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THE TORT OF AIDING AND ADVISING?: THE ATTORNEY EXCEPTION TO AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY

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Attorneys face a variety of ethical challenges. While doing the "right" thing may not always be easy, it should always be clear. Rules of professional conduct demarcate the line between right and wrong in some instances. Other areas, however, are left to common law (and judicial interpretation) to develop. This article deals with one such area: whether (and, if so, under what circumstances) an attorney may be held liable for aiding and abetting a client's breach of fiduciary duty.

Part I of this article explores the traditional aiding and abetting standard in tort law. Part II applies that standard to breach of fiduciary duty liability. Next, Part III surveys case law of tort actions for aiding and abetting breach of fiduciary duty by attorney-defendants, and Part IV questions whether attorneys should have an affirmative duty to prevent clients from breaching fiduciary duties. Finally, Part V applies public policy to reach the conclusion that attorneys should not be given any exception from liability when sued for aiding and abetting a client's breach of fiduciary duty.

I. AIDING AND ABETTING STANDARD

The common law of torts imposes liability for aiding and abetting another in commission of a wrongful act.[1] The parameters of aiding and abetting liability are laid out in the Restatement (Second) of Torts using a three-prong test: (1) the aided party must commit tortious conduct; (2) the aider must know that the aided party's conduct constitutes a breach of duty; and (3) the aider must give substantial assistance or encouragement to the aided party.[2]

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1. *See, e.g.*, Brown v. Perkins, 83 Mass. (1 Allen) 89, 89 (Mass. 1861) ("Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal.").

2. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the

According to comment (d) to that section: "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."[3] However, assistance can be so slight so as to avoid liability; the factors to consider in determining liability are: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) the presence or absence of the defendant at the time of the tort; (4) the defendant's relation to the other; and (5) the defendant's state of mind.[4]

II. APPLICATION OF AIDING AND ABETTING LIABILITY STANDARD TO BREACHES OF FIDUCIARY DUTY

A fiduciary relationship is one in which "one person [called a 'fiduciary'] is under a duty to act for the benefit of another [called a 'beneficiary'] on matters within the scope of the relationship."[5] Common examples of fiduciary relationships include guardian-ward, agent-principal, and attorney-client.[6] The fiduciary's obligation to act for the benefit of another is known as a "fiduciary duty," and breach of that duty causes the fiduciary to be liable to the beneficiary.[7]

Combining aiding and abetting liability with this breach of fiduciary duty liability creates a straightforward result: one who knowingly provides substantial assistance or encouragement to another in breaching a fiduciary duty is liable for aiding and abetting the breach of fiduciary duty.[8] As explored above, providing advice or encouragement satisfies the substantial assistance prong.[9] Therefore, it follows that an attorney who counsels his or her client to breach a fiduciary duty should be liable for aiding and abetting that breach of fiduciary duty.

Aiding in a breach of fiduciary duty may also be aiding in the commission of a crime. For example, an attorney may advise a trustee on how to siphon funds from a beneficiary. Other times, however, a breach of fiduciary duty is not criminal, but is tortious. For instance, a tortious breach of

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other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Id.*

3. *Id.* § 876 cmt. d.

4. *Id.*

5. BLACK'S LAW DICTIONARY 282 (2d pocket ed. 2001).

6. *Id.*

7. RESTATEMENT (SECOND) OF TORTS § 874 (1979).

8. *Id.*

9. *See, e.g.*, Bird v. Lynn, 49 Ky. (10 B. Mon.) 422 (Ky. 1850), *2 (stating that liability for encouraging tortious activity should be imposed when the encouragement has a direct relation to the tortious conduct and was intended to produce it).

fiduciary duty occurs when an agent forgoes their principal's interest and instead pursues their own self-interest, or when a partner takes on a client on the side rather than giving the benefit to the partnership.[10] If an attorney advised that agent or that partner as to how to breach their fiduciary duty with greater stealth or success, that attorney would have aided and abetted in a breach of fiduciary duty. This begs the question of whether the attorney, who owes a fiduciary duty to his or her own clients, should be liable to their client's beneficiary.

