTATEMENT (SECOND) OF TRUSTS § 326 (1959))); Barksdale, *supra* note 96, at 557 n.40 ("[T]he common law has long recognized that one who assists a fiduciary's breach of duty may be liable to the beneficiary." (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993))).

3. The Impossibility of Reconciling These Lines of Cases

How about approaching the question from a broad, theoretical perspective? Is there some universal principle with which one could reconcile cases holding that lawyers are liable for aiding and abetting a fraud and aiding and abetting a breach of trust with cases holding that they are not liable for aiding and abetting a breach of fiduciary duty? No court appears to have made the effort to identify such a principle, but several commentators have dabbled with it.

The most extensive effort comes from Stanley Pietrusiak, who is probably the harshest critic of exposing lawyers to civil aiding and abetting liability. He prefaces his argument with a dire warning that aiding and abetting a breach of fiduciary duty is an "ominous new form of attorney liability" which, at least to the extent that it is applied to corporate attorneys, will result in lawyers being "held liable for aiding any bad policy decision that is later found to be a breach of the corporate representative's fiduciary duties to the corporation."[324] As Pietrusiak sees it:

> While existing case law deals with lawyers *directly* assisting clients in violating established law (typically crimes involving fraud), this radical expansion of the theory would seem to impose liability for attorney conduct that in no way violates the law, even though the corporate fiduciary, by making less favorable decisions than he or she might have, may have breached his or her duty to the entity."[325]

It is hard to know what to make of this criticism. It is not at all clear what Pietrusiak means by "directly" assisting clients, as that is not the rubric employed by the Restatements or the courts. Nor does he explain the difference between "established" and other ("unestablished"?) laws. It is true that lawyers have long been exposed to liability for assisting their clients' frauds, particularly in securities cases, but that liability has not turned on whether the fraud was serious enough to be a crime as well as a tort. And it is hardly a "radical expansion" of the law to hold that aiding and abetting liability can be imposed

324. Pietrusiak, *supra* note 7, at 216-17.
325. *Id.* at 217-18 (footnote omitted).

on persons whose conduct is not independently actionable; that is its *raison d'etre*. Finally, it mocks the seriousness of breaches of fiduciary duty to suggest that they arise when fiduciaries have done nothing more than "mak[e] less favorable decisions than he or she might have . . . ."[326]

More to the point here, Pietrusiak fears that if lawyers are exposed to aiding and abetting liability, "a lawyer would be liable for conduct that constitutes indirect assistance of a policy decision that at worst, was unwise."[327] But no court would impose liability on a lawyer (or anyone else, for that matter) for aiding and abetting a "policy" decision that was merely "unwise." It is only when those decisions are legally actionable—either because they amount to a breach of fiduciary duty or because they are tortious or otherwise legally wrongful—that the principal wrongdoer can be found liable. And unless the lawyer's client is civilly liable to someone, there can be no aiding and abetting liability.[328]

Pietrusiak recommends that "the consequences of such a radical theory strongly point toward limiting aiding-and-abetting liability to its traditional contours and holding that a lawyer should be held liable only for knowingly and substantially aiding and abetting *illegal* conduct."[329] The problem is that he never explains what he means by "illegal." Why are torts such as fraud "illegal" while breaches of fiduciary duty are not? Is there a principled basis for saying that a breach of fiduciary duty is "illegal" if the fiduciary is a trustee but not if he or she is some other kind of fiduciary? Pietrusiak doesn't say.

Professor Hazard, by contrast, grappled directly with this issue, pointing out that it is not possible to decide whether and when lawyers ought to be permitted to aid and abet illegal conduct without confronting the question of what is meant by the word "illegal."[330] Citing section 348 of the Restatement (Second) of Agency, he suggested that lawyers ought to be liable for

326. *Id.* at 218.

327. *Id.* at 217.

328. There is one other fallacy in Pietrusiak's assertion. No lawyer (or anyone else, for that matter) can be liable for aiding and abetting without providing "substantial" assistance. It would take quite a bit of "indirect" assistance to satisfy this standard.

329. *See* Pietrusiak, *supra* note 7, at 259 (emphasis added).