III. RECENT CASE LAW

Two approaches are developing regarding the emerging area of aiding and abetting a breach of fiduciary duty in tort law: (1) creating an explicit exception that safeguards attorneys from liability, and (2) employing less straight-forward means to reach the same end.

A. AN EXPLICIT EXCEPTION FOR ATTORNEYS

The most prominent decision recognizing an explicit exception for attorneys is that of the Oregon Supreme Court in *Reynolds v. Schrock*.[11] Reynolds and Shrock purchased two parcels of land together.[12] Shrock sued Reynolds, and the lawsuit was settled.[13] Shrock's lawyer, Markley, took part in the negotiations and drafting of the settlement agreement.[14] Under the settlement agreement, Reynolds was to transfer his shares in one of the two properties to Shrock and the parties would sell the other property together, with Reynolds receiving the proceeds.[15] If the sale of the second property did not amount to $500,000, Schrock would pay Reynolds the difference and Reynolds would be given a security interest in the first property to ensure payment.[16]

As agreed, Reynolds transferred his interest in the first property to Shrock.[17] Markley advised Schrock that nothing stopped her from selling the first property before the sale of the second property, thereby making it impossible for Reynolds to claim a security interest in it.[18] Schrock, with

10. *See, e.g.*, Van Dusen v. Bigelow, 100 N.W. 723, 724-26 (N.D. 1904) (finding impermissible self-dealing on the part of a real estate agent who surreptitiously sold his principal's land to himself for less than an outside buyer was willing to pay).

11. 142 P.3d 1062 (Or. 2006).

12. *Reynolds*, 142 P.3d at 1063.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 1064.

18. *Id.*

Markley's aid, secretly sold the first property before the sale of the second property.[19] Under advisement by Markley, Schrock then revoked her consent to the sale of the second property because of an alleged breach of the settlement agreement by Reynolds.[20] Since the first property had already been sold to an innocent third party, Reynolds was unable to take a security interest in it, and was also unable to sell the jointly owned second property.[21]

Reynolds sued Schrock for breach of fiduciary duty and Markley for aiding and abetting a breach of fiduciary duty.[22] The lawsuit against Schrock was settled, leaving Markley as the sole defendant.[23] The court held that summary judgment in the attorney's favor was proper, recognizing an exception for attorneys from liability for aiding and abetting a client's breach of fiduciary duty.[24] However, the exception created for attorneys is not unlimited: For a third party to hold an attorney liable for aiding and abetting a client in breach of a fiduciary duty, the burden is on the third party to prove that the lawyer acted outside the scope of the lawyer-client relationship.[25] This exception extends liability to attorney conduct that is unrelated to the representation of a client (even if the person is a client), in the attorney's own self-interest, or within the "crime or fraud" exception to the attorney-client privilege.[26]

The court cited the Restatement for support: "One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege."[27] The court determined that such a "privilege from liability" was proper in the attorney-client setting because the attorney-client relationship is "integral to the legal system itself."[28] Since clients need lawyers in many situations, the court felt that providing lawyers protection from certain aiding and abetting liability would help ensure that attorneys focused on pursuing their clients' interests rather than their own self-interests in avoiding liability.[29]

This decision distinguished itself from, and seemingly greatly narrowed, previous Oregon case law. Previously, attorneys had been held

19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*. at 1069–72.
25. *Id*. at 1069.
26. *Id*.
27. *Id*. at 1066 (citing RESTATEMENT (SECOND) OF TORTS § 890 (1979)).
28. *Id*. at 1068.
29. *Id*. at 1068–69.

liable for aiding and abetting a breach of fiduciary duty in *Granewich v. Harding*.[30] In distinguishing the cases, the Oregon Supreme Court noted that the attorneys in *Granewich* acted outside the scope of the attorney-client relationship.[31] While the court in *Granewich* did accept as true the allegations in the complaint pleading that the attorneys acted outside the scope of their legitimate employment, the court did not state that this fact was determinative to its decision, declaring instead that the defendants' "status as lawyers is irrelevant."[32]

Reynolds was not the first decision to recognize an attorney exception; a Texas appellate court had done so previously in *Alpert v. Crain, Caton & James, P.C.*[33] Since the complaint in that case did not allege that the defendant-lawyers committed any "independent tortious act or misrepresentation" outside of the representation of the client, the court barred the non-client plaintiff from bringing an aiding and abetting breach of fiduciary duty cause of action against the attorneys.[34] No published Texas decision has imposed liability on a lawyer for aiding and abetting a client's breach of fiduciary duty.[35]

While not an "aiding and abetting" case by name, the Supreme Court of Hawaii approved of the *Reynolds* decision in *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, LLP*.[36] The court in *Kahala* cited *Reynolds* by analogy to support the proposition that attorneys' actions within the scope of the lawyer-client relationship fell within the litigation privilege when the plaintiff alleged that the defendant-lawyers were liable for "tortious inducement of breach of fiduciary duty."[37] The "litigation privilege," a less expansive privilege than the full attorney-client privilege recognized in *Reynolds*, protects an attorney from liability to his or her client's civil litigation adversary if the act of the attorney occurred in the course of the attorney's representation and is related to the civil action.[38]

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30. 985 P.2d 788 (Or. 1999).

31. *Reynolds*, 142 P.3d at 1065.

32. *Granewich*, 985 P.2d at 795.

33. 178 S.W.3d 398 (Tex. App. 2005).

34. *Alpert*, 178 S.W.3d at 407.

35. *See* Jessica Palvino, *Aiding-and-Abetting Liability: Is Privity Making a Comeback?*, 70 TEX. B.J. 52, 53 (2007) (noting that although Texas law recognizes a cause of action for aiding and abetting a breach of fiduciary duty, Texas courts "have shown reluctance to extend this cause of action to attorneys whose only actions were to represent their clients").

36. 151 P.3d 732 (Haw. 2007).

37. *Kahala*, 151 P.3d at 751–52, 752 n.19. "[T]ortious inducement of breach of fiduciary duty" is a plaintiff-created and undefined cause of action that, based on its designation, appears to be similar—if not identical—to aiding and abetting a breach of fiduciary duty. *Id.*

38. *Id.* at 750.

B. A LESS-THAN-EXPLICIT EXCEPTION FOR ATTORNEYS?

Case law on attorney liability for aiding and abetting a breach of fiduciary duty is limited, but varied (as to whether the tort exists, its components, and its application to attorneys).[39] Unlike the *Reynolds* decision discussed above, other decisions have declined to explicitly carve out an exception for attorneys.

Courts seem to disfavor extending liability to attorneys acting to further their clients' interests.[40] While considering a case involving accountants, the Supreme Court of Minnesota balanced public policy to narrow the liability of professionals (including attorneys) in aiding and abetting breach of fiduciary duty cases without explicitly adopting another prong of inquiry.[41] Focusing on the plaintiff's pleadings, the court determined that the claim had not been pled with enough particularity—alleging neither "actual knowledge" nor "substantial assistance" by the defendants.[42] Despite imposing this heightened pleading standard for the first time, the court did not remand the case to permit the plaintiff to amend her complaint, but rather held that the plaintiff had failed to state a colorable claim, and awarded summary judgment in the defendants' favor.[43]

A recent decision on the topic, *Alexander v. Anstine*,[44] unfortunately sheds no new light on the issue. Because it determined that the attorney's client had not breached a fiduciary duty, the Supreme Court of Colorado "save[d] for another day the question of whether an attorney can ever be liable for aiding and abetting a breach of fiduciary duty to a non-client."[45] The Colorado Court of Appeals, both in the lower decision in that case and

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39. *See* RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 6.6 (5th ed. 2000) (reviewing cases on attorneys' liability for aiding and abetting a breach of fiduciary duty).