330. *See* Hazard, *supra* note 153, at 672-79.

knowing involvement in fraudulent transactions.[331] But beyond this, he came to no definitive conclusions about where to draw the line.[332]

The Model Rules, for their part, draw a clear but unexplained line. Rule 1.2 bars lawyers from counseling or assisting clients in "conduct the lawyer knows is criminal or fraudulent . . . ."[333] The problem is that the drafters did not make clear the purpose of this limitation.[334] Professors Hazard and Hodes suggest that by barring lawyers only from participation in criminal or fraudulent conduct, Rule 1.2 implicitly permits them to assist non-fraudulent tortious conduct without ethical sanction.[335] This proviso is critical, however, as Hazard and Hodes are quick to add that the civil liability of the lawyer is a separate matter.[336]

The Restatement (Third) of the Law Governing Lawyers, likewise, would limit lawyer discipline for aiding and abetting to situations involving client crime or fraud, while also pointing out that discipline and civil liability are different processes that do not necessarily produce parallel outcomes.[337] The few published cases involving attorney discipline for aiding and abetting civil misconduct generally involve client fraud, although there are at least hints that broader condemnation is possi-

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331. *Id.* at 679.

332. Professor Hazard titled his seminal article *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?* However, because he was writing in 1981, before the explosion of civil aiding and abetting suits, he had little case law with which to work and was forced to limit his focus to exploring the theoretical underpinnings of lawyers' civil aiding and abetting liability, and (very presciently) roughing out the analytical framework.

333. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

334. *See* Pepper, *supra* note 142, at 1591 ("[T]he line drawn for the purposes of lawyer discipline is the civil/criminal line, with a little jog in the line to take in fraudulent conduct. This may be because fraud is enough 'like' crime to cross the line. Or it may be that the line derives from the drafters' notion of the *malum in se*/*malum prohibitum* distinction, with fraud being like crimes in general, morally wrong in itself.").

335. HAZARD & HODES, *supra* note 308, § 5.14.

336. *Id.*

337. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(2) cmt. c (2000). *See also* Daniel L. Draisen, *The Model Rules of Professional Conduct and Their Relationship to Legal Malpractice Actions: A Practical Approach to the Use of the Rules*, 21 J. LEGAL PROF. 67 (1997); Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007).

ble.[338] Moreover, the regulatory process involves more than just attorney disciplinary bodies and the Securities and Exchange Commission, for example, has disciplined lawyers practicing before it for their role in aiding and abetting securities fraud.[339] Lawyers may also, of course, be found guilty of criminal aiding and abetting charges.[340]

Accordingly, at the end of the day, there is no readily apparent principled basis on which courts can grant lawyers a "privilege" to aid and abet their clients' breaches of fiduciary duty without creating serious inconsistencies between those cases and the well-established lines of cases recognizing that such liability exists in the other two situations in which lawyers are most often sued for aiding and abetting—fraud and breach of trust.

B. *Other Inconsistencies*

Insulating lawyers from civil liability for aiding and abetting creates a second type of inconsistency that ought to be briefly noted—one that involves the fates of non-lawyers who are involved in misconduct in which a lawyer is the principal wrongdoer.

No one appears to dispute that non-lawyers are not privileged to aid and abet the wrongdoing of a lawyer.[341] Why then

338. *See, e.g.*, Attorney Grievance Comm'n v. Pak, 929 A.2d 546 (Md. 2007) (attorney disciplined for aiding her parents in their efforts to defraud creditors in real estate and related corporate transactions); Grievance Adm'r v. Rostash, 577 N.W.2d 452 (Mich. 1998) (attorney disciplined for his role in assisting prosecutor in violating public trust); *In re* Konnor, 694 N.W.2d 376 (Wis. 2005) (attorney disciplined in part for his role in aiding and facilitating a trustee's breach of trust). *See also* Russell G. Donaldson, Annotation, *Disciplinary Action Against Attorney for Aiding or Assisting Another Person in Unauthorized Practice of Law*, 41 A.L.R. 4th 361 (1985).

339. *See* Langevoort, *supra* note 31, at 82 ("With respect to securities practice, the SEC authorizes the disbarment of lawyers practicing before it who are guilty of irresponsible professional behavior."); Steinberg, *supra* note 57, at 11-17 (discussing various SEC regulatory prosecutions against lawyers).

340. *See, e.g.*, Gormley v. Patton, No. 07-CV-92-HRW, 2007 WL 2460946 (E.D. Ky. Aug. 24, 2007). *See generally* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998).