40. *See* Thornwood, Inc. v. Jenner & Block, 799 N.E.2d 756, 768 (Ill. App. Ct. 2003) (finding that even though an Illinois court has never found an attorney liable for aiding and abetting his client in a commission of a tort, a *per se* bar preventing such tort actions is not appropriate); Spinner v. Nutt, 631 N.E.2d 542, 546 (Mass. 1994) (requiring the plaintiff to show that defendant-attorney not only knew of the breach of fiduciary duty, but actively participated to such an extent that no reasonable claim of good faith could be made); Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 774-75 (S.D. 2002) (noting that an attorney who merely acts as a "scrivener" for a client has not given "substantial assistance" to the client's breach of fiduciary duty and therefore cannot be held liable).

41. Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) "[I]n cases where aiding and abetting liability is alleged against professionals, [the court] will narrowly and strictly interpret the elements of the claim and require the plaintiff to plead with particularity facts establishing each of [the] elements." *Id.*

42. *Id.* at 187-89.

43. *Id.* at 189 n.4.

44. 152 P.3d 497 (Colo. 2007).

45. *Alexander*, 152 P.3d at 503.

in another case, had previously recognized that an aiding and abetting breach of fiduciary duty lawsuit could lie against an attorney.[46]

IV. FIRST, DO NO HARM; SECOND, PREVENT HARM?

A. AND NOW, A WORD FROM THE COMMENTATORS

Academic discussion has arisen regarding whether attorneys have an affirmative duty to prevent their clients from causing harm in the form of a breach of fiduciary duty. The argument over whether an attorney must, must not, or may disclose to a client's beneficiary that the client is acting inappropriately with regard to the fiduciary relationship presupposes the basic notion that the attorney should not *contribute* to the client's malfeasance.

Professor Hazard advocates that where an attorney's client is a fiduciary of a third party, that third party assumes "derivative client" status and the actual client is the "primary client."[47] Under this model, the attorney effectively has two clients: the primary client (the actual client who hired the attorney) and the derivative client (the beneficiary of the primary client's fiduciary duty).[48] Since the primary client (as a fiduciary) is obligated to work in the interest of the derivative client (as a beneficiary), the attorney is as well.[49] Three consequences of this primary-derivative client model follow: (1) the lawyer's obligation to avoid participation in his or her client's fraud is engaged by a more sensitive trigger than usual;[50] (2) the lawyer must ensure that the fiduciary-primary client volunteers complete and truthful information to the third party-derivative client;[51] and (3) the lawyer has a duty to disobey instructions that would wrongfully harm the

46. *See* Anstine v. Alexander, 128 P.3d 249, 256–58 (Colo. Ct. App. 2005) (upholding a jury's apportionment of one percent of the fault to the attorneys for aiding and abetting client's breach of fiduciary duty); Holmes v. Young, 885 P.2d 305, 308-10 (Colo. Ct. App. 1994) (denying recovery because the attorney had no knowledge that he was assisting his client in breaching a fiduciary duty).

47. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 2.7 (3d ed. Supp. 2007).

48. *Id*.

49. *Id*.

50. *Id*. Model Rule of Professional Conduct 1.2(d) forbids an attorney to counsel a client to commit fraudulent activity, but allows an attorney to discuss the legal ramifications of a proposed course of conduct. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004). Under the derivative client model an attorney would be provided less leeway, and borderline advice would be apt to be categorized as impermissible counseling.

51. HAZARD & HODES, *supra* note 47, § 2.7. Disclosure of this usually privileged information by the attorney is impliedly authorized under Rule 1.6(a) of the Model Rules of Professional Conduct. *Id*.

third party-derivative client (because a client is not permitted to use an attorney to harm the client's beneficiary).[52]

Professor Hazard rejects the opposite view,espoused by ABA Formal Opinion 94-380.[53] The Formal Opinion of the ABA Standing Committee on Ethics and Professional Responsibility states that where an attorney's client is a fiduciary of another, the lawyer has no more duty to the client's beneficiary than to any third party.[54] Not only would disclosure of certain information by an attorney be non-mandatory (which is counter to Hazard's view), such disclosures to the client's beneficiary would be prohibited as if the disclosures were to any third party.[55]