341. *See, e.g.*, Lerner v. Fleet Bank, 459 F.3d 273, 287-88 (2d Cir. 2006); Commodity Futures Trading Comm'n v. Equity Fin. Group, 537 F. Supp. 2d 677, 699 (D.N.J. 2008); Hynix Semiconductor Inc. v. Rambus Inc., No. CV-00-20905, 2007 WL 3284060, at *3 (N.D. Cal. Nov. 2, 2007); Alleco Inc. v. Harry & Jeanette Weinberg Found., 665 A.2d 1038, 1050 (Md. 1995).

should it be different when the shoe is on the other foot? No one has said. Along the same lines, how should the law handle the persons involved in a civil conspiracy with a lawyer? Aiding and abetting (here used in its strict, technical sense) and civil conspiracy are two branches of the same tree, so there is no obvious reason to exempt lawyers from liability for aiding and abetting, but not from liability for civil conspiracy. But if the non-liability of lawyers is extended to civil conspiracies, the result will be that when a group of people, one of whom is a lawyer, engage in a civil conspiracy, all of the conspirators will be fully liable for the acts of their co-conspirators, while the lawyer will not be liable for anything! The courts have, understandably, declined to reach this absurd result.[342]

IV. Aiding and Abetting Claims Against Lawyers Can Be Handled Within the Existing Legal Framework

Permitting lawyers to be sued for aiding and abetting their clients' breaches of fiduciary duty (or other wrongdoing) does not mean exposing them to unlimited liability. Lawyers still have near complete immunity to liability for their conduct during litigation, and what little liability they do have in that arena comes from traditional causes of action like malicious prosecution, not theories of aiding and abetting.[343] Like other agents, lawyers are generally free to assist their clients' breaches of contract without sanction.[344] Lawyers also have the benefit of all of the usual procedural devices available to civil defendants. Thus, when aiding and abetting claims are filed against lawyers, the courts can be depended on to dispose of the meritless ones on motion.[345]

In addition to these protections, others are built into the two main theories of liability set forth in the Restatement (Sec-

342. *See, e.g*, Noel v. Hall, No. CIV. 99-649-AS, 2000 WL 251709 (D. Or. Jan. 18, 2000) (declining to dismiss civil conspiracy claims against attorney); Kurker v. Hill, 689 N.E.2d 833 (Mass. App. Ct. 1998) (reversing trial court's dismissal of civil conspiracy complaint against attorneys but not other alleged conspirators); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468 (Tex. App. 1985) (affirming judgment against attorney for participating in a civil conspiracy).

343. *See supra* note 220; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 56-57 (2000); HAZARD & HODES, *supra* note 308, at 4-40.

344. *See supra* text accompanying notes 151-57.

345. *See* cases cited *supra* note 11 and *infra* notes 348 & 371.

ond) of Torts—section 876(a) (civil conspiracy) and section 876(b) (substantial assistance, or "aiding and abetting").[346]

A. *Civil Conspiracy (Section 876(a))*

Lawyers have little reason to fear their exposure to liability for civil conspiracies. First, with the arguable exception of California, such claims are generally far less common than substantial assistance claims under section 876(b). Moreover, liability under section 876(a) attaches only to those who are engaged in tortious conduct.[347] This makes it difficult to impose civil conspiracy liability in breach of fiduciary duty situations, because it is typically only the fiduciary who owes direct duties to the injured third party.

In addition, any case in which a third party alleges that a lawyer conspired with his or her client carries the potential for summary dismissal on the basis of what is often referred to as the "agent's immunity rule." This generally-accepted principle holds that agents are not legally capable of conspiring with their principals, and it has often been used to dismiss civil conspiracy claims against lawyers who have done nothing other than provide routine legal services.[348] While California may be

346. In this section, I shall revert to using "aiding and abetting" in its technically correct sense to refer only to cases arising under section 876(b).

347. RESTATEMENT (SECOND) OF TORTS § 876 cmt. c (1979).

348. *See, e.g.*, Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (affirming the dismissal of conspiracy claim against lawyers because "an entity cannot conspire with one who acts as its agent"); Michigan Mut. Ins. Co. v. Smoot, 128 F. Supp. 2d 917, 923-25 (E.D. Va. 2000) (granting attorneys' motion to dismiss civil conspiracy claim absent allegation of willful or malicious conduct); Heffernan v. Hunter, No. Civ. A. 97-6041, 1998 WL 633694, at *5, n.4 (E.D. Pa. Aug. 12, 1998) ("Limiting attorney-client conspiracies to those in which the attorney is acting for his sole personal benefit is consistent with federal law regarding conspiracies between corporate agents and their principals."); Astarte, Inc. v. Pacific Indus. Sys., 865 F. Supp. 693, 708 (D. Colo. 1994) ("An attorney, being an agent of his principal, cannot be held liable for conspiracy with his principal where the agent acts within the scope of his authority and do [sic] not rise to the level of active participation in a fraud."); Doctors' Co. v. Super. Ct., 775 P.2d 508, 510-14 (Cal. 1989); Fischer v. Estate of Flax, 816 A.2d 1, 5 (D.C. 2003) ("[T]here can be no 'conspiracy' with a client if an attorney merely acts within the scope of his employment as an advisor to, or an advocate on behalf of, the client."); Fraidin v. Weitzman, 611 A.2d 1046, 1080 (Md. Ct. Spec. App. 1992) ("[T]here can be no conspiracy where an attorney's advice or advocacy is for the benefit of his client and not for the attorney's sole personal benefit."); Roth v. La Societe Anonyme Turbomeca France, 120 S.W.3d 764, 778 (Mo. Ct. App. 2003) ("Because

a special case as a result of the *Wolfrich* decision and the bevy of conspiracy cases against lawyers that it spawned, even California lawyers appear to have little to worry about. The *Doctors' Co.* decision reiterated the "agent-immunity" rule in civil conspiracy cases and left lawyers (and everyone else) exposed to civil conspiracy claims only when they owe an independent duty to the person harmed or when they stand to benefit financially from the conspiracy.[349]

B. *Substantial Assistance (Section 876(b))*

Most of the concerns that have been expressed about lawyer liability for "aiding and abetting" focus on section 876(b)-type claims, which obligate a plaintiff to show that a lawyer knowingly gave substantial assistance or encouragement to the wrongdoing of his or her client.[350] The basic issues under section 876(b) are thus two: what did the lawyer know, and what did the lawyer do?

1. Knowledge

Section 876(b) applies to those who "know[ingly]" give substantial assistance or encouragement to someone engaged in a breach of duty to a third person.[351] A comment to section 874 of

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an attorney is an alter ego of his or her client, a conspiracy between the attorney and client usually is not possible. If, however, an attorney, serving his or her own interest, acts outside the scope of an agency relationship, or if he or she, rather than the client, commits fraud or another intentional tort during the course of his or her representation, the attorney may be liable for conspiracy.") (citations omitted). Other courts acknowledge the rule but apply it in a way that appears to leave more room for liability. *See, e.g.*, Transtexas Gas Corp. v. Stanley, 881 F. Supp. 268, 270-71 (S.D. Tex. 1994) (Notwithstanding the rule against principal/agent conspiracies, "Texas appellate courts have held attorneys liable for conspiring with their clients to commit torts against third-parties."); Blatt v. Green, Rose, Kahn & Piotrkowski, 456 So. 2d 949, 951 (Fla. Dist. Ct. App. 1984) (recognizing conspiracy claim against lawyer for his role in conspiracy to violate Florida Probate Code); Celano v. Frederick, 203 N.E.2d 774, 779 (Ill. App. Ct. 1964) (recognizing civil conspiracy claim against attorneys); Badger Cab Co. v. Soule, 492 N.W.2d 375, 381 (Wis. Ct. App. 1992) ("[A]n attorney may not use the license to practice law as a shield to protect himself/herself from the consequences of participating in an unlawful or illegal conspiracy."). *See also* Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1 (2005).

349. *See Doctors' Co.*, 775 P.2d at 510-14.

350. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

351. *Id.*

the Restatement (Second) of Torts confirms that the same limitation applies to claims for aiding and abetting a breach of fiduciary duty.[352] The text of section 326 of the Restatement (Second) of Trusts uses slightly different phrasing, referring to anyone who participates when he or she "has notice that the trustee is committing a breach of trust."[353] However, a comment to that section uses the terms "knowledge" and "knowing," and there is no reason to believe that it establishes a materially different standard.[354]

While there is some disagreement among the courts on the subject, there is considerable authority for the proposition that constructive knowledge is sufficient to satisfy this standard.[355] Offsetting this principle is the general consensus that the amount of required knowledge varies inversely with the level of assistance provided.[356] Thus, doubts about the extent of a lawyer's knowledge of the wrongfulness of the conduct he or she is assisting are most likely to be resolved against him or her in those cases in which the assistance or encouragement was most substantial.