One commentator has struck a third path, arguing that the attorney should be able to exercise discretion and should be liable neither to a client's beneficiary for non-disclosure of the client's malfeasance, nor to the client if the lawyer decides to disclose such information.[56] Professor Tuttle argues that the ABA's approach neglects to explain why an attorney should treat his or her client's beneficiary as a stranger and ignores the need for a more nuanced approach.[57] Tuttle's major qualm with Hazard's approach is that it does not account for conflicting interests, which may arise where the client has multiple beneficiaries (or in some cases where there is only a single beneficiary).[58] Tuttle seems to misconceive Hazard's approach, arguing that it would require the consent of both "joint-clients" and would give both the fiduciary-primary client and the beneficiary-derivative client the power to discharge the attorney (which, of course, would be unworkable).[59]

Professor Hazard accounts for such problems however, stating that where the client is openly adverse to the "beneficiary," the joint client model is not viable.[60] Examples of such clear cases arise: (1) where the lawyer is retained to represent the fiduciary in litigation concerning the performance of the fiduciary duty; (2) where the lawyer is hired to represent the fiduciary in negotiating the terms and conditions of his or her office (the duties and compensation of the fiduciary, for example); and (3) where a

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52. *Id*.

53. *Id*. § 2.7 n.3.

54. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 380 (1994).

55. *Id*.

56. Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 889 (1994).

57. *Id*. at 905–06.

58. *Id*. at 912–14.

59. *Id*. at 914–16.

60. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 33 (1987).

lawyer with no prior involvement is hired to negotiate for the termination or reformation of the fiduciary-beneficiary relationship.[61] However, Hazard argues that in the "normal legal relationship" between fiduciary and beneficiary the fiduciary is fulfilling his or her duties and therefore the joint client model poses no such problems.[62] However, if the properly functioning fiduciary relationship collapses and becomes antagonistic, the lawyer would only be able to represent the interests of his or her true (or "primary") client.[63]

B. IS MY BROTHER'S BROTHER NOT ALSO MY BROTHER?

Traditionally, an attorney could only be liable in tort to his or her own client. However, inroads have reconstructed this maxim, and an attorney has certain responsibilities to third parties, particularly when the third party has a relationship with the attorney's client.[64] In the situation where a lawyer's client is also a fiduciary, the lawyer may have a duty to prevent the client from breaching his or her own duties to the non-client.[65]

While argument exists as to whether an attorney is required to prevent a client's breach of fiduciary duty,[66] a lawyer owes a duty of care to a nonclient when and to the extent that:

> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
>
> (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
>
> (c) the nonclient is not reasonably able to protect its rights; and
>
> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[67]

As laid out in subsections (a) and (c), this duty does not attach in all circumstances in which the client is a fiduciary—only those in which the

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61. *Id*. at 33–35.
62. *Id*. at 36.
63. *Id*. at 38–39.
64. HAZARD & HODES, *supra* note 47, § 4.6.
65. *Id*.
66. *See* discussion *supra* Part IV.A (discussing whether attorneys have an affirmative duty to prevent their clients from breaching their fiduciary duties).
67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) (2000).

client exercises substantial power over another (as in the case of a guardian or trustee) and the client's beneficiary is not reasonably able to protect its own rights.[68]

Subsection (b)(i) furthers the crime-fraud exception, requiring the attorney to act to prevent or rectify a client's breach of fiduciary duty that is criminal or fraudulent.[69] Subsection (b)(ii) requires the same action when the lawyer lends assistance to the breach.[70] However, according to subsection (d), if taking such action would substantially impair the performance of the attorney's representation of the client, the lawyer has no obligation to act.[71] A lawyer is also excused from the obligation if such action would cause him or her to breach professional rules.[72]

This duty requires attorneys in certain circumstances to clean up their own mess when they have assisted a client's breach of fiduciary duty, or prevent a mess from being made when the client's breach of fiduciary duty would be illegal or fraudulent. Such affirmative duties imply a fundamental duty not to aid in a client's breach of fiduciary duty at the offset. While imposing a duty of disclosure on the attorney could arguably create conflict of interest problems and chill clients' willingness to communicate frankly with their attorneys, those same problems do not arise by merely barring the attorney from advising or participating in a client's breach of fiduciary duty.