Critics of aiding and abetting liability for lawyers nevertheless complain that the knowledge requirement is vague and does not provide lawyers with sufficient guidance on their exposure to liability—without making more than a passing effort to suggest why this is a bigger problem for lawyers than it is for everyone else.[357] It is surely true that lawyers know more than non-lawyers about the law and that they are (or should be at least) better able than non-lawyers to spot any incipient torts or

352. *Id.* § 874 & cmt. c ("A person who *knowingly* assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused.") (emphasis added).

353. RESTATEMENT (SECOND) OF TRUSTS § 326 (1959).

354. *Id.* cmt. a.

355. Holmes v. Young, 885 P.2d 305, 309-10 (Colo. App. 1994) (noting split in authorities); Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999) (discussing split in authorities); Chem-Age Indus. v. Glover, 652 N.W.2d 756, 775 (S.D. 2002) (holding constructive knowledge sufficient); Barksdale, *supra* note 96, at 567 & n.137 (collecting cases going both ways).

356. *Chem-Age Indus.*, 652 N.W.2d at 775. *See also Witzman*, 601 N.W.2d at 188; Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 25-26 (1993); Richmond, *supra* note 96, at 133.

357. Barksdale, *supra* note 96, at 567-73; Pietrusiak, *supra* note 7, at 235-37.

breaches of fiduciary duty that they may be on the verge of assisting.[358] But it is not at all clear why this is a reason to *protect* lawyers, as those most able to see liability coming ought to be in the best position to avoid it. Moreover, this is hardly the only arena in which lawyers are subject to vague or even arguably inconsistent "knowledge" requirements.[359]

Finally, the criticism of aiding and abetting liability is hottest when a third party claims that a lawyer has assisted his or her client's breach of fiduciary duty. However, lawyers advising fiduciaries typically do not have to worry about misreading their clients' intent, since the liability of fiduciaries typically does not depend on their state of mind.[360]

2. Substantial Assistance

The basics of the "substantial assistance" requirement are well-settled. The Restatement suggests five factors for courts to consider in making this assessment: "'the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind.'"[361] To these five factors, the *Halberstam* court added a sixth: the duration of the assistance provided.[362] It is clear that the conduct of the aider and abettor need not be tortious or independently wrongful for

358. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. h (2000) ("A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with [fiduciary] obligations."); Pietrusiak, *supra* note 7, at 256 ("Lawyers' position in society, and their collective legal expertise, suggest that they should 'know better' than to aid in another's breach of fiduciary duties.").

359. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. h (2000) (explaining the knowledge requirement in connection with the duties imposed by section 51(4)); John P. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. REV. 783 (1991); W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod,* 35 U. MIAMI L. REV. 739, 808 (1981) (canvassing the various provisions of the Model Rules of Professional Conduct relating to a lawyer's knowledge, and concluding that "it is hard to find a consistent and principled theory at work . . . .").

360. Tuttle, *supra* note 61, at 901.

361. Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979)).

362. *Id.* at 484.

liability to attach.[363] There is a proximate cause component, as liability depends on a showing, not just that the assistance was "substantial," but that it was "a substantial factor in causing the resulting tort."[364]

Those who have problems with lawyers' liability under section 876(b) have for the most part focused on two issues.

i. *The "Duties" to Speak and Monitor*

An argument frequently made against allowing substantial assistance liability for lawyers is that it forces them to stick their (presumably unwanted) noses into their clients' business—to speak when their advice is not sought, to actively monitor their client's behavior, or perhaps to intervene to prevent a client from committing a tort or some other form of wrongdoing. The Oregon Court of Appeals expressed this concern in *Granewich*,[365] and it has been echoed by other courts and legal commentators.[366] Indeed, two commentators constructed an entire article around the argument that exposing lawyers to aiding and abetting liability improperly forces them to speak or act to prevent their clients from doing something wrong.[367] These concerns are understandable but vastly overblown.

363. Granewich v. Harding, 985 P.2d 788, 794-95 (Or. 1999). This, of course, is the whole point of the difference between section 876(b) (in which the aider and abettor's conduct need not be independently wrongful) and section 876(c) (in which independently tortious conduct *is* necessary). *See* RESTATEMENT (SECOND) OF TORTS § 876(b), (c) (1979).

364. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d. *See also In re* Welding Fume Prods. Liab. Litig., 526 F. Supp. 2d 775, 807 (N.D. Ohio 2007); Clausen v. Carroll, 684 N.E.2d 167, 171-72 (Ill. App. Ct. 1997); Pruitt v. Bowers, 499 S.E.2d 250, 252-53 (S.C. Ct. App. 1998); McNulty & Hanson, *supra* note 356, at 43; Pietrusiak, *supra* note 7, at 234.

365. Granewich v. Harding, 945 P.2d 1067, 1074 (Or. Ct. App. 1997) ("[A]doption of the dissent's proposed rule [permitting aiding and abetting liability] will require that the attorney anticipate client response to his advice and monitor the client's subsequent actions in order to avoid personal liability.").

366. *See, e.g.*, Durham v. Guest, 171 P.3d 756, 761 (N.M. Ct. App. 2007) (expressing concern that lawyers exposed to aiding and abetting liability for their role in representing a client in a dispute "would have to monitor the case during the representation in order to evaluate the ongoing risk of liability"); Pietrusiak, *supra* note 7, at 218 (fretting that lawyers exposed to aiding and abetting liability "would now be obliged to second-guess every policy that may pose a potential breach of fiduciary duty").

367. McNulty & Hanson, *supra* note 356.

To begin with, lawyers have long been authorized to disclose even client confidences to prevent imminent death or serious bodily harm.[368] More relevant here, the trend is clearly in the direction of authorizing lawyers to disclose privileged communications when they suspect that their client plans a crime or fraud.[369] Moreover, why is it reasonable to assume that clients do not want their lawyers to speak up when they have reason to believe that they (the clients) are about to act in a way that will expose them (as well as perhaps their lawyer) to civil liability? Isn't the opposite assumption more reasonable?

Lawyers who fear that a client might expose them to liability by ignoring their advice against legally dubious (but not criminal or fraudulent) conduct, or "twist[ ] [that advice] to suit an unfair aim,"[370] can protect themselves by documenting their advice. Lawyers seem to be born knowing how to do that!

Any residual fear that aiding and abetting liability imposes an uncabined duty on lawyers to babysit their clients evaporates entirely when one studies the cases. For example, the cases involving lawyers that McNulty and Hanson cite in support of their argument against liability for aiding and abetting by "silence or inaction" almost all *reject* such liability.[371] And even if it should happen that there are rare situations in which lawyers are held liable for failing to monitor a client's conduct or to intervene to prevent harm to the client or others, it would

368. CTR. FOR PROF'L RESPONSIBILITY, *supra* note 170, at 101.

369. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3) (1983).

370. Richmond, *supra* note 96, at 131.

371. McNulty & Hanson, *supra* note 356, at 26-28. *See* Camp v. Dema, 948 F.2d 455, 464 (8th Cir. 1991) (affirming grant of summary judgment in favor of lawyer on claim of aiding and abetting securities fraud even though "[h]e transmitted documents, contacted the title insurance company, and had the needed waivers and other documents signed"); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991) (affirming dismissal of aiding and abetting claims against lawyers based on their alleged silence and failure to disclose their clients' securities fraud); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Cir. 1986) (affirming grant of summary judgment in favor of law firm based on silence and inaction). The court, in *S.E.C. v. National Student Marketing Corp.*, did recognize the viability of claims against lawyers for aiding and abetting securities fraud based on silence and inaction, but the precedential and persuasive value of that case is dubious in light of the subsequent rejection of such liability by three courts of appeal, as well as the Supreme Court's *Central Bank* decision rejecting aiding and abetting liability in most federal securities fraud claims. 457 F. Supp. 682, 712-14 (D.D.C. 1978).

only leave them in a situation comparable to that of many other professionals.[372]

Stanley Pietrusiak also argues that aiding and abetting liability imposes on lawyers an unfounded duty to monitor a client's conduct or to intervene to prevent harm.[373] The problem is that in making this argument, he confuses aiding and abetting liability with the principles that govern lawyers' duties to organizational clients.[374] The extent of a corporate lawyer's duty to "go up the ladder" or otherwise blow the whistle on apparent wrongdoing by constituents of a corporation or other entity was thrust into prominence by the savings and loan cases and has been the subject of impassioned debate ever since.[375] But that is an issue of the scope of a lawyer's duty to his or her own client, a very different proposition from the lawyer's liability to a third party for aiding and abetting that client's wrongdoing.[376]

Bryan Barksdale compounds the confusion by citing Pietrusiak's article for the proposition that "numerous courts have taken the position that one may be liable for aiding and abetting the breach of fiduciary duty by inaction or failing to prevent the breach, ignoring the general rule that nonfeasance does not amount to tortious conduct."[377] There are two big errors here. First, Pietrusiak acknowledges that the cases he cites actually demonstrate that "courts have struggled to determine when a person may be liable for nonfeasance."[378] In fact,

372. *See, e.g.*, Patricia C. Kussman, Annotation, *Liability of Doctor, Psychiatrist or Psychologist for Failure to Take Steps to Prevent Patient's Suicide*, 81 A.L.R. 5th 167 (2000).

373. Pietrusiak, *supra* note 7, at 216-17, 237-39.

374. *Id.* at 216-17 (criticizing aiding and abetting a breach of fiduciary duty as an "ominous new form of attorney liability" that arose out of a number of cases in the late 1980s "that read the terms of Rule 1.13 [of the Model Rules of Professional Conduct] broadly by holding that attorneys may be liable for not taking remedial action to prevent their clients' representatives from engaging in illegal acts.") (footnote omitted).

375. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13 (1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 (2000); George C. Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998).

376. The same distinction would also need to be made between aiding and abetting liability, and liability based on the affirmative duties imposed on lawyers by section 51(4) of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS.

377. Barksdale, *supra* note 96, at 575 (citing Pietrusiak, *supra* note 7, at 238).

378. Pietrusiak, *supra* note 7, at 238.

to the extent that a trend is discernible, it appears to be that nonfeasance is *not* enough to support aiding and abetting liability, whether a lawyer is involved or not.[379] Second, it is irrelevant whether nonfeasance is or is not tortious, because the conduct of an aider and abettor need not be wrongful for there to be liability under section 876(b).[380]

ii. *Advice Alone*

A second fear of those who would reject or limit liability for substantial assistance or encouragement is that lawyers will be held liable for "simply giving bad advice."[381] In *Granewich*, for example, the Oregon Court of Appeals worried that "[t]he giving of professional advice will be 'chilled' by the knowledge that liability could result to those outside the professional relationship . . . ."[382] It is most definitely true that section 876(b) applies to anyone who knows that the conduct of another constitutes a breach of duty "and gives substantial assistance *or encouragement* to the other so to conduct himself."[383] And a comment to that section confirms the drafters' intent that physical assistance is not necessary to establish substantial assistance; advice alone is sufficient.[384]

Here too, however, it is hard to find actual cases giving lawyers reason to fear that they will be hit with liability for doing nothing more than giving sound legal advice. Indeed, one commentator states flatly that "[t]here are no reported cases of civil or criminal liability on the part of the lawyer, or of professional discipline, clearly based only upon providing the client with accurate legal information."[385] Certainly none of the three leading cases that reject the aiding and abetting of lawyers (*Reynolds*, *Alpert*, and *Durham*) fall into this category.

379. *In re* Welding Fume Prods. Liab. Litig., 526 F. Supp. 2d 775, 807 n.143 (N.D. Ohio 2007) (collecting cases).

380. *See supra* note 363.

381. Pietrusiak, *supra* note 7, at 217.

382. Granewich v. Harding, 945 P.2d 1067, 1074 (Or. Ct. App. 1997).

383. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (emphasis added).

384. *Id.* § 876 cmt. d ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance.").

385. Pepper, *supra* note 142, at 1548; *see also id*. at 1593-98.

Nevertheless, it would be disingenuous to argue that there is no chance that a court would ever find a lawyer guilty of aiding and abetting on the basis of his or her advice alone. At least two commentators have recently attempted to explore the problems that lawyers face when they are asked to advise clients who are operating at the edge of the law.[386] Though in both instances the commentators' focus was far broader than civil liability for aiding and abetting, neither concluded that lawyers should not be exposed to such liability. If anything, they appear to suggest the opposite.[387]

But there is one very important thing to remember about aiding and abetting claims that might be brought against lawyers by third parties based solely on advice that the lawyer gave to his or her client: it is difficult to imagine how such a case could arise without the involvement of the lawyer's client. If all a lawyer did was give his client advice, a third party would ordinarily have no way of even knowing that the advice was given, much less what it was, unless the lawyer's client put it at issue by, for example, raising an advice of counsel defense. Thus, the lawyer's advice is likely to come to light only when it was bad—when he or she incorrectly counseled a client that a particular course of conduct was permissible.