V. THOUGHTS, CONCLUSIONS, AND A WORD ON PUBLIC POLICY

Despite courts' conclusions to the contrary, no solid foundation exists to create an exception for attorneys from liability for aiding and abetting a client's breach of fiduciary duty. Whether created explicitly or by "strict interpretation" of the elements of the tort, such an exception is inappropriate.[73]

In protecting attorneys from lawsuits alleging aiding and abetting a breach of fiduciary duty through the imposition of a heightened pleading standard, requiring the plaintiff to lay out his or her claim in more rigorous

68. *Id.* § 51(4)(a), (c).
69. *Id.* § 51(4)(b)(i).
70. *Id.* § 51(4)(b)(ii).
71. *Id.* § 51(4)(d).
72. *Id.* § 51 cmt. h.
73. One positive note is that no court has created an *unqualified* exception from liability for attorneys. The exception is limited by the attorney's scope of representation. Attorneys acting outside of the attorney-client relationship may claim no protection, as they are most likely acting for their own benefit (either directly or indirectly, as through the generation of more fees).

detail in the complaint is especially inappropriate.[74] Pleading with such particularity is usually reserved for situations in which even the allegation of the tortious activity could damage a potentially innocent defendant (for example, fraud or mistake).[75] Allegations of aiding and abetting a breach of fiduciary duty do not rise to the same level of damage in accusation. Any charge of tortious activity inevitably causes some harm to the defendant, but this particular cause of action does no more harm to a professional reputation than other torts, such as malpractice, which do not command heightened levels of specificity at the pleading stage.

Applying aiding and abetting liability to breaches of fiduciary duties creates clear liability for those who assist in such breaches.[76] Unless a wealth of close cases exist in which an attorney's loyalties would be divided between zealously representing a client and protecting him- or herself from a lawsuit, no beneficial policy exists that justifies creating an exception for attorneys who assist clients in breaching a fiduciary duty. Attorneys who aid or advise clients in perpetrating frauds or engaging in illegal activity may be held liable for their actions, and indeed the attorney-client privilege is not available for communications regarding the fraud or crime.[77] The reasoning behind such a rule is that society rightfully wishes to discourage attorneys from making such suggestions to clients.[78] The same rationale applies to advising clients to breach fiduciary duties. Since

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74. *See* Witman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (requiring plaintiffs to plead facts with particularity when attempting to impose aiding and abetting liability on professionals).

75. *See, e.g.*, FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

76. The common law of agency is helpful by analogy in this area (especially given that agents are fiduciaries of their principals). The Restatement of Agency states 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." RESTATEMENT (SECOND) OF AGENCY § 312 (1958). Comment (d) to that section makes clear that liability may be enforced through a tort action against the party that assisted in the violation of the duty. *Id.* § 312 cmt. d. Comment (a) states that privileges to aid an agent in breaching a duty to his principal are "rare," and uses the parent-child privilege as the only example: A parent may assist a child in breaching a duty to the child's principal. *Id.* § 312 cmt. a.

An attorney's privilege to aid his or her client in breaching a fiduciary duty is based in protecting societal good, by fostering the attorney-client relationship and strengthening the legal system. Such "benefit of society" privileges should be extended cautiously, for these privileges have no specific beneficiaries. However, those who are harmed by the privilege—the parties to whom the breached fiduciary duty was owed—are easily identifiable.

77. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. f (2000) (stating that lawyers are subject to the same liability as non-lawyers, subject to certain exceptions); 1 CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVID. § 95 (6th ed. 2006) ("[I]t would be a perversion of justice to extend [the attorney-client privilege] to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme.").

78. MCCORMICK ET AL., *supra* note 77, § 95.

such advice is to be discouraged, attorneys who proffer it should be held liable to the extent they cause harm.