And if a lawyer was found liable to a third party solely on the basis of advice that he or she gave to a client, it would hardly be the first time something like that ever happened to a professional.[388] Nor would it necessarily be the least bit unfair. Consider for instance, whether there would (or should) have been any difference in the outcome in *Moore v. Shaw* if attorney Shaw, instead of preparing the agreements by which George Moore breached his fiduciary duty by terminating his mother's trust early, had told him that she was too busy to prepare the documents and had instead explained how he could draft them himself, that George had followed Shaw's advice in preparing

386. *See* Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287 (1994); Pepper, *supra* note 142.

387. Newman, *supra* note 386, at 312.

388. *See, e.g.*, Francisco v. Manson, Jackson & Kane, Inc., 377 N.W.2d 313 (Mich. Ct. App. 1985) (affirming judgment against architect for injuries suffered by ten-year-old boy in fall from diving platform that architect had recommended to the boy's school).

the documents, and that the bank had accepted the documents he drafted and terminated the trust.

IV. Conclusion

The last twenty-five years have witnessed the rapid transformation of two of the common law's sleepier streams—civil aiding and abetting liability and the general civil liability of lawyers—into raging rivers. One would expect to find turbulence at the intersection of these developments, and it is surely to be expected that courts tossed into the maelstrom would have difficulty getting their bearings. But the fact that errors are predictable does not mean that they need not be identified and corrected.

Because there were, until recently, few decisions seeking to impose civil aiding and abetting liability on lawyers, it is not surprising that courts confronted with such cases would view them as presenting the question of whether to recognize a brand new cause of action against lawyers. So posed, the question looks entirely different than it does when framed as it should be—whether lawyers should be exempted from a cause of action that applies to everyone else.

It has been argued that the decisions in *Reynolds* and *Alpert* should be applauded because "an attorney should not be held liable merely for doing his job"[389] and that exposing lawyers to civil aiding and abetting liability is a bad idea because "[w]hile the lawyer has wide discretion in matters of tactical considerations and technical expertise, the lawyer is bound to follow the client's wishes regarding the overall goals of the representation. In short, as an advocate, the lawyer is hired to zealously execute the client's directives, not to second-guess them."[390] As Professors Hazard and Hodes point out, sentiments like these reflect the mistaken belief "that the lawyer's duty is one of *unconditional* loyalty to the client, a loyalty that leaves no room for concern for anyone else."[391] But a lawyer's loyalty to his or her client was never meant to be blind. Lawyers must represent their clients "zealously [but] within the

389. Palvino, *supra* note 96, at 53.
390. Pietrusiak, *supra* note 7, at 261 (footnotes omitted).
391. HAZARD & HODES, *supra* note 308, at 4-32.

bounds of the law"—a critical limitation that leaves plenty of room for aiding and abetting liability.[392]

There are now, in 2008, many cases holding lawyers civilly liable for aiding and abetting their clients' misconduct, and there is precious little evidence that such decisions have inhibited lawyers from providing necessary legal services. In the area in which lawyers traditionally faced the most serious exposure to aiding and abetting liability (securities fraud), the courts were able to work through the issues raised by that theory of liability without driving lawyers away from providing legal services.[393] The existing structure of aiding and abetting law provides lawyers with much protection, and it is worth remembering that civil aiding and abetting suits will be adjudicated by judges, who can surely be trusted to understand and be sensitive to the predicament of lawyer defendants.

Such judicial sensitivity must have limits. The quote set out at the beginning of this article was, obviously, intended to highlight what I see as the most troubling aspect of the *Reynolds*, *Alpert* and *Durham* decisions: the fact that they are sure to be perceived—correctly—as granting lawyers special protection from civil liability. The "widespread public hostility toward lawyers and the legal profession" has been well-documented and thoroughly aired, and there is no need to rehash it here.[394] It is, however, worth pointing out that the *Reynolds* court's unfortunate use of the term "privilege" to describe the protection that it granted lawyers, and lawyers alone, is, in this environment, especially dangerous. It is one thing to say that particular *conduct* is "privileged," but it is something else entirely to say that a particular *profession* is "privileged" in a way that others are not. Those who believe that the call to the bar is so important that lawyers must be insulated from liability to which everyone else is exposed would do well to recall George Orwell's parable about what happens when those in a position to make the rules decide to grant themselves special "privileges."

392. *Id.*
393. *See, e.g.*, Langevoort, *supra* note 31, at 84-89.
394. Pietrusiak, *supra* note 7, at 219 (footnote omitted).